

**Restorative Justice in New Zealand:  
A Model For U.S. Criminal Justice**

**by**

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## **EXECUTIVE SUMMARY**

New Zealand has garnered international acclaim for its youth justice processes. In particular, the New Zealand invention of the “family group conference (FGC)” for youth offenders has been hailed as a pioneering model of restorative justice.

As an American prosecutor, I came to New Zealand this year specifically to study the FGC and other restorative justice initiatives in New Zealand. I have become convinced that restorative justice processes work and should be pursued as a matter of criminal justice policy.

But what is restorative justice? Restorative justice is a process whereby parties with a stake in a criminal offense (including the offender, the victim, and the communities of each) collectively resolve how to deal with the aftermath of the criminal act with an emphasis on repairing the harm from that act – the harm to the victim, to the community, and to the offender her/himself. Examples of restorative justice include FGCs, sentencing circles in North America, and victim-offender mediations in the United States, each of which are described below.

Criminal justice processes that are restorative share a number of characteristics that explain why they are effective in – among other things – reducing reoffending, increasing satisfaction rates, and preventing crime in the first place.

Perhaps most important, restorative justice makes the actual victims of crime central participants in the response to the crime. FGCs in New Zealand are conferences in which victims are invited to meet offenders and their families, with the police and a justice coordinator present, to discuss the crime and what should happen as a result of the crime. Victims are thereby given a voice to tell of the impact of the crime and to get their questions answered: Why were they victimized? Will they be victimized again? How will the offender put things right? In New Zealand, victims have the right (but no obligation) to attend the mandated FGC and to tell the young offender face-to-face about the personal impact of the crime. Persons who have observed FGCs attest to how important this expression is not only for the victim but the offender and his/her family.

Critically, the involvement of the victim leads to a greater accountability from the young offender. It is difficult for offenders to make excuses and to retreat behind a shell in the face of victims recounting the often devastating impact of the offense. Offenders more often express real remorse, which is a key step to their own journey away from crime and to the healing of the wounds suffered by victims.

Restorative justice works additionally because it gives new voices to victims, to offenders, and to community representatives. In this way, the participants – including even police – feel a greater sense of ownership in the process and of the outcomes produced by the process. This explains why researchers have found much higher levels of satisfaction with restorative justice processes than with traditional criminal justice in the courts. Victim and offender satisfaction rates in excess of 90% are not unusual.

Restorative justice programs are also a natural fit with community policing and police problem-solving, which have proven so effective in reducing crime rates in countries around the world. A key component of community policing is for the police to better understand the communities they serve. Restorative justice processes allow the police and other participants to understand in greater detail why a crime was committed in the first place. Police, working with community groups, can then use this information to target specific areas and types of offending with carefully tailored programs to reduce crime. In Wellington, police and the Wellington City youth justice coordinator have used information gathered from FGCs to target certain gang activity and truancy problems. The net effect has been an impressive two-thirds reduction in crime by youth offenders in Wellington City since 1996.

Another key to the effectiveness of restorative justice is its ability to accommodate cultural and ethnic diversity. Family group conferences, for example, can be held almost anywhere. The ability to conduct a conference on a marae or at the offices of a community group (with due deference to the view of the victim as to venue) can make an important difference. Even if held at a governmental office, the FGC procedure is flexible enough to allow prayer and other types of cultural accommodations.

Consensus decision-making is also very important. The hallmark of restorative justice is collaboration among those parties with an interest in the criminal offense, including victims, offenders, families of victims and offenders, community groups, and the police. Decisions are reached in FGCs in New Zealand and restorative justice programs elsewhere as a result of the conference groups coming to better understandings and achieving collective agreement as to how the injuries that were caused and revealed by the crime can best be healed.

Because they often reveal a deeper understanding of what is needed to reintegrate the offender into the community and to restore the victim, restorative justice conferences frequently lead to the greater use of community resources (including drug/alcohol counselling and alternative education programs). In this way, restorative justice seems better at building communities and resources within the community than traditional court processes.

Restorative justice is not a panacea. Nor can it supplant completely conventional criminal court processes. But in New Zealand and elsewhere, it is a tool that has repeatedly proven to be effective.

Because of its effectiveness and because most of the concerns raised about restorative justice are either not well founded or can be adequately addressed through sound operational practices as discussed below, I believe that restorative justice should be implemented as part of the federal criminal justice system. When I return to the United States, I will propose a program of restorative justice conferences in the Northern District of Indiana, all as described in more detail in last sections of this paper.

## INTRODUCTION

We are still a long way from the time when our conscience can be certain of having done everything possible to prevent crime and to control it effectively so that it no longer does harm and, at the same time, to offer to those who commit crimes a way of redeeming themselves and making a positive return to society. If all those in some way involved in the problem tried to . . . develop this line of thought, perhaps humanity as a whole could take a great step forward in creating a more serene and peaceful society.

Pope John Paul II, July 9, 2000

### **What is Restorative Justice?**

A well-accepted definition of restorative justice has proven elusive.<sup>1</sup> Many authors have resorted to indicating what restorative justice is not. In these instances, restorative justice is usually set off against “retributive justice.” See Kathleen Daly, “Revisiting the Relationship between Retributive and Restorative Justice,” at 34 (contained in Strang & Braithwaite, Restorative Justice: Philosophy to Practice (2000)) (“The oppositional contrast between retributive and restorative justice has become a permanent fixture in the field”). Others have indicated a number of principles by which restorative justice is characterized. See, e.g., Allison Morris and Gabrielle Maxwell, “Restorative Conferencing,” at 174-175 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)); Tony F. Marshall, “Restorative Justice: An Overview,” at 5 (1999).

The lack of a conclusive definition may be the result of the failure of scholars to produce yet an underlying theory to explain and justify restorative justice practices. Nevertheless, we have gained enough experience and enough has been written to venture at least a working definition of restorative justice:

*Restorative justice is a system or practice which emphasizes the healing of wounds suffered by victims, offenders, and communities that are caused or revealed by offending conduct.*

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<sup>1</sup> The term restorative justice was probably first used by Albert Eglash in a 1977 article entitled “Beyond Restitution: Creative Restitution,” in which he suggested that there are three basis types of criminal justice: retributive justice based on punishment; distributive justice based on therapeutic treatment of offenders; and restorative justice based on restitution. See Daniel Van Ness and Karen Heetderks Strong, Restorative Justice, at 24 (1997).

Another useful definition of restorative justice is: “Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.” Tony F. Marshall, “Restorative Justice: An Overview,” at 5 (1999).

Under either definition, restorative justice focuses on the harms that are caused by offending conduct – harm to the victim personally, harm to the offender him or herself, and harm to the community as a whole from the wrongful conduct. Daniel Van Ness and Karen Heetderks Strong, Restorative Justice, at 31 (1997). As suggested by its label, restorative justice seeks to restore or repair damage caused by the offender’s conduct. Tony F. Marshall, “Restorative Justice: An Overview,” at 7 (1999).

To be sure, restorative justice constitutes a way of thinking about crime and the responses to it that are different from conventional western approaches to crime. Daniel Van Ness and Karen Heetderks Strong, Restorative Justice, at 42 (1997). It focuses on the harm caused by the crime, repair of that harm, and reduction of future harm by preventing future crime. Id. Restorative justice requires offenders to take responsibility for their actions and for the harm they have caused. Id. It seeks redress for victims, recompense by offenders, and reintegration of both victims and offenders within the community. Id.

Howard Zehr has written:

Crime is a violation or harm to people and relationships.  
The aim of justice is to identify obligations, to meet needs and to promote healing. The process of justice involves victims, offenders and community in an effort to identify obligations and solutions, maximising the exchange of information (dialogue, mutual agreement) between them.

In other words, crime violates people. Violations always create obligations. Justice should involve victims, offenders and the community in search to identify needs and obligations so that things can be made right (so far as possible).

Howard Zehr, “Rethinking Criminal Justice: Restorative Justice,” at 9 (May 1995), (reprinted in Re-Thinking Criminal Justice (Vol. I) edited by Judge F.W.M. McElrea).

Efforts to articulate a satisfactory theory to underlie the diversity of restorative justice programs and practices that have developed in recent years have proven to be as difficult as putting forward an accepted definition of restorative justice. See Kathleen Daly and Russ Immarigeon, “The Past, Present, and Future of Restorative Justice: Some Critical Reflections,” Contemporary Justice Review Vol. 1, at 31 (1998) (restorative justice “does not yet have a coherent paradigm”). However, one of the better attempts to posit an underlying theory was from an American law professor, Erik Luna, while he was a visiting lecturer at Victoria University in Wellington. In his lecture entitled “Reason and Emotion in Restorative Justice,” Luna traced the development of western penal

philosophy as applied to juveniles, a philosophy that vacillated between the “treatment” sanctioning model and the “punishment” sanctioning model.

The treatment model views the juvenile offender as “sick” in need of treatment and health services. Erik Luna, “Reason and Emotion in Restorative Justice,” at 9 (2000). Under this model, the juvenile offender is not deemed accountable for his actions and instead his “sickness” is considered the precipitating cause of the offending. Under the treatment model, the state takes possession of the child for his own good and seeks to rehabilitate him into a law-abiding member of society. This would typically involve involuntary counselling and medical care, and in some instances institutionalization in a residential “treatment” facility. Id.

In response to strong perceptions of the failure of the treatment model, many jurisdictions including in America shifted to a youth court system grounded in the “just desert” theory of justice. Erik Luna, “Reason and Emotion in Restorative Justice,” at 10 (2000). The punishment model of juvenile justice places its emphasis on determining guilt and then punishing the offender for his or her moral blameworthiness. Id. The central actors are legal professionals, including judges and lawyers, who are involved in an adversarial contest between the state and the defendant. Once guilt is established, then the court imposes punishment in proportion to the gravity of the crime. Id.

In his article, Luna sets out three basic principles and the five sub-principles of “restorative sanctioning.” Erik Luna, “Reason and Emotion in Restorative Justice,” at 4-6 (2000). He then measures the “treatment” and “punishment” sanctioning models against these principles. Luna describes the basic principles of restorative justice or the restorative sanctioning model as follows:

Restorative justice incorporates three basic principles in its approach to sanctioning. First, crime is not just an act against the state but against particular victims and the community in general. Offending, then, is primarily a breach of human relationships and only secondarily a violation of the law. As such, the community, family members, and supporters, rather than the state and its justice machinery, are considered the locus of crime control. Toward these ends, the restorative model seeks the active participation of victims, families, and community representatives to address the causes and consequences of offending.

Second, the primary aim of this approach is making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender. Accountability is defined as recognising the wrongfulness of one’s conduct, expressing remorse for any resulting injury, and taking actions to repair the damage done by the offending. Crime creates positive obligations, this approach argues, that require affirmative action on the part of the offender.

Finally, restorative justice envisions a collaborative sanctioning process all stakeholders concerned with the offender and the offence. The central feature is largely uninhibited dialogue among the parties, allowing all present to express their emotions and ideas in an open forum. Through discussion and deliberation, restorative sanctioning contemplates mutual agreement and the steps that must be taken to heal the victim and the community, as well as a plan to confront the factors contributing to the offender's conduct and facilitate his development as a law-abiding citizen.

Erik Luna, "Reason and Emotion in Restorative Justice," at 4 (2000).

The first of the sub-principles is inclusion, or the notion that parties with a stake in the criminal offense should participate in the process that responds to offense. Erik Luna, "Reason and Emotion in Restorative Justice," at 5 (2000). The second sub-principle is voluntariness, or the idea that a party is involved in the sanctioning process by virtue of his own free choice. Included in this sub-principle is the ability to choose to accept or reject a particular outcome. *Id.* The third sub-principle is that the participants, most notably victims and offenders, are entitled to support during this sanctioning process. *Id.* at 5-6. This third sub-principle reinforces the first two principles of being included in the process of decision-making and being included without improper coercion. The fourth sub-principle, as articulated by Luna, is the parties' ability to control to some extent the very process by which decisions are reached. Stated differently, stakeholders in the restorative process must have the ability to shape the process to some extent. *Id.* at 6. The last sub-principle is freedom of discourse among all participants. As Luna notes, uninhibited conversation ensures a level of ownership in the process and its outcome. *Id.*

Using these principles, it is easy to see just how different the restorative justice sanctioning model is from the treatment and punishment models. Neither the treatment nor punishment models are inclusive. The treatment model singularly focuses on the offender and his rehabilitation. Victims, their supporters, and community members are excluded from the process as largely irrelevant to the treatment of the offender. Erik Luna, "Reason and Emotion in Restorative Justice," at 9-10 (2000). Similarly, the punishment model focuses on the state and the defendant in this court-centered form of justice. *Id.* at 10-11. The victim, community representatives, and family members are largely excluded from the process.

With respect to the other principles as well, the treatment and punishment models fall far short of the restorative sanctioning model. As Luna stated:

Both models exclude parties with important interests in the sanctioning process; reject the concept of voluntary participation; deprive the juvenile of important supporters; place process control solely within the ambit of professionals; prevent free dialogue among stakeholders; and thwart the pivotal stages of constructive censure, genuine remorse and stakeholder acceptance.



Erik Luna, "Reason and Emotion in Restorative Justice," at 11 (2000).

### **What has fuelled the restorative justice movement?**

The restorative justice movement, if it can properly be called that, has gained strength or impetus from a number of different sources. These include: the movement towards increased rights for victims in the criminal justice process; alarm over increasing and high rates of incarceration, particularly among indigenous or minority populations; the movement towards greater community involvement in crime prevention; and concern about recidivist offending.

In the late 1960s and in the 1970s, many in the United States became concerned about the lack of any formal or express rights belonging to victims of crimes. John W. Stickels, "Victim Impact Evidence: The Victims' Right That Influences Criminal Trials," *Texas Tech Law Review* at 231, 235 (2001). Concomitantly, many perceived an imbalance in the rights belonging to the accused and the rights of crime victims. *Id.* A victims rights movement thereby emerged. In 1982, for example, the President of the United States created a Task Force on Victims' Rights. That Task Force recommended a constitutional amendment for victims rights. Terry Carter, "Righting Victims' Rights," *ABA Journal* (December 2000). Shortly thereafter, in 1982, Congress passed legislation allowing victims to provide victim impact statements describing their experiences as victims and the costs incurred as crime victims. John W. Stickels, "Victim Impact Evidence: The Victims' Right That Influences Criminal Trials," *Texas Tech Law Review* at 231, 236-237 (2001). Several persons have recognized that part of the impetus towards restorative justice programs was the victims' rights movement. *See, e.g.*, Joan W. Howarth, "Toward The Restorative Constitution: A Restorative Justice Critique Of Anti-Gang Public Nuisance Injunctions," *Hastings Constitutional Law Quarterly* at 720 (Summer 2000).

Over and above concerns regarding the plight of crime victims, many have advocated for restorative justice because of their view that incarceration rates are too high and too many people are being sent to prison. Father Jim Consedine, to take just one example, has argued vehemently that New Zealand imprisons far too many people at overwhelming costs. *See* Jim Consedine, *Restorative Justice: Healing The Effects of Crime*, at 28-30 (1995). The same criticism is frequently levelled at the United States, which also has a high incarceration rate.

