

**Restorative Injustice?: The Boundaries of Restorative Justice at the
Intersections of Gender, Race and Class: A Canadian Focus**

by

ADRIENNE CHRISTIE, B. Soc. Sc.

A thesis submitted to
the Faculty of Graduate Studies
in partial fulfilment of
the requirements for the degree of

Master of Arts

**Carleton University
Ottawa, Ontario
April 10, 2000**

**© copyright
2000, Adrienne Christie**



**National Library
of Canada**

**Acquisitions and
Bibliographic Services**

**395 Wellington Street
Ottawa ON K1A 0N4
Canada**

**Bibliothèque nationale
du Canada**

**Acquisitions et
services bibliographiques**

**395, rue Wellington
Ottawa ON K1A 0N4
Canada**

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-52342-X

Canada

ABSTRACT

For years there have been calls by Canadians for a more healing system of criminal justice. We have tinkered with the system but are never any more satisfied with what is developed. In an effort to move beyond tinkering with the pattern of thinking about criminal justice, “restorative justice” was developed. Restorative justice seeks to heal all parties affected by wrongdoing, including the wrongdoer, the sufferer of wrong and their communities. Within the restorative justice literature, however, there are no developed critical analyses of this vision of justice. Nor have any diversity/intersectional analyses been completed. The purpose of this thesis, therefore, was to discover whether Canadians involved in the restorative justice movement are taking gender, race and class seriously. I found that there has been very little consultation by proponents and governments with equality-seeking organizations and the principles of restorative justice are lacking in diversity analyses. In addition, the definition of restorative justice is vulnerable to misinterpretation thereby increasing the risk that existing inequalities will be transferred into this new vision of justice. In conclusion, restorative justice in practice does not, in its present form, improve equality for multiply oppressed Canadians, thus resulting in restorative *in-justice* rather than restorative justice.

ACKNOWLEDGEMENTS

Many people have stood by me during the development of this thesis. In particular, I am indebted to three very special people, to whom I dedicate this thesis. To my mom who has remained by my side throughout this, at times, arduous process and never allowed me to give up, even when I could not see the light at the end of the tunnel; to my sister to whom I am grateful for her objective advice; and to my dad who, when he was alive, always encouraged me to do my best.

I also want to thank all the people who took the time to meet and discuss this issue with me. I am especially thankful for and appreciative of the persistence of Diana Majury who cajoled, encouraged and constructively criticized as I completed this thesis. I also want to thank Renate Mohr for giving of her time and wisdom during a period when time was very precious for her; Dorothy Franklin for supporting me in this endeavour; Steve Good for showing me that I have what it takes; and the English teachers in secondary school who told me I couldn't do it - I proved you wrong!

TABLE OF CONTENTS

Title Page	i
Acceptance Form.....	ii
Abstract.....	iii
Acknowledgments	iv
Table of Contents	v-vi
1. Introduction	1-12
<i>Methodology, scope and limitations of the study</i>	7-10
<i>Overview</i>	10-12
2. Differences of Universe and Multiple Dimensions of Inequality.....	13-31
<i>The “failure of existing rules is the prelude to a search for new ones”</i>	13-18
<i>Multiple dimensions of inequality</i>	19-23
<i>Common themes in gender, race and class scholarship</i>	23-31
3. “Changing Lenses”: Past Justice as Future Justice?.....	32-60
<i>Ancient codes and practices: Violations of people and their relationships</i>	34-37
<i>The religious revolution: Transgressions against the moral order</i>	37-39
<i>The western legal revolution: Crimes against the King’s peace</i>	40-41
<i>The social and intellectual revolution: The Enlightenment onward</i> ...	41-44
<i>The cementing of a penal ideology in Canada</i>	45-52
<i>Some criticisms of the dominant criminal justice paradigm in Canada</i>	52-57
<i>Conclusion</i>	57-60
4. Restorative Justice: “Crime is Far More than Lawbreaking”	61-88
<i>The principles of restorative justice</i>	69-70
<i>The sufferer of wrong in restorative justice</i>	71-74
<i>Wrongdoer as party to the solution in restorative justice</i>	75-78
<i>“Community is not a place”</i>	78-83
<i>The role of the state in restorative justice</i>	83-88
5. Boundaries of Restorative Justice: A Canadian Focus.....	89-107
<i>Restorative justice in practice</i>	90-96

Mediation processes 96-100
Sentencing Circles..... 100-107
Conclusion 107

6. A Band-Aid Solution or a Healing Apparatus?..... 108-110
Next steps..... 111-112

7. Works Cited 113-126

CHAPTER 1: INTRODUCTION

The contemporary buzz word for sentencing reform is “restorative justice”. Arising out of a disenchantment with the traditional adversarial (retributive) philosophy of justice, restorative justice heralds a more holistic response to crime. It is a response which recognizes crime as a greater transgression than the mere contravention of man-made, state-enforced law; a response which accepts that the victim, the community and even the offender are the recipients of the harmful effects of crime; a response which regards the community context as both a contributor to crime and as a participant in the solution (Waller 1990); a response which stresses the importance of offender accountability; a response which emphasizes the importance of the criminal justice *process* to repair these harms; and a response which views state involvement as secondary to community involvement (i.e., with the government taking responsibility for the basic foundation of order and the community accepting responsibility for the maintenance of peace and harmony) (Van Ness 1993).

Restorative justice comes under a number of labels including “transformative justice”, “healing justice” and “community justice” (Church Council on Justice and Corrections (CCJC) 1995, 1). It is actualized through processes such as sentencing circles, victim-offender mediation, family group conferencing, victim-offender reconciliation and reintegrative shaming to name a few. Such processes have enjoyed some success, however, it can also be argued that restorative justice may not benefit all

members of the "human community" (McCold 1995, 1996). More to the point, restorative justice may be having particular and variable gender, race and class impacts. The problem is this: advocates of restorative justice have become so enmeshed in this idea of a more healing justice that they are suffering from tunnel-vision - an over indulgence in self-promotion and a scarcity of critical analyses (Pate 1997a). They are working towards a specific outcome based on generalities and are not seriously reflecting on the complexities of the constitution of Canadian society. This disregard for the voices of different groups isolates their "area of inquiry within a screened context of social reality ... [that] ... fails to consider the interdependency of culture, race and class as important considerations for women's lives" (Bernat 1995, 2-3). Cultural backgrounds, power-imbances, societal ideologies, and economic strata are key variables at play on a daily basis in Canada. As such, these variables must be taken into consideration in the development of social policy.

By and large, however, much social policy is developed with little consideration given to issues of gender, race (Williams 1989) or class (Squires 1994). Even less attention is paid to the effects of social policy at the intersection of these variables. Consequently, there is increasing pressure by equality-seeking organizations and feminist scholars to incorporate the interactions between these variables in the development and implementation of social policy (Blea 1992; Jackman 1994; Jhappan 1996; Khayatt 1994; Status of Women Canada (SWC) 1996; Williams 1989). More to the point, criminal justice policy has been and continues to be particularly vulnerable to

marginalizations based on gender, race and class variables¹. In my view, this is due in large part, to a lack of funding of and consultation with equality-seeking groups, as well as little to no intersectional analyses in the development, implementation and evaluation of criminal justice programming.

Literature on restorative justice tends not to discuss or even consider issues of (in)equality. The majority of the literature on restorative justice is devoid of any substantial discussion on the effect of restorative justice on race, class and gender relationships. For instance, Van Ness and Heetderks Strong, in their publication, *Restoring Justice* (1997), one of the most widely cited publications on the topic, only touch briefly upon power-imbalances in the context of restorative justice. They recognize that power imbalances exist between rich and poor, for racial minority groups, between victims and offenders due to “social, economic and political inequities, [or] by a pre-existing relationship that may have existed between the two (a particular problem in the case of domestic violence cases)” (169). They also concede that these power imbalances “will become increasingly important for restorative justice practitioners to recognize and address” (169). In recommending a resolution to such imbalances, they suggest a greater use of grand juries, inquests and legislative hearings to explore and address the larger social problems, rather than ensuring equality within the restorative process. While the

¹ See for example, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995); and *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (1996).

larger social problems do indeed need to be addressed, such macro-level equality will take a long time. If restorative justice processes proceed in the meantime, it is essential that more micro-level equality be addressed in the interim.

There is a clear need to integrate critical analyses into the restorative justice 'paradigm' prior to its widespread implementation otherwise the same power imbalances, misunderstood contexts and pre-existing social constructions which are present in the prevailing adversarial (retributive) justice model will be duplicated in restorative justice practices. Additionally, proponents of restorative justice must ask themselves in the developmental phase of their program,

[w]hat steps have been taken to ensure that the level of racism, sexism, classism and homophobia which is presently experienced by members of marginalized groups is not simply going to be transferred into the community apparatus for delivering restorative justice - and thereby be even more difficult to identify and control? As Ruth Morris writes about achieving 'transformative justice': 'We cannot get there without recognizing the prominent role of racial, ethnic, and socioeconomic discrimination in our existing injustice system' (Goundry 1997, 29).

Key to this thesis is the up-front recognition of the significant role of racial, gender and socioeconomic discrimination in criminal justice policy. The goal of this research and analysis is to discover whether Canadians involved in the restorative justice movement are taking gender, race and class seriously (i.e., is this a consciousness on the part of the people in the movement?) and how, if at all, these considerations are influencing the restorative justice movement. If these variables are in fact being considered in the development and implementation of restorative justice then there should be improved

equity/equality under the restorative vision of justice in comparison to that achieved under the adversarial (retributive) system. However, if restorative justice techniques are advanced without adequate equality analyses and carefully considered safeguards, restorative justice will become one more “alternative” to the current justice system which fails to address diversity issues and will result less in restorative justice and more in restorative *in-justice*.

In the course of trying to answer this question, several subsidiary questions were explored. For example, what do Canadians involved in the restorative justice movement understand restorative justice to be? What are the views, concerns and issues of equality-seeking organizations in Canada about restorative justice? What issues can be understood from circle sentencing rulings (which have typically been conducted with male Aboriginal offenders)? Are these alternatives illustrative of “traditional” Aboriginal conflict resolution practices as is frequently proffered by proponents, or are they merely techniques imposed upon them by the majority under a rhetoric of ‘traditionalism’? Is it enough to return the “stolen conflict” (Christie 1977) to the primary players, or are further safeguards required? Do we need to be focusing on structural change (i.e., transformative justice (Morris 1995)) or will a change of “lenses” (Zehr 1990) suffice? What constitutes a community under restorative justice, and what are the variable dynamics that could lead to differential influence in unique circumstances?

These questions underscored my exploration of restorative justice. By examining restorative justice through an intersectional lens, the meaning of success is expanded. Not only will success be defined by a more healthy society in terms of fewer damaged relationships in both the present and the future, it will also be considered more healthy as a result of greater equality for all. For restorative justice to be more than a band-aid solution, it must be put through the rigours of an analysis that addresses the multiple dimensions of inequality in order to ensure that we are more than tinkering with the current system. For a shift in paradigm from adversarial injustice to restorative justice to be complete, restorative justice must be accompanied by a fundamental transformation of societal attitude toward crime and criminal justice and by the full inclusion of the diversity of people who make up Canadian society.

Throughout the following discussion, several key terms will be employed. While the terms adversarial (retributive) and restorative justice will be discussed at length in the text, terms such as gender, race, class and equity/equality, are deserving of definition. For the purposes of this study, gender is understood to be “the culturally specific set of characteristics that identifies the social behaviour of women and men and the relationship between them ... Like the concepts of class, race and ethnicity, gender is an analytical tool for understanding social processes” (SWC 1996, 3). Likewise, race is not defined as biological inheritance, but as a “social and political construct that can be relevant to self-identity and to the apprehension of social issues” (Patterson, Cameron and Lalonde 1996,

230: n.1).² Similarly, class is a “political idea that arise[s] from underlying economic and political structures” (Banton 1977, 4). It is used by those with control over the economic resources of production and consumption to demean or exploit those so labelled (Jackman 1994). Lastly, equity is the process of being fair to all people, regardless of gender, race or class, while, equality means that all people, regardless of gender, race or class enjoy the same status. “Equity leads to equality” (SWC 1996, 3).

Methodology, scope and limitations of the study

The views of equality-seeking organizations, government officials, academics, victims’ groups, and representatives of restorative justice programs figure prominently in this study. The principle sources of evidence and authority employed within this research are information found through literature reviews and participation at and transcripts of national and local conferences on restorative justice³. Case law on sentencing circles and secondary materials such as government documents, and program evaluations also provided a significant amount of information.

² It should be noted that the physical characteristics of race are often determining factors within the criminal justice system. That is, by virtue of one’s perceived “race” (colour), the discretion of law enforcement authorities may be adversely affected resulting in an increase in arrests and consequently a decrease in referrals to alternatives to incarceration based on race, rather than on the characteristics of the crime itself (Roberts and Doob 1996).

³ Canadian Criminal Justice Association Bi-Annual Conference. Ottawa, Ontario. September 1997.
 Greater Toronto Area Restorative Justice Conference. Toronto, Ontario. November 1997.
 Ontario Association of Criminology and Corrections. Toronto, Ontario. February 1999.
 Satisfying Justice. Vancouver, B.C. March 1997 (compiled and edited by Scott 1997).
 Women’s Equality Seeking Organizations annual meeting with the Minister of Justice and Attorney General of Canada (A. Anne McLellan). Ottawa, Ontario. September 1997 (transcript by Bruce Levey Reporting Services).

Survey research (interviews) was also used. I determined my prospective interviewees through participant lists from conferences, through previous research where I gained knowledge of the mandates of certain organizations or upon the suggestion of those contacted, through my work in the federal government, and through the Internet and phonebook. Attempts were made to conduct interviews with twenty-eight (28) individuals and group representatives of both genders with a variety of cultural, socio-economic and racial backgrounds; however, only eight (8) face-to-face interviews were actually conducted. These were with the following organizations/people: National Associations Active in Criminal Justice (December 03 1997); Canadian Centre for Victims of Crime (December 05 1997); Correctional Service of Canada (January 23 1998); Royal Canadian Mounted Police (January 30 1998); Department of Justice, Canada (January 30 1998); Canadian Association of Elizabeth Fry Societies (February 12 1998); Mary Crnkovich (February 13 1998). An interview with a representative of the Attorney General of British Columbia (December 19 1997) was cut short because of time constraints. A further scheduled interview with a representative of the British Columbia Association of Specialized Victim Assistance and Counselling Programs (BCASVACP) was cancelled at the time of the meeting due to sickness on the part of the prospective interviewee. Of the other groups contacted, interviews were declined for the following reasons: lack of funding/resources to look at justice issues (4); no established policy or position on restorative justice at the time (7); lack of familiarity with restorative justice (2); unwillingness to grant interview (1); and failure to return repeated phone calls (5).

The major drawback in conducting research this way is that it is not representative of those involved in the restorative justice movement. For example, interviews with participants who had been involved as 'victims' or 'offenders' in a restorative process would have benefited the overall analysis, but for practical and privacy reasons I chose not to pursue direct participant interviews. For the goals of this research, the type of purposive sampling utilized was adequate in that it provided information that was not otherwise available. At the time of commencing this thesis, there were no written reports, to my knowledge, representing the views of Canadian equality-seeking organizations or analyses taking into consideration issues of diversity. Accordingly, the information derived from conferences and interviews was integral to providing a picture of the views of these groups and of the issues related to diversity. While I did not get representativeness or breadth, I did get a great deal of information to achieve the goal of this thesis: to understand the general arguments from an equality perspective with respect to restorative justice and to determine the impact, or possible impact, of the lack of reflection on the effects restorative justice might have on the intersections of gender, race and class.

I do not purport to provide a comprehensive equality analysis. The variables of gender, race and class are only a few of what might in reality be a very long list of equity issues that need to be addressed. It is not my intention to dismiss the salience of other relevant factors such as sexuality, religion, ethnicity, or dis/ability. I acknowledge the

importance of these social relations; however, the scope of this research would not permit a more extensive investigation.

Overview

Chapter two introduces the notion of a paradigm and provides a theoretical lens which considers the intersections between and among gender, race and class. In a perfect world, a shift in the justice paradigm from retributive (adversarial) to restorative would automatically be accompanied by suitable mechanisms to secure equality in its application. But given that we do not live in a perfect world, the mechanisms are largely absent. By analyzing restorative justice through an intersectional lens, the embedded biases and stereotypes resulting from the historical treatment of various groups can be brought to light. The “interlocking nature of oppression” (Collins 1990) can only be efficiently and effectively understood and subsequently repaired through layered analyses. In doing so, one must, as Creese and Stasiulus so eloquently expressed, “challeng[e] the ‘categorical hegemony’ attempted by many Marxists with class, many feminists with gender” (1996, 8), and many critical race theorists with race.

In order to assess the question of a paradigm shift, one needs to be aware of the historical context in which the shift is said to be occurring. To this end, *chapter three* sketches out the evolution of justice practices from ancient legal codes and practices, through the religious, western legal and social/intellectual revolutions, to contemporary Canadian justice. This brief profile of the evolution of conflict resolution practices and

ideology will provide a base from which to discuss the dynamic social movement called restorative justice. The reader will notice that a more informal system of justice which repairs harm done, rather than punishes the wrongdoer, is not a modern notion, nor are the controversies new; the newness lies only in the manner in which these concepts are presented and managed in modern society.

Chapter four examines what is meant by the term restorative justice as well as the notions of 'victim', 'offender' and 'community'. An appreciation for the range of interpretations and therefore applications of these terms, coupled with their many pairings, illustrates the reach that different restorative practices might have. This is of importance especially when advocates of different programs assume that they are, as the adage says, "singing from the same song-sheet". This will form the basis from which to critically review restorative justice in principle versus in practice, and then subsequently permit me to identify the gaps in the area of gender, race and class.

Chapter five builds on the conceptual framework proffered in the previous chapters and identifies several theoretical and practical boundaries that this "new" vision of justice has on gender, race and class, and their intersections in practice. In doing so, the views of several practitioners, government officials, non-government organization (NGO) officials, academics and judicial officials involved in the restorative justice movement in Canada, in defence of, and in opposition to, restorative justice are considered. This assessment is conducted in light of the principal question guiding this

research: whether Canadians involved in the restorative justice movement are taking gender, race and class seriously, and how, if at all, these considerations are influencing the restorative justice movement.

Chapter six summarizes the principal findings and outlines necessary next steps with regard to the future of the restorative justice movement.

CHAPTER 2: DIFFERENCES OF UNIVERSE AND MULTIPLE DIMENSIONS OF INEQUALITY

In Canada, the current paradigm of criminal justice is adversarial, is discussed almost exclusively in terms of degrees of harm perpetrated by the offender and is focused on the penal yardstick. This is largely referred to as the retributive paradigm. However, dissatisfaction with this model of justice sparked several academics (Bazemore and Schiff 1996; Bazemore and Umbreit 1994, 1995; Cragg 1992; Galaway and Hudson 1990 and 1996; McCold 1995, 1996; McCold and Wachtel 1997; Messmer and Otto 1992; Umbreit and Carey 1995; Van Ness 1993; Van Ness and Heetderks Strong 1997; Walgrave 1995; Wright 1991; Zehr 1990) to commit themselves to the development of a new paradigm which encompasses a healing approach to the resolution of wrongdoing. It is distressing to note, though, that there is no consideration in the literature to date of the impact that this “new paradigm” might have on multiply oppressed individuals and groups. It is critical to address this as, it is my contention, that for a paradigm shift to a healing model to be complete, it must be accompanied by suitable mechanisms to secure equality in its application. To this end, the purpose of this chapter is to outline the constitution of a paradigm, and to introduce a theoretical lens through which to assess the success of the paradigm shift.

The “failure of existing rules is the prelude to a search for new ones”

Much discourse on the nature of paradigms has ensued since the publication of *The Structure of Scientific Revolutions* by Thomas Kuhn in 1962. Kuhn gained notoriety

when he linked “the philosophy of science to the sociology of scientific practice” (Harvey 1982, 85). At the time, Kuhn’s insights into the nature of paradigms was considered revolutionary. However, Kuhn’s discussion of paradigms is geared strictly to the scientific world, a weakness for which he received considerable criticism. Nevertheless, one can identify parallels in other areas of scholarship and, as a result, the notions of paradigms and paradigm shifts have become common currency in the social sciences (Harvey 1982, 89).

Paradigms embody our current constructions of reality about something. They are common sense explanations - “a constellation of beliefs, values, techniques, and so on” (Kuhn 1970, 175) - which fit observed phenomena and provide reasons for why things are or are not possible. However, structures within society are not static. The inadequacy of existing rules, for example, can leave explanations and corresponding processes operating in the past and can be the prelude to a search for new rules (Kuhn 1970). Not unexpectedly then, paradigms can and do change over time (Zehr 1990).

The move from the Ptolemaic paradigm to the Newtonian paradigm provides a classic illustration of a “paradigm” shift. Until the seventeenth-century scientific revolution, it was understood that the world was decidedly flat and that the universe revolved around the earth (Ptolemaic paradigm). In time, with technological advances and further investigation, a growing collection of evidence fell outside the expectations of this paradigm. Even though scientists began to question the existing rules, the Ptolemaic

paradigm was not instantaneously discarded. For centuries, this paradigm had been the pillar to which scientific, philosophical and theological doctrine had been tethered; to abandon it forthwith would have been revolutionary and frightening. Consequently, in order to stabilize the paradigm, its inconsistencies were masked by a number of reforms. In the early eighteenth century, however, the number of reforms became too great to be accommodated by the Ptolemaic paradigm such that it was eventually replaced by an ostensibly more logical paradigm introduced by Copernicus and ushered in by Newton. This new paradigm not only put the sun at the centre of the universe and recognized the earth as one of the planets, Newton's physics made it workable by assuming that certain regularities existed and could be explained in terms of cause-and-effect; it provided rules and a more fitting explanation for how the universe functions.