Others have expressed concerns about recidivist (repeat) offending. Statistics compiled by the New Zealand Ministry of Justice, for example, show that an astounding 80% of persons imprisoned in New Zealand are reconvicted within two years of their release from prison. *See* Ministry of Justice, *Recidivism Patterns For People Convicted in 1995*, at 9 (2001). There is a widely held view that the criminal justice system can and must do better. As the Chief District Court Judge of New Zealand David Carruthers recently said:

The reality is that our conventional system of criminal justice often does not work. It aims to deal with crime dispassionately without reference to emotion. In doing so, it fails to engage offenders and the victims of offences. It fails to stimulate any sense of respect for themselves or each other. Instead, it gives predominance to the needs of professionals who represent the state. Moreover, the adversarial nature of the system creates ‘a hostile environment where concern for mutual respect is replaced with the desire for victory in a pure winner-take-all scenario.’ Neither of these tendencies is helpful for the victim or offender. Despite the best efforts and intentions of judges, counsel and court staff, the conventional system often fails to provide victims or offenders with meaningful justice.

Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 4 (June 2001).

Finally, “religion and moral theory still provide strong backgrounds for restorative justice.” Kurki, “Restorative and Community Justice in the United States,” at 240 (2000). From this perspective, restorative justice places an appropriate emphasis on offender accountability but at the same time strives for greater healing. The National Conference of Catholic Bishops in the United States has specifically endorsed the move to restorative justice practices. The Bishops stated in a November 15, 2000 text:

An increasingly widespread and positive development in many communities is often referred to as restorative justice. Restorative justice focuses first on the victim and the community harmed by the crime, rather than on the dominant state-against-the-perpetrator model. This shift in focus affirms the hurt and loss of the victim, as well as the harm and fear of the community, and insists that offenders come to grips with the consequences of their actions. These approaches are not “soft on crime” because they specifically call the offender to face victims and the communities. This experience offers victims a much greater sense of peace and accountability. Offenders who are willing to face the human consequences of their actions are more ready to accept responsibility, make reparations, and rebuild their lives.

National Conference of Catholic Bishops of the United States, “Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice,” at 20 (2000).

## TYPES OF RESTORATIVE JUSTICE PRACTICES

### Family Group Conferences

Prior to 1989, New Zealand applied a “welfare” model to youth care and protection and youth justice. That is, issues regarding endangered children or juvenile misconduct were referred to professionals including social workers at the Department of Social Welfare. These professionals would make recommendations to the courts, which would then decide what should happen to or for the child. See Hudson, Morris, Maxwell, and Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, at 20-22 (1996). The statutory basis for this model was the Children and Young Persons Act of 1974. Id. at 20. Under this model, children were in many cases removed from their families.

In the 1980s, there was a growing concern that removal of children from their families was destabilizing and otherwise harmful. Hudson, Morris, Maxwell, and Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, at 22 (1996). “New Zealanders had reached the view that the existing youth justice system was a complete failure under the Children and Young Persons Act 1974.” Judge Carolyn Henwood, “The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective,” at 2 (1997).

Many Maori in New Zealand in particular voiced their concerns that too many Maori children were being removed from their families and that the processes by which child welfare and youth justice decisions had been made were inimical to Maori traditions and values. Neil Cleaver, “Another Arm of the Bureaucracy?” 1 *Social Work Now* at 7 (July 1995). The removal of children in particular from Maori families upset many because of the importance of kinship and descent lines in Maori culture. Hudson, Morris, Maxwell, and Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, at 22 (1996).

Simultaneously, the treatment of youth offenders who had been placed in residences became a public issue in New Zealand. Hudson, Morris, Maxwell, and Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, at 23 (1996). Part of the issue was the use of prolonged incarceration in the name of child welfare. Id. “Too many young people were in custody with very little differentiation between those who were in the need of care and protection and those who were committing crimes.” Judge Carolyn Henwood, “The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective,” at 2 (1997). In summary, the “existing legislation had become culturally and politically unacceptable for New Zealand society and reform was required.” Id. at 3.

As a result, a Children and Young Persons Bill was introduced in Parliament in the mid 1980s. The bill was referred to a select committee until 1987. At that time, a new Minister of Social Welfare directed that a review of the Bill be performed by the Department of Social Welfare with the provision that the bill be made more culturally

sensitive and accommodating to the tangata whenua (indigenous people). The Minister also directed that that the bill involve parents and family groups in developing solutions to youth problems. See Hudson, Morris, Maxwell, and Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, at 24-25 (1996). These directions were based on submissions concerning, and objections to, the 1986 Bill that had been received from the public. Id.

Neil Cleaver has described the working party's efforts to address public concerns including the concern for greater cultural sensitivity:

In its report of December 1987, the working party on the Bill explained that instead of conducting a "piecemeal analysis" of the Bill, it had:

Reviewed the basic assumption and intention underlying the Bill and endeavoured to develop proposals which were responsive to public concerns as to how those assumptions have been expressed. Particular attention was paid to the need to reflect in legislation the principles and spirit of the Treaty of Waitangi.

One of the key principles that guided the working party was that:

The Bill must involve parents, family groups, whānau, hapū and iwi in developing solutions to problem situations.

The working party saw this principle as overcoming what they perceived to be the monocultural nature of the Bill. In their view family/whānau involvement in some way implied that Māori values and cultural practices would be incorporated into the way in which care and protection and offending of young people was addressed.

Neil Cleaver, "Another Arm of the Bureaucracy?" 1 *Social Work Now* at 7 (July 1995).

In 1989, a substantially modified Bill was introduced in Parliament. This draft legislation proposed the use of "family group conferences" to deal both with care and protection for children and with youth crime. That Bill was passed as the Children, Young Persons and Their Families Act of 1989.

Several scholars have written that the Children, Young Persons and Their Families Act of 1989 and family group conferences in particular were based on and incorporated Maori concepts and traditions of justice. See, e.g., Chris Cuneen, "Community Conferencing and the Fiction of Indigenous Control," 30 *The Australian and New Zealand Journal of Criminology* 292, 293 (1997). But no one has been able to cite any concrete evidence that meetings (hui) along the lines of family group conferences were used by Maori prior to European colonization or in the early 20th century. Rather, the implementation of the family group conference in the 1989 Act was a product of objections to professional "care and protection" teams deciding the fate of children. In the place of professional teams, the responsibility for decision-making was given to families (whanau) and extended families (hapu).

The “foundation stone” of the 1989 Act is the family group conference. Mike Doolan, “The Family Group Conference – 10 Years On,” at 2 (1999). See also Judge Carolyn Henwood, “The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective,” at 13 (1997) (“The jewel in the crown of our Act is the ‘Family Group Conference’”). Chief District Court Judge David Carruthers (also the former Principal Youth Court Judge) has identified the family group conference as a New Zealand invention and its “gift to the world.” Remarks by Chief District Court Judge David Carruthers, Wellesley Club Luncheon, Wellington, New Zealand (June 6, 2001).

In a New Zealand family group conference, a youth justice coordinator invites the victim of the criminal offense to meet with the offender and the offender’s family. Police also attend the conference. After introductions, the conference is commenced most often by the police reading a “statement of the facts,” which describes the criminal offense and basic background information about the youth offender. The offender is then asked if s/he denies or admits those facts. If the offender agrees to the facts of the offense (or at least the core portion of them), then the victim is asked to speak about the impact the offense has had on him/her. On those occasions when the victim is unable or unwilling to attend in person, the youth justice coordinator may read a letter or other kind of statement from the victim recounting the impact of the criminal offense on the victim. Frequently, statements by the victim are followed by an apology or some expression of remorse by the offender. The conference participants then discuss collectively and sometimes with emotion what should be done to repair the harm to the victim (including the payment of restitution) and what the offender should do in order to be held accountable for the offense. After a suitable discussion period, the offender is left alone with his family to discuss a suitable plan.

Once the family has had sufficient time to caucus privately, then the entire group reconvenes to hear of the proposed family group conference plan from the family and the offender. The proposed plan is discussed and frequently negotiated by the parties including the police and the victim. If a collective agreement is reached, the plan is recorded in writing by the justice coordinator. If criminal charges had been presented in court, then the family group conference plan is presented to the court for approval.

### **NZ Youth Justice Coordinator Survey**

Most persons who are familiar with the family group conference process in New Zealand would agree that the youth justice coordinator is a key participant in the process. Prior to this year, a small number of youth justice coordinators had been interviewed by researchers to obtain their views on certain aspects of the family group conference process. But no effort had been made to survey all youth justice coordinators in New Zealand concerning their views on family group conferences and youth crime in general. The author, with the Department of Child, Youth, and Family Services National Coordinators Manager, undertook in May – June 2001 to survey all of the youth justice coordinators in New Zealand. Written questionnaires were sent to all coordinators or

supervisors who were currently employed at CYFS and who had conducted family group conferences. About 75% of coordinators responded to the survey.

Among other things, the survey confirmed that family group conferencing is working for youth offenders and has further identified what makes family group conferences (FGCs) effective. More than 92% of coordinators believed that FGCs were effective overall. About 8% of coordinators believed that FGCs were only sometimes effective. No coordinators believed that FGCs were not effective at all.

About half of the responding coordinators believed that the victim's attendance and input at the FGC was what makes the FGC effective. The importance of the victim's participation was echoed by the coordinators' comments about the impact of victim non-attendance. The vast majority of coordinators believed that non-attendance by the victim, whatever the reason, dramatically reduced the impact of the FGC on the offender and hence the FGC's effectiveness. Most felt that the absence of the victim made it difficult to demonstrate to the offender the harm from the criminal conduct and, as a result, made it easier for the offender to remain detached from and unmoved by the process. Put another way, the victim's non-attendance undermined the effort to hold the offender accountable.

Equally important to making FGCs effective was thorough preparation, including personal visits with families of the offender and victims, by the justice coordinator prior to the convening of the FGC itself. Other less frequently noted keys to making FGCs effective were: vigilant monitoring and follow-up of the FGC plan/agreement; the family of the offender taking responsibility for, and supporting, the young offender; and requiring the offender to take responsibility for his criminal conduct.

Coordinators had many ideas for making FGCs more effective more often. The most frequently indicated ways to improve FGC effectiveness was to allow more time to convene the FGC and to have better resources and programs available to the young person who had offended. Other suggestions for improving the effectiveness of conferences included limiting the number of FGCs held for an individual offender and improving the resources available to offenders.

While a significant number of coordinators believed that victim needs were met "well" or "very well" (a little more than 25%), many coordinators believed that victims needs were met only in certain situations. The most frequently cited victim need *not* met by the FGC process was full restitution for victim losses. Even though the monetary needs of victims were not well met, coordinators believed that victim needs of having a voice in the process, of telling their stories, and of venting their feelings were significant needs met by the FGC process. Only about 4% of coordinators felt that victim needs were "not met" or were "poorly met" by the process overall.

Surveyed coordinators almost all felt that effective steps could be taken that would avoid victims being revictimized at the family group conference. Coordinators cited the ability of victims to have support persons at the conference as one such measure.

Other protective measures included careful preparation in advance of the conference of both offenders and victims to ensure that the rights of victims were well understood and that victim expectations were realistic. Coordinators also cited the presence of police as well as the control exerted by the coordinator at the conference as steps that helped ensure that victims were not intimidated or otherwise revictimized at the FGC. Finally, coordinators frequently cited the veto power that victims had over the FGC plans or agreements as a way for victims to avoid being revictimized.

Another measure of the success of FGCs is how often FGC plans or agreements were successfully completed by young offenders. Coordinators were asked in what percentage of cases with agreed-upon FGC outcomes were FGC agreements “entirely or almost entirely fulfilled by the young person.” The responses revealed that, on average, FGC agreements or plans were successfully fulfilled in over 80 percent of cases.

A large percentage of coordinators (about 88%) believed that group conferences could be used effectively with adult offenders. Some coordinators believed that use of such conferences would be even more successful with adults than with young persons while others believed that group conferences could only be used successfully with some adult offenders. Only a small number (4%) felt that group conferences could not be used effectively with adults. About 8% were simply not sure.

As part of the survey, coordinators were asked what they thought the most pressing youth crime problems were in New Zealand today. The number one crime problem cited – by a large measure -- was drug and alcohol use and addictions. More than half of the responding coordinators (57%) viewed drug and alcohol abuse and addictions as one of the most pressing youth crime problems today in New Zealand. The next most frequently cited youth crime problem was violent offending by New Zealand youths. Also cited by numerous coordinators as problems were: burglary/home invasion crimes by young persons, breakdowns in family structures, single parent families, lack of parental supervision, violent culture, and poor parenting.<sup>2</sup>

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<sup>2</sup> Coordinators were also asked if youth justice coordinators should be part of the New Zealand social welfare agency, the Department of Child, Youth, and Family Services. More than half of the responding coordinators (58%) felt that youth justice coordinators should not be part of the Department of Child, Youth, and Family Services. Thirty-six percent felt that youth justice coordinators should remain part of CYFS while about 7% were unsure. If youth justice coordinators were not part of CYFS, views were mixed as to where they should be located. About a third (33%) thought that the Ministry of Justice would be a good spot for justice coordinators (probably unaware that the Ministry of Justice at this time only deals with criminal justice policy, not operational matters). Another 23% felt that a new agency should be created for youth justice coordinators while another 23% mentioned the district courts as a possible place to locate youth justice coordinators. Interestingly, less than 5% of respondents mentioned the Department for Courts or the Department of Corrections as a possible place to locate justice coordinators.

## **Adult Conferencing in New Zealand**

An early proponent of extending restorative justice processes to adult offenders in New Zealand was District Court Judge F.W.M. McElrea. In 1994, at a judges' conference, McElrea proposed the idea of adapting youth justice processes to adult criminal courts. Bowen, Boyack, and Hooper, New Zealand Restorative Justice Practice Manual, at 18 (2000).

Other calls for the extension of restorative justice to adult offenders in New Zealand followed. In 1995, Father Jim Consedine's book, Restorative Justice – Healing The Effects Of Crime was published. Consedine, a Catholic priest and prison chaplain wrote:

Restorative justice is a philosophy that offers us a chance to practise the qualities that make people great – true justice based on apology, compassion, healing, mercy, reconciliation, forgiveness and, where appropriate, sanction. It offers the processes whereby those affected by criminal behaviour – be they victims, offenders, the families involved or the wider community – all can have a part in resolving the issues that flow from the offending.

We need a quality of criminal justice that recognises the immense value that these virtues bring to the quality of life and acknowledges the centrality of and need to enhance and protect the common good. No-one is saying 'be soft on crime'. Rather the plea is to take this tougher option and utilise all the great human qualities that reflect a power that can and does change human behaviour for the better.

Now is the time for a radical shift to a parallel system of criminal justice involving restorative processes. These include conferencing, victim offender facilitation and more diversion.

Consedine, Restorative Justice – Healing The Effects Of Crime, at 196 (1995).

## **Waitakere Restorative Justice Pilot**

Recently, a pilot program that extended restorative justice conferencing to adult offenders was run in Waitakere (west of Auckland), New Zealand. This pilot was established by a partnership between the Restorative Justice Trust and the Methodist Mission Northern. The Restorative Justice Trust was established in 1999 to study, promote, and refine restorative justice practices in New Zealand.

This program involved cases referred from the Waitakere District Court during the period from April 1, 2000 until September 30, 2000. Any participant in a criminal



case could suggest a referral to the pilot program for a restorative justice conference. The criteria for referral were that:

- there was a direct victim
- the offense had a maximum sentence of at least two years imprisonment
- the offender had admitted guilt
- there was essential agreement about the facts underlying the case

The court could either approve or disapprove of a referral. Once approved by the court, the administrator of the pilot program appointed a facilitator. The facilitator was responsible for contacting both the victim and the offender to see if they were agreeable to proceeding with a restorative justice conference. If they were, a conference was convened to bring together the offender and victim along with police, probation officers, lawyers, and supporters of both victim and offender. The focus of the conference was to discuss the criminal offense and how amends could be made. The facilitator was then responsible for writing a report of the conference and the conference agreements, which was then forwarded to the court. Although the report was not binding on the court, the court would then consider the report in conjunction with deciding the disposition of the case and the sentence to be imposed, if any, on the offender.

During the pilot period, 42 cases were referred to the program. Restorative justice conferences were held in 22 of the 42 referred cases. In the remaining 20 cases, either the offender or victim declined to participate in the conference or the offender was deemed unsuitable.

### **Court-Referred Restorative Justice Conferences**

In June 2000, the New Zealand Government announced NZ\$4.8 million in funding to introduce restorative justice conferences for adult offenders. In September 2000, the government announced that this pilot program would be conducted in four District Courts in Auckland, Waitakere, Hamilton and Dunedin.

This pilot restorative justice program will be used for persons who have committed offenses for which the maximum sentence is at least two years imprisonment. A conference will be conducted only with the voluntary consent of the offender and of the victim. Conferences will be adjourned and supervised by two co-facilitators, who will be paid for their service. A written report from the conference will be prepared and forwarded to the sentencing court.

The program is expected to start receiving referrals as early as August 2001. Four coordinators, from the Department of Courts, have been selected for each of the four district courts that are to be included in the pilot. Facilitators for the conferences are being selected and trained at this time. Training will consist of four days of training and evaluation as to whether the prospective facilitators are ready to adjourn conferences.

The pilot program expects to handle up to 1200 conferenced cases per year. Evaluation of the project is expected to commence in early 2002. Researchers from Victoria University in Wellington will examine cases handled by the conferencing pilot as well as a matched “control group” of criminal cases that are not referred for restorative justice conferencing. The evaluators will follow up both groups a year later as well.

### **Project Turnaround in Timaru, New Zealand**

Project Turnaround is a community-based diversion scheme that was begun in Timaru, New Zealand in 1997. Under this program, certain offenders who have admitted guilt and have shown remorse are diverted from the court after an initial appearance before a judge. If there is victim consent, a diversion meeting or conference modelled in part on family group conferences from the youth justice area is convened with an emphasis on community rather than family.

To represent the community, two members from a panel of volunteers are present at the conference along with a police representative. Both the offender and victim are encouraged to bring supporters to the conference. At the conference, the police read the summary of facts (which describes the criminal offense) and the offender must admit his/her guilt. The victim is invited to describe the impact of the crime and his/her feelings. Queries are made to the offender as to why the offense was committed and what contributed to it.

Thereafter, the Project Turnaround conference turns to the question of how to deal with the offending. The victim and the offender are asked to suggest ways to deal with offending and a plan to address the offense is put together. Before the end of the conference, the offender is asked to sign a contract in which she or he agrees to do certain things within set time frames.

Critically, the victim has the final say on whether the plan should go ahead or the matter should be returned to the court. Very few victims, however, have elected to return the matter to court.

After the conference, the offender’s progress on the plan is monitored to assure completion. If the plan is not completed, the matter is referred back to the court. If the plan is completed, the criminal charges are dismissed and criminal conviction with respect to the matter is avoided. Less than 10% of matters are referred back to the court because the offender has failed to complete the agreed-upon plan.

In 2000, Project Turnaround received an International Community Justice Award in London, England for “implementation of an outstanding community-based project which places the victim’s views at the heart of the process and which has contributed significantly to reducing reconviction rates while retaining public confidence.” Ministry of Justice, Justice Matters, at 16 (2000).

## **Australian Restorative Justice**

Conferencing, adapted from the New Zealand family group conferencing model, was introduced into the Australian criminal justice system in the early 1990s. See Australian Institute of Criminology, “Restorative Justice: An Australian Perspective,” (2001). See also Chris Cunneen, “Community Conferencing and the Fiction of Indigenous Control,” 30 *The Australian and New Zealand Journal of Criminology* 292, 293 (1997).

For example, in 1991 police in the city of Wagga Wagga, New South Wales adopted portions of the New Zealand conferencing idea but in the form of conferences organised and run by police officers. Australian Institute of Criminology, “Restorative Justice: An Australian Perspective,” (2001). Police in other Australian locations also experimented with conferencing; during 1992-95, police-run conferences were established in the Australian Capital Territory (ACT) and were tried on a pilot basis in Western Australia, the Northern Territory, Queensland, and Tasmania. Other applications of the conferencing idea have been tried in schools and workplaces in New South Wales and Queensland beginning in 1994, and these continue to operate.<sup>3</sup>

Variations exist in the offences and offenders who are eligible for conferencing, the existence of a legislative basis, and the agency in which it is located. At the present time: in the ACT, conferencing is run by the police; in New South Wales, South Australia, Western Australia, and Queensland it is run by justice authorities; and in Victoria it is run by a church body. In some jurisdictions conferencing remains on a small scale, while in others, principally South Australia, Western Australia, and New South Wales, it is becoming an established part of mainstream juvenile justice processing.

There are three jurisdictions in Australia (Western Australia, Queensland, and the ACT) where restorative conferencing is being used with adult offenders. Heather Strang, “Restorative Justice Programs in Australia,” at 4, 28-29 (2001). Recently, the New South Wales Attorney General’s Department has proposed a two-year pilot program of community justice conferencing for adult offenders. See “Community Justice Conferencing for Adult Offenders Discussion Paper – Model,” at 1 (2001).

The aim of conferencing in Australia is to divert offenders from the justice system by offering them the opportunity to attend a conference to discuss and resolve the offense instead of being charged and appearing in court. Conferencing is not offered where offenders wish to contest their guilt. The conference, which normally lasts 1 to 2 hours, is attended by the victims and their supporters, the offenders and their supporters and other relevant parties. The conference coordinator focuses the discussion on condemning the act, without condemning the character of the actor. Offenders are asked to explain what happened, how they have felt about the crime, and what they think should be done.

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<sup>3</sup> Much of the information in this section has been obtained from the Australian Institute of Criminology’s website, which is found at: [www.aic.gov.au/rjustice](http://www.aic.gov.au/rjustice)

The victims and others are asked to describe the physical, financial and emotional consequences of the crime. This discussion may lead the offenders, their families and friends to experience the shame of the act, prompting an apology to the victim. A plan of action is developed and signed by key participants. The plan may include the offender paying compensation to the victim, doing work for the victim or the community, or any other undertaking the participants may agree upon. It is the responsibility of the conference participants to determine the outcomes that are most appropriate for these particular victims and these particular offenders.

All eight Australian states and territories have used the conference model, but there are five in which conferencing is active. Of these five jurisdictions, all but one (the ACT) has legislatively established conferencing. South Australia began to use conferences routinely in 1994, Western Australia and the ACT in 1995, and New South Wales in 1998.<sup>4</sup> Queensland is experimenting with several formats for conferencing but conferencing is not available on a state-wide basis. Tasmania passed legislation in 1997, which gave statutory authority to establish conferences, but a conferencing program has not yet started. The State of Victoria, like the ACT, is without a statutory scheme, but a community organisation, working in partnership with State agencies, uses the conference model in selected cases as a pre-sentence option.

### **Family Group Conferencing in America**

Restorative and community justice conferences have been utilized in a number of state and local jurisdictions in the United States. For example, in July 1996, a two-year pilot program using family group conferences for juvenile offenders in 12 communities in the 1st Judicial District in Minnesota was begun. Fercello and Umbreit, "Client Evaluation of Family Group Conferencing in 12 Sites in 1st Judicial District of Minnesota," at 1 (1998). The conferencing used in Minnesota involved a mediation-type process coordinated by a neutral facilitator who assisted victims, offenders and other concerned parties (parents, relatives, friends, and other supporters of the victims or offenders) to engage in an open dialogue about the crime and its impact. *Id.* at 2.

The role of the facilitator was to ensure a safe environment for participants to openly and honestly discuss the circumstances surrounding the crime and the impact. The facilitator was also responsible for making sure that the conference was controlled and fair for all parties involved. Fercello and Umbreit, "Client Evaluation of Family Group

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<sup>4</sup> The Reintegrative Shaming Experiments (RISE), a project carried out by the Australian National University, is studying conferencing in Canberra, ACT, Australia's national capital. In the ACT, the "Wagga model" of police-run conference practice has been adopted. The South Australia Juvenile Justice (SAJJ) research on conferencing project is studying the ways in which conferences vary in "restorativeness" and "democratic" process for participants. Conference practices in South Australia utilize the "New Zealand model" of non-police run conferences in a state where conferencing is legislatively based.

Conferencing in 12 Sites in 1st Judicial District of Minnesota,” at 2 (1998). Most conferences began with the facilitator setting down ground rules that allowed each party to have a chance to speak. Next, either the victim or the offender was asked to describe the events surrounding the crime and the impact on him or her. The victim was usually offered a choice as to whether or not he/she would like to speak first or have the offender go first. After the victim and the offender had shared their stories, the facilitator invited the parties to discuss restitution. An important component of the FGC was that both the victim and the offender were required to agree to the restitution before it was finalized. After the restitution agreement was formalized, most conferences ended with participants sharing refreshments. Id.

A separate family group conference project was commenced on a local level in November 1995 in Bethlehem, Pennsylvania, a mid-sized American city. The program was dubbed “Operation PROJECT (for “Program for Redirection of Offending Juveniles through Empathy building and Conferencing Techniques”) and followed the Wagga model of police-facilitated conferences. See Paul McCold and Lt. John Starr, “Paper Presented to the American Society of Criminology, Annual Meeting, Chicago,” at 3-4 (November 1996). Twenty police officers initially were trained for participation in the program (out of approximately 140 sworn officers). Id. See also Paul McCold and Benjamin Wachtel, “Restorative Policing Experiment: The Bethlehem Police Family Group Conferencing Project,” at 3 (1998). The program was limited to first-time offenders who had been arrested by police and who had been charged with misdemeanor offenses (not including any drug/alcohol crimes). Paul McCold and Lt. John Starr, “Paper Presented to the American Society of Criminology, Annual Meeting, Chicago,” at 3-4 (November 1996). Participation in the conferencing process was voluntary for both offenders and victims. Id. Preliminary results showed high rates of satisfaction among victims and offenders. Id. at 4-5. The program continues today. See Website: <http://www.an.psu.edu/pa-rcpi/police.html> .

### **Navajo Peacemaking Circles**

Native American Navajos call living in right relationship “Hozhooji.” Paul McCold “Restorative Justice Practice – The State of the Field 1999,” at 16 (1999). If a person believes that they have suffered wrongful conduct, they make a demand on the offender to put things right. Id. If this is unsuccessful, the wronged person may turn to a respected community leader to facilitate and organize a peacemaking circle. Id. The process is not confrontational but instead involves family and clan members of victims and offenders talking through matters to arrive at a solution. Id.

The process opens with a prayer to seek supernatural assistance. Paul McCold “Restorative Justice Practice – The State of the Field 1999,” at 16 (1999). “Prayer is very powerful in Navajo thinking, because it summons supernatural beings to take part in the process. It actually summons and brings them to the gathering, to participate and to help with the outcome.” James W. Zion, “The Dynamics of Navajo Peacemaking,” at 7 (1998).

Following the prayer, the parties in the circle have an opportunity to explain their grievances. Paul McCold “Restorative Justice Practice – The State of the Field 1999,” at 16 (1999). The victim has an opportunity to disclose not only the facts but the impact of the offense or wrongful conduct as well. Id. People have an opportunity to say how they feel about the event and to make a strong demand that something be done about it. Id. Relatives also have an opportunity to express their feelings and opinions about the matter. Id.

The person who is the focus of the discussion is provided an opportunity to explain his or her behavior in full. Paul McCold “Restorative Justice Practice – The State of the Field 1999,” at 16 (1999). Denials and excuses are exposed by the people who know the wrongdoer best—his spouse, parents, siblings, other relatives and neighbors. The process is designed to clarify the offending situation and to get to the root of the problem. The peacemaker has persuasive authority and draws on the traditions and stories of the culture to offer practical advice. The parties then return to a discussion of the nature of the problem and what needs to be done to resolve it. Id.

Often, the action taken is in the form of *nalyeeh*, which also translates as restitution or reparation. Robert Yazzie and James W. Zion, “Navajo Restorative Justice: The Law of Equality and Justice,” at 168 (contained in Restorative Justice: International Perspectives, edited by Burt Galloway and Joe Hudson (1996)). Payments can be in the form of money, horses, jewelry, or other goods. Id. The payment may at times be symbolic only. The focus is not upon adequate compensation, but upon a holistic kind of remedy. Paul McCold, “Restorative Justice Practice – The State of the Field 1999,” at 16 (1999). The feelings and relationships of the parties are what is most important. The process ends in an action plan to solve the problem. Id.

### **Circle Sentencing in Canada**

Circle Sentencing is a type of restorative justice conferencing that is used in Canada. In 1992, Yukon Judge Barry Stuart convened the first circle conference in the case of Philip Moses. Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 2 (2000). While circle sentencing was initially used for aboriginal offenders, it is now applied to aboriginal and non-aboriginal offenders.

Circle sentencing is an alternative to judges receiving formal sentencing submissions from the defense and crown lawyers in cases involving serious offenses or cases where the circumstances of the offender are such so as to justify a significant intervention. Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 3 (2000). “It is not often used for minor charges, as the process is intrusive, lengthy and requires a significant commitment from all participants.” Id. It has been used for both adults and juveniles. Id. Circle sentencing is not a form of diversion; rather, it is part of the court process and results in convictions and criminal records for

offenders. Id. The offender must normally enter a plea of guilty at an early stage of the proceedings in order to indicate an acceptance of responsibility for the offense. Id.

The procedure is as follows. Chairs are arranged in a circle and the session is chaired either by a respected member of the community, sometimes called ‘the keeper of the circle’ or by the judge. Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 3 (2000). Usually between fifteen and fifty persons are in attendance. The participants in the circle introduce themselves, then the charges are read and the crown and defence lawyers make brief opening remarks. The community members then speak. Id. Participation is voluntary and everyone has an equal voice. Caroline G. Nicholl, “Community Policing, Community Justice, and Restorative Justice,” at 156 (1999).

Unlike a formal court-based sentencing, the discussions focus on more than just the offense and the offender and often include the following matters:

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

Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 3-4 (2000). See also Caroline G. Nicholl, “Community Policing, Community Justice, and Restorative Justice,” at 156 (1999).

Victims are notified in advance that an offender is seeking to use the circle sentencing process. Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 4 (2000). The victim is assisted in establishing a support group and is encouraged to attend the hearing with his or her support group. Unlike formal court, where the role of the victim at sentencing is usually limited to providing a victim impact statement, the victim is a full and equal participant in a circle sentencing hearing. Id.