Edward de Bono (1985) discusses the nature of paradigms in terms of "differences of universe." These "differences of universe" can be explained as a disharmony between two or more patterns of thinking about reality. He claims that "[t]alking across universes is even worse than talking across languages." To illustrate, he suggests that "[i]f you talk English to a Japanese [person] who does not understand you then there is no communication. With universes, if you are talking in one universe and the listener is listening in another universe there may be no real comprehension but the listener believes he or she is understanding" (52). Kuhn's term for this phenomenon was "incommensurability" (1970, 198-200). de Bono also states that we perceive in an 'active' information universe, which requires us to organize incoming information into 'self-

organizing information systems'. Self-organizing information systems are the brain paths we use to assimilate facts and file them in our minds for future reference. These patterns of understanding reality resemble the furrows created by the flow of water down a hill which were created by the water taking the least resistant route. A change in direction is unlikely without the removal of debris, such as rocks and twigs, which act as barriers to alternative routes.

The retributive paradigm of justice is one way of organizing reality. The retributive paradigm shapes how Western Europeans define problems relating to wrongdoings and what we recognize as appropriate solutions. Within this context, wrongdoings are conceived of as "crimes" and the appropriate solution to crime is "punishment". For decades this has been the universe in which we have understood wrongdoings. Once a wrongdoing has occurred, our 'self-organizing information systems' open the gate that guides us down the path where punishment is the logical result. Zehr (1995) explains this further in the following excerpt:

The retributive paradigm creates its own reality....Punishment, not resolution or settlement, is seen as the appropriate outcome. Responsibility becomes absolute, defined in terms of guilt rather than liability. Outcomes are imposed with little participation by victim or offender, shaping our perceptions of what can and should be done (89).

If someone were to suggest that resolution or settlement is the appropriate outcome to wrongdoing, that responsibility is defined in terms of liability, and that participation of victims and offenders is paramount, an individual rooted in the retributive paradigm would

have difficulty understanding this different universe. It would fall outside what this individual would deem to be common sense.

In Canada, Western Europeans have, since before Confederation, employed a state-owned adversarial philosophy¹ in the context of criminal “justice.” Individuals are pitted against the state, the administration of pain (punishment) is the rule rather than the exception, victims and offenders are mere spectators to the court proceedings (their lawyers are the active participants), and the adversarial process outweighs outcome (i.e., punishment over healing). Over the years, numerous reforms have been promoted to respond to criticisms of the system. Criticisms were aimed at the inadequacy of the facilities (Baehre 1977), the deficiency in the ability to treat and/or rehabilitate an offender (Carrigan 1991), and the disregard for the human, emotional needs of victims and offenders throughout the justice process (Zehr 1995). However, dressing-up the

¹ Our current system of justice in Canada is based on adversariness. Even if we are to conceive of the function of law as “not to solve conflicts but to seek to avoid them by prohibiting harmful behaviour”, as suggested by Cragg (1992, 178), adversariness is inevitable. Free will and laws repressing free will invite adversariness, and imposing further adverse conditions, such as trial, jail etc. in the name of justice to respond to the conflict, neither resolves nor repairs the conflict for the victim, the community or the offender. In this regard, I will employ the term “adversarial” to denote our current system of justice, not retributive as has been suggested by several authors. I find that retributive is not an easily defined word. Semantically, the term retribution is very broad. Its meaning has at least two roots: one meaning revenge and the other meaning satisfaction/reparation. Our current system, I would argue, does neither exclusively. For example, Roberts and Birkenmayer’s (1997) study on the use of sentencing guidelines by judges in Canada found that while indeed judges are punitive, it is rare that an offender receives a maximum penalty - which is ironic in and of itself as the public is of the belief that the judges are being too soft on crime. Moreover, it is rare for victims to feel vindicated or satisfied by current practices, and offenders, who are often victims of earlier abuse themselves, are not provided with the necessary situations in which to accept responsibility and/or grow into law abiding citizens. As such, the current justice system in Canada will be referred to, as what it is: adversarial, in both process and principle.

retributive system with penitence, rehabilitation, treatment, and reintegration reforms was no more than a clever attempt to preserve the 'comfortable' traditional adversarial paradigm under the guise of a more humanitarian approach. Even the *Statement of Principles for Victims of Crime*, adopted by the Ministers responsible for Justice in 1988, which was to "guide them in promoting access to justice, fair treatment, and provisions of assistance to victims of crime" (Waller 1990, 463), has done little to promote the active participation of victims within the process, other than as witnesses for the prosecution. As the preponderance of Canadians operate under a "presumption of prison" (Zehr 1990), most would consider alternatives to incarceration as "soft on crime," thus failing to understand the impact that an alternative could have if considered in a different "universe." It follows then that the promotion of alternative approaches on a bedrock of adversariness (retribution) is not unlike re-arranging the deck chairs on the Titanic. Unless there is a change in the way in which we conceive of 'crime' and our response to it, the current system may collapse under its own weight. As part of this reconceptualization, it is essential that any new paradigm for justice be put through the rigours of an analysis that addresses the multiple dimensions of inequality, in order to ensure that the paradigm has truly shifted to a healing model and that we are not still tinkering with the retributive (adversarial) system. It is easy to change the system so that the process is different, but to change the system so that the foundation is different and results in a healing justice requires a lot more work. We need to look at the whole person and the social context in order to heal and not base justice on generalizations and false universalisms.

Multiple dimensions of inequality

There is much (warranted) pressure from multiply-oppressed and equality-seeking groups for intersectional analyses in contemporary scholarship (Bakashi, Goodwin, Painter and Southern 1995; Blea 1992; Jackman 1994; Jhappan 1996; Khayatt 1994; Patterson, Cameron and Lalonde 1996). Intersectional analyses permit the discovery of the configurations and repressive effects of the various points of intersection of, for example, gender, race and class, and facilitate the development of ways to eradicate these historical constructions (Schwartz and Milovanovic 1996). In particular, there is an appeal for analyses of social policy not only to reject the singular focus on male subjects in which the “male subject [is the] theoretical point of departure” (Creese and Stasiulis 1996, 6), but also to reject the gender-centric² (Carlen 1994) and gender essentialist³ (Jhappan 1996) positions advanced by many feminists. Not only are these one-dimensional ideologies inattentive to the importance of race and class influences⁴ they ignore the multidimensionality of power through the employment of an “either-or” dichotomy. The “possibility that identity can be contingent on the simultaneous intersection of these categories” is ignored (Patterson, Cameron and Lalonde 1996, 230). Intersectional analyses should be fundamental to the development and implementation of social policy in

² By gender-centric, Carlen is referring to the tendency for academics to either set concepts such as gender, race and class in hierarchies, with gender “*always* being the most important in terms of explanation or characterization of sets of relationships or that all theory should be ‘gendered’” (1994, 140-141).

³ By gender essentialist, Jhappan (1996) is referring to the notion of the “essential woman”. However, this “generic woman” she says, “is not only white, but middle class, and also able-bodied, heterosexual, and in Canada, the United States, Britain, Australia, and New Zealand at least, usually anglophone” (22).

⁴ The variables gender, race and class are examples of what might be a very long list. While this research focuses on these three variables, it is in no way intended to discount other important variables such as sexual orientation or disability.

order to identify potential inequalities, and to respond to and thereby prevent their subsequent existence in programs flowing out of policy. In order to understand the significance and application of intersectional analyses, it is important to understand the context out of which intersectional analyses evolved.

Feminism had its beginnings questioning the privilege of maleness. This privilege was evident in the workforce, social settings, the household, as well as in academe. The preponderance of scholarship on social, economic and legal issues was premised on the universal male - white, middle class, able-bodied and heterosexual men were the beginning and the end in research on the effects of some variable on humankind (Creese and Stasiulis 1996; Jhappan 1996). Feminists challenged the universal male. Over time feminism expanded, and since the 1960s theories identifying the rampant inequality of women have abounded. There are many different streams of feminism, including liberal, radical, Marxist and socialist, but all flow from the same premise: that women have been relegated a subordinate status to men, and that action must be taken to abolish such blatantly coerced inequality (Renzetti and Curran 1995).

In the 1970s and 1980s, white feminists, having categorically exposed male universalism, found themselves subject to critique. They were criticized for creating a universal female, based on models of themselves. This universal woman sidelined multiply oppressed groups, such as women of colour and women in the lower economic strata (Baca Zinn and Dill 1996; Weber 1998). This was not a new debate, however. In Akron,

Ohio in 1851, it is said that Sojourner Truth, a former slave, abolitionist and feminist, posed the rhetorical question at a women's rights convention: "Ain't I a woman," to illustrate that black women are women too and to make the point that their voices should not be absent from feminist/abolitionist dialogue (Wing 1997). However, the passage of over 100 years did little to reform feminist ideology. Women of colour continued to question the "hegemony of feminisms constructed primarily around the lives of white middle-class women" (Baca Zinn and Dill 1996, 321). Not only did women of colour oppose the use of one dimensional theories of gender which offer a "false universalism" of the concept of 'woman' (Baca Zinn and Dill 1996, 322), they also submitted that the employment of the single variable of 'gender' in feminist analyses presupposes that women are a homogeneous group⁵ (Baca Zinn and Dill 1996; Bernat 1995; Henriques 1995).

In an effort to counter this female universalism, gender scholarship began to branch out into discrete areas where analyses could capture the unique experiences of women of colour, the majority of whom were poor or working class (Weber 1998). This

⁵ If women were of a homogeneous group, all women would have shared values, traditions, beliefs and histories. Moreover, power imbalances, differences or conflicts could not exist among women, and all women would have to have equal access and opportunity in life (Crnkovich 1995). Research studies often assume that "we can isolate a gender variable and import meaning to it without further inquiry about the women and the cultural milieu from which these women originate" (Bernat 1995, 1). In doing so, researchers neglect to consider how the strains of historical heritage, rich cultural roots, and cultural and group differences generated as a result of interaction within a racially stratified social order affect women in unique ways (Baca Zinn and Dill 1996; Bernat 1995; Henriques 1995; Ralston 1991). This argument is also seen extensively throughout scholarship on First Nations Peoples in Canada where the Canadian use of the term Aboriginal presupposes that all First Nations Peoples, all Métis, and all Inuit are a homogenous group (Crnkovich 1995).

led to a multitude of feminisms that “exhibit[ed] a plurality of intellectual and political positions” (Baca Zinn and Dill 1996, 326), none of which were universally accepted. Over time, the struggle between the seemingly distinct entities of race, gender, and class to be the principal analytical category explaining inequality began to encounter the barriers associated with the hierarchizing of systems of oppression - of race over gender, for example (Baca Zinn and Dill 1996; Weber 1998). Advocates of each analytical category began to recognize and accept that “inequality could not be explained, let alone challenged, via a race-only, class-only, or gender-only framework” (Collins 1995, 492). Common themes from the seemingly competing theories began to appear:

Jhappan (1996) on class: “The Canadian political economy stream ... has yet to understand that the intersections of race, gender and class produce far more complex results than can be accounted for by class alone” (18).

Baca Zinn and Dill (1996) on race: “For example, people of the same race will experience race differently depending upon their location in the class structure as working class, professional managerial class, or unemployed; in the gender structure as female or male...” (327).

In the mid-1980s, it was becoming increasingly apparent that the limitations that women who are multiply oppressed encountered could not be understood by looking through a unidimensional scope; rather these barriers needed to be considered by taking into account the multidimensionality and interconnectedness of class, gender and race systems (Weber 1998). This ‘interlocking nature of oppression,’ so entitled by Patricia Collins (1990), can be likened to looking through a kaleidoscope where race, class, gender, sexuality, geography, disability, among other social constructions and variables,

are all different points and colours that interact simultaneously thus creating new pictures with each turn. This is mirrored in the unique⁶ lives of each individual whose lived reality becomes altered across time and space by different systems of power relations, competing societal and individual interests, and contextual diversity. To this end, the importance of multidimensional analyses in gender, race and class scholarship was becoming more evident and theoreticians delved deeper.

Common themes in gender, race and class scholarship

Conceptual frameworks for understanding race, class and gender (Weber 1998), interlocking oppressions and intersectionality (Collins 1995; Creese and Stasiulis 1996; Khayatt 1994), multiracial feminism (Baca Zinn and Dill 1996), and integrative anti-racism (George and Ramkissoon 1998) are not grand theories. They are models intended to orient the academic, researcher, scholar or policy analyst to consider the many variables at play in every social situation (Collins 1990). To claim to have the single, unitary, all-encompassing theory would defeat the fundamental principle of the multidimensional argument. Because an individual's lived reality is unique from others' experiences, the claimant would have a difficult time convincing scholars of a uniform plurality. In the words of Jhappan (1996), "...theories which pretend to [have] universalistic application must be discarded in favour of more complex, layered analyses which account for the

⁶ It should be noted that while every individual is entirely unique, there are some macro level experiences that are similar for groups of people, and it is these grounds upon which social policy and programming can and must be explored. Micro level experiences are important factors; however, it would be impossible to ever effect far-reaching social policy that is in the best interests of all people at the level of individualism.

multifaceted intersections of race, gender, class, and other variables” (22). The purpose of these types of layered analyses is to explore what it is to be, for example, a man, a woman; a husband, a wife; an employee, an employer in a particular situation at a particular time as a result of the simultaneous interactions of class, race, and gender (George and Ramkissoon 1998). Weber (1998) has identified five themes common to race, class, gender and sexuality scholarship that describe the way that each are conceptualized as systems of oppression.

The first theme identified by Weber is that race, class and gender and other variables are all *contextual*. Although they persist throughout history, each is subject to change both temporally and spatially - none are static and fixed. With societal transformation come new definitions, interpretations, and understandings. This concept of interpretive transformation and shifting contextual meanings is well illustrated by the term “Indian”. “Indian” was not a distinct classification until the arrival of Western Europeans and the creation of a government which considered “Indians” as a single group (Mawhiney 1994). Prior to this, one could not be an Indian rather only an Iroquois, Ojibway or Cree - identity was linked to a tribe, not to race (Svensson 1979). In 1869 the *Act for the Gradual Enfranchisement of the Indians* was passed by the British Government which shifted the definition of “Indian” from “a cultural concept that was self-defined to a legal one imposed by the government” (Mawhiney 1994, 24).

In 1876, the *Indian Act* was passed in Canada. This was at a time when the goal of defining “Indian” was to civilize, through assimilation, those considered “Indian” into Euro-Western ways. As such, by defining “Indian” as “any male person of Indian blood reputed to belong to a particular band; any child of such person; and any women who is or was lawfully married to such a person,” a dominant/subordinate relationship between the State and “Indian” peoples was ostensibly legitimized (Mawhiney 1994, 27). Between 1876 and 1926 the *Act* was amended 25 times. Many of the changes further limited the definition of “Indian” in order, in part, to reflect shifts in intent from assimilation to segregation (Mawhiney 1994). The current *Act* gives three identifiers for Canada’s first inhabitants: Indian, Métis and Inuit. While the terms Métis and Inuit are routinely employed, the umbrella term, First Nations Peoples, is the term employed by the people themselves and is a more appropriate term than Indian because it is more respectful of their history. It must be remembered, however, that while the majority of “Indians” continue to link their identities to their tribe, they are epistemologically dependent on Western imported terms “in order to participate in the Euro-Canadian political and social system” (West 1995, 279).

The above is an attempt to illustrate that shifts in context alter the meaning of a word, even if the term remains the same. A similar example could be developed for the terms woman and mother, which have undergone great transformations over the years to reflect changing views with respect to the female person in Western culture. On another level, situations can be misunderstood if they are being viewed through the lens of another

culture (i.e., different context). For example, researchers often conduct studies in societies other than their own. Their research is grounded in their own perceptions of reality and, therefore, the set of facts that surround a particular situation, such as the roles of males and females in the study society, are evaluated from that dominant outlook. As such, presumptions are made about how certain things ought to be. In this regard, Foster (1993) suggests that much of the research on Hidatsa and Crow women is imperfect because the lens through which these women were studied was from the dominant western standpoint. Foreign assumptions about social, economic and female-male relations informed the analyses and the traditional role of these women was disregarded (Bernat 1995). It is important, therefore, to appreciate that gender, race and class must be understood within a specific historical and global context, and accept that there are no definitions that can be applied universally.

The second theme identified by Weber is that the terms gender, class and race are *socially constructed*, not fixed biological traits, “whose meaning develops out of group struggles over socially valued resources” (Weber 1998, 18), with the ‘dominant’ group ascribing value-laden labels to the ‘subordinate’ group. An individual falls into a number of categories including, male or female, White or Black (or non-White) which translates into social ranking, such as worthy or unworthy, good or bad (Lorber 1994). This theme complements the former. Refer back to the changing definition of “Indian.” While the definition was amended over time to reflect changing ideologies of the ‘dominant’ group,

the term "Indian" throughout has had a stigmatizing effect based in Euro-Western domination through assimilation and segregation.

Weber (1998) further illustrates this point with the following example:

Middle-class mothers who stay at home to care for their children are often viewed by the dominant culture as "good mothers," yet poor women who do the same are viewed as lazy or "welfare queens." "How can women's reproductive capacities prescribe their roles as mothers when we have different expectations for mothers of different classes...?" (19).

Similar valuations are made on the basis of whether a mother is a gestational mother, a surrogate mother or a social mother. Herein lies the problem of socially constructed definitions: by permitting individuals only one constant identifying feature (i.e., wealthy or poor), we ignore a subject's background, heritage, and cultural or group values generated as a result of interaction within a stratified social order (Bernat 1995).

The third theme identified by Weber expands on the previous two points. That is, writers of gender, race and class studies emphasize the dominant-subordinate *systems of power relationships* that exist in society. One group exercises control over another in a struggle to gain a significant portion of valued resources - wealth, access to health care, education, etc. - in society. Because there is a focus on the relational nature of these power relationships, scholars of race, class and gender studies focus on privilege as well as oppression. One cannot exist without the other. There cannot be an esteemed race unless there are races which are singled out as less desirable; there cannot be control unless there is restriction; and there cannot be ownership without others' labour (Weber 1998).

For example, Western Europeans employed several terms to establish their 'superiority' over First Nations peoples. The terms 'indigenous,' 'native' and 'aboriginal' are Western terms "which allow us to position, in our minds, groups of people in a specific area" (West 1995, 285). Furthermore, these terms are often paired with the words "savage" and "primitive," which tend to evoke images of uncivilized barbarians.⁷ These terms are simply unifying misnomers imposed upon First Nations people by external forces whose aim it was to simultaneously separate, categorize, and assimilate this perceived subordinate class (Wood 1994).

The fourth theme identified by Weber is that in order to understand the interconnecting influences in people's lives, a purely quantified analyses is wholly inadequate; research in both the *social structural (macro)* and *social psychological (micro)* are necessary. Granted, statistics and censii are useful in situating an individual or group in the larger societal scheme, but they do not provide a clear picture of the personal biographies of the subjects, or cultural traditions of specific communities, or where they sit exactly in the 'matrix of domination' (Weber 1998). Patricia Collins (1995) draws a more germane distinction between macro and micro oppressions:

First, the notion of interlocking oppressions refers to the macro level connections linking systems of oppression such as race, class and gender. This is the model describing the social structures that create social positions. Second, the notion of intersectionality describes micro level processes - namely, how each individual and group occupies a social

⁷ However, it is interesting to note that these words in their original form are far from pejorative. "Rather...the words 'primitive' (from the Latin *primitivus* meaning 'in the first place') and 'savage' (from the Latin *siluaticus* meaning 'living in the woods') simply refer to first experiences with nature" (Diamond 1974, 124-125).

position within interlocking structures of oppression described by the metaphor of intersectionality. Together they shape oppression (492).

Weber (1998) illustrates this through the following example. "Today's working woman" is most often conceived of as a Caucasian, married professional who has attained a position of power in the labour force. But, this is more the exception than the rule and is not consistent with the lived reality of most women. Nevertheless, this is the image portrayed in the media - an image which represents the dominant race and class. Women are consistently measured up to this distorted image of perfection by society, and when women "come to believe that their failure to measure up is a result of personal limitations - a lack of talent, desire or effort - they internalize the oppression" (Weber 1998, 24). In order to resist internalizing the oppression, women must be aware of "the dominant belief system [and the] nature of and the structural barriers to attaining the 'ideal'" (Weber 1998, 24). In this way they can develop positive self-images and self-definition.

The fifth theme identified by Weber is that race, class and gender operate concurrently in every social situation, that is, they are *simultaneously expressed*. Therefore, it is important to avoid an 'additive' approach when conducting research (i.e., using one structure as fundamental and adding the other factors and stirring...) (Collins 1995). We must also acknowledge that "almost all of us occupy both dominant and subordinate positions and experience" (Weber 1998, 24), and that "intersecting forms of domination produce *both* oppression *and* opportunity" (Baca Zinn and Dill 1996, 327). Different situations will sometimes work to one's advantage, other times they can be

oppressive; therefore, says Weber (1998), no one individual or group can legitimately “deny their privilege or claim absolute victim status” (29).

Weber’s goal in identifying these themes is to raise questions and issues to consider in analyses, stating that “the most important tools we bring to the analytical process are the questions we ask” (1998, 27). Her questioning conceptual framework is now being woven into course curricula and academics are increasingly posing research questions that address the nature of the interconnectedness and interactions of race, gender and class structures. It is important that scholarship on race, class and gender be approached with a sensitivity to the zeitgeist of the era as well as its historical foundations, and a consciousness of the geographic setting, past and present, of each social group to be studied. This holistic approach will inform the analysis and perhaps provide a greater understanding of global diversity as well as outline prospective trends/patterns for future conduct. Moreover, as systems of inequality are socially constructed, not naturally occurring, change is not unattainable. At its most simplistic level, it is a matter of putting ourselves in a person’s shoes who is ‘different’ from us and trying to understand life from their perspective. Not only should we have the opportunity to try to understand the lives of others at the macro, societal level, but also at the micro, psychological level. Therefore, it is important that researchers dialogue with those they are writing about in order to gain an appreciation for the way that the power of the dominant class causes them to act and react, and more importantly, to understand how this power has affected their pasts and how it might affect their futures.