Circle sentencing discussions typically last from two to eight hours, and frequently involve meetings on two separate dates. Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 5 (2000). Often at the end of the first meeting,

the offender is given a set of goals to determine if the offender can follow through with a plan before a final sentencing plan is imposed. The circle will reconvene several weeks, or even months later, to review the offender's performance and make any necessary changes to the recommended plan. At that time, the judge will impose the final sentence incorporating the recommendations of the circle. Id.

### **Community Reparative Boards in Vermont**

Another type of restorative or community justice process that has been developed is the reparative board, an example of which is the community reparative boards in Vermont, United States. David Karp and Lynne Walther, "Community Reparative Boards in Vermont: Theory and Practice," at 199 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)).

The process in Vermont commences when a judge sentences a convicted criminal offender involving a minor offense to "reparative probation" in lieu of a traditional probation sentence or brief jail sentence. David Karp and Lynne Walther, "Community Reparative Boards in Vermont: Theory and Practice," at 200 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)). After processing and notification to the victim, the offender meets with a board of volunteer community representatives. The meeting is open to the public and begins with a review of the criminal offense, either by the offender or the victim if the victim is present. Id. at 200. The board then explores with the offender what things can be done to repair the injury from the crime and also to reintegrate the offender in the community. Id. Among the reparative strategies are letters of apology, community service, and further education for the offender. A reparative contract is then prepared and signed by the board and the offender. Offenders who do not fulfil the terms of the contract are returned to the criminal court. Id.

### **POTENTIAL CONTRIBUTIONS FROM RESTORATIVE JUSTICE PROCESSES**

Many have argued that restorative justice should be pursued because traditional court systems have completely failed to stem the rising tide of crime. See, e.g., Jim Consedine, Restorative Justice: Healing The Effects of Crime, 18-19, 183-184 (1995). Yet, at least in America, crime rates and victimization rates have been steadily falling – dramatically so – over the last decade. From 1989 through 1999, crimes recorded by police in the United States fell by more than 18%. See Bureau of Justice Statistics, Sourcebook Of Criminal Justice Statistics 1999, Table 3.120 at 266 (2000). See also Home Office Statistical Bulletin, International Comparisons of Criminal Justice Statistics 1999, Table A at 3 (2000). The crime rate (recorded crimes per 100,000 persons) in the United States has similarly declined since 1991. Bureau of Justice Statistics, Sourcebook Of Criminal Justice Statistics 1999, Table 3.120 at 266 (2000). In 1999 (the last full year for available data), the crime rate in America was the lowest that it had ever been since



1973. Id. The following table illustrates just how significantly reported crime and crime rates have fallen in the United States over the last decade.

<u>Year</u>	<u>Total Recorded Crime</u>	<u>Crime Rate (per 100,000 persons)</u>
1970	8,098,000	3,984.5
1971	8,588,200	4,164.7
1972	8,248,800	3,961.4
1973	8,718,100	4,154.4
1974	10,253,400	4,850.4
1975	11,292,400	5,298.5
1976	11,349,700	5,287.3
1977	10,984,500	5,077.6
1978	11,209,000	5,140.3
1979	12,249,500	5,565.5
1980	13,408,300	5,950.0
1981	13,423,800	5,858.2
1982	12,974,400	5,603.6
1983	12,108,600	5,175.0
1984	11,881,800	5,031.3
1985	12,431,400	5,207.1
1986	13,211,900	5,480.4
1987	13,508,700	5,550.0
1988	13,923,100	5,664.2
1989	14,251,400	5,741.0
1990	14,475,600	5,820.3
1991	14,872,900	5,897.8
1992	14,438,200	5,660.2
1993	14,141,800	5,484.4
1994	13,989,500	5,373.5
1995	13,862,700	5,275.9
1996	13,493,900	5,086.6
1997	13,194,600	4,930.0
1998	12,475,600	4,615.5
1999	11,635,100	4,266.8

Bureau of Justice Statistics, Sourcebook Of Criminal Justice Statistics 1999, Table 3.120 at 266 (2000). See also Bureau of Justice Statistics (online).<sup>5</sup>

It is not just in reported crime that the statistics showed a marked decrease in the United States. Crime victimization as tallied by the National Crime Victimization Survey (NCVS) has also shown marked decreases in recent years in America. Bureau of Justice Statistics, Sourcebook Of Criminal Justice Statistics 1999, Table 3.1 at 178 (2000). See

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<sup>5</sup> Crimes rates appear not to have fallen similarly in other countries. From 1989 through 1999, for example, recorded crime in New Zealand increased by approximately 20%. Home Office Statistical Bulletin, International Comparisons of Criminal Justice Statistics 1999, Table A at 3 (2000). Recorded crime in Australia increased by 17% from 1995 through 1999. Id. In England and Wales, reported crime increased 20% from 1989 through 1999. Id.

Lawrence B. Joseph, Crime, Communities and Public Policy, Table 2 at 39 (1995). In 1999, the total estimate of victimizations in the United States was approximately 28.8 million (with a population of more than 280 million persons). Bureau of Justice Statistics (online); Census Bureau Statistics (online). By comparison, total victimizations in the United States was more than 35 million in 1991 and more than 41 million in 1981. Lawrence B. Joseph, Crime, Communities and Public Policy, Table 2 at 39 (1995).

In 2000, according to the National Crime Victimization Survey, crime levels in the United States fell dramatically again. Violent crime victimizations decreased 15% from 1999 and property crime victimizations decreased 10% since 1999. Bureau of Justice Statistics, National Crime Victimization Survey, at 1 and Table 1 (June 2001). The 25.9 million victimizations recorded in the survey was the lowest number of victimizations ever recorded since 1973, when the National Crime Victimization Survey began. Id.

These statistics at least suggest that traditional criminal justice policies have not “failed,” at least not in the United States. If restorative justice is to be pursued, there must be other reasons and motivations to justify it. There are. Restorative justice can make critical and important contributions other than simply attempting to supplant an allegedly failed “retributive” criminal justice system. The contributions are discussed below.

### **Victim Participation**

The vast majority of resources in traditional criminal justice systems are focused on the offender. This is not surprising in one sense given the obvious need in the first place to identify offenders.

Once an offender is identified, tremendous resources are expended to ensure that the rights of the accused are protected and not abridged in any way. Police and prosecutors, for example, expend considerable time and effort investigating a matter so that the fact of the crime can be proved beyond a reasonable doubt, the very high standard of proof dictated by the United States Constitution and by law in many other democratic countries around the world.

As part of the adversary process, the accused is allowed to retain a lawyer or, if s/he cannot afford one, a lawyer is appointed to represent the accused in the criminal case. The right to counsel protects all of the due process rights of the accused. The accused has access to the courts with the ability to file motions with the courts to suppress evidence. The accused also has the ability to compel persons to give testimony and to obtain documents and physical evidence in support of his defense. Even more fundamentally, the accused has the right to a public trial before a jury of persons selected from the community. The cost of the jury trial is born entirely by the state.

By contrast, precious few resources are expended by the state on the victim of a criminal offense. See “Offenders Should Pay,” The Dominion, at 10 (June 8, 2001) (“The justice system gives every sign of being designed for the benefit of the offenders and their lawyers rather than the victims. They often seem to be the forgotten people in the process”). See also T. Richard Snyder, The Protestant Ethic and the Spirit of Punishment, at 132 (2001). Up until a few years ago, victims were simply sources of information for the police and prosecutors investigating offending conduct. Once a case was filed against an accused, victims became potential witnesses at preliminary court hearings, criminal trials, and sentencing hearings. “Often victims are forced to relive the crime through the interminable processes of the criminal justice system, few resources are available for their own healing, and they remain silenced on the sidelines.” T. Richard Snyder, The Protestant Ethic and the Spirit of Punishment, at 132 (2001). In most American courts, victims do not even have the right to attend the criminal trial until after they have testified (in order to protect their testimony from being influenced by the testimony of witnesses testifying before them in the criminal trial).

As part of most sentencing processes, victims are queried by prosecutors or court personnel as part of the preparation of a written victim impact statement that is submitted to the court. Victims rarely have the right to even address the sentencing court orally concerning the impact of the crime and restitution issues. “In our experience, victims are rarely involved in the resolution of cases.” Douglas B. Ammar, “Forgiveness and the Law – A Redemptive Opportunity,” Fordham Urban Law Journal at 1591 (June 2000). As a result, “[s]tudies of victims have consistently demonstrated [victims’] frustration and disillusionment with the criminal justice system.” New Zealand Department of Justice, Victims Court Assistance, at 17 (1995).

In short, what happens with traditional criminal justice processes is that the victim is virtually forgotten. Caroline G. Nicholl, “Community Policing, Community Justice, and Restorative Justice,” at 75 (1999) (“The system is seen to be overprotective of offenders, to isolate victims, and to ignore the fears and concerns of communities”). Moreover, because of the due process protections afforded to accused persons/offenders and the harsh punitive measures that are frequently assessed against them if they are found or plead guilty, offenders often take on and take over the role of “victim” in conventional criminal justice processes. This is particularly true at sentencing hearings. Judges, probation officers, and defense lawyers focus on the offender as the victim because of the criminal process that the offender has endured and the criminal punishment that he is about to endure.

In very recent times, small but nevertheless important improvements in the way in which criminal victims are treated have been implemented. In 1990, the United States Congress passed legislation specifically setting out the rights of crime victims.<sup>6</sup> Pursuant

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<sup>6</sup> Section 10606(b) of Title 42 of the United States Code provides that:

A crime victim has the following rights:

to this legislation, the U.S. Attorney General issued guidelines that implement procedures designed to enhance the treatment of victims by law enforcement investigators (such as the FBI) and United States Attorneys (federal prosecutors). However, Congress specifically denied victims a cause of action to enforce these victims' rights. See 42 U.S.C. Section 10606(c).

Similar measures are being adopted in New Zealand to further protect the rights of victims. See "Offenders Should Pay," The Dominion, at 10 (June 8, 2001). Proposed legislation will give victims the right to be notified of proceedings, to give a victim impact statement at sentencing, and to be informed of services and remedies available. Justice Matters, No. 11 at 9 (June 2001).

Restorative justice practices have considerable potential to increase the resources expended on the care and healing of victims. This is because the participation of victims is at the heart of most restorative justice schemes. Indeed, some would argue that a scheme is not really part of the restorative justice "umbrella" unless victims are part and parcel of the process.

In restorative justice conferences, a victim is much more than a source of initial information about a criminal offense and a potential witness at trial. The victim is a central actor in the conference. As Judge Heino Lilles remarked regarding the restorative justice process of circle sentencings: "Unlike formal court, where the role of the victim at sentencing is usually limited to providing a victim impact statement, the victim is a full and equal participant in a Circle Sentencing hearing." Lilles, "Circle Sentencing: Part of the Restorative Justice Continuum," at 4 (2000).

Importantly, the victim is allowed and expected to tell an offender directly or through the victim's representative of the harm that was caused by the offending conduct. This can and frequently does have a cathartic effect on the victim. As important, the victim's account of the personal harm that was caused by the offending conduct has proven to frequently be a key ingredient in piercing the shell of the offender and

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- (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
  - (2) The right to be reasonably protected from the accused offender.
  - (3) The right to be notified of court proceedings.
  - (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
  - (5) The right to confer with [the] attorney for the Government in the case.
  - (6) The right to restitution.
  - (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

42 U.S.C. Section 10606(b).

beginning the process of reintegration and restoration for the offender. As Judge Carolyn Henwood, the primary Youth Court Judge in the Wellington City region, recently stated:

[V]ictims are a key participant at the family group conference and there can be no doubt [that] when they are present at the conference a better outcome will be achieved. It is my view that a face to face meeting with a victim is the most powerful event that is likely to influence or modify a young persons behavior.

Judge Carolyn Henwood, "The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective," at 20 (1997).

A frequent outcome of family group conferences in New Zealand is an apology from the offender to the victim and the victim's family. This is sometimes given orally at the family group conference or sometimes it is given in a letter passed on to the victim at or after the family group conference. This apology can be and often is incredibly important to the victim. See Howard Zehr, "Journey To Belonging," at 11 (2000) ("My work with victims suggests that the need for vindication is indeed one of the most basic needs that victims experience; it is one of the central demands that they make of a justice system"). Yet it is a component that is most often completely absent from conventional criminal justice processes, even when an offender decides to plead guilty.

Moreover, restoration of the victim by the offender through restitution or other forms of reparation is another central component of restorative justice conferences. Because the harm to victims and their families is a central feature of the conference, it is routine that restitution and similar healing steps are addressed in restorative justice conferences. The parties to a restorative justice conference work toward a consensus as to what will help to restore the victim and often the victim's family as well as what will help to reintegrate the offender. The offender's apology to the victim, his or her agreement to help restore the victim, and then the actual follow-through on those agreements then become the building blocks of the offender's own restoration and eventual reintegration into the community. Mick Brown, "New Zealand Youth Justice Process," at 5 (1995).

In these ways, victims are given a new voice in the criminal justice process and the criminal justice process is given a new emphasis: the healing and restoration of victims. As a result, restorative justice is "much more satisfying to victims." Judge F.W.M McElrea, "Restorative Process and Outcome: Emerging Theories of Restorative Interventions," at 1 (1998).

It is perhaps true that victims could be given these kinds of opportunities and these emphases could be added to traditional criminal justice systems. For example, rules and statutes could be (and have in certain instances been) added mandating that victims be given the right to address the court at different stages of the criminal process including sentencing hearings. Restitution to victims could be made mandatory, as it has been by United States law for almost all federal criminal offenses. But these would just be add

ons. Restorative justice practices make healing the victim (through apology, restitution, etc.) a central and fundamental component of criminal justice outcomes.

Additionally, a key part of the restorative justice experience for victims is to view the criminal justice process and the offender “up close.” With restorative justice conferences, prejudgments and media-influenced views held by victims and their supporters fall away to more empathetic and more accurate views of offenders, their families, and the criminal justice system. Remarks by Chief District Court Judge David Carruthers, Wellesley Club Luncheon, Wellington, New Zealand (June 6, 2001). One author explained: “Conferencing often demolishes myths and stereotypes about victims and offenders, allowing for a broader meaning of crime, how it can happen, and how it can be prevented.” Caroline G. Nicholl, “Community Policing, Community Justice, and Restorative Justice,” at 154 (1999).

### **Increased Satisfaction**

One notable problem with traditional criminal justice system is the low levels of satisfaction experienced by those participating in it. By contrast, participants in restorative justice processes report relatively high levels of satisfaction.