To this end, it is logical to conclude that:

...intersectional forms of analysis, which consider how different systems of stratification and their associated discourses and ideologies intersect, provide a more complex sense of the multidimensional nature of power, privilege and inequality in contemporary societies (Creese and Stasiulis 1996, 8).

This tool for diversity analysis will be used to briefly explore justice paradigms through the ages and will be applied more diligently to the “new” restorative justice. If Canadians are to be successful in developing and implementing a healing approach to criminal justice in Canada, proponents must conduct extensive analyses, including an intersectional analysis. The shift will only reach the significance of a paradigm shift if it is accompanied by suitable mechanisms to ensure equality in its application. A paradigm shift would require a fundamental rethinking of criminal justice as it is today; an intersectional analysis would be an essential element of that rethinking. Intersectional analysis is relatively new to the criminal justice forum, but it must be used to avoid merely tinkering with the system in the development and implementation of a restorative vision of justice. The following chapter will demonstrate how the quest for social dominance by an élite few resulted in less community-based dispute resolution and increased state imposed punishment. Power-relationships in the form of church and state control were instituted through feudal dominion, assimilation practices and patriarchal ideologies, all of which impacted Canadian criminal justice through the years.

CHAPTER 3: “CHANGING LENSES”¹: PAST JUSTICE AS FUTURE JUSTICE?

Actions which violate the social and/or moral values of a particular community, society or country are responded to through various mechanisms ranging from requiring the offender to acknowledge the harm done and taking responsibility to capital punishment. These mechanisms shift over time to respond to changing social structures. Over the centuries, wrongdoings have been regarded as “violation[s] of *people and their relationships*” (Zehr 1995, 210), as transgressions against the *moral order*, as crimes against the *King’s peace*, and as crimes that are committed against *society*² (our current belief). These transformations are the result of struggles for authority and for control over non-conformers, not necessarily any failure of preceding mechanisms of dispute resolution. In this regard, past patterns of thinking about justice can provide contemporary policy makers with an informative basis from which to consider the future of Canadian justice.

Until several hundred years ago in western Europe, wrongdoings were seen as involving the violation of an individual, not of a state imposed law. In time, the individual victim came to be replaced by the state and the response to conflict changed. Before long, variations of the adversarial (retributive) paradigm of criminal justice came to “monopolize our vision” (Zehr 1990, 97). Contemporary adversarial methods and punitive tools, such as incarceration, are ingrained in the Canadian psyche (Griffiths and Verdun-Jones 1989)

¹ This is the title of one of the most well known books on restorative justice: *Changing Lenses* by Howard Zehr (1995).

² While really a variation on “King’s Peace”, crimes against society and paying one’s debt to society are the contemporary phrases employed.

and are in direct contrast to the fundamentally positive restorative techniques of several ancient legal codes where retributive sanctions were used only in instances of last resort. Because the criminal justice system in Canada has, for centuries, been overwhelmingly discussed in terms of degrees of harm, academics, practitioners, policy makers, and the public alike accept the penal yardstick - that is where punishment is measured by the amount of pain³ inflicted upon an 'offender'. To this end, justice is often calculated in terms of time served within the confines of a prison or penitentiary, not by victim satisfaction, the righting of relationships or the re-establishment of balance within a community.

As will be seen, however, public perceptions and attitudes about justice change over time. In Canada, in the late 1990s, there has been a distinct movement towards a more restorative system of justice. At the same time, we maintain a strong foot-hold in the adversarial (retributive) system. As a result, the merits of these two 'universes' are being debated. To ground this discussion it is helpful to look to our past practices.

We have been fighting the same battle for centuries. We tinker with the system but are never any more satisfied with what is developed. The change from a system where wrongdoing was regarded as the violation of people and their relationships to a system where the King's Peace was violated marked the move to a consolidated authority base

³ Christie (1981) describes pain as: "punishment as administered by the penal law system is the conscious inflicting of pain...It is intended within penal institutions that those at the receiving end shall get something that makes them unhappy, something that hurts" (16).

where the few could have power. This resulted in less community-based dispute resolution and increased state imposed punishment. Power-relationships in the form of church and state control were instituted through feudal dominion, assimilation practices and patriarchal ideologies. We have continued to build on this pattern of thinking about the criminal justice system and it is in this vein that “we have constructed elaborate institutions...[but]...because the pattern itself is wrong....it is no wonder they fail” (Van Ness and Heetderks Strong 1997, 13).

The purpose of this chapter, therefore, is to provide a cursory overview of the evolution of penal ideology and the tinkering to the justice system as it began in the years Before Common Era (B.C.E.)⁴, through legal, religious, social and intellectual revolutions in continental western Europe and England, concluding with Canadian correctional philosophy in the twentieth century.

Ancient codes and practices: Violations of people and their relationships

Restitutive and restorative practices were established in the ancient legal codes of several Middle Eastern and Western civilizations. The Codes of Hammurabi (c. 1700 B.C.E.) and Lipit-Ishtar (1875 B.C.E.) both ordered restitution for property offences. Certain Middle Eastern codes including, the Sumerian Code of UrNammu (c. 2050 B.C.E.) and the Code of Eshnunna (c. 1700 B.C.E.) even prescribed restitution for

⁴ B.C.E. and C.E. replace B.C. and A.D., respectively. B.C.E. stands for “Before Common Era” and C.E. stands for “Common Era” (Van Ness and Heetderks Strong 1997).

offences which were of a violent nature. In the West, the Roman Law of the Twelve Tables (449 B.C.E.) provided an ascending scale of restitution requiring "thieves to pay double restitution unless the property was found in their houses; in that case, they paid triple damages; for resisting the search of their houses, they paid quadruple restitution" (Van Ness and Heetderks Strong 1997, 8). Restitution for wrongdoings ranging from theft to homicide was also included in the Lex Salica (c. 496 C.E.), the earliest existing set of Germanic tribal laws. Likewise, meticulously detailed restitution schedules, demarcating the values of each finger and its nail, can be found in the English Laws of Ethelbert (c. 600 C.E.). Each of these legal codes demonstrates a common desire, spanning both time and space, to restore community⁵ peace through meaningful and personal restitution between the offender and their family and the victim and their family (Van Ness and Heetderks Strong 1997).

During this time, crime was viewed interpersonally - a conflict between two individuals - not as a conflict between one individual and the state. Resolution of the dispute was to be carried out in the community between the victim (or a representative of the victim in the case of murder) and the offender. Such traditional community oriented practices maintained a focus on the harm done, not on the breach of law or of morality. Crime was understood to create responsibilities whose fulfillment was generally accomplished through either feud, negotiation, restitution, or reconciliation. In most

⁵ Community in this sense means the disputants. Community peace, therefore, implies the suppression of the illegal behaviour and the balancing of relations between the disputants so that life may proceed normally (Hoebel 1973).

cases, restitution was the favoured instrument, with church and community leaders acting as intermediaries, helping to negotiate and subsequently record the arrived-at settlement. Failing successful negotiation, the disputants could choose private vengeance or legal recourse⁶; however, these were generally used as actions of last resort, either to ensure retribution or to coerce mediated settlement (Hoebel 1973; Zehr 1990). Restitution contributed to the maintenance of balance within the typically small communities. The public recognition of the victim's injury and the offender's acknowledgment of responsibility tended to be seen as of greater importance than the need for the infliction of pain on the offender. Although retributive options did exist, restitution was a more frequently employed method of reparation.

The influence of religion cannot be discounted in the formation of these codes. In studies of law and religion, the etymology of legal terminology is often traced back to the language of the Old Testament. The desire for the reparation of harm to both victim and

⁶ The contemporary equivalent to private vengeance would likely be what is termed vigilantism, and similar to personal vigilantism today, private vengeance was rarely practiced. Zehr (1990) discusses two reasons for its infrequent use: first, it would often result in reciprocal violence which could lead to more long-lasting effects such as death which would work to the detriment of the community; and second, the existence of sanctuaries provided safe places for accused individuals to retreat for a length of time to provide a 'cooling-off' period for all parties involved. Similarly, legal recourse was seldom exercised except when there existed a clear need to encourage negotiated settlements - it was rarely used to rule on questions of law or custom. This reluctance to engage the judicial system was fivefold: negotiated settlements were preferred; the notion of a central authority over disputes caused concern among local communities; financial costs of prosecution were prohibitive; victims faced prosecution if they failed to argue their cases successfully; and court imposed fines went to the court's coffers not to the victim, thus providing little recompense to the victim save moral vindication. In addition, the courts, which were accusatorial in nature, did not have jurisdiction to initiate legal cases unless the Crown itself was the victim, nor did they have authority to continue a case without an accuser. The role of the court was to arbitrate, not to pass judgement, and in doing so, the court "was to equalize power relationships insofar as it was possible, and generally to regulate the conflict" (Zehr 1990, 105).

community can also be seen in the Old Testament. For example, the Hebrew word, *shalom*, is frequently used to describe “the ideal in which the community should function. This term signifies completeness, fulfillment, wholeness - the existence of right relationships between individuals, the community, and God” (Carr 1980, 931). Rather than describing the way of life then, it outlines a goal to strive for. Harmful actions were considered to break *shalom*; therefore, there was an obligation to right the wronged relationships in order to “restore wholeness.” The words *shillum*, meaning restitution, and *shillem*, meaning retribution⁷/recompense, are both derived from the same root as *shalom* and they too imply the restoration of right relationships and community peace (Van Ness 1993).

However, power-struggles within and by the Church in a bid to gain increased control over the affairs of the Church as well as the state set the stage for the movement away from the restoration of relationships to the development and implementation of the first modern legal system: Canon law.

The religious revolution: Transgressions against the moral order

During the medieval Christian centuries (c. 1250 C.E.), the church witnessed two parallel challenges, one internal and the other external. The internal challenge began when several decentralized powers began to assert their hegemonic inclinations, and discipline

⁷ Retribution in this sense does not mean revenge but rather satisfaction or vindication. Revenge is derived from an entirely different root (Van Ness and Heetderks Strong 1997).

within the Church gave way under the weight of these struggles for authority. As a result, the medieval years came to be characterized by efforts of the papacy to reinforce its influence within the Church. This struggle for authority did not stop there, however. The Roman Catholic Church, in an effort to maintain a preponderance of power over state affairs, also challenged the emerging secular system of law which was becoming increasingly centralized and therefore powerful (Zehr 1990). Both religious and secular powers went in pursuit of new propositions and tools which would strengthen their authority: "law from the late Roman Empire provided just such an instrument, first for the church, then for the state" (Zehr 1990, 111).

Roman law⁸ was the keystone for the development of canon law (c. 1300 C.E.) and in time, secular powers throughout western continental Europe and England also embraced its rudimentary principles (Zehr 1990). Roman law, according to Berman (1975, 1983) introduced a significantly different pattern of thinking from the conventional wisdom of the day. Custom was replaced by formal, rational, codified law and its swift adoption led to the creation of new rules and increased power and legitimacy for central authorities. This new law was quickly ushered in and its universality provided extensive opportunities for evaluation and widespread dissemination throughout much of western Europe (i.e., through the universities). As a result, the principles of Roman law were embraced by the church and subsequently modified to give birth to the first modern legal

⁸ Justinian I, the Byzantine emperor from 527-565 C.E., developed Justinian's Code which formed the basis of Roman law. It was lost after the sixth century and rediscovered in the late eleventh century to form the basis of canon law (Random House Webster's College Dictionary 1996, 734).

system: canon law. The Church now had a convincing instrument with which to secure control both within and without the Church. Not only could it attempt to repair problems of heresy and clerical abuse within the church (i.e., the Inquisition (1350-1400 C.E.)), it could build solid structures to ward off absolute rule by the state.

This powerful tool caused a dramatic shift in both the underlying principles of justice and for whom justice was sought. Moral transgressions became paramount and the moral order, not the individual, was perceived as the principal victim. The notions of free will and personal responsibility were formalized, thus laying the basis for punishment. Imprisonment came to be used to punish “wayward monastics” and in time, led to the widespread use of imprisonment. The principles of canon law were ultimately adopted and adapted by secular authorities; “[j]ustice became a matter of applying rules, establishing guilt, and fixing penalties... [and the] ...focus shifted from settlements between participants to punishment by established authorities” (Zehr 1990, 112-113). The days of forgiveness and reconciliation had all but disappeared, with the greatest impact occurring in western continental Europe. Concurrently, England developed its own system of state controlled justice, and while, according to Zehr (1990), the totality of the impact of canon law in England is unclear, the linkages between canon law and state law cannot be disputed.

The western legal revolution: Crimes against the King's peace

For common law jurisdictions, the aftermath of the Norman invasion (1066 C.E.) of Britain saw a powerful move from the restorative understanding of crime and local systems of dispute resolution. The Monarchy asserted royal jurisdiction over the Church in secular matters, including criminal justice. The *Leges Henrici Primi*, written early in the twelfth century, established that such offences as robbery, arson, murder, theft, and other violent crimes, were henceforth to be crimes against the King's peace, not the primary victim (Umbreit 1996; Van Ness and Heetderks Strong 1997). This began a "legal revolution" (Berman 1975, 1983) which ultimately achieved majority acceptance in the twentieth century, some 800 years later.

This revolution sparked the creation, development and implementation of a system of criminal justice unlike any system of law seen in medieval Europe. Law came to be written down, certain acts were labelled criminal warranting specific sanctions, cases began to be handled by legal professionals, politicians and judiciaries were recognized as performing specific roles, and established courts became the fora for the determination of justice (Zehr 1990).

As custom came to be replaced with formal codified principles, it became common place, even logical, for the state to assume a greater role in certain types of cases. In Europe, prosecutors for the state began to emerge and the courts favoured an inquisitorial role over their previous accusatorial role and "[t]he court was responsible for bringing

charges, compiling facts, and determining the outcomes - often in secret” (Zehr 1990, 108). In England, while the court system remained accusatorial in its framework, justices of the peace came to be called upon more frequently to act as representatives of the state thereby encroaching upon the traditional role of the citizen. In addition, punishment began to be increasingly used over settlement and “[f]ines-which went to the state’s coffers - began to replace restitution to victims” (Zehr 1990, 109). Torture became commonplace, as both a penalty and as a truth-seeking tool, and the victim of crime was redefined, with the state now assuming the legal role of victim (Zehr 1990).

By the onset of the seventeenth century, the cornerstones of a system of state justice had been laid in Europe. France, Germany and England had each established legal codes, all of which expanded the role of the state. Wrongdoings had become ‘crimes’ and physical and economic punishments had become commonplace. The Protestant Reformation may have also encouraged the use of punishment by its reliance on the state as “God’s agent in administering punishment” (Zehr 1990, 116). However, it cannot be said that state justice had a monopoly at this time; “the eighteenth-century Enlightenment and French Revolution were required before state justice could make such a radical claim” (Zehr 1990, 116).

The social and intellectual revolution: The Enlightenment onward

By the eighteenth century, the old aristocracy had claimed natural superiority and justice became increasingly arbitrary and abusive. Inappropriate sentences and torture

were commonplace responses applied to anyone who threatened the authority of the aristocracy: offenders, suspects and political prisoners alike. As a result, 'justice' was being called into question by the new middle class of the Industrial Revolution. Philosophers of this era, known as the Enlightenment, were very vocal in their concerns about and recommendations for the future of the criminal justice system. They sought to transform the system from one based on religion and tradition, to one based on rationality and human rights (Carrigan 1991; Williams and McShane 1988).

The prevailing philosophy of the Classical School of thought, as it came to be called, espoused human dignity as illustrated through, *inter alia*, free-will choices and rationality as well as morality and responsibility. Beccaria's famous dissertation, *On Crime and Punishment* (1764), illustrates the popular sentiment of the time and is often heralded as the cornerstone of modern penal law (Williams and McShane 1988). His concern was with the social structure of the day, the way in which law is conceived of and developed, and how these laws affected the rights of the citizenry. Beccaria and his contemporaries attacked the existing system, favouring one which focused on the breach of law, not the act, civil rights, due process, rules of evidence and testimony, determinate sentencing and deterrence. Moreover, they were of the mind that in order for the law to be equally applied to all, it should be enforced by the state; thus creating a 'social contract' between the state and its citizens. The nature of this social contract was such that to deviate from it necessitated punishment. Beccaria felt that the pain inflicted upon the offender should be proportionate to the harm caused by the act in order to offset the

pleasure derived from the act. This was necessary in order to deter both the offender as well as the general population from breaking the social contract again or at all. Not only did this entrench the rights of the new middle class⁹, but it permitted further justification for the existence of government (Carrigan 1991; Foucault 1977; Garland 1990; Williams and McShane 1988; Zehr 1990).

After the Enlightenment came the French Revolution which began in 1789. Led by the treatise of Jean Jacques Rousseau (liberty, equality and fraternity) (Carrigan 1991), it too sought to transform both the law and the state into rational entities which were more egalitarian. The state was gaining increased legitimacy and new tools of social control, through criminal codes, were being developed and used. Moreover, because the state was protecting the rights of the citizenry under the social contract, it was considered reasonable that the state assume the roles of both victim and vindicator. The proverbial phraseology, an eye for an eye¹⁰, became a seemingly logical and accepted philosophy; where pain was felt, punishment should be given, or more appropriately, when a law was broken, consequences were deserved (i.e., the offender's actions warrant his/her "just desserts") (Zehr 1990). While a literal interpretation was not followed and mitigating factors were considered, pain was nonetheless administered in a calculable, utilitarian

⁹ The time-honored conceptions of property and ownership were undergoing change. "For example, enclosure movements, the practice of claiming sole use of and fencing of previously open lands, deprived the common people of what had been their traditional right - to use the land and its resources such as game and firewood. These changes placed stress on the poor and created a resentment that affected the agricultural and rural power base of aristocracy" (Williams and McShane 1998, 12-13). In addition, secularism caused the restructuring of institutions, aimed at the benefit of the new classes (14).

¹⁰ While many consider this phraseology a call to retribution, Zehr (1985) tells us that it was really meant as a limit to bring peace through compensation aimed at maintaining the power balance between groups.

fashion in order that the hedonistic motives for the crime were, theoretically at least, outweighed by the sanction. However, as the government continued to receive considerable public support, there was less of a need to continue to promote its legitimacy through brutal public displays of authority (i.e., the scaffold). This worked to the benefit of the state because the public was becoming increasingly 'humanitarian' and no longer wanted to witness what Foucault phrased the "spectacle of the scaffold." They preferred that such punishments be carried out behind closed doors. As for deterrence, the media came to be the preferred medium of social control, detailing the sanctions the citizenry could anticipate should they contravene the social contract. These events marked the move from the scaffold to the prison (Foucault 1977).

By the end of the eighteenth century a complete shift in the ways of constructing and understanding reality, in terms of criminal justice, had occurred. Four major transformations characterized this shift in the justice paradigm: private/community justice became public justice; custom was replaced with formal, written law; vengeance came to be practiced through state defined punishment; and individual harms became collective harms against both the state and the moral order (Zehr 1990). But it was not long after the Enlightenment and the French Revolution that criticisms of the new justice system began to emerge. Inadequacies were highlighted and modifications were introduced to the now well established European and English systems. Meanwhile, the transition to state control from traditionally community-run correctional services was still in its infancy in Canada.

The cementing of a penal ideology in Canada

The historical evolution of corrections in Canada saw punishment (pre-institution) as the prominent model from 1700-1830, punishment and penitence from 1830-1938, rehabilitation from 1938-1970, reintegration from 1970-1978 and reparation from 1978-mid-1990s and restoration from mid-1990s-present. According to Ekstedt and Griffiths (1988), despite the dearth of literature on the history of Canadian corrections, it has been concluded that the correctional history of Canada is unique from that of other countries¹¹, including those of like political-economies, such as the United States and England. The influence of American corrections on the evolution of a Canadian penal philosophy, and specifically the impetus for the erection of the first penitentiary in Canada in 1835, is disputed among historians. Accounts of early sanctions do, however, acknowledge the influence of English punishment and practice, particularly the use of corporal punishment over prison sentences.

Early punishments in both Upper and Lower Canada reflected the practices established in English criminal law. The sanctions were harsh, including capital punishment, severe corporal punishment, transportation, banishment, fines and whipping. As the organization of the state evolved into one which was more advanced (mid-1700s), the entrenching of penal philosophy and practice in Canada became visible. In the latter half of the century, perceptions of crime and its punishment began to change. Influenced

¹¹ The uniqueness of Canada's correctional history is a result of Canada's geography, political history, government structure, economy, religion and philosophical movements.

largely by the Enlightenment thinkers, criticism of England's "Bloody Code" intensified and reformers in Canada argued for more moderate and rational sentences which were swift, certain and consistent and which were aimed at the reformation of the offender. In response, Upper Canada passed the *Act of 1800* which reduced the severity of punishment for several offences. The severe penalties available for some offences were rarely employed (Baehre 1977).¹² The goal was no longer strictly to punish, but to deter, both specifically and generally (Carrigan 1991; Ekstedt and Griffiths 1998). Public shaming was considered an appropriate method of deterrence. As such, the pillory was used extensively in Lower Canada until 1842 and the stocks were used in Upper Canada until 1872 and banishment used until 1902 (Carrigan 1991).

In the latter half of the eighteenth century, some provinces also had workhouses in which the "dangerous class" was housed. This included prostitutes, gamblers, difficult children and servants, the aged, the poor and "the insane" (Carrigan 1991; Coles 1979). Confinement was not generally used for punishment, rather the workhouses were used chiefly to employ the 'dregs' of society and instill in them the Protestant work ethic or

¹² This is not dissimilar to contemporary practice. Roberts and Birkenmayer (1997) performed a comprehensive analysis of sentencing data and found that while "nation-wide surveys over the past 20 years have repeatedly shown that most Canadians believe that sentences should be more severe, particularly for violent offenders ... neither the general public nor criminal justice professionals have any accurate idea of sentencing patterns ... [therefore it is not widely known that] although each offence in the *Criminal Code* carries a maximum penalty, these are almost never imposed. There are two principle reasons for this. First, the current maxima are for the most part too high, and second, they fail to reflect contemporary perceptions of the relative seriousness of the crimes for which they can be imposed ... Accordingly, the maximum penalty structure does not serve as a guide for judges as to the relative seriousness of different crimes. They may well encourage false expectations among members of the public" (460 and 474-475).

alternatively to detain individuals awaiting trial or sentencing. It was not until 1810 that legislation established that gaols were henceforth to act as 'houses of correction'. However, these local gaols received harsh criticism from the citizenry, who cited that they were inadequate and did not protect the community. It was "[t]his perception, in conjunction with the changes which occurred in attitudes toward crime and punishment in Canada, [that] set the stage for the era of the penitentiary" (Ekstedt and Griffiths 1998, 23).

The penitentiary was heralded as a "moral architecture" (Taylor 1979) embodying all which was good and removing all that was bad. The penitentiary was seen as a utopian society of sorts which aimed to "create an environment which would remove the convict as far as possible from the evil influences that had led him to crime" (Beattie 1977, 22-23). The purpose for the development of Canada's first penitentiary in 1835, however, is disputed among historians (Carrigan 1991; Ekstedt and Griffiths 1988). But the common thread between liberal-pluralist and radical-elitist interpretations of Canadian corrections is public sentiment toward crime and punishment¹³ as well as the political, economic and

¹³ It is interesting to note that the arguments of a century and a half ago are not all that dissimilar to the arguments of today. For example, Bellomo (1972), has suggested that the construction of the Kingston penitentiary was due to an increase in crime combined with overcrowding in the local gaols. Conversely, Beattie (1977) argues that at the time of the construction of Kingston, crime was not widespread but that it was the *perception* of crime as a serious problem, as a result of significant media coverage, that caused moral panic and, therefore, the desire for more strict responses in order to save society from all that was evil. In fact, Canada was not immune from the experiences of its mother country nor her neighbour to the south as:

[a]ccounts of trials appeared regularly in the newspapers and the contemporary debates in England and the U.S. on the central questions of penal philosophy and practice - capital punishment, for example, and the virtues of imprisonment - were followed and echoed in the Canadian press (Beattie 1977, 1-2).

philosophic ideologies of the early nineteenth century.

In secondary accounts of the unfolding of Canadian corrections, liberal-pluralists link the development of the penitentiary to the social and political changes in Canada during the early to mid-1800s when society became increasingly stratified due to a rise in mercantilism and ownership, and a new class structure became clearly delineated (Chunn 1981). Historians such as Baehre (1977), Beattie (1977) and Taylor (1979) argue that the focus of Canadian correctional philosophy was on the growth of the “dangerous class” who posed a clear threat to the social and moral fabric of Canadian society. Conversely, radical-elitists, such as Gosselin (1982) and Smandych and Verdun Jones (1982), to varying degrees, postulate that the penitentiary was an instrument of bourgeois control; that the system of corrections in Canada, including the military, was a complicated web of coercion; and that the penitentiary became popular with government officials for reasons of cost-effectiveness and economic benefit¹⁴.

At this time the goals of imprisonment were punishment and penitence. The prison was constructed and operated following the Auburn model, which extolled the benefits of congregate but silent work, in comparison to the separate and silent Pennsylvania model common in many European countries (Baehre 1977). The prison lacked classification and segregation; therefore, offenders of all degrees, women, men, children and “the insane” were confined together. The penal philosophy of this period presumed that strict

¹⁴ We will see this critique again in the concerns raised about restorative justice.

discipline and religious meditation were the only ways to reform a prisoner (Shoom 1966). It was thought that a life of “labor, silence and strict obedience...[was] a more effective deterrent than a sentence in one of the local gaols...” (Ekstedt and Griffiths 1988). However impressive initial optimism was with the penitentiary, it was short-lived. Only five years after its construction, Kingston penitentiary was facing criticisms which would last well into the next century.

At the heart of the early critiques was concern with the adequacy of the facilities and with the effectiveness of the institution to treat the prisoners in a humanitarian manner and to carry out the reformation of the offenders given the high rate of recidivism¹⁵ (Baehre 1977). While the reformation of offenders was recognized as the responsibility of the state at this time, it had never been effectively carried out and it was close to 100 years later (c. 1925-1935) that the shift to a rehabilitation model was becoming apparent (Ekstedt and Griffiths 1988). This was followed in 1938 with the Archambault Commission’s 88 recommendations for the improvement of the penitentiary system in Canada. These recommendations included: the reorganization of the entire penitentiary system on a national level under the control of the federal government; the renewal of transformation and rehabilitation as the goals of incarceration (as opposed to the temporary protection of society); the establishment of new approaches to probation and parole; and improvement in services for the prisoners. Following World War II, there

¹⁵ Carrigan (1991) indicates that a majority of the critical study done in the early 1800s on the treatment of criminals was directed at the male population; female criminals “were almost an afterthought” (449).

was a shift to the treatment of offenders which was accomplished through improved classification methods and the implementation of programs such as Alcoholics Anonymous within the institutions (Carrigan 1991). The use of the medical model had a significant impact on Canadian corrections and the 1950s and 1960s saw a rise in the involvement of behavioural science professionals in correctional programming. By the late 1960s, however, a “disenchantment with the rehabilitative approach and its perceived failure to change the attitudes and behaviours of criminal offenders...led many correctional observers to call for a return to the philosophy of punishment” (Griffiths, Klein and Verdun-Jones 1980, 239).

In 1969, *the Canadian Committee on Corrections* (Ouimet Report) suggested that treatment of offenders might be more effective in the community rather than the institutional setting. This was largely influenced by the 1960s ‘rights’ movement (i.e., state assistance for the poor, equality for women and racial minorities, prisoner’s rights, etc.) (Carrigan 1991; Ekstedt and Griffiths 1988). The notion that prison was not a place of rehabilitation received additional support from the Law Reform Commission of Canada in 1975 and from the MacGuigan Subcommittee in 1977. This marked a move away from the rehabilitation/treatment oriented (medical model) ideology of corrections in Canada to one of reintegration (Ekstedt and Griffiths 1988).

In the 1970s, probation, parole and diversion programs became the favoured methods of administering criminal justice in Canada. Whether the shift in thinking to

reintegration/decarceration is the result of humanitarian ideals or cost-savings is unclear. It is clear though that this model assumed that prison would only be used as a measure of last resort (Ekstedt and Griffiths 1988) (although we know that this is not necessarily what has happened in practice). In the late 1970s, there was a move to focus on the consequences of crime, not just the crime itself. This meant that victims were starting to become a focus of the justice system and it was thought that the offender should make up for the harm done through compensation, restitution, community service or victim service (Ekstedt and Griffiths 1988).

The *Corrections and Conditional Release Act (CCRA)* (1992) drives corrections in Canada today. The principle of the CCRA is to “contribute to the maintenance of a just, peaceful and safe society by: a) carrying out sentencing imposed by courts...; and b) assisting in the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in the penitentiary and in the community” (Sec. 3). Clearly, there is still a drive to rehabilitate and reintegrate, but the rights and needs of the offender, and to a certain extent the victim, have been incorporated. In addition, while the protection of society remains paramount, the Correctional Service of Canada is mandated to use the least restrictive measures possible and requires “that correctional policies, programs, and practices respect gender, ethnic, cultural and linguistic rights and be responsive to the special needs of women and aboriginal peoples...” (Sec. 4). In this regard, there has been a significant movement in the design and philosophy of women’s prisons as well as prisons for First Nations peoples.

These are long awaited improvements to the draconian white, male focused system of justice in Canada. In spite of these changes, however, the Canadian Justice System remains the subject of considerable criticism, particularly as it relates to the lack of diversity analysis and consideration of women, Aboriginal peoples, people of colour and poor people.

Some criticisms of the dominant criminal justice paradigm in Canada

As with Canadian law more generally,¹⁶ Canadian criminal law has traditionally been “drafted, enforced and primarily reformed by men, for men” (Canadian Association of Elizabeth Fry Societies (CAEFS) 1988, 20) which has resulted in the absence of gender-based criminal justice policy. Even research conducted on the sentencing practices of judges has failed to address gender as an issue (Mohr 1990). In addition, many police officers do not have an adequate awareness of the dynamics of power and control to address incidents involving violence against women and children, and according to Oglov¹⁷ (1997) the existing policy dealing with violence against women in relationships is inconsistently applied. In addition, many victims do not report their abuse/community problems to the police. In the view of Rupert Ross, “this is one of the most striking and

¹⁶ Over the ages, Canadian laws have been formulated to assimilate, alienate and subjugate women, First Nations peoples and underprivileged people, to cite a few. This is most evident in the assemblage of different laws for ‘different’ people. For example, laws have prohibited women from voting and from sitting on juries, have denied women custody of their children, and have robbed ‘Indian’ women of their ‘Indian’ status. Men have been denied social assistance targeted for mothers and have been subject to criminal charges of sexual assault which women have not (Dawson 1993). The *Indian Act* places restrictions on First Nations people. For the élite, there are tax benefits and exceptions for which those with lower incomes are not eligible. The written law is not the most pervasive form of discrimination. Law in practice is equally problematic.

¹⁷ Oglov is writing on behalf of the B.C./Yukon Society of Transition Houses.

unacknowledged failures of the Western justice system: a great many victims, especially Aboriginal victims, choose not to use it” (1996, 201-202). There is a high rate of acquittal because victims do not want to testify as they are fearful of the adversarial process – the courtroom is not a safe place for the victim to address his/her victimization (Berzins 1997a; Ross 1996).

Criminal law has also been drafted, enforced and reformed by *white* men for *white* men. Recent research has found that over-policing of Aboriginal and African-American groups/communities is resulting in increased detection of crime amongst these groups and this is followed by a higher incidence of arrest controls, especially for minor petty offences (e.g., drinking violations) (Brodeur 1991; Roberts and Doob 1996). The Aboriginal Justice Inquiry of Manitoba (1991) and the Cawsey Task Force (1991) Reports submit that over-policing is one of the most significant sources of systemic racism against Aboriginal Peoples in Canada (Royal Commission on Aboriginal Peoples (RCAP) 1996). At the same time, under-policing is also a problem in remote Inuit communities especially with regard to being protected from more serious offences, such as violent assaults against persons (particularly within the family) (Brodeur 1991; Pauktuutit 1995). These problems are not exclusive to Canadian police services, reports out of New Zealand with regard to the Maori peoples, and Britain with regard to Black peoples have identified that “there is too much policing against the community and not enough policing that answers the needs of the community” (Ronalds, Champman and Kitchener 1983).

Research has also shown that judges are reluctant to permit pre-trial release or set bail for these groups, and more recently have been hesitant to give sentences of two years less a day, to Aboriginal peoples in particular, because this could result in a conditional sentence. This shows an implicit desire to keep these groups under the strictest of controls (Roberts and Doob 1996). Other research has found that this may not be overt discrimination but may be due in part to the criteria judges take into consideration when sentencing, which on the surface appear to be neutral but “can conceal an extremely strong bias in the sentencing process” (Quigley 1994, 46). These include socio-economic factors such as fixed address, employment, and level of education or involvement in educational programs, or strong links with the community (RCAP 1996).

There is a significant overrepresentation of Aboriginal peoples as offenders in the criminal justice system. This was first documented in 1967 and again in 1974. Reports and inquiries since 1974 have confirmed Aboriginal overrepresentation and have “demonstrated that the problem is getting worse, not better” (RCAP 1996, 29). Aboriginal peoples are imprisoned in disproportionate numbers and they are more likely than non-Aboriginal peoples to be “denied bail, spend more time in pre-trial detention and spend less time with their lawyers, and, if convicted, are more likely to be incarcerated” (Aboriginal Justice Inquiry of Manitoba 1991, 1). It has been suggested that “...imprisonment remains the best-funded labour market program for the unemployed and indigenous people” (Braithwaite 1996, 5).

While our current adversarial system of justice exemplifies the traditional Anglo-Saxon need for justice through punishment, it must be understood that this is not the tradition common to other groups within the multi-cultural mosaic called Canada. For example, Aboriginal and Inuit peoples of Canada's north have employed a justice system based upon "the restoration of order and reparation to the injured party" (Griffiths and Patenaude 1990, 145). The Assembly of First Nations, in its brief to the Royal Commission on Aboriginal Peoples (1996), explained this holistic approach:

Even though First Nations do not adhere to a single world view or moral code, there are nonetheless commonalities in the approach of all First Nations to justice issues. A justice system from the perspective of First Nations is more than a set of rules or institutions to regulate individual conduct or to prescribe procedures to achieve in the abstract. 'Justice' refers instead to an aspect of the natural order in which everyone and everything stands in relation to each other...Justice must be a felt experience, not merely a thought. It must, therefore, be an internal experience, not an intrusive state of order, imposed from the outside, and separate from one's experience of reality...Justice is not a concept easily separable from other concepts that make up the ways by which First Nations have come to know themselves and the world. Nor is it static. It evolves as a First Nation grows and adapts to changing circumstances, so that harmony and balance are maintained (3).

To illustrate the different systems of justice in Aboriginal communities, the following are summaries of a few of the submissions made by First Nations to the Royal Commission on Aboriginal Peoples (1996). On Canada's west coast the potlatch (Feast) is the support for the Gitksan and Wet'suwet'en tribal systems. Political, legal, economic, social, spiritual, ceremonial and educational dimensions are all part of the preparation and holding of the Feast. The Feast can also operate as a dispute resolution process by ordering peaceful relationships within and between Houses and with other neighboring

people. Some communities of the Ojibwa Nation in northern Ontario solve disputes through an intermediary who is a person known by both the disputants. Calling the disputants to account for their actions permits more emphasis on “modifying future behaviour than on penalizing wrong-doers for past misdeeds” (21). Similarly, Métis dispute resolution involved shaming the offender in front of the community for the wrongdoing committed. According to the Federation of Métis Settlements, shaming resulted in very few repeat offenders. The traditional justice system of the Inuit of Nunavik involved the “provision of practical advice and persuasive exhortation for correct and proper behaviour...In more serious cases, offenders were ostracized or banished from the clan or group...[and in many instances]...the people who suffered this indignity often became useful members of society, albeit with another clan in another group” (22). In the same way, Inuit peoples traditionally valued non-interference. This meant that if a dispute did not affect the entire community’s survival, it would be dealt with informally between the immediate disputants. In fact, a natural ‘cushion’ against formal criminal justice processing may exist when relatives reside as neighbours in small, remote communities. This is because there is a greater likelihood of the community responding to the offender rather than the offence (which is key in restorative justice) (LaPrairie 1997).

Each of these systems of justice, however, have been largely displaced by the Western-Anglo version of justice. From the 1920s, it was apparent that Canadians were culturally ignorant of Aboriginal justice systems. This limited our understanding of distinctive Aboriginal world views and prevented the inclusion of Aboriginal justice

systems within the Canadian federation (RCAP 1996). That is until recently. Over the past decade, academics and policy makers have been exploring Aboriginal systems of justice with a view to incorporating their holistic methods to restore relationships rather than rely largely on a penal yardstick. This has been part of the discussions and the development of restorative justice. But the grafting of Aboriginal insights and practices onto the Western criminal justice system may not be possible. “[T]he justice processes brought to life at Hollow Water and in New Zealand’s Family Group Conference flow out of a wholly-different justice paradigm than the one that has captured the western system. It is not just their greater emphasis on healing that sets them apart - it is a very different perception of what human beings are, how they work, why they lose their way, and how they may be brought back on track again that makes traditional processes unique” (Ross 1995, 435).

Conclusion

The evolution of correctional policy and practice in western Europe and then in Canada began by discarding community-based justice for state-run justice. But the move from harms against people to harms against the state was less a reflection on the effectiveness of community-based justice than a desire of the few to have a preponderance of power over state affairs, including criminal justice. By removing the focus of wrongdoing from the participants, wrongdoers, sufferers of wrong and their communities were all disempowered from healing, and calls for harsher sentences have ensued. The powers that be have since introduced a multitude of reforms to the way criminal justice is

done in Canada, albeit based largely on exaggerated perceptions of crime and patriarchal traditions. As a result, a satisfactory model of justice is yet to be found. Restorative justice may be the model of justice Canadians have been waiting for; a return to what once was long ago.

Community-based justice has a longer history than adversarial (retributive) justice and was a more commonly utilized approach, forming the basis of justice in First Nations and Inuit communities as well as western Europe. At the end of the twentieth century, it is being utilized extensively in some communities in Australia, Africa and Japan (Van Ness and Heetderks Strong 1997). Recent reforms to the criminal justice system in Canada have focused increasingly on a return to the community-based model of justice (i.e., probation, parole, community-service, etc.), except that what has not yet changed is our thinking about crime. Canadians are still largely of the view that crime is an act against the state rather than against an individual and their relationships. It is a focus on the righting of the injured, of relationships and of communities, and not “paying one’s debt to society” that is necessary for criminal justice in Canada to more than tinker with the system.

If history teaches us nothing else, it does illustrate that we must remember that constant readjustments to correctional policy and practice are required. Just as Canadians consider the *Charter of Rights and Freedoms* as a living tree which can change over time when new insights are made, so too should criminal justice policy. Indeed, we may have

even reached a time in our criminal justice policy where the planting of a new tree is required. Readjustments and shifts in philosophy do not occur independently of their environment; rather, they are the combination of several competing variables, creating a system with:

... a complex conceptual base [which] ... reflects the interrelationships of such concepts as the nature of man, society, culture, values, economics and politics. The response to crime is formulated on the basis of these interrelationships ... Punishment; deterrence, both individual and general; retribution; the protection of society; incapacitation; humanitarianism; reform; treatment and rehabilitation have all been evident in the way society has dealt with offenders against the law or social order (Skinner, Dreidger and Grainger 1981, 171).

But the complex conceptual base must also reflect the interdependence of gender, race and class. It must not be focused only on preserving the authority of the state. Power-relationships imposed by the predominately rich male elite have been created and have been perpetuated through the years and are still seen in the laws and practices today. To this we tie the notion that the major cause of dissatisfaction with the criminal justice system is the way in which we think about criminal justice, and we are left with an impossible task. Unless we start to build a system from a new foundation and introduce intersectional analysis, the Canadian justice system will continue to go in circles. Given that Canadian corrections is moving to a restorative vision of justice, we have a tremendous opportunity to address this problem. But are we?

In defining and developing restorative justice it would be prudent to keep the following illustration in mind:

The modern prison, born just over two centuries ago as an alternative to corporal and capital punishment, contains an important lesson for those of us who advocate social change. The Quakers and others who championed the first modern prisons did so with the best of motives but, in reality, created a monster. This history warns us that no matter how lofty our motives and theories, alternatives [sic] processes intended as reforms may be co-opted and diverted from their original purposes (Zehr 1995, 207).

CHAPTER 4: RESTORATIVE JUSTICE: “CRIME IS MORE THAN LAWBREAKING”¹

Restorative justice seeks to expose the ineffectiveness of the current adversarial approach while at the same time “stumbling” towards a restorative ideal (Zehr 1989). This philosophy is aimed at incorporating the victim, the community, the offender, and in most definitions, the government, in all stages of the justice process. Some argue that restorative justice is a replacement for our existing criminal justice system (Zehr and Umbreit 1982; Weitekamp 1991). Others suggest that it is not necessarily a physical replacement but rather an alternative route (i.e., in a dual-track system) in which all the parties are involved to quell fears, alleviate confusion/conflict, and try to heal, to the best of all abilities, everyone touched by the crime - a more people- and problem-oriented approach (Van Ness 1993; Van Ness and Heetderks Strong 1997; Zehr 1990).

According to Van Ness and Heetderks Strong (1997), the term “restorative justice” was likely coined by Albert Eglash in 1977. Eglash outlined what he perceived as three forms of criminal justice: (1) retributive justice grounded in punishment; (2) distributive justice grounded in the therapeutic treatment of offenders; and (3) restorative justice grounded in restitution². The former two focus on a certain outcome for the

¹ This is the phrase employed by Van Ness (1997) to encourage a new understanding of crime: “crime is far more than lawbreaking; it also causes injuries to victims, communities and even to offenders” (n.p.).

² Llewellyn and Howse raise an interesting and important point about the linking of restorative justice and restitution. They say that while restitution is often an important part of restorative justice practices, not all restitution is restorative (similarities can also be drawn with Alternative Dispute Resolution practices). Restitution demands the valuation of those material items that were taken/destroyed, but cannot address the immaterial damage suffered by the victim. Restitution also aims to return the victim to the status quo ante, while restorative justice aims to re-establish the relationships between the victim, offender and community involved to an ideal state of social equality. For example, the return of land to First Nations

offender; however, unlike in the third model, the offender is rarely involved in coming to the ultimate conclusion. Both permit scant participation of either the victim or the offender in the process. The latter focuses on the harm done and requires active participation of both the victim and the offender in the reparation and rehabilitation process (Van Ness and Heetderks Strong 1997). Two decades later, the term “restorative justice” is increasingly being employed in criminal justice circles.

Several authors have now written about this thing we call “restorative justice”, but like any new philosophy, there are several versions, each one attempting in its own right to establish the most plausible model accompanied by the necessary physics to make it work. The most cited work to date is that of Howard Zehr, a writer and consultant on criminal justice issues. Howard Zehr may well be considered the “father” of restorative justice. He uses a camera analogy to prompt us to view the criminal justice system through two different lenses: one retributive and the other restorative. These are outlined below.