A study of the restorative justice project in Bethlehem, Pennsylvania reported that the vast majority (over 90%) of victims, offenders, and offenders’ parents would recommend restorative conferencing to others. Kurki, “Restorative and Community Justice in the United States,” at 278 (2000). Ninety-three percent of victims who participated in the conferences said meeting with the offender was helpful. Paul McCold and Benjamin Wachtel, “Restorative Policing Experiment: The Bethlehem Police Family Group Conferencing Project,” at 3 (1998). One hundred percent of participating offenders said meeting with victims was helpful. *Id.* Ninety-four percent of victims, 94% of offenders, and 94% of parents of offenders would choose to participate in a conference if they had to do it over again. *Id.*

Similar satisfaction levels were achieved with a group conferencing project in Minnesota. There, 98% of victims, 94% of offenders, and 99% of persons supporting victims or offenders would recommend conferencing to others. Fercello and Umbreit, “Client Evaluation of Family Group Conferencing in 12 Sites in 1st Judicial District of Minnesota,” at 1 (1998). Importantly, 95% of victims and offenders were satisfied with the outcome of the conference. *Id.*

In New Zealand, satisfaction levels are fairly high but not in every study. Morris and Maxwell found that 84% of offenders and 85% of parents of offenders were satisfied with the outcomes of the family group conference. Allison Morris and Gabrielle Maxwell, “Restorative Justice in New Zealand: Family Group Conferences As A Case Study,” at 11 (1998). However, in the Morris and Maxwell study, only about half of the victims participating in family group conferences reported being satisfied with the outcome of the conference. *Id.* at 12. About 31% of victims were dissatisfied with the

outcome of the family group conference, an interesting statistic given that victims can reject a family group conference agreement with which they disagree. Id.

On the other hand, other researchers have found much higher levels of satisfaction experienced by victims who participated in family group conferences. Marion Ellis interviewed victims who participated in family group conferences in late 1996 and early 1997 in Dunedin. Marion Ellis, "Victims, Restorative Justice, and the New Zealand Family Group Conference," at 72-73 (2000). Ellis found that over 92% of responding surveyed victims were "satisfied" or "very satisfied" with the family group conference that they attended. Id. at 89. Moreover, 95% of victims indicated that the family group conference has "met their expectations." Id. at 112. Finally, 85% of surveyed victims indicated that they felt better after the conference than before. None of the surveyed victims felt worse after the conference while 10% felt about the same after the conference. Id. at 114. The most common reason for feeling better after the conference was the remorse shown or expressed by the offender. Id. at 114-115.

In Australia, researchers have found high levels of satisfaction among conference participants. In New South Wales, a 1999 study found over 90% of participants felt that the conference was fair to both victim and offender. Heather Strang, "Restorative Justice Programs in Australia," at 9 (2001). Over 90% felt that had the opportunity to express their views and had been treated with respect, and at least 79% said they were satisfied with the way their case had been dealt with by the justice system. Id.

### **Acceptance of Responsibility**

Judge F.W.M. McElrea of the Youth Court in Auckland has commented: "The western model of criminal justice does not in my view hold offenders accountable in a meaningful way." Judge McElrea, "Accountability in the Community: Taking Responsibility for Offending," at 64 (contained in Re-Thinking Criminal Justice Vol. I, edited by F.W.M. McElrea (1995)). Van Ness and Strong have explained it this way:

Because of the legal presumption of innocence bestowed on all defendants, as well as the panoply of due process rights that are afforded them, defendants have few incentives to assume responsibility for their actions, and many incentives to remain passive while the government marshals its cases and [defense] lawyers attempt to dismantle them.

Daniel Van Ness and Karen Heetderks Strong, Restorative Justice, at 34 (1997).

Judge McElrea quoted the astute comments of the Saskatchewan Deputy Minister of Justice, Brent Cotter, who stated at a Restorative Justice Conference in March 1995:

The [traditional] criminal justice system encourages you to avoid responsibility and deny, and hope you might get off. In a family, such

behaviour would be considered dysfunctional. In a community it is still dysfunctional.

Id. at 67.

Not only do offenders refuse to plead guilty even when they have committed the offense with which they are charged but even those offenders who choose to plead guilty are most often not fully held accountable. Frequently, they do not own up forthrightly and completely to the factual circumstances of the offense and rarely do they apologize or otherwise make amends to the victim. As Howard Zehr (quoted by McElrea) stated regarding the traditional criminal justice system:

You do your time in prison and you're paying your debt to society, but it doesn't feel like you're paying a debt to anybody – basically, you're living off people while you are doing that. You never in that process come to understand what you did, and what I'm saying "accountability" means is understanding what you did and, then taking responsibility for it; and taking responsibility for it means doing something to make it right, but also helping to be part of that process.

McElrea, "Accountability in the Community: Taking Responsibility for Offending," at 64 (contained in Re-Thinking Criminal Justice Vol. I, edited by F.W.M. McElrea (1995)).

Judge McElrea of New Zealand has also identified and focused on a critical component of injustice: the situation where a person who is in fact guilty of a serious offense is found "not guilty" following an adversarial trial. Judge McElrea asks:

What does it do to the person who is in fact guilty to be found "not guilty"? And what does it do to the victim-offender (and other) relationships, and to the respect for justice in the community? In each case the answer is, I believe, that it does untold damage – to the respect for the law and for the courts, and to the measure of justice in the community. May I illustrate with an example:

A man rapes a woman. He does not deny it to the police but nor does he admit it. He simply keeps silent. He is charged with rape. In court he is never asked whether he admits the charge and so he pleads Not Guilty in order to put the prosecution to the proof, in the hope that they will fail to prove the case. The woman gives evidence. The defence lawyer alleges that the woman had dressed "provocatively"; he puts it to her that she encouraged his client's advances and consented to the indecencies inflicted upon her. When she denies this he puts it to her that she is lying. The woman breaks down and therefore must find the man Not Guilty.

Even though the man may later admit his guilt he cannot be tried again for that rape. As he has not given evidence he has not committed perjury. He



is free forever. *Does he think justice has been done?* The woman knows that he raped her and feels that she has been branded by the verdict as a liar. *Does she think that justice has been done?* The woman's mother has given "recent complaint" evidence for the prosecution. She knows what her daughter has gone through. *Does she think that justice has been done?* The officer in charge of the case felt that his witnesses had been telling the truth. *Does he think that justice has been done?* The woman tells her friends and others in the community of her experience of the law. *Will they think that justice has been done?* Are all these people going to be satisfied with the legalistic answer that because there was a reasonable doubt and the defendant did not admit guilt he must be presumed innocent? Of course not – and to expect otherwise is to fail to understand the community's sense of justice.

Judge McElrea, "Accountability in the Community: Taking Responsibility for Offending," at 70-71 (contained in Re-Thinking Criminal Justice Vol. I, edited by F.W.M. McElrea (1995)).

Restorative justice conferences along with other restorative processes can encourage offenders to accept responsibility more often and more fully in several ways. Because restorative justice processes can shift the primary emphasis from punishment to accountability, restoration, and healing, offenders will be able to discover that the critical step in their own healing and reintegration is acknowledging responsibility for what they have done. As Father Considine said,

We know group conferencing to be a good scheme for young people. The New Zealand results teach us this. The secret of its success with them lies in the 'carrot and stick' approach, which forms part of restorative philosophy. The key to this is the fact that all participants work out a recommended conference plan to which all must agree if at all possible. This is the incentive, the carrot, which encourages offenders to front up and take responsibility for what they have done. They get the chance to participate in a reparative outcome.

Bowen, Boyack, and Hooper, New Zealand Restorative Justice Practice Manual, at 10 (2000).

Judge McElrea has put it this way:

[Admitting guilt] has little appeal under the present system, but as part of a new deal for victims and offenders it would be a different proposition. When the consequences of admitting guilt are rejection and isolation, and imprisonment holds out only the prospect of degradation and destruction of self respect, there is much less incentive to plead guilty. But if that is changed into a positive, growing and healing experience, if the

consequences are intended to promote reconciliation, there is an incentive to accept responsibility.

McElrea, "Accountability in the Community: Taking Responsibility for Offending," at 68 (contained in Re-Thinking Criminal Justice Vol. I, edited by F.W.M. McElrea (1995)).

Moreover, restorative justice processes emphasize reintegrative as opposed to destructive shaming. Numerous studies have shown that condemning the criminal conduct while acknowledging the fundamental worth of the offending person is much more effective in reducing the chance for recidivism than is shaming or stigmatizing the offender because he has engaged in criminal conduct. See, e.g., Maxwell and Morris, "Understanding Reoffending," at 41 (1999).

In addition to constructive rather than destructive censuring, conferencing generates greater and more sincere remorse on the part of offenders as a result of two key factors.

First, the presence of the victim and her articulation of the harm she has suffered frustrate an offender's attempt to neutralise his offence. The juvenile cannot, in other words, rationalise his crime as being minor or harmless when a real person stands in front of him describing the physical and emotional pain flowing from his behaviour.

Second, the presence of the young person's family members, their personal condemnation of the offence, and the visible signs of anguish felt by family members confronted by the harm caused by their own kin all provide exceptionally powerful signals to the juvenile on the wrongfulness of his conduct.

Erik Luna, "Reason and Emotion in Restorative Justice," at 14 (2000).

Finally, the absence of technical jargon (for example, regarding the admissibility of evidence and regarding burdens of proof) at a restorative justice conference also assists offenders in forthrightly and candidly owning up to what they did and why. It is often easier to get at the truth of what happened without the full panoply of procedural rules embodied in the traditional, court-based system of justice.

### **Decreased Recidivism**

Research over the past several years indicate significant potential for restorative justice programs to reduce recidivism. In one study, researchers from the Institute of Criminology of Victoria University and researchers from the Ministry of Justice studied the affects of restorative justice conferencing of "Project Turnaround" in Timaru, New

Zealand. Maxwell, Morris, and Anderson, Community Panel Adult Pre-trial Diversion: Supplementary Evaluation (1999). As noted above, Project Turnaround used restorative conferences convened by a community panel with the input of crime victims. Researchers looked at the if, when, and how persons who were participants in Project Turnaround were reconvicted of a criminal offense as compared with a closely matched control group. The researchers found that the Project Turnaround group were reconvicted less often and that the difference in reoffending rates between the two groups was statistically significant one year after participation in the restorative conference. Id. at 43-44. Researchers also found that the offenses of which the Project Turnaround participants were reconvicted were less serious than those of the control group who were not part of the restorative justice process. Id. at 50.

These same researchers studied another restorative justice scheme in West Auckland named “Te Whanau Awhina.” This restorative justice scheme was Maori-based and differed in the specific processes utilized. Nevertheless, reductions in recidivism were observed there as well, both in reconviction rates and seriousness of reoffending. Maxwell, Morris, and Anderson, Community Panel Adult Pre-trial Diversion: Supplementary Evaluation at 5, 45, and 50 (1999).

Research into the impact of restorative justice conferences using control groups was also done in Canberra Australia by researchers from the University of Pennsylvania and from the Australian National University. See “Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE),” (Nov. 2000). Researchers found that restorative conferences for those youths involved in violent crime reduced reoffending rates by a larger percentage: 38 crimes per 100 offenders per year (as compared to simply being sent to court). Id. However, it should be noted that similar reductions in recidivism rates were not observed with respect to youths involved in drunk driving or juvenile property crimes. Id. See also Heather Strang, “Restorative Justice Programs in Australia,” at 38 (2001).

One of the better explanations for why restorative justice processes appear to be more effective in reducing recidivism than traditional criminal justice processes in court has been put forward by Charles Barton. Barton sets out in an article entitled “Theories of Restorative Justice” four explanations for why restorative justice processes work:

1. Reversal of moral disengagement: (re)engaging the offender at a moral psychological level with the consequences of their behavior.
2. Social and moral development: aiding the moral and social development of the offender, so that they can learn and become wiser for the experience.
3. Emotional and moral psychological healing: aiding emotional and moral psychological healing from the trauma of the criminal incident through interaction between the parties and symbolic reparation.
4. Reintegrative shaming: tempering unequivocal disapproval of the wrongful *behavior* (shaming) with expressions of respect and acceptance of the individual into their community (reintegration).

Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics*, vol. 2, no. 1 (July 2000).

It is an observed phenomenon that, when persons engage in conduct harmful toward another person, they ease or silence their consciences by various means of moral disengagement including: blaming or dehumanizing the victim, rationalizing that the good consequences from the conduct outweigh the bad, denying the seriousness of the harmful effects on others, and obscuring or lessening personal responsibility for the wrongful activity. Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics*, vol. 2, no. 1, at 3-4 (July 2000). Well-run restorative justice conferences, "where affected people tell the offender face to face about the disruption and harm their actions caused" seriously challenge and often successfully reverse internal mechanisms of disengagement. *Id.* at 4.

Peaceful and lawful coexistence is dependent on the moral enculturation of society's individual members. Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics*, vol. 2, no. 1, at 6 (July 2000). Learning from one's own and other's mistakes and misdeeds forms an important part of an individual's social and moral development. *Id.* Barton explains why restorative justice conferences are effective in this regard:

There are good reasons to suppose that restorative justice meetings between offenders and victims are particularly effective in aiding the moral development of the participants. In a well run meeting there is going to be an in-depth exploration of the details of the incident, its causes, and the many ways in which people were affected by it, including the offender. Even more importantly, participants voice their views about why this kind of behaviour is unacceptable and why it will not be tolerated. Finally, the meeting turns its attention to repairing the harm and the damage caused by the wrongful behaviour. Upon having responded in appropriate ways to repair the harm, the offender is welcomed back into the moral fold with a clearly articulated expectation that they will have learned from the incident and that they will do better in the future. A restorative justice meeting, thus, offers a complete factual and moral picture of the wrongful behaviour, its circumstances, its causes, and its consequences. It also offers reasons as to why it is regarded to be wrong and unacceptable, and it demonstrates through example the need to put things right following moral mistakes and wrongful conduct. It is hard to imagine a more powerful way of learning from mistakes and moral misbehaviour. As John MacDonald put the matter with respect to the moral development of young offenders.

No one will argue against the rights to silence, the right to legal representation, and the competent counsel. But what we also suggest, and which lawyers can't offer, and don't want to offer, is

the opportunity for the young offender to be educated from this experience. Young offenders have the right to learn the consequences of their crime. They have the right to understand how many other people it affects. They have the right to develop as full human beings through this process. Now if you let the opportunity slip by, by handing it over to lawyers, you deny them all those developmental rights.

Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics*, vol. 2, no. 1, at 6 (July 2000).

Barton believes that even recidivists can be influenced for the better with restorative processes. Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics*, vol. 2, no. 1, at 7 (July 2000). Pointing to research that crises can be converting, Barton argues that there is "no better way to induce and guide the outcome of such crises than in a restorative justice meeting, such as a conference or a sentencing circle where important people in the life the offender are active participants." *Id.* at 9. "When, in addition to the victim and their supporters, the most important people in the offender's life confront the offender with their unacceptable behaviour and make it clear that they are shocked, hurt, and ashamed by it, and that it is intolerable, there is tremendous pressure on the offender to re-examine their moral outlook and the kind of person they want to be." *Id.* A key, Barton emphasizes, is that this pressure is applied in an overall supportive and caring environment. *Id.*

### **Problem-solving approach to crime**

It is true that restorative justice conferences are in the first instance concerned with dealing with the aftermath of offending conduct principally from the perspectives of the victim and the offender. Yet, experience with restorative justice conferences in New Zealand has shown an ancillary benefit from restorative conferencing.