<u>Current Adversarial System</u>	<u>Restorative System</u>
1) Crime violates the state and its laws; justice focuses on	1) Crime violates people and relationships; justice focuses on
2) establishing blame (guilt) and	2) identifying needs and obligations and
3) administering pain (punishment); justice is sought through	3) making things right; justice is sought through
4) a conflict between adversaries in which	4) dialogue and mutual agreement in which
5) offender is pitted against state,	5) victims and offenders are given central roles; and justice is judged by the extent to which

peoples does not equate restoration; there is a need to also address the destruction of culture through assimilation and massive abuses of human rights experienced by First Nations peoples throughout history (1999).

6) rules and intentions outweigh outcomes, and	6) responsibilities are assumed and needs are met; and
7) one side wins while the other loses.	7) healing (of individuals and relationships) is encouraged.

Zehr 1995, 209-210

The comparison above is widely recognized as the first attempt to delineate a new model of justice that rivals the traditional adversarial (retributive) model. Wesley Cragg describes restorative justice as a process of conflict resolution. He proposes that if “the basic function of the law is to reduce recourse to violence in the resolution of disputes, then... a basic task of law enforcement is to resolve conflicts with a minimum use of force” (1992, 178). Similarly, Tony Marshall discusses restorative justice as a “process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future” (1997, n.p.). In an amalgam of the above, Martin Wright (1991) describes restorative justice as “not a new form of punishment, rehabilitation, or reducing pressure on the system, but a different principle, repairing (as far as possible) or making up for the damage and hurt caused by the crime. This can be done for the victim, if there is one, and if the victim wishes it; otherwise it can be done for the community” (41). Later, he suggests that while the offender is to be held accountable and required to make reparation, further harm should not be imposed on the offender. He adds, “[a]ttention would be given not only to the outcome [reparation], but also to evolving a process [mediation] that respected the feelings and humanity of both the victim and the offender” (112).

In responding to the question, “What is restorative justice?,” Van Ness and

Heetderks Strong (1997) explain that:

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

It views criminal acts more comprehensively [than we do now] ... it involves more parties ... it measures success differently, [and] ... it recognizes the importance of community involvement and initiative in responding to and reducing crime... (42).

Other terms are also used in discussions of restorative justice. Canadian penal abolitionist Ruth Morris discusses three approaches to crime³: (1) retributive which begins with the crime and is based on punishment, deterrence, protection and rehabilitation; (2) restorative which begins with the crime and is based on the restoration of wholeness to the victim and responsibility of the offender; and (3) transformative which begins with the causes of crime and is based on treating crime as an opportunity to find healing for both the victim and the offender (1995). She suggests that retributive processes sever communities, families and lives; restorative processes try to heal victims, and make offenders take responsibility, sending both promptly back to their respective communities; while only transformative practices strengthen existing communities and build new

³ In comparison to Eglash's three approaches to crime mentioned earlier, Ruth Morris goes a step further to suggest that the very foundation of justice needs to be revisited and that simply involving victims, offenders and communities is not sufficient. Morris suggests, and rightly so, that social structures of Canadian society must be changed so that structural injustices are not perpetuated as they will be under the current restorative justice movement. See *Penal abolition: The practical choice* (1995) by Ruth Morris for a more detailed discussion.

communities in an effort to “bridge the social barriers which are destroying us” (1997, n.p.). She also implores us to understand that “the world was [not] a benign place before this terrible criminal ruptured the social peace with her or his dreadful crime” (1995, 72).

Lorraine Berzins, Co-ordinator of Research and Analysis for the [Canadian] Church Council on Justice and Corrections (CCJC), prefers the phrase, “Satisfying Justice”, which, she argues, is not about going “soft on crime or criminals”; nor is it about “decriminalization or diversion or informal processes that are intended to ignore or neglect crime and do nothing about harm or injustice in the community”; nor is it about trivial modifications to the system. It is about recovering from the destructiveness of the current criminal justice system which she analogizes to a war, citing our preoccupation with courtroom “battles” resulting from our “war on crime” (Berzins 1997a). John Braithwaite, an Australian criminologist, talks about “reintegrative shaming”, highlighting the need to shame the act, not the actor in a manner which is not stigmatizing (1989, 1996). Still, others speak of “relational justice” (Van Ness and Heetderks Strong 1997), “healing justice” and “community justice” (CCJC 1995). While each of these terms has similar principles, it is the term “restorative justice” which has sparked the greatest interest and the definition propelled by Van Ness and Heetderks Strong, cited above, is the most commonly employed across Canada today.

Although restorative justice principles do not prescribe the exact techniques that should be followed in putting them into practice, Van Ness does provide a directional

model, the physics if you will, by analogizing restorative programming to the construction of a house. He suggests that, like a house, programs based on a restorative paradigm must have 5 parts: four corner posts and a roof. This paradigm would be built on a foundation of principles⁴ cemented in the understanding that “crime is far more than lawbreaking”. The first corner post is *encounter* in which the sufferer of wrong, the wrongdoer and the affected communities meet. The second is *reparation* in which the wrongdoer makes amends with the sufferer of wrong, the affected communities and him/herself. The third corner post is *reintegration* in which the re-entry of the person - either the sufferer of wrong or the wrongdoer - “into community life as a whole, contributing, productive person” (Van Ness 1997, n.p.). The fourth is *participation* in which both the wrongdoer and the sufferer of wrong are voluntary and meaningful contributors to the outcome. The final element is the roof which would involve the *transformation* of people and their relationships and could “shed light on issues of structural or systemic injustice” (1997, n.p.).

Despite the appeal of the underlying principles of restorative justice, the approach described as restorative justice has been subjected to considerable debate and criticism.

⁴ These are:

Foundational principle 1: If crime is more than lawbreaking, then justice requires that we work to heal victims, offenders and communities who have been injured by crime.

Foundational principle 2: If crime is more than lawbreaking, then victims, offenders and communities should have opportunities for active involvement in the justice process as early and as fully as possible.

Foundational principle 3: If crime is more than lawbreaking, then we must rethink the relative roles and responsibilities of the government and the community. In broad terms, let me suggest that in promoting justice, government is responsible for preserving a justice order and the community for establishing a just peace (Van Ness 1997, n.p.).

Ruth Morris, for example, has indicated that restorative justice cannot restore the past, it reinforces structural injustices and it is too easily co-opted by retributive justice (1997). Similarly, Carole LaPrairie, an independent justice consultant and contractor, has stated that not unlike diversion in the 1960/70s and Alternative Dispute Resolution (ADR) in the 1980s, restorative justice is simply the 90s “rush to find a new way of justice”. She posits that advocates of restorative justice have created a “false dichotomy” between restorative justice and retributive justice, as much of restorative justice is in retributive justice (i.e., diversion and ADR) (1999). Others are concerned that this “philosophical framework will be interpreted through marginalizing behaviour and legislation” (B.C. Association of Specialized Victim Assistance and Counselling Programs (BCASVACP) 1997, 1). A further concern is that restorative justice has the potential to be soft on crime, that it will not reflect the seriousness of the crime, and that because it is driven by the faith community the only way to heal is to forgive (Canadian Resource Centre for Victims of Crime 1997, personal communication). Likewise, the notion of “reintegrative shaming” for members of different racial backgrounds must also be considered. The use of reintegrative shaming with a white Canadian may have one effect, but for a Canadian of Korean or South East Asian heritage, this may have quite another (Goundry 1997). To this end, many groups have asked, what steps, if any, have been taken to guarantee that racism, sexism, and classism, which form part of the daily lives of members of marginalized groups, will not merely be superimposed onto the community that is responsible for delivering restorative justice and, therefore, maintaining or increasing the level of inequality that already exists in the current system? (Goundry 1997).

It is important for these reasons, among others, to consider the whole of restorative justice including its principles and practices. They must be assessed with a view to determining how restorative justice responds to multiply oppressed people in practice, not just in theory. Multiple dimensions of inequality must be considered when building a new foundation for justice.

Restorative justice, therefore, should be subject to diversity-based/intersectional analyses. This would include, but is not limited to, the exploration of a particular practice's impact on gender, race and class variables. Such analyses should address the interactions between these variables as well as the multidimensionality of power. This will permit the identification of those individuals who may be "doubly or triply disadvantaged by structures, practices and norms of society" (Etherington, et al. 1991, xi) and thereby effect positive change to avoid causing an injustice to those identified. One would necessarily have to examine the relationship between gender, race and class to determine the extent of differences in access to justice. In so doing, "a mixture of expertise, diversity and representativeness, in terms of cultural background, academic discipline, region of Canada and gender" would be required (Etherington, et al. 1991, xi). For the purposes of determining whether Canadians involved in the restorative justice movement are taking gender, race and class seriously (i.e., is this a consciousness on the part of the people in the movement?) and how, if at all, these considerations are influencing the restorative justice movement, the views of several Canadians were sought, and the findings are described in the following pages.

The principles of restorative justice

Crime is more than law breaking. It is also injury to others. This notion is underscored in the literature on restorative justice. Restorative justice aims to reframe the way in which we understand and respond to crime by emphasizing the violation of people and their relationships, not the conflict between the offender and the state (Zehr 1995). It aims to examine the nature and extent of the harm experienced in every set of circumstances. In order to understand the restorative philosophy, we need to expand our current self-organizing system respecting criminal justice in three fundamental ways. First, we must acknowledge that crime hurts people, not the state institution - offenders should not be paying a debt to society, but rather to those he/she harmed - and the state should not be "stealing" the conflict from the victim and the offender leaving it to lawyers to battle out (Christie 1977). It may be this discontinuity in the retributive paradigm that fuels some critics' discontent with the current adversarial system, at least in part. Second, we must acknowledge that victims are not the only ones harmed by crime - offenders and communities are also harmed. They are not all victims in the same sense, however. The distinction relates to the source and relative position in relation to the harm. An individual becomes a victim/sufferer of wrong when they are directly harmed by the actions of another. The offender/wrongdoer is (in part) harmed by their own actions, while communities are harmed indirectly (Llewellyn and Howse 1999). Each of these parties unwittingly became part of a relationship established as a result of the wrongdoing. Accordingly, each must also be empowered to participate fully in advancing a solution, so that the harm to each party is addressed (Llewellyn and Howse 1999). Communities also

need to be empowered to assist in the reintegration of sufferers of wrong and wrongdoers, which will provide greater assurances that relationships will be restored. Third, we must employ less stigmatizing language. One of the tenets of restorative justice is that victims and offenders are not to be shamed, it is the act not the actor that is the object of shame. If we are to successfully restore relationships, we must first remove barriers to reintegration, which starts with changing the language used. Current criminal justice language, however, is fraught with bias. Use of the term victim is one which equality-seeking organizations have long challenged - simplistically, women who have been sexually assaulted or otherwise abused are not considered victims but rather are recognized as survivors. Similarly, societal prejudice towards offenders is significant. The term offender conjures up thoughts that are upsetting and therefore negatively influenced. Llewellyn and Howse (1999) employ the less stigmatizing terms: sufferer of wrong and wrongdoer. They substitute crime with wrongdoing. These terms will be employed from here on in to emphasize the need to change the language in order to change the vision.

As the philosophy of restorative justice calls for a different approach, it must be accompanied by a different set of questions and mechanisms. This chapter will go on to describe the impetus for reverting back to a more participatory model of justice, outline the principles of restorative justice as well as some of the questions against which success can be measured, and summarize critiques advanced by some stakeholders and Canadians working in the field.

The sufferer of wrong in restorative justice

One of the greatest criticisms voiced by victims of the current adversarial system of justice is the instituted detachment forced upon them in the aftermath of their (as opposed to the state's) conflict. The current justice system systematically distances the victim from the offence, the trial, and the offender, except in the capacity as a witness for the prosecution. The current system is concerned with the contravention of a law, not the individuals involved. This results in a tendency to undervalue and/or disregard the needs of victims (Cragg 1992). All too frequently, victims are not even kept apprised of the status of "their" case and many never learn of its ultimate resolution. The victim is not given the opportunity to confront their wrongdoer and ask questions to assure him/herself of the motives behind the crime, to tell his/her own story, and to allay fears of a repeat attack (Cragg 1992; de Villiers⁵ 1997; Derkson⁶ 1997; Van Ness and Heetderks Strong 1997; Wright 1991; Zehr 1990). Moreover, victims are often re-victimized through the trauma of trial - the courtroom and court process are not safe places for the victim to address their victimization (Berzins 1997a; Cragg 1992; Ross 1996, 202; Wright 1991).

Victims indicate that, in order to heal, they want to be informed, consulted and involved. They want to play a "defined role" in the system and they want support for themselves as the sufferers of wrong clearly delineated at both the front and back end of

⁵ Priscilla de Villiers is the mother of a murdered child and founder and President of Canadians Against Violence Everywhere Advocating its Termination (CAVEAT).

⁶ Wilma Derkson is the mother of a teenage daughter who was kidnapped and murdered in Manitoba. She is also an active facilitator of victim's groups.

the justice process (de Villiers 1997). They want to reclaim a balance in their lives; to re-establish a sense of meaning (Oglov 1997; Zehr 1990). Victims need to be heard and affirmed. They also need the harm done to them to be acknowledged by both the offender and their communities. In the absence of any meaningful involvement, the victim might be motivated to call for tougher penalties in an attempt to achieve some sense of satisfaction. But without involvement in the outcome, the victim is not empowered to be restored. The hurt experienced by a living person is not addressed through the concept of “paying back” society. Tougher penalties might provide symbolic measures of healing, but they do not offer anything in the way of genuine healing.

Restorative justice understands that sufferers of wrong need to regain control in their lives and to have their harms acknowledged. To accomplish this, restorative justice seeks to empower sufferers of wrong by involving them more meaningfully in the reparation of harm - sufferers of wrong will be informed, consulted, affirmed, heard and involved. In this way, justice will be “lived, not simply done by others and reported” (Zehr 1990, 203). The first step in the regaining of control for the sufferer of wrong is to hear the wrongdoer, or a proxy, accept responsibility and admit accountability for their actions. The second step is to be reintegrated back into their communities. When victimized, an individual will struggle with a loss of their personal ‘locus of control’. Sufferers of wrong may feel helpless, guilty, ashamed, angry, fearful, and/or vulnerable. It will be difficult to regain a sense of balance or confidence, indeed if it was even there to begin with. They will seek out friends, family, and colleagues for support in their

endeavour to adapt to their new situation. Unfortunately, sufferers of wrong are frequently re-victimized by these same people; a phenomenon psychologists have termed “secondary victimization” (Wright 1991; Zehr 1990). By trying to distance themselves from the sufferer of wrong, in an effort to avoid feeling harmed themselves, friends and family may end up blaming the sufferer of wrong and alienating them from their communities (Cragg 1992; Scott 1997; Wright 1991; Van Ness 1997; Zehr 1990). Restorative justice calls upon the sufferer of wrong’s communities as a support system for the primary sufferer of wrong. In this way, the sufferer of wrong will be supported and reintegrated into their communities and at the same time, communities, as indirect sufferers of wrong, will have an opportunity to deal with their sense of vulnerability by participating in the solution. For empowerment to occur, all parties to the relationship must have an opportunity to be heard. Meaningful involvement provides the sufferer of wrong with a meaningful measure of control over the proceedings, thus making healing easier.

Restorative justice aims to be flexible enough to respond to the divergent needs of sufferers of wrong through, for example, compensation, restitution, information, empowerment or experience of justice, alone or in combination (Van Ness 1997; Zehr 1990). To evaluate whether restorative processes are helping sufferers of wrong, Zehr suggests that we measure them against the “Restorative Justice Yardstick,” in which he asks whether the injustice was adequately acknowledged and whether:

- there are sufficient opportunities for sufferers of wrong to tell their truth to relevant listeners;
- sufferers of wrong are receiving needed compensation or restitution;
- sufferers of wrong are receiving adequate information about the event, the offender, and the process;
- sufferers of wrong have a voice in the process; and
- sufferers of wrong are sufficiently protected against further violation (1990)?

Despite the clear delineation by restorative justice proponents of the inadequacies of the current system of justice to address the needs of sufferers of wrong, the language dealing with sufferers of wrong is somewhat vague in restorative justice literature. While restorative justice must remain flexible enough to attend to the needs of all the players, we must be careful to avoid radical inconsistencies in its interpretation and application (Berzins 1997b). Because there is no common language or understanding of the philosophy of restorative justice, the notion of restorative justice may have one meaning for some and another for others - for urban Canadian culture in contrast with age old native culture, for example. Moreover, in the absence of clear meanings, there exists the very distinct possibility that the "language of restorative justice could be co-opted without any deliberate intent to embrace the radically different philosophy on which it is based" (Heidebrecht 1997, 55). Inconsistency in interpretation can lead to misapplication thereby increasing the danger that the primary sufferer of wrong will continue to be neglected in restorative initiatives. As mentioned earlier, restorative justice considers many people to be sufferers of wrong but priority must be given to the primary sufferer of wrong who has sustained direct harm as a result of the wrongdoer's actions (Llewellyn and Howse 1999). At the same time, the wrongdoer must also be part of the solution - more than as a resident of the state.

Wrongdoer as party to the solution in restorative justice

In the current adversarial system punishment follows crime. In many instances, but not all, prison is the method of punishment and the number of years is the measurement - that is, more numbers equals more "justice" and sentences that deviate from this norm often require a greater level of justification (Berzins 1996; Zehr 1990). Illustrative of this is the fact that of all countries in the world, Canada has the seventh highest incarceration rate per 100,000 people (CCJC 1996). The current line of reasoning presumes that punishment is the culmination of a process that will assist offenders in taking responsibility, being remorseful, and paying their debt to society; however, there are several flaws with this line of reasoning. Not the least of which is that by segregating offenders/accused from the crime and by requiring them to establish a defence, offenders are taught to maintain an egocentric focus which distances them from genuine accountability. By isolating them from the repercussions their actions have had on the recipient of their actions, wrongdoers are not afforded the opportunity to empathize with that person and appreciate that their actions have harmed a real person. By placing them in a system in which almost all decisions are made for them, offenders become de-individuated, dependent, and helpless to effect change, for themselves and for others⁷. Moreover, by "paying their debt to society," rather than the victim, the offender can

⁷ I would suggest that we see this affect most strongly in cases of the wrongly convicted. For example, Canadian, David Milgaard, was convicted in 1969 of a murder he did not commit. Despite his innocence and the strong support of his family, particularly his mother, David, when eventually released after having served 23 years in prison, had some significant adjustment problems to overcome and was arrested on a few different occasions for different crimes. David was an innocent man going in, but came out unable to make responsible decisions all the time -- this had nothing to do with his guilty mind, because he did not have one. Now there will be people who say, he is the exception, but the reality is, we base most of our tough laws on the Clifford Olsen's and Paul Bernardo's of the world, who too, are the exception.

depersonalize his/her crime. In short, the current system alienates offenders from the crime and its resolution.

To address these criticisms, proponents of restorative justice argue that wrongdoers should be equally part of the solution as is the sufferer of wrong. Wrongdoers must be empowered to take responsibility and be accountable for their actions. In this regard, wrongdoers should have a right to make amends to the sufferer of wrong, not the state, except in such instances where the state is the sufferer of wrong (i.e., treason) (Wright 1991). Injuries to wrongdoers, whether they contribute to or result from crime, must also be addressed (Van Ness and Heetderks Strong 1997). Past injustices to the wrongdoer, such as child abuse, are not excuses for rejecting accountability, but knowledge of them permits a more personalized healing plan to be undertaken. However, “[a]cknowledging wrongdoers’ injuries is not an uncomplicated task. The injuries wrongdoers suffer are often a complex mix of those which pre-date and contribute to the wrongdoing and those resulting from the wrongdoing. It is not often possible to decipher one from the other, nor is it desirable from a restorative justice perspective to do so” (Llewellyn and Howse 1999, 25). In order for a wrongdoer to be empowered, their injuries may also need to be addressed. Not doing so may prevent the wrongdoer from taking responsibility and being accountable for their actions (Llewellyn and Howse 1999). Van Ness and Heetderks Strong (1997) outline three opportunities when the negative contributing circumstances of the offender can be addressed:

- when their circumstances would prohibit them from fulfilling their obligations (i.e., inability to pay restitution due to unemployment);
- when their circumstances go hand-in-hand with the offence (i.e., stole to support drug habit); and
- when victim and offender have identified circumstances that they agree should be addressed, even though they did not contribute directly to the crime nor would they prevent completion of the sentence (i.e., illiteracy) (33).

Restorative justice aims to make the conditions such that a wrongdoer has more direct involvement in the solution, and is capable of successfully completing the reparation. Providing the wrongdoer with an opportunity to understand the human consequences of his/her acts and to face up to what he/she has done and to whom he/she has done it, permits wrongdoers to voluntarily assume responsibility for their actions and is an important step on the road to healing the hurt caused by the wrongdoing (Van Ness and Heetderks Strong 1997). Wrongdoers are more likely to grow personally when provided with opportunities to make their own choices. In this way, genuine accountability can be achieved (Zehr 1990).

To evaluate whether restorative processes are reaching offenders, Zehr (1990) suggests that we measure them against the "Restorative Justice Yardstick," in which he asks whether wrongdoers are:

- encouraged to understand and take responsibility for what they have done;
- provided encouragement and opportunity to make things right;
- encouraged to change their behaviour (repentance); and
- having their own needs addressed (230)?

Restorative justice must also be prudent not to further alienate and isolate wrongdoers from the communities from which they came and which they will be part of

again in the future. A support system for the wrongdoer is as important as a support system for the sufferer of wrong, and not having ready-made communities should not be an impediment to restorative processes. In this regard, to fully comprehend restorative justice, the notion of community must also be examined.

“Community is not a place”⁸

There are varying levels of community (i.e., societal, geographical, issue-driven, social, etc.) and each “can be harmed in different ways and to different degrees by conflict and wrongdoing. Thus, it is possible for each to participate in the process of restoration in different ways. They might each play different roles according to what is required in the specific context at issue” (Llewellyn and Howse 1999, 26-27). However, most authors of restorative justice literature never really explore the question of community, leaving supporters-in-principle of restorative justice unsure as to who the potential participants in a restorative justice process may be. Not only are there several ways in which to define community, the connotations attached to this term create complexities which might prevent the adoption of one definition or the exclusion of another definition (LaPrairie 1995b). As such, it is not enough just to add the prefix ‘community’ to a word in an effort to describe who and what is involved (Cohen 1985; Harris 1989). The concept itself is expansive, and “[i]f general experience to date with “community corrections” and “community policing” offers us any lessons, a clear imperative would be to specify more

⁸ Title used by McCold and Wachtel (1997): *Community is not a place: A new look at community justice initiatives.*

carefully what we mean by “community” or “communities” and how and why it or they would be involved” (Harris 1989, 35). The question then becomes what type of community would best suit the needs of restorative justice?

First and foremost, restorative justice requires a shift in the fundamental location of social control, from the state back to the individual citizen and their communities. However, the idea of community cannot be considered solely within the confines of geographical boundaries. Even if traditional geographic communities are not germane to restorative justice, because of the lack of connection between its members, this should not preclude more critical analyses of novel approaches such as restorative justice. The fact that society, and accordingly the criminal justice system, is becoming increasingly complex requires a substantially larger frame of reference when considering matters of community justice. We should not be hesitant to re-define community or re-invent tradition to accomplish this goal (although it must be beneficial to all parties concerned) (Harris 1989; La Prairie 1995b). We need to expand our self-organizing information systems to look at community beyond being a place and more as an entity. For example, community can be any number of things: a common-interest association (Haviland 1993; Long, 1995); a community of interest/care/concern (Braithwaite 1989); the participants at regular meetings (LaPrairie 1995a), such as Alcoholics Anonymous (Peck 1987); anyone within a geographic boundary (community-policing); a sub-culture (Cohen 1985); or just a group of people in which each member “feels safe” (Peck 1987). Conceptions of community are far reaching and not conclusive. However, it is possible to identify two general themes

within these interpretations. There are two broad understandings of community - a social group who resides within a geographical boundary, and a social community with close personal ties. In terms of restorative justice, the latter appears to be the more useful. The need for close and meaningful support systems is paramount to successful healing, and this cannot be achieved in a largely anonymous community.

For the purposes of restorative justice, community cannot be defined *a priori*. It is contingent on the nature of the conflict.

The community with standing in any given conflict will be dependent upon a number of factors, including the level of harm inflicted, the relationship of the disputants, and the aggregation represented. There are many different levels of community, as there are different levels of disputes. Each offender and each victim are members of several communities such as family, friends, neighbourhood and school organizations, and churches and community organizations. Offenders are also members of a local community, a municipal subdivision, a metropolitan area, a state, and federal- and societal-level communities. Ultimately, we are all members of the human community (McCold 1995, n.p.).

While this is a broad and inclusive set of potential community characteristics, it does not inform readers what configuration of community best suits restorative justice.

McCold, while acknowledging that there are several conceptions of community, would envision a restorative justice community as involving few others than the sufferer of wrong and the wrongdoer and perhaps a few family members or friends (incident-based participation). He even argues that “[t]o live in a geographic area does not mean we are of ‘one community’ ... [i]n and of itself, community is not a place” (McCold and Watchtel 1997, 3-4). Indeed community requires its members to be inclusive, committed,

consensual, humble, interdependent and immune to “mob psychology.” In this regard, there is “no such thing as instant community under normal circumstances” (Peck 1987, 67-68). While geographical boundaries can be placed around “communities,” a community cannot be achieved without a great deal of work on the part of its members.

McCold elaborates further how he envisions community for the purposes of restorative justice:

The community with an interest could include the entire American public, since individual criminal conflicts contribute to the general fear of crime in society. [However,] if we wish to avoid “stealing the conflict” (Christie 1977), it seems prudent to consider the minimal necessary boundary of community as that *limited to parties with a direct stake (need and responsibility) in the specific conflict* (1995, n.p.) (*emphasis added*).

Similarly, Braithwaite champions a more emotional response to crime and suggests that for restorative justice to be truly effective, both wrongdoer and sufferer of wrong must have the support of people they trust and respect. Braithwaite suggests that “[c]rime is best controlled when members of the community are the primary controllers” (1989, 6). By primary controllers, Braithwaite is alluding to both the wrongdoer and the sufferer of wrong’s “community of interest” who become engaged in a process of shaming the act, not the actor (Braithwaite 1989). This may include family, friends, a favourite soccer coach, a teacher, church members, cultural/community centre members or any one whom the sufferer of wrong and wrongdoer want to have present in the circle or at the conference to act as a support. By removing the stigmatizing allegations which are common in the adversarial justice system, and by assembling reliable support groups (communities of care), the successful reintegration of the wrongdoer is much more likely

to occur (Braithwaite 1996).

To evaluate whether restorative processes are taking into account community concerns, Zehr (1990) suggests that we measure them against the “Restorative Justice Yardstick,” in which he asks whether:

- the process is sufficiently public;
- community protection is being addressed; and
- the community is represented in some way in the process (230)?

Just as a flexible definition of community can (and must) be used for restorative justice to work, a flexible application of restorative programs must be available to cater to the needs of the specific community being targeted (Ross 1996). While restorative justice is not dependent on a shared cultural understanding of justice, like the current system is, there must be assurances that those involved in a conflict can explore their different needs and ideas of healing and negotiate a mutually beneficial resolution. However, “if a ‘community’ is structurally comprised of people who are intolerant of others (if they are racist, sexist, misogynist, and homophobic, or if they are merely ignorant of the ways in which power differentials operate in a society)” (Oglov 1997, 9), how will equitable treatment for all members be promoted and ensured? Equality-seeking organizations and service providers must be involved in the development, implementation and evaluation of activities impinging on ‘community’ to ensure that the community is fairly represented and that structural power inequalities, biases and values of our culture are neither repeated nor reinforced (Oglov 1997). For example, as Berzins explains,

Some people already know they don't like a system that takes justice out of the hands of communities, but many of us don't like the unfettered forces in communities either - there are power imbalances and socio-economic inequities in communities, and communities when left on their own have a history of scapegoating the vulnerable, abusing the rights of the disadvantaged. We could be caught in a tug of war between those who want more power given to communities, and those who don't trust communities with that power (1997a).

In this light, implementing restorative justice could be a double-edged sword. While it will enable the development of restorative programs, it will also set boundaries that may end up dis-empowering restorative initiatives through an incomplete understanding of the restorative philosophy, insufficient resource allocation, unhealthy power-relationships, and discriminatory beliefs and practices within communities (Scott 1997).

The role of the state in restorative justice

In the current system, the state assumes the role of victim and vindicator. The system functions on the supposition that there are only two parties to the crime: the government and the offender. The state has a monopoly over society's response to crime (Van Ness and Heetderks Strong 1997). Abolitionists, communitarians, 'restorians', among others, have mounted strong campaigns in an attempt to reduce this stronghold by the state. In the words of eminent Norwegian criminologist, Nils Christie (1981) there is a need to work toward "so little state as we dare". Cohen (1985) mirrors this sentiment by pointing out that,

...the most obvious and incontrovertible feature of current correctional policies is that they are the creatures of the state: by state-employed personnel. It is unlikely, to say the least, that the very same interests and

forces which destroyed the traditional community - bureaucracy, professionalization, centralization, rationalization - can now be used to reverse the process (123).

This brings us back to the argument, although in a slightly different light, that tinkering with the system has not and will not work. A different way of thinking about justice is needed and a new set of rules is required. This includes the need for a shift in our conceptions of social control, to where the state would be responsible for maintaining the basic foundation of order while communities would be responsible for the maintenance of peace and harmony. Both order and peace are necessary elements of public safety and go hand in hand in a free state. Order is imposed on communities. It prescribes “external limits on behaviour and enforces those limits to minimize overt conflict and to control potentially chaotic factors” (Van Ness and Heetderks Strong 1997, 35-36). Peace, on the other hand, is the “cooperative dynamic fostered from within a community” where there is respect for the members and the interests of the community and a commitment by the community to “assume responsibility for addressing the underlying social, economic and moral factors that contribute to conflict within the community” (Van Ness and Heetderks Strong 1997, 35).

In this sense, advocates of restorative justice still feel that there is a need for prisons in exceptional cases (these are never defined), but they emphasize that imprisonment can only work in moderation and even then restorative measures can be used in the institutional setting. There is a desire for a justice that is less punitive, less stigmatizing, less humiliating, less isolating, less ego-centric and less dangerous, in terms

of, for example, the prevalence of assault and AIDS in prisons. As such, there is a humanitarian argument for the acceptance of restorative justice. In order for this to succeed, however, the state must be willing to let go of some power, and private citizens must be willing to accept some extra responsibility when it comes to the restoration of peace within their communities. This “letting-go” by the state can be achieved through such activities as increased referrals from the police to restorative initiatives, the provision of financial resources to communities for restorative initiatives (Braithwaite and Daly 1993) which will illustrate society’s denunciation of crime, or two-separate tracks of justice (i.e., one retributive and the other restorative) (Zehr 1990). Plainly, the role of government in restorative justice is not clear, except to admit that there is a role.

Given the critiques of the current system and the promotion of restorative justice by many groups working in the area of criminal justice, it makes sense that the state wants to investigate the ramifications restorative justice might have on the future of criminal justice in Canada. There are concerns, however, with how the state defines the success of restorative justice and with whom the state appoints to explore the principles and practices of restorative justice.

Many groups, including advocates of restorative justice, have voiced suspicions that the potential cost-savings associated with a non-carceral option will be the state’s motivation for restorative justice rather than the reparation of harm⁹. Although restorative

⁹ These groups/individuals include Berzins (1997b), BCASVACP (1997); Canadian Resource Centre for

justice might result in cost-savings over the longer term¹⁰, it will require additional resources at the outset. Restorative initiatives will require resources for the education and training of, for example, victim's services and specialized victim's assistance providers, police, crown and corrections personnel, not to mention research, analyses, development of screening tools for appropriate referrals to restorative justice programs and monitoring and evaluation of these initiatives. Furthermore, there is a concern that there will be an off-loading of considerable responsibilities, with no identified accountability structure, and associated expenses onto communities (CAEFS, personal communication, February 12, 1998). This fear is not without foundation. New Canadian reform measures, under the auspices of restorative justice, are not dissimilar to the mass de-institutionalization of people with mental health problems in the 1970s. This initiative too was perceived to be progressive at the time; however, "the initiative did not live up to its [sic] promise because it was not accompanied by the necessary resources to ensure that community supports existed for these people" (BCASVACP 1997, 5). The individuals who were de-institutionalized often found themselves living on the streets, committing crimes and then being incarcerated.

There are concerns about who will be involved in and consulted about restorative

Victims of Crime (1997); de Villiers (1997); Royal Canadian Mounted Police (1998); and the groups recorded by Bruce Levey Reporting Services (1997).

¹⁰ The RCMP has implied that restorative justice should, in the long run, be a more cost-effective method of resolving conflict. For example, Community Justice Forums do not require offenders [or victims] to obtain legal counsel, nor do parties to the conflict (including witnesses) need to take full days off from work to meet court commitments as the forum will take place at the most convenient time possible for all involved. In addition, court, probation and legal aid costs will not be incurred and police officers will not be on the payroll while waiting their turn to testify (RCMP, n.d.).

programs to ensure that they do not merely transfer existing systemic inequalities and power imbalances within the justice system into the hands of the community. This fear is not groundless either. While governments say they are taking into consideration the concerns of advocacy groups in restorative justice programming, many of the advocacy groups I contacted in the course of doing my research were unable to express an opinion on restorative justice as they lacked the financial and human resources necessary to devote the person-hours to proactively explore justice issues. At the same time these groups were unaware of the movement due to a lack of consultation with their organization¹¹. This lack of information among community groups exists despite the fact that the governments of British Columbia, Alberta Saskatchewan, New Brunswick and Nova Scotia have all legislated restorative justice (La Prairie 1999). The failure to consult with key equality-seeking stakeholders means that restorative justice as a paradigm cannot be achieved because the safeguards that would be necessary are not being identified and power-imbalances in many forms will continue in the “new” justice just as they occur in the current justice system.

This said, the identification of structural and systemic injustices should not be a back-end process. While evaluation of all social programs is necessary and may provide additional information that was not foreseen in the development and implementation

¹¹ Groups which fell into these categories included the Assembly of First Nations, the Native Women's Association of Canada, the Women's Action Centre Against Violence and the National Anti-Poverty Association. Other groups such as the National Capital Alliance on Race Relations, the National Council of Women and the National Association of Women and the Law were still wrestling with the idea and were not yet prepared to articulate a position.

stages, intersectional/diversity considerations should be carefully thought about at the front-end. The move to restorative justice represents a shift in thinking about the criminal justice system and if it is accompanied at the outset by the necessary diversity analyses, it could create a system which is mindful of the diversity of Canadian society and ultimately represent a shift in paradigm, and not just tinkering with the system. The following chapter will outline two restorative processes and will identify several problems with them that, in large part, could have been addressed at the outset, had the proper consultations taken place.

CHAPTER 5: BOUNDARIES OF RESTORATIVE JUSTICE: A CANADIAN FOCUS

While many of the representations made by equality-seeking organizations, victim's groups, the legal community and academics reflect the view that the philosophy of restorative justice is an admirable one, these groups are not confident that restorative justice can be realized practically. The most critical observation made about restorative justice is that its principles do not always translate into practice. This is because changes are being made on a faulty foundation, when changes should really be made to the foundation. By promoting alternative approaches on a foundation of adversariness (retribution) we are merely repackaging the medium, not changing the model. For example, practices such as mediation and sentencing circles have been used since before the principles of restorative justice were developed. Mediation, in particular, already had established guidelines that were being utilized and these guidelines do not correspond with the restorative vision. A distinction has to be made between traditional mediation and what proponents are considering restorative mediation¹. If restorative mediation is misinterpreted and applied as traditional mediation, the restorative intent will be lost. In this context, restorative mediation risks the same shortcomings of traditional mediation if the identified dimensions of inequality that are found in traditional mediation are not addressed². Likewise, sentencing circles risk perpetuating and even exacerbating existing

¹ Many proponents of restorative justice consider mediation to be restorative justice and while I will use mediation in my analysis, I do so with the following caveat: mediation lacks the involvement of community and in my opinion cannot be considered restorative justice in its true sense.

² According to Scott (1997) only four provinces have developed standards related to safety and power-imbalance issues in mediation and victim-offender programs.

power-relationships within, especially, First Nations communities. While advocates of restorative justice do not propound that restorative justice initiatives can overcome the “deep structural injustices” in society, they do emphasize that it will not make the problems worse (Braithwaite 1996). However, many groups feel that inequities will continue and could worsen if systems of power relationships and contextual and social differences are not seriously considered in the development, implementation and evaluation of restorative justice practices.

For there to be a complete shift in paradigm, we need to change the way in which we conceive of ‘crime’ and our response to it as well as ensure that the inequities in our current system are not simply transformed in a restorative system. This chapter, while not intended to be a thorough evaluation, will raise questions about the effectiveness of restorative justice to restore relationships in an equitable manner.

Restorative justice in practice

Canadian equality-seeking organizations³ have expressed concern with restorative justice on two levels. On a general level they question the notion of restorative justice as a meaningful alternative to the criminal justice system. It is these groups’ contention that alternatives to the current justice system do not, for example, address violence against

³ These include the Canadian Association of Elizabeth Fry Societies, the Ontario Coalition of Elizabeth Fry Societies, the B.C./Yukon Society of Transition Houses, the Canadian Association of Sexual Assault Centres, the Métis National Council of Women, the National Organization of Immigrant and Visible Minority Women of Canada, Pauktuutit - the Inuit Women’s Association of Canada, National Associations Active in Criminal Justice, the National Action Committee on the Status of Women, and the Ontario Coalition of Visible Minority.

women but rather serve to further deplete the meager resources of an already resource-strained equality-seeking support system. In fact, it is their belief that restorative justice, mediation, circle sentencing, alternative dispute sentencing and conditional sentencing all decriminalize violence against women (Bruce Levey Reporting Services 1997). It has been said that,

[n]one of these policies and practices stand the test of scrutiny by whether they advance equality...Restorative justice practices ignore so far if not contradict the equality seeking womens' groups...Alternate dispute resolutions are, in fact, decriminalizing violence against women and simultaneously criminalizing women who defend themselves from male violence. They [the Government] are withdrawing resources from the most economically in need and therefore in need of protection from the gender, class and race biases of the justice system. These methods are criminalizing those who cannot hire lawyers to assure what little protection has been available through due process (Lakeman 1997, 56-57).

Lakeman touches on a number of important issues here. Not only have we seen that equality-seeking organizations have less than adequate funding to look at justice issues, the issue of systemic power-imbalances and the move away from hard fought for constitutional and common-law safeguards fly in the face of any vision of equality or social justice. Without societal change reaching the root causes of crime, real justice can never be achieved (CAEFS, personal communication, February 12, 1998; Crnkovich, personal communication, February 13, 1998; National Associations Active in Criminal Justice, personal communication, December 3, 1997).

The second level of concern relates to restorative justice specifically. The concern here is that the starting point of restorative justice is flawed because we are "tending to

take what are predominately white, male and middle class mores and values, and imposing them upon other members of our community. We must be careful not to merely repackage and recreate the inequities of our current systems” (Pate 1997b, 5)⁴. By failing to carefully consider the impact that restorative justice could have on people who experience multiple dimensions of inequality, we are assuming that a state of justice previously existed for those involved in the wrongdoing (i.e., Restoring to what: poverty? abuse?) and are thereby maintaining the current level of intolerance and prejudice towards many groups within the larger Canadian community.

The potential for harm does not end there; there is a real risk that the situation could worsen. The *Canadian Charter of Rights and Freedoms* is only applicable against State regulations and practices, not against the common person who abuses, mistreats or harasses which could occur in community-run restorative justice (Crnkovich, personal communication, February 13, 1998). Safeguards to protect the accused wrongdoer and even to some extent sufferers of wrong that have been fought for in the current adversarial system may not apply to restorative justice initiatives. In addition, there are no overt due-process-type safeguards to ensure that vulnerable persons are fairly and equally represented in a restorative process, and “there are no indications as to what an equality rights analysis of these criminal justice reforms [restorative justice] might look like” (Goundry 1997, 28). Restorative justice, or at least programs under the guise of restorative justice, have been established and gender, race and class variables have not

⁴ Pate is the Executive Director of the Canadian Association of Elizabeth Fry Societies.

been seriously considered, equality-seeking organizations have not been consulted on their development or implementation⁵, and adequate resources have not been allocated to communities to effectively run these programs.

Restorative justice is not a catch-all phrase for alternatives to the adversarial system. Restorative justice is a type of alternative dispute resolution, but not all alternative dispute resolution practices are restorative. Nonetheless, proponents of restorative justice frequently lump alternative practices under the label restorative justice in an effort to either secure legitimacy for their initiatives (Llewellyn and Howse 1999) or because they have misinterpreted the philosophy of restorative justice (Berzins 1997b). Often then, restorative justice is being “interpreted through the marginalizing behaviour and legislation that has historically existed in our society” (BCASVACP 1997). The harm is further compounded in a dual-track system where there is a perception that restorative practices are “soft on crime” and that only the “less serious” wrongdoings go through restorative justice processes while the “really serious” go through the traditional adversarial system (Canadian Resource Centre for Victims of Crime 1997, personal communication, December 05, 1997). However, as will be shown below, “really serious” wrongdoings are going through restorative processes, effectively sending out the message that violence against the person, particularly women and children, is not serious.

⁵ Several equality-seeking groups I contacted were unable to comment on restorative justice for two key reasons: a lack of consultation by the government with them on the issue and a lack of resources with which to research justice-related issues.

In British Columbia, for example, the government has provided assurances that violence against women in relationship type offences (e.g., wife assault) will not form part of restorative practices, except in exceptional circumstances (whatever these are)⁶. However, a number of restorative justice initiatives do deal with violence against women. According to information provided by a senior official at the British Columbia Attorney General's office (personal communication, December 19, 1997), the RCMP-run Sparwood family group conference program takes in wife assault cases (1997). The Fraser Region Community Justice Initiatives Association likewise deals with crimes at all levels of seriousness through victim-offender mediation/reconciliation programs (Scott 1997). Memorial University of Newfoundland conducted a demonstration project called the Family Group Decision Making Project which focused on families experiencing violence (Burford and Pennell 1996).

In addition, of the seven (Saskatchewan (5), Yukon (1) and Quebec (1)) reported cases in which sentencing circles were an issue between 1992 and 1995⁷, six were crimes against a person, including one driving while impaired causing death (*R. v. Rope*), one sexual assault (*R. v. Taylor*), one robbery involving violence (*R. v. Morin*), and one assault causing bodily harm against a female family member (*R. v. Johnson*). Each of these cases

⁶ The Attorney General of B.C. also made assurances that "[n]othing in this framework is intended to, nor should be taken to rescind, modify or replace existing Ministry policies on Violence Against Women in Relationships and Hate Crime nor on forthcoming Ministry policies on Sexual Assault and Child Abuse and Neglect" (British Columbia Ministry of Attorney General 1997, 2).

⁷ These cases are the only cases that had been reported by the end of the research phase of this thesis. I recognize that these cases constitute the first few in which sentencing circles were an issue and that since this time there have been many more reported cases, many of which describe an improved circle process.

went through sentencing circles. The two cases which were denied sentencing circles involved aggravated assault. The first was denied a circle because the accused was liable for a term of imprisonment, had no community support and was determined to have an inadequate willingness to change (*R. v. Cheekinew*). The second was permitted a healing circle with the knowledge that he would be spending time in jail (*R. v. Joseyounen*).