Family group conferences in New Zealand, for example, have provided a greater understanding regarding why and how youth crime is committed. This is not surprising given the frank discussions that are engendered at family group conferences. Frequently, as noted above, victims want to know "why me?" or how did the crime itself come to happen. Michael J.A. Brown, "New Zealand Youth Justice Process," at 4 (1995). Also, details regarding why and how the crime was committed are needed in order to put together an appropriate response to the offender's criminal conduct. In the course of answering these questions, participants to the conference including youth justice coordinators and police learn significant information about what is happening in the community and why it is happening. *See* Judge Carolyn Henwood, "The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective," at 47 (1997). Police and other criminal justice agencies can then use this information to "problem solve" and target specific preventative or curative action. *See* Caroline G. Nicholl, "Community Policing, Community Justice, and Restorative Justice,"

at 154-155 (1999) (“conferencing mirrors the problem analysis that goes on under problem-oriented policing”); Paul McCold & Benjamin Wachtel, “Community Is Not A Place: A New Look At Community Justice Initiatives,” 1 Contemporary Justice Review 71, 79 (1998) (“The collaborative processes developed from restorative justice practitioners are a natural tool for police interested in engaging communities for crime control and prevention . . .”).

In Wellington, New Zealand, for example, police and the youth justice coordinator learned in part from family group conferences some of the factors underlying the criminal conduct by repeat offenders. What they found was that these youths were often culturally isolated and/or had suffered a major trauma in their childhood. As a result, these youths aligned themselves to questionable role models, including role models in criminal gangs. The police and the local youth justice coordinator also found out that repeat youth offenders tended to offend together (or in groups) and had a history of truancy.

Using this information and a problem-solving or “broken windows” approach, the youth aid police and the youth justice coordinator in Wellington worked with local schools and community groups to address several key causes and factors involved in the worst and most troublesome youth offending in Wellington. In particular, a program called Tu Rangitahi was developed in order to address repeated criminal offending by a group of youths associated with the Black Power gang. Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 9 (June 2001). Another program in the second half of 2000 targeted 15 Samoan youths from the Newtown area of Wellington who were known to police and the youth justice coordinator for their criminal behavior. “When Bad Boys Turn Out Good,” The Dominion (October 5, 2000). Both of these programs provided activities that were aimed at enhancing the self-worth of the young persons who were being recruited by gangs. The programs also worked to build cultural links and awareness of community support. Id.

A third program initiated in Wellington City focused on truancy and suspensions from school involving at-risk youths. Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 9-10 (June 2001). Police working with the Wellington justice coordinator found that crimes were being committed by young persons who had been suspended from school or who had otherwise dropped off school rolls. Working with schools, the police and the justice coordinator developed alternatives to school suspensions, including drug/alcohol counselling and anger management courses. The result was a major drop in school suspensions and a major decline in referrals to police. Id.

The overall results of this problem solving approach in Wellington, based in part on the “intelligence” and understanding gathered in the family group conferences, was nothing short of spectacular. Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 10 (June 2001). Between 1996 and 2000, youth offending in Wellington decreased by two-thirds. Specifically, in

1996, police and the Department of Child, Youth and Family Services conducted 556 youth justice family group conferences in Wellington. By the year 2000, only 174 family group conferences needed to be held. In considering this decline, it is important to remember that family group conferences are *mandatory* in New Zealand if a youth is going to be charged with a criminal offense other than murder or manslaughter. See Children, Young Persons and Their Families Act 1989, Sections 272-274.

As Chief District Court Judge David Carruthers recently stated:

[The approach in Wellington city] is an example of the potential for the restorative justice model, applied with very good operational practice targeted at the identified risk factors, to greatly reduce youth offending and even to reduce offending amongst the ‘tough end’ offenders. By strengthening family and community involvement with youth offenders, the initiatives had a significant impact on youth offending.

Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 9 (June 2001).

### **Cultural and Ethnic Accommodation**

As noted above, a principal aim of the legislation that was passed as the Children, Young Persons and Their Families Act of 1989 was to introduce a greater cultural sensitivity and accommodation to the tangata whenua. Researchers who have studied the Act and the family group conference process have acknowledged that there is at least a considerable potential for cultural and ethnic accommodation:

It is also our view, and that of many of the Maori participants, that there is at least the potential FGCs to be more able to cope with cultural diversity than other types of tribunals. This is best summed up in the words of the Maori researchers involved in the project:

We feel that the Act for the most part is an excellent piece of legislation which promises exciting possibilities for the future. When the processes outlined in the Act were observed, Maori families were indeed empowered and able to take an active part in decisions concerning their young people. It is not difficult to see the beneficial influences that the Act may eventually exert on wider Maori, Polynesian and Pakeha society. Maori society could gain immensely from legislation that acknowledges and strengthens the hapu and tribal structures and their place in decisions regarding the wellbeing of young people and [from legislation] that provides them with an opportunity to contribute to any reparation and to support those offended against. The same scenario would apply to Pacific Island peoples.

Olsen, Maxwell, and Morris, “Maori and Youth Justice in New Zealand,” at 59 (contained in Popular Justice and Community Regeneration: Pathways of Indigenous Reform, edited by Kayleen M. Hazlehurst (1995)). See also Paul Nixon, “Family Group Conference Connections: Shared Problems and Joined Up Solutions,” at 2 (1999); Judge Carolyn Henwood, “The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective,” at 46 (1997).

The key to cultural accommodation with conferencing appears to be flexibility. As Luna said of the family group conference in New Zealand, a restorative justice conference is “an inherently flexible process.” Erik Luna, “Reason and Emotion in Restorative Justice,” at 12 (2000).

Judge Lilles has similarly commented on the ability of circle sentencing processes to accommodate cultural and ethnic diversity in Canada:

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

Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum,” at 23 (2000).

Giving stakeholders in the criminal justice process such as victims, offenders and community groups new voices and power to make decisions seems to be additional keys to cultural accommodation. A concomitant part of this new design, however, is that the state and other actors in the traditional criminal justice system must be willing to relinquish their exclusive hold on the justice process and turn over real decision-making power to these other stakeholders. As one author recently put it: “Core restorative ideals imply that government should surrender its monopoly over responses to crime to those who are directly affected – the victim, the offender, and the community.” Kurki, “Restorative and Community Justice in the United States,” at 236 (2000). See also Daniel Van Ness and Karen Heetderks Strong, Restorative Justice, at 31 (1997)



## **Consensus decision-making**

An important component of restorative justice is that decisions should be reached through personal dialogue and consensus. Kurki, “Restorative and Community Justice in the United States,” at 239 (2000).

Kay Pranis of the Minnesota Department of Corrections has written of the importance of giving those centrally involved in the criminal justice process a voice and allowing them to reach decisions through consensus:

Conferencing gives the power to make a decision to those most affected by a decision. It provides disempowered people, victims, their supporters, offenders and their supporters with the opportunity to take control of a significant event in their lives. And it requires that the decisions made address the interests of all parties, because agreement requires everyone’s approval. That is democracy in action on a small scale, but with enormous implications if practised widely.

Pranis, “Conferencing and the Community,” at 8 (1998).

John Braithwaite put it this way: “Restorative justice is deliberative justice; it is about people deliberating over the consequences of crimes, and to deal with them and prevent their recurrence.” John Braithwaite, “Restorative Justice,” at 329 (contained in The Handbook of Crime and Punishment, edited by Michael Tonry (1998)).

In summary, it is a hallmark of restorative justice that decisions about how to deal with the aftermath of crime are reached after the views of all participants have been canvassed and considered. After this consideration and collaboration, a group decision emerges and is implemented. In this way, it is possible for larger groups (offenders, victims, and police) to feel “ownership” of the conference outcome.

## **Community Building**

Judge Barry Stuart, the first Canadian judge to use a sentencing circle, has emphasized that a key component of restorative justice processes is the building up of communities, “changing perspectives about what communities can do, and forging new, cooperative working relationships.” Barry Stuart, “Guiding Principles for Peacemaking Circles,” at 235 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)). See also Paul H. Hahn, Emerging Criminal Justice, at 133 (1998) (restorative justice “views the proper response to crime as ‘community building’”).

Kay Pranis of the Minnesota Department of Corrections has observed specifically how communities are built up through restorative justice conferences:

Relationships are the threads of community. The interweaving of relationships is the fabric of community. Mutual responsibility is the loom on which the fabric of community is woven. Crime represents a failure of responsibility – often on many levels, individual, family and community. Our response to crime must strengthen or build relationships and emphasise and re-establish mutual responsibility on all levels – that is, new threads, add strands to old threads and weave them together based on a pattern of answering to and for one another.

Setting limits in a loving way, articulating norms of behaviour and reinforcing mutual responsibility are critical functions of healthy communities. Conferencing can contribute to the care and maintenance of those functions in community.

Kay Pranis, “Conferencing and the Community,” at 1 (1998).

Tony Marshall has commented as well: “Restorative Justice programmes mobilise community resources (voluntary organisations, volunteer mediators), enhance community capacities for social control (conflict-resolution, education, prejudice-reduction, experience of collaborative problem-solving, etc.) and directly create opportunities for offender support and reform (e.g. conferencing programmes).” Tony F. Marshall, “Restorative Justice: An Overview,” at 21 (1999). The recruitment of volunteers from the community has been a part of this community building. “Restorative justice programs have been successful in involving volunteers.” Kurki, “Restorative and Community Justice in the United States,” at 241 (2000).

In New Zealand, successful youth justice practices are most often characterized by youth justice coordinators who are aware of existing community resources and are working to build additional community-based resources for offenders and victims. Judge Carolyn Henwood, “The Children Young Persons and Their Families Act 1989: The New Zealand Situation 1997 – A Judicial Perspective,” at 23 (1997). Indeed, the title “youth justice coordinator” suggests the active coordination of youth justice resources from both the state and the local community.

The Chief District Court Judge has observed how effective restorative justice processes are at community building:

One of the most exciting aspects of the restorative justice process is that it taps into the traditions, culture, and wisdom of communities. Crime is a community wide problem. In order to solve the problem, it is necessary to involve the community. . . . Restorative approaches strengthen the bonds between members of the community. The more these bonds are strengthened, the more able the community is to restrain impulses and actions that would be disapproved by the community. Successful restorative sanctioning does not focus on the victim’s needs to the

detriment of rehabilitation. Rather, it mobilises the relevant community to identify and address the underlying problems that lead to offending.

Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 16-17 (June 2001).

### **Spirituality**

One New Zealander, Tom Marshall, has emphasized that true healing and forgiveness cannot be achieved without the intervention of God. See Tom Marshall, Right Relationships, at 90 (1989). Canadian Judge Barry Stuart has written that people experience conflict in four dimensions: mental, emotional, physical and spiritual. Stuart, “Guiding Principles for Peacemaking Circles,” at 233 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)). Judge Stuart has also written:

Very few processes recognise the importance of the spiritual dimension in conflict. Conflicts can penetrate deeply into all aspects of one’s life. A connection to spirituality in working through conflict can deepen the mutual will to resolve differences and strengthen commitments to solutions. . . . Creating space for spirituality in the conflict process is as essential as creating space for the physical, mental and emotional aspects of conflict. The aboriginal medicine wheel recognises that the physical, emotional, spiritual, and mental dimensions must all be equally addressed in order to acquire and maintain balance within individuals and communities.

Stuart, “Guiding Principles for Peacemaking Circles,” at 233 (contained in Restorative Community Justice, edited by Gordon Bazemore and Mara Schiff (2001)).

Restorative justice processes and certainly conferences in particular are flexible and dynamic enough to create a space for the spirituality that strengthens or in some people’s view enables healing and restoration. In New Zealand, for example, family group conferences are often begun with a prayer or karakia (Maori for prayer). In America, Navajo peacemaking circles “with a prayer to seek supernatural assistance.” Paul McCold “Restorative Justice Practice – The State of the Field 1999,” at 15 (1999).

Judge McElrea has written from a Christian perspective that restorative justice allows a place for grace:

It is very easy in a world of high achievers like the legal profession to be caught up in the belief that we succeed in life by our own efforts. That of course is not the Christian message. After reading Phillip Yansley’s wonderful book *What’s So Amazing About Grace?* it occurred to me that it was often God’s grace that was at work in restorative justice. In such a

context an expression of forgiveness cannot be something expected of victims – it is theirs to give if they feel it appropriate at the time, and they sometimes do. More often, though, there is a place for grace, that unearned generosity of spirit, and its transforming power.

I will give but one example. It relates to a young man in Wellington who at the age of 16 committed two burglaries. He had been in trouble before and been to family group conferences but this time he didn't wait around; he took off for the South Island and the police lost contact with him. Two years later something had changed his life. His partner was pregnant and he was going to become a father. He wanted to clean up his past and put behind him the mistakes that he had made so that they did not come back to haunt his new family. He handed himself into the police and asked that a family group conference be arranged where he could meet the people who owned the two houses he had burgled. He had a job and has worked out that he could repay the damage suffered by these two families (which was quite a lot of money – about \$1500) at \$50 per week. He put forward that proposal and on a whiteboard set out his entire budget including expected expenses for when the baby arrived. He also offered to do community service in addition to paying this reparation.

The victims were so impressed that they said they wanted the \$1500 spent not on themselves but on the baby, to make sure that it had the start in life which the young offender had never been given. They also said that instead of community service they wanted him and his partner to attend parenting courses. They wanted to see broken the cycle in which he had been caught up in an early age. The victims also wanted to be kept informed and it was agreed that when the baby was six months old the young man would write a letter to them to tell them how things had been going for him and his new family.

The gracious response of those victims was, for Christians, an expression of the love of God – and for non-Christians perhaps an expression of that love which desires the good of the other. The victim who does not demand their “pound of flesh” or an eye for an eye they have lost is freeing both sides from the cycle of action and reaction, of “take” and “payback”. The victim who wants to see a better outcome for both themselves and the offender exhibits a generosity and their defences can be overcome by grace. As Yansey put it:

“Justice has a good and righteous and rational kind of power. The power of grace is different: unworldly, transforming and supernatural.”

Only the gracious power of love can break the cycle of violence, anger and revenge. Is this not what we should be seeking for our system of justice?

Judge F.W.M. McElrea, "A Christian Approach To Conflict Resolution," at 3 (2001).

Former Principal Youth Court Judge (and now Chief District Court Judge) David Carruthers has similarly remarked that spiritual values underlie restorative justice. Remarks by Chief District Court Judge David Carruthers, Wellesley Club Luncheon, Wellington, New Zealand (June 6, 2001).

### **Improved Perceptions of Police**

In many areas and among many groups, perceptions about police have declined substantially. Many, particularly among minority populations, are distrustful and fearful of the police. Some have attributed this distrust to the emergence of police "professionalism." See, e.g., Craig D. Uchida, "The Development of the American Police: An Historical Overview," at 92 (contained in Crime & Justice in America: Present Realities and Future Prospects, edited by Paul Cromwell & Roger Dunham (1997)).

Whatever the cause, restorative justice has the potential to change and improve on the public's perception of the police, perhaps even dramatically so. Preliminary data from Canberra, Australia, for example, suggests that offenders have much more positive perceptions of police following participation in a restorative conference than following traditional court processes. In about 90% of cases assigned to a conference, offenders thought that the police had been fair to them. In cases randomly assigned to court, only 48 to 78% of offenders thought that the police had been fair. See John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," at 102 (1999).

One reason for the improved perceptions in police performance from restorative justice processes is that police almost inevitably gain deeper and truer understandings of their community through their participation in restorative justice processes. Restorative justice conferences allow for candid interactions between the police, offenders, offenders' families, and victims that provide the police with greater insights into why and how crimes have been committed. Police can in turn use this information to respond more appropriately in their communities.