While we hear promising statements by governments that “it is extremely important that our constitutional rights of equality are included in the discussion [on restorative justice]...especially as it relates to women, but...also...as it relates to Aboriginal people, [and] as it relates to people who are not sharing in the resources that we have in this country...” (Honourable John Nilson, Attorney General and Minister of Justice of Saskatchewan 1997, n.p.), the reality is that restorative processes or processes under the guise of restorative justice are being implemented without the involvement of these groups. While it may be that the above-noted cases are the exception, there are no data available to dispute the perception by equality-seeking groups, for example, that serious assaults against the person are being put into restorative processes on a regular basis without equality issues being raised. Further research needs to be done. Just as protections were needed for wrongdoers when the state assumed the role of victim, protections are needed for both the wrongdoer and the sufferer of wrong in restorative justice. The ensuing discussion on two models of restorative justice demonstrates the serious gaps that do exist in or could form part of restorative justice programs that have recently been introduced.

Mediation (victim-offender mediation/restorative mediation) and sentencing circles are two of the most well-known models of what we in Canada consider restorative justice. Both processes have been used on numerous occasions dating back to the 1970s and 1980s. While restorative justice overall is lacking a system-wide evaluation, there are decidedly more reports on mediation and sentencing circles than on more recently employed processes such as family group conferencing and community justice forums. One would presume then that shortcomings in restorative mediation and sentencing circles would have been addressed. Unfortunately, this has not been the case. Because these programs lack some essential restorative justice features, it is misleading to include these processes under the restorative justice label. However, I mention them here because they are consistently put forward as restorative justice processes and as such reflect a serious theory/practice gap.

It is not my intent to make wide-sweeping generalizations about restorative justice as a whole based on two processes, but rather to raise a red flag to where potential problems could occur if the practice of restorative justice is not consistent with its principles.

Mediation processes⁸

Mediation has become an increasingly popular form of dispute resolution and is

⁸ The model of restorative justice called Victim-Offender Reconciliation Program (VORP) was started in Canada in 1974. VORPs can be run at pre-conviction, pre-sentence or post-sentence, and referrals can come from the courts, probation services, or the police. Since 1989 they have come under the name Victim-Offender Mediation (VOM) programs. These are considered restorative mediation processes.

used regularly in civil and family law. From its use in these contexts, mediation has been identified as having a number of shortcomings. The most significant shortcoming is rooted in existing *systems of power-relationships*. Power imbalances and systemic inequities could have tremendously negative impacts on mediation in the restorative justice context if these issues are not recognized and responded to.

Mediation assumes that sufferers of wrong and wrongdoers have equal bargaining power. Mediation is the practice of putting two people together in the same room and with the assistance of a third party discussing identified problems and developing a solution. If there is a pre-existing power-imbalance between the two parties, and this has not been identified and addressed prior to the mediation, mediation may result in a solution that is not satisfactory or adequate to the party with the least power even though apparently agreed to by that party. The legitimate fear of one party or the “erosion of self, voice and mind that is often the result of the psychological consequence of ongoing abuse” (Oglov 1997, 9) is often ignored. For example, in situations of wife abuse, women generally occupy a less powerful bargaining position as a result of many conditions, ranging from a lack of financial resources to their care-taking role of minor children. Many women feel that they have no choice but essentially to negotiate for their safety through written agreements and ignore their past experiences in order to address the current conflict (Oglov 1997). Furthermore, non-compliance may be considered uncooperative and could reflect negatively on the non-willing partner. Women repeatedly yield to mediation if they think that non-compliance will be used against them in contexts

such as custody and access, and this could be duplicated in other contexts (i.e., it would be thought that they are not conciliatory, or are vindictive or angry) (Bruce Levey Reporting Services 1997; Oglov 1997).

Considerable case law has evolved over the years to provide for more equitable treatment and protection of women. However, mediation “removes from our system of law the legal rights for women to equality in the family and in family law matters” (Bruce Levey Reporting Services 1997, 51)⁹. Case law becomes irrelevant as the process is “removed from the public domain and shifted to a non-legal, private system behind closed doors” (51). Mediation is, therefore, “counterproductive to achieving equality rights for

⁹ Other weaknesses of mediation were carefully outlined by equality-seeking organizations at the annual consultation on violence against women with the Minister of Justice and Attorney General of Canada. On September 18, 1997, the Honourable A. Anne McLellan met with representatives of several equality-seeking organizations who collectively indicated that mediation to address family law cases is not in the best interests of women or children - both will have their safety compromised. The associations/organizations represented at this forum included: National Association of Women and the Law, Ontario Coalition of Rape Crisis Centers, National Action Committee on the Status of Women, Regroupement Québécois des Calacs, Auberge Transition Montréal, Harmony House Ottawa, St. John's Rape Crisis Center, Vancouver Custody and Access Support and Advocacy Association, Regroupement provincial des maisons d'hébergement et de transition pour femmes victimes d'violence conjugale, Vancouver Rape Relief and Women's Shelter, Métis National Council of Women, Inc., Native Women's Association of Canada, Canadian Research Institute for the Advance of Women (CRIAW), Kenora Sexual Assault Center, Kamloops Sexual Assault Center, Crysalis House/Transition House Association of Nova Scotia, YWCA/YMCA of Canada, The Sexual Assault Support Center, Sexual Assault Support of Ottawa, Interval House, Nova Scotia Women's Association C.O.N.N.E.C.T., Mothers on Trial, WAVAN/Rape Crisis Center, Ikwe-Widdjiitiwin, Inc., Fédération nationale des femmes canadiennes - françaises, Faculty of Law - Queen's University, Feminist Alliance on New Reproductive and Genetic Technologies, Disabled Women's Network of Canada, Regina Anti-Poverty Ministry, Merritt Legal Services, Toronto Rape Crisis Center, Sexual Assault Crisis Program, Sexual Assault Center of Edmonton, Pauktuutit, Canadian Association of Sexual Assault Centers, Fredericton Sexual Assault Center, Yukon Women's Transition Home - Kaushee's Place, Ontario Association of Interval House, Lesbian Issues, Provincial Association Against Family Violence, P.E.I. Rape/Sexual Assault Crisis Center, South Surrey - White Rock Women's Place, Women's Resources Society of the Fraser Valley, Canadian Association of Elizabeth Fry Societies, Council of Elizabeth Fry Societies, Hamilton Rape Crisis Center, O.W.J.N.E.T., Saskatchewan Action Committee/Status of Women, University of Ottawa, NOIVMWC, Movement Contre Le Vio e L'Inceste, Ontario Coalition of Visible Minority Women (Ontario) Inc., CLC Women's Bureau, LEAF, Action Ontarienne Contre la Violence Fait Aux Femmes, and YWCA Munroe House.

women” (51) because it risks re-suppressing the reality of violence against women.

This is not progress.

Bargaining power is similarly an issue for impoverished individuals and peoples of colour. Impoverished individuals (as sufferers of wrong or wrongdoers) may be forced to mediate while the wealthy buy legal representation. If a dual-track system were implemented, and participation in restorative justice processes were voluntary, those with resources may not choose the healing alternative. In such cases, greater disparities among the powerful and the less empowered could result. In addition, “aboriginal, immigrant women and women of colour [may be] forced to mediate privately without benefit of advocacy in a system where gender power and balance is severely compounded by racism and discrimination based on language and culture” (Bruce Levey Reporting Services 1997, 50). In addition, language barriers and the significance of eye contact or the use of sur- or proper- names in certain cultures need to be addressed in the mediation process (Umbreit 1986). This raises again the notion of Western conceptualizations of how things are and ought to be.

Mediation is not exclusive to the family law context and is increasingly being used in the criminal law context. In fact it has been for years, just not to the same degree. Similar potential for power imbalances exists in criminal law as in family law. Not only does the potential exist in cases of abuse and family violence, it also exists in cases where other cultural traditions and ways of behaving are different from the dominant Western

culture, and in cases where the poverty stricken are pitted against corporations as in cases of shoplifting, for example. Without properly established safeguards, restorative mediation could remain the same justice under a different name.

Sentencing Circles

Sentencing circles were formally started in Canada in 1992 following Judge Barry Stuart's ruling in *R. v. Moses* and are most frequently employed in First Nations communities. Sentencing circles are considered to be restorative. Although processes similar to sentencing circles have been practiced for many years in First Nations communities, these processes were based on a wholly different foundation¹⁰ (RCAP 1996; Ross 1995; Winegarden 1997). Current forms of sentencing circles have a very adversarial feel about them. They tend to generally operate under a presumption of punishment by the state in the form of the local community who will "sentence" the offender rather than address the act carried out by the wrongdoer¹¹. The stigma attached to these sentences may be unhealthy and contrary to the restorative vision (Braithwaite 1989; Braithwaite and Mugford 1994). Furthermore, sentencing circles are not necessarily voluntary because charges that have been dropped or stayed as a result of the

¹⁰ In comparison to Western law which is individualized, is based on the notion of free-will, focuses on the act, is adversarial, labels and stigmatizes, requires offenders to "take" responsibility and is determined by a jury of strangers, Aboriginal law considers that people are a product of their environment and must be healed with the involvement of that environment, is based on the notions of determinism and that wrongdoers can be healed and reintegrated with appropriate support and skills development, focuses on the disharmony between people, is holistic in its approach to healing, is non-adversarial, and requires that wrongdoers "be" responsible (Ross 1995).

¹¹ Sentencing circles should not be confused with healing circles which involve the victim and offender only.

wrongdoer agreeing to participate in a sentencing circle may be reactivated and charges of failure to comply can be given if a person does not attend the sentencing hearing (Saskatoon Community Mediation Services and the Mennonite Central Committee Ministry 1996). It seems that the only feature that fits into the restorative vision is that there is community involvement in the development of a solution. To these ends, the foundation of sentencing circles raises a red flag.

Sentencing circles raise concerns that relate to the intersectionality critique of restorative justice. The first is the development of these programs based on *socially constructed ideas of traditionalism*. In recent years, Anglo-Canadians have started taking notice of the holistic and inclusive approaches of First Nations peoples to life and justice (Winegarden 1997). This has resulted in efforts to advance justice for First Nations peoples in more culturally relevant ways. However, the implementation of sentencing circles in First Nations and Inuit communities has been criticized for its unenlightened, although not mal-intentioned, attempt to provide for a more healing, more progressive justice in these communities (Crnkovich 1995; Oglov 1997; Ross 1996). Sentencing circles have been developed through the eyes of the Western justice system - a primarily reactive industry built around police, lawyers, judges and penitentiaries - and it can be argued that they are not reflective of traditional Aboriginal practices. The transition to a justice system determined by Anglo-Canadians to be traditionally Aboriginal is problematic because it is still based on a justice process that the very languages of First Nations peoples deny (Ross 1996). The Assembly of First Nations stresses that justice is a felt

experience that cannot be imposed from the outside with any success (*R. v. Moses* 1992). Sentencing circles should not be considered a “traditional practice” of Aboriginal peoples in Canada. In actuality they are “very much a creation growing out of the existing system introduced within aboriginal communities, for the most part by the judiciary serving these communities” (Crnkovich 1995, 4) - a type of ‘white’ man’s justice with only a hint of Aboriginal holistic healing. While the effort to provide justice in a more culturally appropriate way is to be applauded, these processes are based on an artificial foundation. Contemporary sentencing circles are based on the very system that was used to assimilate the First Nations people in Canada; therefore, to use it as the basis for an “enlightened” justice system is illogical. As such they may be more dangerous than restorative.

Even if a process is successful in one community, it cannot necessarily be transferred to another community with success¹². An assumption is being made that an initiative which is community based, within a community made up primarily of Aboriginal peoples, must be “traditionally aboriginal” and can, therefore, be generalized across Aboriginal communities. However, despite some commonalities, Aboriginal communities across Canada are not homogenous (Assembly of First Nations 1993), nor are they

¹² For example, according to Crnkovich, Inuit women find solace through informal safety networks such as centres where they are taught how to sew. This is not a place for ‘victims,’ nor is it a place defined as a sexual assault centre, but is a place where, during the course of the day, women discuss their lives, but are not limited to discussing their abuse. These centres focus on the strength of women and children and it is for this reason, according to Crnkovich, that Inuit women are resilient, and hopeful (personal communication, February 13, 1998). However, these types of centres could not be transferred into an Anglo-Canadian community with any success as sewing is not an integral function as it is in Inuit communities. The contexts and resultant needs are entirely different.

exposed to the same situations and circumstances. The differences stem from both historical factors (i.e., colonialism and residential schools) and contemporary procedures (i.e., Aboriginal Self-government, First Nations Policing Agreements and Land Claim disputes) (Oglov 1997; Ross 1996). “The degree and impact of change has been mediated by settlement patterns, geographic location, cultural factors, and individual community experience, so there is variation in the degree to which these influences have affected communities” (LaPrairie 1997, 43). The *contexts* in which they live are unique.

The good intentions involved in the promotion of sentencing circles are moot because a crucial element is missing in the analysis, that is, consideration of difference within and between Aboriginal communities (Crnkovich 1995). On the most basic level, there is a failure to ensure equity/equality in this type of restorative justice initiative. Diversity is central to all communities, even those which appear on the surface to be more homogeneous than heterogeneous. It is this type of oversight which can turn the best-intentioned program into just another inadequate alternative, and in the process reaffirming Martinson’s theory that “nothing works”.

An additional concern with sentencing circles is related to their structure and function (i.e., who would be the most appropriate individual to conduct them and who will be accountable for protecting the rights of the parties involved). While sentencing circles have the potential to be more culturally relevant in First Nations communities, these communities still suffer from internal challenges (RCAP 1996), and are subject to *systems*

of power relationships (Crnkovich 1995; Peterson 1992). Habitually, sentencing circles are conducted by and with the local Elders, to the exclusion of other age groups. This may result in an inaccurate reflection of contemporary community values, and can also result in more severe punishments than would have been recommended in the current justice system, particularly for those who have been marginalized in the community (Lilles 1991; RCAP 1996).

Sentencing circles may be especially harmful for female sufferers of wrong. In Inuit communities, Inuit women's voices are frequently ignored, and violence against women is not taken seriously and in some cases is openly tolerated (Peterson 1992). For example, the Inuit Justice Task Force (1993) found that the elders' view of wife abuse is that it is not a serious crime or is caused by the wife's "lack of obedience to her husband or non-acceptance of her traditional role" (Crnkovich 1993, 31: f.n.36). Giving Elders responsibility for sentencing circles, in an effort to better reflect Inuit tradition, may in fact cause rather than solve problems.

In addition, a return to truly traditional ways of living may not necessarily be welcome. For example, there is strong dissent by Inuit women against such a return because of the inherent patriarchy and disproportionate power relations within these communities. To assume that communities and their members are necessarily equal, ignores the "fundamental power imbalances, differences and conflicts within the system and the community and helps promote a myth that all participating have equal access and

opportunity” (Crnkovich 1995, 14). Inuit women have indicated that they are more vulnerable to sexism, racism and violence with the use of sentencing circles (Oglov 1997) and are fearful that their interests will not be protected while those of the accused will be (Crnkovich 1995). The following is illustrative of an event from which their concerns emanate.

On May 4, 1993 in Kangiqsujaq, Nunavik, Judge Jean-Luc Dutil held a sentencing circle for Jusipi Nappaaluk who was convicted of common assault (for the fourth time) on his wife (the last assault occurring when he was on probation for the third conviction of assault). While restorative justice is heralded for its principle of dealing with the harm to both the wrongdoer and the sufferer of wrong, the focus of the discussion was on Jusipi, while the blame for abuse was sometimes placed upon both him and his wife. Jusipi was sentenced to abstain from alcohol, get counselling (with his wife) and keep the peace and not abuse his wife. In reading the summary of this trial¹³, it was difficult to see what role the sufferer of wrong played in this supposed restorative resolution or where her safety was taken into account. By sentencing her to counselling with her husband, she was effectively blamed for her abuse and the power-imbalance was legitimized. While this is only one case and no attempt is being made to generalize, it is a clear example of what

¹³ The summary of this circle can be found in Pauktuutit’s (the Inuit Women’s Association of Canada) report: *Inuit Women and Justice: Progress Report No. 1* (1995). It should be noted that in a workshop following this circle, Jusipi’s wife expressed “her fears about the process and the consequences of the circle she personally suffered” (25). At the same time, she cautioned the Chair of the Advisory Committee on the Administration of Justice in Native Communities that sentencing circles should not be used in cases of family violence.

can go wrong if power-relationships are not considered in the development of restorative responses (Crnkovich 1993).

The issue of power-relationships is not only an issue of gender, however, but also of class (New Zealand Ministry of Justice 1995). In First Nations communities, power-relationships can be especially harmful to those without a share of the community resources. Employment and kinship are the keys to power on reserves (LaPrairie 1997). Those with access to a combination of these means have a significant advantage over those with neither. The latter become marginalized within their own community, and upon leaving to seek better fortune in the city, frequently bring with them a barrage of personal problems, and a paucity of employable skills that makes success in their new surroundings largely impossible. As a result, “[t]hey are effectively excluded from access to opportunity, power and place in both societies” (LaPrairie 1997, 45). For example, in *R. v. Cheekineew* the offender was charged with aggravated assault but was denied a sentencing circle, in part, because of a lack of community support. Braithwaite and Daly discuss the possibility that an immediately accessible community would not be available for everyone and they suggest that “this means the co-ordinator is incompetent, not that these human beings are devoid of caring relationships” (1993, n.p.). The authors do not, however, provide any guidance on what happens to individuals in these instances. Does this mean that where a “community of interest” cannot be found, the sufferer of wrong and the wrongdoer are referred back to the traditional court system thus reinforcing existing marginalizations? Sentencing circles, which may on the on face appear to be more

culturally relevant, can end up having less to do with traditional justice than with socially constructed ideas of reality, misunderstood contexts, and systems of power-relationships.

Conclusion

Restorative justice does not articulate particular techniques, per se, to restore relationships and achieve justice. Restorative justice advocates merely provide a yardstick which outlines the requirement for techniques to sufficiently incorporate the needs of both the victim and the offender, and to adequately address the victim-offender relationship, their communities and the future of all participants in their mandates (Bazemore and Umbreit 1994). Van Ness has posited that the “[s]trategic reforms are not [themselves] the vision” but that “they bring us closer to a societal response to crime which reflects the vision” (1989, 24). As such, the theory is that if the techniques incorporate the underlying vision of restorative justice, society will slowly begin to adopt restorative justice principles, thereby understanding crime within this context and will eventually abandon adversarial justice principles. However, if these techniques do not adequately ensure the rights, protections and equitable treatment of the participants, the vision is not complete. So to avoid just tinkering with the system, the way in which we think about justice must be changed and as an essential component of this change a thorough and ongoing diversity analysis must be included.

CHAPTER 6: A BAND-AID SOLUTION OR A HEALING APPARATUS?

For centuries we have been fighting the same battle. In an effort to find a more satisfactory system of criminal justice in Canada we have introduced reforms ranging from rehabilitation to reintegration to reparation. However, because these reforms are based on a pattern of thinking that does not work, it is not surprising that these reforms have been disappointing. The distinction of restorative justice is that it is built on an entirely different foundation - it is a unique way of thinking about justice. For this reason, restorative justice is appealing to many. In particular, the focus on multi-party participation is welcomed. By involving sufferers of wrong, wrongdoers and communities in the solution to wrongdoing, the conflict is given back to the parties involved, and not "stolen" by the state (Christie 1977). This is important as it empowers the parties with a measure of control over the proceedings, thus making healing easier. Moreover, the wrongdoer is expected to accept accountability for his or her action(s) and communities are expected to accept some responsibility for the events leading up to the wrongdoing as well as be supportive of the sufferer of wrong and wrongdoers' reintegration.

While this vision is admirable and one that that may well indeed be the future of Canadian criminal justice, there is little indication in the research or by proponents of restorative justice that gender, race and class considerations are being taken seriously. In fact, there is so little consideration of these variables that several equality-seeking organizations, representing multiply-oppressed groups, were unaware of this "restorative vision of justice". Others were unable to comment due to a lack of funding and therefore

no resources with which to study justice issues. Still others were endeavouring to gain sufficient information to be able to develop a position. They all were, however, of the opinion that their voices are being disregarded and as a result gender, race and class variables, not to mention their interdependence, have not been considered in the development and implementation of restorative practices. This is a fundamental flaw. As I maintained throughout the paper, for restorative justice to become a full-fledged paradigm not only does it have to be accompanied by a fundamental transformation of societal thinking toward crime and criminal justice, it must come with a similar shift in attitude toward the people who make up Canadian society. This is not and will not be an easy road to travel, but as the Honourable E.D. Bayda, Chief Justice of Saskatchewan has said,

to purge the psyche of the principles of retributive justice, moulded as it has been by church theology and Enlightenment philosophy, is a task of horrendous proportions. But one should not capitulate too quickly....think of what has happened to the cultural habit of smoking, and also the once not-frowned-upon act of driving while drunk. The public's mood can be changed. It takes time. It takes education. Public servants, academics, news journalists, lawyers, and judges all have a distinct role to play (1997, 5).

The Honourable Bayda is quite correct; but herein lies the danger. If we forge ahead with the restorative vision of justice in advance of rigorous critical analyses that attend to gender, race and class interactions, we risk reinforcing existing discriminations and failing to address underlying societal power imbalances, systemic inequality and infrastructural inequities (i.e., poverty, unemployment). If we do not, we will maintain existing discriminations and underlying societal power imbalances. To avoid either, proponents of

restorative justice must keep in mind three key points. First, people have to be willing to embrace the new model/paradigm. Second, they need to understand the new vision in order to avoid the co-optation and/or misapplication of processes under the guise of the new vision. Third, they must be aware of their own biases and be conscious not to transfer existing marginalizations into the new vision.