Additionally, restorative justice conferences allow the police to propose, support, and agree to less onerous punishments for offenders. In this way, police are frequently viewed by offenders and offenders' families as having empathetic and even sympathetic views. As one author noted:

The relationship between the police and the community, especially, can be strengthened through conferencing. Participants who are invited . . . to attend a conference are inclined to think more positively and favorably toward the police simply because of the willingness by the police to listen and allow their views to shape decisionmaking. . . . People also feel better about being involved in a process that inspires community building,

and promotes healthy community relationships, than they do about attending an adversarial trial that tends to leave people feeling sour.

Caroline G. Nicholl, "Community Policing, Community Justice, and Restorative Justice," at 150 (1999).

Improved perceptions of police not only allow police to gather information more effectively but also appears to directly reduce the crime rate. "[R]esearch consistently demonstrates that individuals who believe that the police treated them fairly and respectfully in their previous encounters are more likely to obey the law in the future." Philip B. Heymann, "The New Policing," *Fordham Urban Law Journal* at 419 (December 2000).

### **Cutting Across Political Lines**

Commentators have recognized the potential for restorative justice to cut across traditional political lines. Professor John Braithwaite has noted that restorative justice appeals to liberal politicians as a less punitive system while appealing to conservatives through its strong emphasis on victim empowerment, family empowerment, and increased personal responsibility. John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," at 4 (1999). Other commentators as well have noted that can accommodate both "law and order" and "progressive" responses to crime. See Kathleen Daly and Russ Immarigeon, "The Past, Present, and Future of Restorative Justice: Some Critical Reflections," *Contemporary Justice Review* Vol. 1, at 31 (1998). See also Caroline G. Nicholl, "Community Policing, Community Justice, and Restorative Justice," at 149 (1999) (citing the bipartisan support for restorative justice conferencing).

## **POTENTIAL CONCERNS AND ISSUES**

### **"Soft" Option**

Among some, there has been an impression that restorative justice processes are too lenient or "soft" on criminal offenders. Tony F. Marshall, "Restorative Justice: An Overview," at 26 (1999). These concerns can be answered in several ways.

As an initial matter, restorative justice processes and outcome are not easy or "soft." Researchers have found based on observations of restorative justice processes and with interviews of offenders after these processes that facing a victim is most often a difficult and emotional experience for offenders. Tony F. Marshall, "Restorative Justice: An Overview," at 18 (1999). Offenders, in the face of real suffering by real victims, are less able to utilize excuses to explain away or rationalize their offending behavior. Many offenders have indicated that restorative justice processes and outcomes are more difficult to endure than traditional justice processes and punishment. Id. Indeed, the author has personally witnessed young offenders in New Zealand indicate that they

would rather receive a sentence of imprisonment than go through a family group conference.

It is not only the personal meeting with victims and hearing from victims that are difficult for offenders. Restorative justice is tougher on offenders because active acceptance of responsibility for the criminal conduct and for putting things right for the victim and the community is expected of offenders. Tony F. Marshall, "Restorative Justice: An Overview," at 26 (1999).

The Chief District Court Judge of New Zealand has observed:

There is nothing soft about the way conference participants deal with offenders. In fact, my experience is that, in terms of outcomes, the courts are and have been much softer on young offenders than families ever are. "Sometimes it's an easy option for a youngster to go into prison for a short time and sit in his cell doing nothing for the greater part of the day."

Chief District Court Judge David Carruthers, "Restorative Justice, With Reference To Experience In New Zealand," at 11 (June 2001).

Finally, Richard Snyder had this perspective on the criticism that restorative justice is too "soft" on crime:

To resist the spirit of punishment is not to be soft on crime. It is to be passionately committed to the redemption of all persons and of the society, to justice that is restorative. It does not mean that we should not "get tough," not prevent people from doing acts that harm. It does not mean that we should never put anyone in prison. What it does mean that in our toughness, in our justice, in our dealing with crime, we should recognise that we are dealing with our brothers and sisters – God's children – and they can come home if we are open to them. Whether they come home is finally their decision, but it can be their decision only if we are ready to receive them with open arms, only if our justice system is a place of restoration. We have no other choice if we wish to survive with dignity as a nation.

T. Richard Snyder, The Protestant Ethic and the Spirit of Punishment, at 157 (2001)

## Net-Widening

Another criticism levelled at restorative justice processes is that they expand the types and numbers of offenders who are involved in the justice process and thereby expand the intrusion of governmental authority. See, e.g., Richard Delgado, “Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice,” *Stanford Law Review* at 761-762 (2000); Martin Wright, Justice for Victims and Offenders: A Restorative Response to Crime, at 156 (1996).

The usual response to the net-widening criticism is to cite research that shows that restorative justice does not result in net-widening. Maxwell and Morris, for example, studied the use of family group conferences and the diversionary scheme contained in the Children, Young Persons and Their Families Act of 1989. They found that a lack of any net widening through the use of FGCs in New Zealand and that, since the Act was passed, overall “young people are now much more likely to be dealt with by informal means, within the community, and without a record of a conviction.” Gabrielle Maxwell and Allison Morris, “Research on Family Group Conferences with Young Offenders in New Zealand,” at 94 (contained in Family Group Conferences: Perspectives on Policy and Practice, edited by Joe Hudson, Allison Morris, Gabrielle Maxwell, and Burt Galaway (1996)). Other researchers have similarly found no net widening effects. See generally John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts,” at 89 (1999) (collecting research).

Others have responded to the net-widening concern by noting that restorative justice processes, by empowering victims, family members and community representatives, in fact reduce state power and control. See, e.g., Erik Luna, “Restorative Justice and Its Critics,” at 11 (2000); John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts,” at 90-91 (1999).

From a different perspective, given the positive contribution that restorative justice processes can have (on offenders, victims, and communities), one may argue that net-widening effects do not constitute an unwelcome by-product of restorative justice but an improvement. As Braithwaite put it recently, “an assumption that net widening is a bad thing seems wrong.” John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts,” at 91 (1999). The argument would be that, by dealing with offenders earlier and with less serious offenses, we have a better chance to re-integrate the offender into the community and with less cost to the community. The alternative is to wait until persons have committed more serious offenses and caused greater harm to victims, the community, and to themselves.

In Wellington, New Zealand, for example, police youth aid officers use family group conferences (following consultations with the local youth justice coordinator) to deal with somewhat minor offenses (fighting, shoplifting, etc.) in order to prevent young persons from committing more serious offenses such as assault, burglary, and robbery. In these instances, police youth aid give notice of their intention to charge young persons with certain criminal offenses in order to have a family group conference scheduled. If



the FGC agreement and plan is adhered to by the young person, and statistics show that it usually is, then police do not follow up the matter with formal charges and the matter never proceeds to court adjudication. By intervening at an earlier stage, the police and the youth justice coordinator in Wellington City have helped to reduce crimes rates in the area substantially since 1996.

### **Outcome Disparity**

A frequently-noted concern about restorative justice is that it may lead to outcome disparity, that is, offenders involved in like offending end up with different sanctions. See, e.g., Richard Delgado, “Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice,” *Stanford Law Review* at 759 (2000). This concern was also recently raised by the Chief Justice of New Zealand, the Right Honorable Dame Sian Elias. In an April 24, 2001 Lecture in Napier, the Chief Justice expressed support for the aims of restorative justice programs but simultaneously expressed concerns including the concern that “consistency of treatment of like cases” may be jeopardized in restorative justice schemes. “Lecture Given by the Rt. Hon. Dame Sian Elias, GNZM, Chief Justice of New Zealand, on the occasion of the John Robson Lecture for the Napier Pilot City Trust,” at 3 (April 24, 2001). As the Chief Justice noted, fundamental fairness would seem to suggest that persons who have engaged in the same kind of criminal conduct should receive roughly the same criminal justice sanction. The Chief Justice said that, “without such consistency[,] corrosive unfairness can result.” Id.

Indeed, the fundamental notion of like treatment for like cases led the United States to revamp the federal sentencing system completely in the 1987. The concern was that federal criminal defendants who had committed very similar or essentially identical crimes were being subjected to very different criminal sentences depending on such factors such as which judge had been assigned the case, or which way the judge decided to exercise his or her discretion on a particular day. One commentator described the concerns this way:

By the early 1970s, criminal justice researchers and scholars became concerned with the unpredictable and often widely disparate sentences that this highly discretionary sentencing system produced. Empirical research and anecdotal evidence revealed that sentencing judges' exercise of broad and largely unreviewable discretion resulted in substantial and undue differences in both the lengths and types of sentences meted out to similar defendants.

Douglas A. Berman, “Balanced and Purposeful Departures: Fixing A Jurisprudence That Undermines the Federal Sentencing Guidelines,” *Notre Dame Law Review* at 26 (Nov. 2000).

As a result, Congress passed the Sentencing Reform Act of 1984 that created the U.S. Sentencing Commission. The Commission studied over 10,000 federal criminal

sentences and, based on that study, formulated a system of Sentencing Guidelines that set out narrow sentencing guideline ranges based on the type of criminal offense, aggravating and mitigating factors, and offender criminal history. The United States Supreme Court described the changes wrought by the Sentencing Reform Act:

The Sentencing Reform Act of 1984, as amended, [18 U.S.C. § 3551](#) *et seq.*, [28 U.S.C. §§ 991-998](#), made far-reaching changes in federal sentencing. Before the Act, sentencing judges enjoyed broad discretion in determining whether and how long an offender should be incarcerated. [Mistretta v. United States](#), 488 U.S. 361, 363, 109 S.Ct. 647, 650, 102 L.Ed.2d 714 (1989). The discretion led to perceptions that "federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." \*\*2044 S.Rep. No. 98-225, p. 38 (1983). In response, Congress created the United States Sentencing Commission and charged it with developing a comprehensive set of sentencing guidelines, [28 U.S.C. § 994](#). The Commission promulgated the United States Sentencing Guidelines, which "specify an appropriate [sentencing range] for each class of convicted persons" based on various factors related to the offense and the offender. United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, p. 1 (Nov. 1995) (1995 U.S.S.G.).

[United States v. Koon](#), 518 U.S. 81, 92 (1996).

Departures from these sentencing guideline ranges is permitted only on narrow and principled grounds. [See](#) 18 U.S.C. Section 3553(b). After the prescribed period of Congressional review, the Sentencing Guidelines took effect on November 1, 1987. U.S.S.G. Section 1A Introduction. At least some commentators have recognized that the Sentencing Commission "accomplished a task that many thought could not be done; it developed a workable set of guidelines that could be applied with relative ease to the wide variety of criminal conduct prohibited by federal law." Judge John S. Martin, Jr., "The Role Of The Departure Power In Reducing Injustice And Unwarranted Disparity Under The Sentencing Guidelines," *Brooklyn Law Review* at 260 (2000). The result has been a dramatic decrease in judicial discretion in sentencing and a concomitant increase in sentencing consistency in the United States since 1987.

The responses to concerns about inconsistency from restorative justice practices have been addressed in several ways. Some have argued essentially that there has been inconsistency in sentences in traditional criminal justice systems and consistency is not a paramount criminal justice value anyway. [See](#) Allison Morris and Warren Young, "Reforming Criminal Justice: The Potential of Restorative Justice," 21-22 (contained in [Restorative Justice: Philosophy to Practice](#), edited by Heather Strang and John Braithwaite (2000)). These kinds of responses, however, seem to ignore the common-sense notion that offenders who commit similar offenses ought to be sanctioned similarly as well as the fact that certain kinds of traditional criminal justice schemes (e.g. that of

the United States under the Sentencing Guideline system since 1987) have achieved high levels of sentencing consistency.

A better response to the consistency concern is to achieve as much consistency as possible and then to justify adequately any remaining inconsistency. As explained more below, incorporating restorative justice processes within a sentencing guideline system may help to achieve a substantial measure of consistency. Any remaining disparities can be justified by circumstances that are unique to each individual case.

Another response to the concern about inconsistency is give and maintain with the courts a supervisory role over the outcomes decided upon through restorative justice conferences and other practices. “In fulfilment of this role, the Court can safeguard against discriminatory results.” Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 12 (June 2001).

### **Potential Revictimization**

Because of the central role played by victims at restorative justice conferencing and other restorative justice programs, an obvious concern is that victims may be harmed further by participating in restorative justice processes. Heather Strang, “Restorative Justice Programs in Australia,” at 35-36 (2001). It is a weighty concern. Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 18 (June 2001) (“This is not a criticism that can be dismissed lightly”). Revictimization of persons who have already suffered physical harm, disrespect, loss of control, pecuniary loss, and more from the criminal offense itself would be unacceptable. It is worth noting that the New Zealand Victim Support Agency has, despite the possibility of revictimization, endorsed the restorative justice approach. Id.

Steps can be taken to reduce the possibility of the justice process further injuring victims. Chief District Court Judge David Carruthers, “Restorative Justice, With Reference To Experience In New Zealand,” at 18 (June 2001). The Office of Victims of Crime in the U.S. Department of Justice, for example, has issued guidelines for victim sensitivity in victim-offender mediation programs. Office of Victims of Crime Bulletin (July 2000). These guidelines seem equally applicable to restorative justice conferencing:

- Ensure the physical safety of the victim.
- Screen cases for suitability for the process.
- Verify that the offender wants to participate before contacting the victim, to avoid possible re-victimization of the victim.
- Allow the offender to choose whether to participate in the mediation process.
- Conduct an in-person pre-conference session with the victim and:
  - Listen carefully to the victim.
  - Provide information and answer questions about the programme.

- Discuss risks and benefits and assist the victim in making an informed decision about whether to participate.
- Conduct careful, extensive victim preparation including:
  - Ensure that the victim's expectations are realistic.
  - Assess the victim's losses and needs.
  - Estimate restitution possibilities.
- Allow the victim to:
  - Choose whether to participate in the mediation process.
  - Schedule the mediation session at a convenient time.
  - Select the mediation site.
  - Arrange the seating.
  - Decide who speaks first.
  - Terminate session at any time.
  - Determine the type of restitution.
- Conduct an in-person preconference session with the offender.
  - Make sure the offender understands the process and its relationship to the judicial system.
- Use victim-sensitive language that avoids implying judgment or pressuring the victim in any way.
- Follow up after the mediation session.
  - Monitor the agreement until completion.
  - Notify the victim of agreement alteration or completion.
  - Schedule additional sessions if needed.
- Train facilitators in victim sensitivity.

Office of Victims of Crime Bulletin, "The Restorative Justice and Mediation Collection: Executive Summary," at 5-6 (July 2000).

Surveyed justice coordinators in New Zealand almost all felt that effective steps could be taken that would avoid victims being revictimized at the family group conference. Coordinators cited the ability of victims to have support at the conference as one such measure. Other protective measures included careful preparation in advance of the conference of both offenders and victims to ensure that the rights of victims were well understood and that victim expectations were realistic. Coordinators also cited the presence of police as well as the control exerted by the coordinator at the conference as steps that helped ensure that victims were not intimidated or otherwise revictimized at the FGC. Finally, coordinators frequently cited the veto power that victims had over the FGC plans or agreements as a way for victims to avoid being revictimized.

In sum, it "is very important that good operational practice is used to ensure that victims are not further victimized." Chief District Court Judge David Carruthers, "Restorative Justice, With Reference To Experience In New Zealand," at 18 (June 2001).

## **Offenders' Rights**

Some have argued that an offender's fundamental rights of due process are likely to be infringed through restorative justice practices. See, e.g., Richard Delgado, "Prosecuting Violence: A Colloquy on Race, Community, and Justice," *Stanford Law Review* 753, 760 (April 2000). The argument is basically that, because lawyers are not always present and do not manage the process, an offender's basic rights may be overlooked or otherwise forfeited.

The Chief District Court Judge of New Zealand has responded directly to this criticism:

While it is desirable that offenders be encouraged to speak for themselves, there is no necessity to exclude lawyers from the restorative justice conference process. In this context, it is appropriate that the lawyer fulfil the role of protecting the offender's basic rights in a manner consistent with the objectives of restorative justice. This requires an understanding, on the part of lawyers, of the difference of their role under the restorative justice process.

Chief District Court Judge David Carruthers, "Restorative Justice, With Reference To Experience In New Zealand," at 19 (June 2001).

A survey of youth justice coordinators in New Zealand in May-June 2001 by the author revealed that lawyers in New Zealand who represent juvenile offenders (called "youth advocates") are fulfilling their role well. That is, most justice coordinators see youth advocates who participate in family group conferences as protecting well the basic due process rights of their clients while at the same time playing a constructive role in the restorative justice process that requires different approaches than that required in the adversary criminal justice system.

## **Restorative Justice: A Supplement To Court-Processes**

Commentators have noted that restorative justice programs are unable to replace traditional court-based criminal justice systems entirely. See, e.g., John Braithwaite, "A Future Where Punishment Is Marginalised: Realistic or Utopian?" 46 *UCLA Law Review* 1727, 1742 (1999). Rather, there is real potential for restorative justice programs to exist alongside court-based criminal justice systems. Daly and Immarigeon describe a restorative justice program that co-exists with a traditional court-based system:

One imaginative "action-research" project is the Mediation for Reparation Project in Leuven, Belgium. The project does not offer diversion from court; mediation staff run victim-offender meetings in parallel with prosecutorial investigations, the expectation being that the outcome of the mediation may affect the sentence. The project requires discussions

between prosecutors and members of the mediation staff in selecting and going forward with cases. This permits “a forum for permanent reflection and re-thinking of the existing approach within the system... [it provides a way to make] members of the judiciary more effectively committed to the new, restorative paradigm.”

The Leuven research can reveal how forms of restorative justice may be able to work alongside current practices, and it may suggest ways in which traditional legal practices in criminal or juvenile courts can be informed, and perhaps changed by, restorative justice ideas

Kathleen Daly and Russ Immarigeon, “The Past, Present, and Future of Restorative Justice: Some Critical Reflections,” *Contemporary Justice Review* Vol. 1, at 37 (1998).

It would appear, then, that there is significant potential for a restorative justice program to supplement the criminal justice system in U.S. federal courts. The next section describes how such a program might work.

## **RESTORATIVE JUSTICE FOR THE FEDERAL CRIMINAL JUSTICE SYSTEM**

As has been noted, restorative justice can be applied at any stage in the criminal justice process. Two applications would seem particularly appropriate in the context of federal criminal justice in the United States.

First, restorative justice could be applied after the FBI and/or other law enforcement agencies have investigated a crime and determined who the perpetrator was but prior to the filing of any formal charges by the United States Attorney. At this point, the United States Attorney could offer the accused the opportunity to engage in a restorative justice conference with the proviso that, if a conference agreement is reached and fulfilled, charges would not be filed against the accused.

Second, restorative justice could be applied after charges have been filed. If a defendant decides to plead guilty, then the possibility of a restorative justice conference could be explored. If an agreement is reached and fulfilled, then, the prosecution and defendant could jointly report on the conference and the agreement to the sentencing court. The parties could also in some cases seek a “downward departure” (that is, reduction in guideline sentence range) based on the defendant’s successful participation in a restorative justice process.

There is a potential third restorative justice opportunity in the federal criminal justice system. A restorative justice conference could be held after a defendant is sentenced. This kind of restorative justice program is currently being trialled at the Hawkes Bay Regional Prison in the Hawkes Bay region of the North Island, New Zealand. Its aim is to reduce reoffending by arranging for a restorative justice conference with the victim while an offender is serving his term of imprisonment. The program has

been in place since August 2000, has involved offenders convicted of serious offenses, and to date has shown considerable promise. See also Lesley Moreland, “Murder to Mediation – Tenacity Brings Results,” at 24-28 (contained in Repairing the Damage: Restorative Justice In Action, Bristol University (1997)).

### **Diversion Restorative Justice**

As noted above, police in New Zealand can obtain a family group conference by announcing to the youth justice coordinator “an intention to charge” a young person with a specific offense based on their investigation. The police investigation report outlines the details of the offense as well as any specific victims. A family group conference is then convened with the young person, the young person’s family and other supporters, a youth advocate (lawyer) for the offender, the victim (if the victim so chooses), the police, and the youth justice coordinator. If an agreement is reached as to how the offender can put things right, then the police most frequently will agree not to file the intended charge and the young person’s record is not burdened with the offense. A prerequisite to an agreement is the young person admitting the offense and the essential facts underlying the offense. If the young person denies the offense or essential facts of the offense, then the family group conference is terminated and the matter proceeds to court for a contested hearing.

In the same way, the United States Attorney’s Office could announce its intention to charge a particular offense and offer the possibility of a restorative justice conference. If the prospective defendant agrees, then the victim(s) could be contacted to determine their willingness to participate in the conference. If the victims also agree, then the conference could be arranged by a restorative justice coordinator.

The conference could be held with the offender and supporters of the offender (including the offender’s family), the victim and supporters of the victim, the Assistant United States Attorney in charge of the case, and the lead agent or officer from the federal, state, or local law enforcement agency which investigated the offense. If the restorative justice conference is modeled after Project Turnaround in Timaru, New Zealand, then representatives from a community panel would also attend the conference.

After introductions and explanations regarding the process, the case agent would then read a summary of the offense. The offender would be asked if s/he agrees with that summary and admits the offense as outlined. If the offender admits the offense, then the victim would be asked to describe the impact of the offense on him/her. The group would then discuss the criminal offense and what is needed to “put things right” for the victim, the community and the offender.

If an agreement is reached, then the United States Attorney’s Office would agree not to present the matter to a federal grand jury or otherwise file the charge with the court. Unanimous consent among all participants, including the Assistant United States Attorney, would be required.

## **Post-charge Restorative Justice**

A restorative justice conference could also be held after a charge has been filed against a defendant. In that case, the conference could be held after an offender had agreed to plead and actually pleaded guilty to a federal criminal offense. A restorative justice conference is even potentially possible following a conviction at a trial although the benefits of such a conference may be reduced at that point.

Much like the diversionary conference described above, if the convicted defendant agrees, then the victim(s) could be contacted to determine their willingness to participate in the conference. If the victim also agrees, then the conference could be arranged by a restorative justice coordinator.

The conference could be held with the offender and supporters of the offender (including the offender's family), the victim and supporters of the victim, the Assistant United States Attorney in charge of the case, and the lead agent or officer from the federal, state, or local law enforcement agency which investigated the offense. After introductions and explanations regarding the process, the case agent would then read a summary of the offense. The offender would be asked if s/he agrees with that summary and admits the offense as outlined. If the offender admits the offense, then the victim would be asked to describe the impact of the offense on him/her. At this point, the conference would be expected to discuss what is needed to put things right. Among the issues to be addressed would be clear signs of remorse by the offender including possible apologies to the victims, a plan for making full restitution to victims, and other efforts to heal the victims. Another important part of the discussion would be the impact of the crime on the community and how the community could be restored (including community service by the offender). Additionally, the conference discussions would focus on why this offense was committed by this offender at this time as well as what could be done by and for the offender to ensure that there is no further criminal conduct by this offender. Part of this discussion could focus on the need for further education and training, employment, or drug/alcohol counseling.

After an appropriate discussion of these issues, the offender would be allowed to caucus with his family and/or other supporters in order to discuss privately a restorative justice plan. The plan would have to be both achievable for the offender and address the needs of other conference participants including the victims. Once an offender has come up with a proposal, the conference participants would come together again to hear from the offender about his/her proposed restorative justice plan. The conference would then discuss and typically negotiate the plan and amendments to the plan. Part of the plan would be a recommendation to the judge concerning how the restorative justice efforts of the offender should be taken into account at his/her sentencing by the District Court.

After an agreement is reached, then a report on the conference and its outcome would be prepared for the United States District Judge who is to sentence the offender. The conference outcome would report on the restitution agreements made and the recommendation of the conference with respect to the impact of the conference on the



sentencing guideline range. There would be several possibilities in that regard. One possibility, albeit an unlikely one, would be for there to be no impact on the guideline sentence to be imposed. Another possibility would be for the judge to reduce the defendant's sentence within the otherwise applicable guideline range based on the defendant's participation in the restorative justice conference, the successful agreement reached, and related factors. Another possibility would be for the parties at the conference to recommend to the sentencing court that the defendant be granted a downward departure based on the defendant's participation in the restorative justice conference and the successful agreement reached. If accepted by the court, the defendant would receive a less severe sentence and punishment. The sentencing court would ultimately determine whether to depart downward and by how much based on the value and benefits of the restorative justice conference.

If no agreement is reached, then at least the efforts towards restorative justice could be reported to the District Court. The District Court could, in its discretion, take even these efforts into account in deciding upon the final sentence for the defendant.

### **Downward Departures for Restorative Justice**

Section 3553(b) of Title 18 of the United States Code allows a United States District Court to depart downward, that is, to sentence a convicted defendant outside of the range mandated by the federal sentencing guideline range in limited circumstances. Section 3553(b) provides:

The court shall impose a sentence of the kind, and within the range, [established by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. Section 3553(b).

To determine whether a circumstance was adequately taken into consideration by the Commission, Congress instructed courts to "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. Section 3553(b).

As can be seen, a departure from the Sentencing Guidelines must as an initial matter be based on the Guidelines not taking a mitigating (or aggravating) factor into account adequately. The cases the guidelines took into account are considered within the "heartland" of cases. Those outside the heartland are eligible for a departure, either upward or downward, as long as the special circumstance involved is not one of those expressly forbidden from being taken into account at sentencing. See United States v. Koon, 518 U.S. 81, 93 (1996) ("The Commission lists certain factors that never can be

bases for departure (race, sex, national origin, creed, religion, socio-economic status, [1995 U.S.S.G. § 5H1.10](#); lack of guidance as a youth, § 5H1.12; drug or alcohol dependence, § 5H1.4; and economic hardship, § 5K2.12).”

The United States Supreme Court explained further how a court should determine whether it had authority to depart from a prescribed sentencing guideline:

[A] sentencing court considering a departure should ask the following questions:

"1) What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?

"2) Has the Commission forbidden departures based on those features?

"3) If not, has the Commission encouraged departures based on those features?

"4) If not, has the Commission discouraged departures based on those features?" [United States v. Rivera, 994 F.2d 942, 949 \(C.A.1 1993\)](#).

\* \* \* If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. Cf. [ibid.](#) If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," [ibid.](#), decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent." 1995 U.S.S.G. ch. 1, pt. A, p. 6.

[United States v. Koon](#), 518 U.S. 81, 95-96 (1996)

With respect to this initial prerequisite, there is nothing in the Sentencing Guidelines, the Commission's policy statements, or the Commission's official commentary about restorative justice at all. Nothing in the Guidelines takes into account the mitigating circumstance that a defendant has voluntarily participated in a restorative justice conference or that such a conference resulted in substantial benefits to the victim(s) of the offense. Similarly, nothing in the Guidelines expressly makes the offender's participation in a restorative justice conference a forbidden, encouraged, or discouraged factor. As such, restorative justice cases are likely to be considered outside of the "heartland" of sentencing cases.

The next issue, as dictated by Section 3553(b), is whether this restorative justice circumstance "should result in a sentence different from that described." 18 U.S.C.

Section 3553(b). That determination by the District Court would be based at least in part on the recommendation of the restorative justice conference participants themselves.

Finally, the District Court would have to decide how far to depart from the applicable sentencing guideline range. This too would be based on the recommendation of the conference participants as well as the sentencing judge's comparison of these restorative justice efforts to other restorative justice efforts of which the judge is aware or made aware.

## **CONCLUSION**

As Father Jim Consedine wrote in the Foreword to the New Zealand Restorative Justice Practice Manual:

Restorative justice is a positive way of dealing with crime. It can lead to the transformation of people's lives. The question is – do we have the courage, the vision, and the political will to implement it? . . . The answer rests with us all.

Bowen, Boyack, and Hooper, New Zealand Restorative Justice Practice Manual, at 10 (2000).

No one can doubt that we can do better in responding to crime, in caring for victims of crimes, and in making our communities more respectful and safer places in which to live. Restorative justice presents a new paradigm in criminal justice policy. It is a paradigm that is gaining increased acceptance around the world. That paradigm is gaining increased acceptance because the people who are involved with restorative justice and the researchers who have studied restorative justice programs know of its effectiveness and transformative potential.

Indeed, many in the United States have first hand experience with different restorative justice models. To date, however, these models have been utilized only in state and local jurisdictions. The time has come to apply restorative justice, and in particular restorative justice conferencing, to the federal criminal justice system in the United States.

## **The Author**

Donald J. Schmid is a federal prosecutor with the United States Department of Justice and was awarded an Ian Axford (New Zealand) Fellowship in Public Policy by the New Zealand Government in 2001. He is an Assistant United States Attorney and he is the Chief of the United States' Attorney's Office in South Bend, Indiana. Mr. Schmid has prosecuted major public corruption cases as well as large drug, violent crime, and white collar fraud cases.

Mr. Schmid has been a prosecutor with the U.S. Department of Justice since 1994 and has received numerous awards for his prosecution work. Prior to joining the Department of Justice, Mr. Schmid was a trial and appellate attorney with Gibson, Dunn & Crutcher in Los Angeles, California.

Mr. Schmid received his doctor of laws degree from the University of Michigan in 1995, where he graduated magna cum laude and Order of the Coif. He received his bachelor of arts degree in economics and philosophy from the University of Notre Dame in 1982, where he graduated summa cum laude.

While an undergraduate at Notre Dame, Mr. Schmid was named a Mellon Fellow. Pursuant to this fellowship, Mr. Schmid worked with the Law and Psychiatry Program at the University of Pittsburgh School of Medicine and conducted his own research into patient views of confidentiality. The results of his research were published in the journal "Hospital and Community Psychiatry."

With the Ian Axford Fellowship, Mr. Schmid came to New Zealand to study restorative justice initiatives, including the family group conference. While in New Zealand, Mr. Schmid has been hosted by the New Zealand Ministry of Justice in Wellington.

Mr. Schmid is married and has three daughters. Mr. Schmid has been in New Zealand with his family since January 2001. He will return to the United States in August 2001.

## **No Man Is An Island**

**by John Donne (1572-1631)**

No man is an island, entire of itself.  
Every man is a piece of the continent, a part of the main.  
If a clod be washed away by the sea, Europe is the less, as well as if a  
promontory were . . .  
Any man's death diminishes me because I am involved in mankind.  
And therefore never send to know for whom the bell tolls, it tolls for thee.