In some instances, however, processes under the name of restorative justice have been implemented. The following criticisms have been raised with respect to these programs. Restorative programs will not work if they are built on artificial foundations or if we assume that all parties to the problem have equal access or power. Other processes decriminalize violence against women, withdraw resources from the most economically in need of protection and criminalize those who cannot hire lawyers to assure what little protection has been available through due process. These findings raise serious concerns that gender, race and class considerations are not influencing the restorative justice movement. While we do not want to measure restorative justice against perfection, we do need to judge it against the current system and in this regard there has not been marked improvement in equality under the restorative vision of justice. Because racism, sexism and classism already exist within our communities and many of our social systems, it is imperative that these systems and any proposed changes thereto, be measured for impacts, positive and negative. If such analyses are not performed, socially constructed definitions of individual and group roles will continue to fuel power imbalances within communities, which will maintain and/or perpetuate systemic discrimination therein.

Which brings us to this challenge: what justice process can “best deliver safety and healing for real people who must ultimately continue to live with each other, by and large, in our various communities across the country” (Berzins 1997a) and what steps need to be taken to ensure that we do not exacerbate systemic bias and to ensure that the restorative justice agenda serves the interests of the multiply-oppressed?

Next Steps

Restorative justice can and should be developed, provided that proponents throw out the notion that a state of justice previously existed for those involved in the wrongdoing and that at least the following concerns are explored:

- there must be appropriate consideration of race, class and gender variables;
- there must be adequate consultation with equality-seeking groups and other concerned stakeholders before reforms are made;
- there must be involvement of equality-seeking organizations and other concerned stakeholders in the policy development, implementation and evaluation processes;
- there must be appropriate resource allocation to allow equality-seeking organizations and other concerned stakeholders to conduct their own research and analyses in order to better advise the government, to provide support to sufferers of wrong and wrongdoers, and to provide sufficient training/sensitization to program administrators;
- there must be clear accountability or at least an identified recourse structure within each process/program;
- if the relationships are not ones of equality, restorative justice must identify what is necessary to restore them to this ideal; and
- cost savings cannot be permitted to drive the reforms (Goundry 1997).

The above is not intended to be an exhaustive list but a few of the key missing elements of the current restorative justice movement. But most of all, governments and proponents of restorative justice alike need to be mindful that,

Some of the most effective approaches are those that are designed with, by and for the participants. It is far harder to perpetuate biases, intentionally or unintentionally, if you strive to include all stakeholders and actually redistribute the power and the control by ensuring that all who may be

impacted, most particularly those with the least power, are full and equal participants (Pate 1994, 64).

All of this will have to be done in baby steps. While governments have agendas and timelines, implementing social policy that fails to address the concerns of major sectors of society will only cause additional problems over the long term. Canadians will then be resentful of a vision that is fundamentally good and we will have once again just tinkered with the system without embracing the true vision of restorative justice. “The Canadian House of justice is showing cracks and may even be crumbling. A patch job is not sufficient and bandaids won’t do. We need to re-design, rethink and re-engineer that system so that it is strengthened and re-invigorated” (Honourable Ujjal Dosanjh, 1997) and in doing so, do our utmost to ensure greater equality for all Canadians in the development of this healing model of justice.

WORKS CITED

- (Report of the) Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People. 1991: 16. Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada*. (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 27.
- Assembly of First Nations. 1993. Reclaiming our Nationhood, Strengthening our Heritage: 65. Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada*. (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 3.
- Baca Zinn, M. and Dill, B.T. 1996. Theorizing difference from multiracial feminism. *Feminist Studies* 22:321-331.
- Baehre, R. 1977. Origins of the penitentiary system in Upper Canada. *LXIX Ontario History*: 186, 191, 193, 194, 200. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 20, 30-33 and 37.
- Bakshi, P.; Goodwin, M.; Painter, J. and Southern, A. 1995. Gender, race, and class in the local welfare state: Moving beyond regulation theory in analyzing the transition from Fordism. *Environment and Planning A* 27:1539-1554.
- Banton, M. 1977. *Idea of Race*. London: Tavistock.
- Bayda, The Honourable E.D. 1997. The Theory and Practice of Sentencing: Are they on the same wavelength? *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* 2(4):1-6.
- Bazemore, G. and Schiff, M. 1996. Community justice/restorative justice: Prospects for a new social ecology for community corrections. *International Journal of Comparative and Applied Criminal Justice* 20(2):311-335.
- Bazemore, G. and Umbreit, M. 1994. *Balanced and restorative justice: Program summary*. Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention (OJJDP), U.S. Department of Justice.

- Beattie, J.M. 1977. *Attitudes towards crime and punishment in Upper Canada, 1830-1850: A documentary study*: 2-3, 22-23, 27, 29-32. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 30-31, 35 and 39.
- Bellomo, J.J. 1972. Upper Canadians' attitudes towards crime and punishment, 1832-1851. *LXIV Ontario History*: 16. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 29.
- Berman, H.J. 1975. The religious foundations of western law. *The Catholic University of America Law Review* 24(3): 490-508. Quoted in H. Zehr, *Changing lenses: A new focus for crime and justice*. (Scottsdale, PA: Herald Press, 1990), 108.
- . 1983. *Law and revolution: The formation of the western legal tradition* (Cambridge, Massachusetts: Harvard University Press, 1983). Quoted in H. Zehr, *Changing lenses: A new focus for crime and justice*. (Scottsdale, PA: Herald Press, 1990), 108.
- Bernat, F.P. 1995. Opening the dialogue: Women's culture and the criminal justice system. *Women and Criminal Justice* 7:1-7.
- Berzins, L. 1996. New Directions on sentencing. Paper presented to the National Judicial Institute, Victoria, British Columbia, 15 March.
- . 1997a. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), 6.
- . 1997b. Discussion at the Greater Toronto Area Restorative Justice Symposium, Toronto, Ontario, 18-19 November.
- Blea, I.I. 1992. *La Chicana and the intersection of race, class and gender*. New York: Praeger Publishers.
- Braithwaite, J. 1989. *Crime, shame and reintegration*. Cambridge: Cambridge University Press.
- . 1996. Restorative justice and a better future. Paper presented at the Dorothy J. Killam Memorial Lecture, Dalhousie University, N.S., October.
- Braithwaite, J. and Daly, K. 1993. Masculinities, violence, and communitarian control. In *Just boys doing business: Men, masculinity and crime*, edited by T. Newburn and B. Stanko. London: Routledge.

- Braithwaite, J. and Mugford, S. 1994. Conditions of successful reintegration ceremonies. *British Journal of Criminal Justice* 34(2):139- 171.
- British Columbia Association of Specialized Victim Assistance and Counselling Programs (BCASVACP). 1997. *Newsletter of the BCASVACP (Fall)*. Victoria, B.C.: BCASVACP.
- British Columbia Ministry of Attorney General. 1997. Interview by author. Victoria, British Columbia, 19 December.
- . 1998. *A restorative justice framework: British Columbia justice reform*. Victoria, B.C.: B.C. Ministry of Attorney General.
- Brodeur, J.-P. 1991. *Justice for the Cree: Policing and alternative dispute resolution*: 16-17. Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal people and criminal justice in Canada* (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 38 and 39.
- Bruce Levey Reporting Services. 1997. Transcript. Canadian Department of Justice Consultation on Violence Against Women. Ottawa, Ontario, 18 September.
- Burford, G. and Pennell, J. 1996. *Family group decision making: New roles for 'old' partners in resolving family violence: Implementation report summary*. St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland.
- Canadian Association of Elizabeth Fry Societies. 1988. Sentencing in context: Revealing the realities of women in conflict with the law: 20. Quoted in R. Mohr, Sentencing as a gendered process: Results of a consultation, *Canadian Journal of Criminology* 32:484.
- . 1998. Interview by author. Ottawa, Ontario, 12 February.
- Canadian Resource Center for Victims of Crime. 1997. Interview by author. Ottawa, Ontario, 05 December.
- Carlen, P. 1994. Gender, class, racism, and criminal justice: Against global and gender-centric theories, for poststructuralist perspectives. In *Inequality, crime and social control*, edited by G.S. Bridges and M.A. Myers. Boulder, Colorado: Westview Press, Inc.

- Carr, G.L. 1980. Shalom, in theological wordbook of the Old Testament, in R.L. Harris et al. eds.: 931. Quoted in D. Van Ness, *New wine and old wineskins: Four challenges of restorative justice*. *Criminal Law Forum* 4(2):254.
- Carrigan, O. D. 1991. *Crime and punishment in Canada: A history*. Toronto, Ontario: McClelland and Stewart Inc.
- Christie, N. 1977. Conflict as property. *The British Journal of Criminology* 17(1):1-14. Quoted in P. McCold, *Restorative justice and the role of community*. In *Restorative justice: International perspectives*, edited by B. Galaway and J. Hudson. (New York: Kugler Publications and Criminal Justice Press, 1996), 91- 92.
- . 1981. *Limits to pain*. Norway: Universitetsforlaget.
- Chunn, D.E. 1981. Good men work hard: Convict labour in Kingston Penitentiary, 1835-1850. *4 Canadian Criminology Forum*: 17-18. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and Practice*. 2d ed. (Toronto: Butterworths, 1988), 30.
- Church Council on Justice and Corrections (CCJC). 1995. *Restorative justice in the nineties: Healing communities*. *Update*. Ottawa, Ontario: CCJC.
- . 1996. *Satisfying justice: Safe community options that attempt to repair harm from crime and reduce the use or length of imprisonment*. Ottawa, Ontario: CCJC.
- Cohen, S. 1985. *Visions of social control: Crime, punishment and classification*. Oxford: Polity Press.
- Coles, D. 1979. *Nova Scotia corrections - An historical perspective: 2*. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice* 2d ed. (Toronto: Butterworths, 1988), 21.
- Collins, P.H. 1990. Black Feminist thought: Knowledge, consciousness and the politics of empowerment: 15, 16, 19, 22 and 25. Quoted in L. Weber, *A conceptual framework for understanding race, class, gender and sexuality*. *Psychology of Women Quarterly* 22(1):13-32.
- Collins, P.H. 1995. On West and Fenstermaker's "Doing Difference". *Gender and Society* 9:491-494.
- Canada. *Corrections and Conditional Release Act*. 1992. c.20.

- Cragg, W. 1992. *The practice of punishment: Towards a theory of restorative justice*. London, England: Routledge.
- Creese, G. and Stasiulis, D. 1996. Introduction: Intersections of gender, race, class and sexuality. *Studies in Political Economy* 51:5-14.
- Crnkovich, M. 1993. Report on a sentencing circle in Nunavik. In *Inuit Women and justice: Progress report number 1*, edited by Pauktuutit, the Inuit Women's Association of Canada. Ottawa: Pauktuutit.
- . 1995. The role of the victim in the criminal justice system - Circle sentencing in Inuit communities. Paper presented at a conference of the Canadian Institute for the Administration of Justice, Banff, Alberta, 11-14, October.
- . 1998. Interview by author. Ottawa, Ontario, 13 February.
- Dawson, B. ed. 1993. Introduction to *Women, law and social change: Core readings and current issues*. 2d ed. Ontario: Captus Press.
- de Bono, E. 1985. *Conflicts: A better way to resolve them*. London, England: Harrap.
- de Villiers, P. 1997. CAVEAT seeks holistic approach to crime prevention. *CAVEAT Stopwatch* 5(3):2.
- Derkson, W. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), n.p.
- Diamond, S. 1974. *In search of the primitive* (New Brunswick: Transaction Books): 124-125. Quoted in D. West, Epistemological dependence and Native peoples: An essay on the future of Native/non-Native relations in Canada. *The Canadian Journal of Native Studies* 15(2):286.
- Dosanjh, The Honourable U. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), 51.
- Ekstedt, J.W. and Griffiths, C.T. 1988. *Corrections in Canada: Policy and practice*. 2d ed. Toronto: Butterworths.
- Etherington, B., Bogart, W.A., Irish, M and Stewart, G. 1991. *Preserving identity by having many identities: A report on multiculturalism and access to justice*. Ontario: University of Windsor.

- Foster, M.H. 1993. Of baggage and bondage: Gender and status among Hidatsa Crow Women, *American Indian Culture and Research Journal* (17):121-152. Quoted in F. Bernat, Opening the dialogue: Women's culture and the criminal justice system, *Women and Criminal Justice* 7(1): 4.
- Foucault, M. 1977. *Discipline and punish: The birth of the prison*. Translated by A. Sheridan. New York: Vintage Books.
- Galaway, B. and Hudson, J. eds., 1990. *Criminal justice, restitution and reconciliation*. New York: Criminal Justice Press.
- . 1996. *Restorative justice: International perspectives*. New York: Criminal Justice Press.
- Garland, D. 1990. *Punishment and modern society: A study in social theory*. Chicago: The University of Chicago Press.
- George, U. and Ramkissoon, S. 1998. Race, gender, and class: Interlocking oppressions in the lives of South Asian women in Canada. *AFFILIA: Journal of Women and Social Work* 13:102-119.
- Gosselin, L. 1982. *Prisons in Canada*: 97. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 31-32.
- Goundry, S. 1997. *Restorative justice and criminal justice reform in B.C. - Identifying some preliminary questions and issues*. Vancouver: Legal Consulting and Research Services for B.C. Association of Specialized Victim Assistance and Counseling Programs.
- Griffiths, C.T., Klein, J.F. and Verdun-Jones, S. 1980. *Criminal Justice in Canada: An introductory text*: 239. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 55.
- Griffiths, C. T. and Verdun-Jones, S. 1989. *Canadian criminal justice*. Vancouver: Butterworths Canada Ltd.
- Griffiths, C.T. and Patenaude, A.L. 1990. The use of Community Service Orders and restitution in the Canadian North: The prospects and problems of 'localized' corrections. In *Criminal justice, restitution, and reconciliation*, edited by B. Galaway and J. Hudson. New York: Criminal Justice Press, 1990.

- Harris, K. 1989. Alternative visions in the context of contemporary realities. In *Justice: The restorative vision - Occasional papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice* (February, no.7). Indiana: MCC U.S. Office of Criminal Justice.
- Harvey, L. 1982. The use and abuse of Kuhnian paradigms in the sociology of knowledge. *Sociology: The Journal of the British Sociological Association* 16(1):85-101.
- Haviland, W. 1993. *Cultural anthropology*. 7th ed. Florida: Harcourt Brace College Publishers.
- Heidebrecht, D. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), 56.
- Henriques, Z.W. 1995. African-American women: The oppressive intersection of gender, race and class. *Women and Criminal Justice* 7:67-80.
- Hoebel, E. A. 1973. *The Law of Primitive Man: A Study in Comparative Legal Dynamics*: 279. Quoted in D. Van Ness and K. Heetderks Strong, *Restoring Justice*. (Cincinnati: Anderson Publishing Co., 1997), 7-8.
- Jackman, M.R. 1994. *The velvet glove: Paternalism and conflict in gender, class and race relations*. Los Angeles: University of California Press.
- Jhappan, R. 1996. Post-modern race and gender essentialism or a post-mortem of scholarship. *Studies in Political Economy* 51(Fall):15-63.
- Khayatt, D. 1994. The boundaries of identity at the intersection of race, class and gender. *Canadian Women's Studies* (Spring):6-12.
- Kuhn, T. 1970. *The structure of scientific revolutions*. 2d ed. Chicago, Illinois: University of Chicago Press.
- Lakeman, L. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), 56-57.
- LaPrairie, C. 1995a. *Altering course: New directions in criminal justice: Sentencing circles and family group conferences*. Ontario: Aboriginal Justice Directorate, Department of Justice Canada.
- . 1995b. Community justice or just communities?: Aboriginal communities in search of justice. *Canadian Journal of Criminology* 37(4):521-545.

- . 1997. **Reconstructing theory: Explaining Aboriginal over-representation.** *The Australian and New Zealand Journal of Criminology* 30:39-54.
- . 1999. **Paper presented at symposium, Restorative Justice: A definition.** 1999 conference of the Ontario Association of Corrections and Criminal Justice, 17-19 February, Toronto, Ontario.
- Lilles, Judge H. 1991. **Tribal justice: A new beginning.** Paper presented at symposium, *Achieving Justice: Today and Tomorrow*: 11-12. Quoted in Royal Commission On Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada* (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 114.
- Llewellyn and Howse. 1999. *Restorative justice: A conceptual framework.* Prepared for the Law Commission of Canada. [<http://www.lcc.gc.ca/en/papers/howse.html>].
- Long, K. 1995. **Community input at sentencing: Victim's right or victim's revenge?** *Boston University Law Review* 75(1): 187-229.
- Lorber, J. 1994. *Paradoxes of gender.* Quoted in L. Weber, *A conceptual framework for understanding race, class, gender and sexuality.* *Psychology of Women Quarterly* 22(1):18.
- Marshall, T. 1997. *Forthcoming. European Journal for Criminal Policy and Research.* Quoted in P. McCold and B. Wachtel, *Community is not a place: A new look at community justice initiatives.* Paper presented to the International Conference on Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice, Albany, New York, 5-7 June. ([<http://www.realjustice.org>]), 9.
- Mawhiney, A-M. 1994. *Towards Aboriginal Self-Government: Relations between Status Indian Peoples and the Government of Canada, 1969-1984.* New York: Garland.
- McCold, P. 1995. *Restorative Justice: The Role of the Community.* Paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston. [<http://www.realjustice.org>].
- McCold, P. 1996. *Restorative justice and the role of community.* In *Restorative justice: International perspectives*, edited by B. Galaway and J. Hudson. New York: Kugler Publications and Criminal Justice Press.

- McCold, P. and Wachtel, B. 1997. Community is not a place: A new look at community justice initiatives. Paper presented to the International Conference on Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice, Albany, New York, 5-7 June. [<http://www.realjustice.org>].
- Messmer, H. and Hans-Uwe, O., eds. 1992. *Restorative justice on trial: Pitfalls and potential of victim-offender mediation - international research perspectives*. Netherlands: Kluwer Academic Publishers.
- Mohr, R. 1990. Sentencing as a gendered process: Results of a consultation. *Canadian Journal of Criminology* 32:479-485.
- Morris, R. 1995. *Penal Abolition: the practical choice*. Ontario: Canadian Scholars' Press Inc.
- . 1997. *Why transformative justice?* Paper presented at the bi-annual conference of the Canadian Criminal Justice Association, Ottawa, Ontario, 22-25 September.
- National Associations Active in Criminal Justice (NAACJ). 1997. Interview by author. Ottawa, Ontario, 3 December.
- New Zealand. Ministry of Justice. 1995. *Restorative justice: A discussion paper*.
- Nilson, The Honourable J. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), n.p.
- Oglov, V. 1997. *Restorative justice reforms to the criminal justice system: Draft discussion paper*. B.C.: The B.C./Yukon Society of Transition Houses.
- Pate, K. 1994. This women's [sic] perspective on justice. Restorative? Retributive? How about redistributive? *Journal of Prisoners on Prisons* 5(2):60-64.
- . 1997a. Scott Clark's notes from meeting between the Department of Justice and Women's Groups. March 3, 1997.
- Patterson, L.A.; Cameron, J.E. and Lalonde, R.N. 1996. The intersection of race and gender: Examining the politics of identity in Women's Studies. *Canadian Journal of Behavioural Science* 28:229-239.
- Pauktuutit (Inuit Women's Association of Canada). 1995. *Inuit women and justice: Progress report no. 1*. Ottawa, Ontario: Pauktuutit.

- Peck, S. M. 1987. *The different drum: Community making and peace*. New York: Touchstone.
- Peterson, K. 1992. *The justice house: Report of the Special Advisor on gender and equality to the Minister of Justice of the Northwest Territories: 72*. Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada* (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 274.
- Quigley, T. 1994. Some Issues in Sentencing of Aboriginal Offenders. *Continuing Poundmaker and Riel's Quest, Presentations made at a conference on Aboriginal Peoples and justice: 275-276*. (comp. R. Gosse, J. Youngblood Henderson and R. Carter). Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada* (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 46.
- Ralston, H. 1991. Race, class, gender and work experience of South Asian immigrant women in Atlantic Canada. *Canadian Ethnic Studies* 23:129-139.
- Renzetti, C. and Curran, D.J., eds. 1995. *Women, men and society*. 3d ed. Boston: Allyn and Bacon.
- Roberts, J.V. and Birkenmayer, A. 1997. Sentencing in Canada: Recent statistical trends. *Canadian Journal of Criminology* 39:459-482.
- Roberts, J. and Doob, A. 1996. Race, ethnicity, and criminal justice in Canada. In M. Tonry, ed., *Ethnicity, crime and immigration: Comparative cross-national perspectives*, Crime and Justice: A Review of Research, 21(Fall). Chicago: University of Chicago.
- Ronalds, C., Champman, M and Kitchener, K. 1983. Policing Aborigines. *Issues in Criminal Justice Administration: 170*. Quoted in Royal Commission on Aboriginal Peoples, *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada*. (Ottawa, Ontario: Minister of Supply and Services Canada, 1996), 39.
- Ross, R. 1995. Restorative justice: Exploring the Aboriginal. *Saskatchewan Law Review* 59: 431-435.
- . 1996. *Returning to the teachings: Exploring Aboriginal justice*. Toronto: Penguin Press.

- Royal Canadian Mounted Police (RCMP) 1998. Interview by author. Ottawa, Ontario, 30 January.
- . n.d. *Community justice forum: Canadian resource guide*. Ottawa: RCMP Headquarters.
- Royal Commission on Aboriginal Peoples. 1996. *Bridging the cultural divide: A report on Aboriginal People and criminal justice in Canada*. Ottawa, Ontario: Minister of Supply and Services Canada.
- Saskatoon Community Mediation Services and the Mennonite Central Committee Ministry. 1995. *Restorative justice - Four community models*. Saskatchewan: Terry Pugh/SCMS/MCC.
- Schwartz, M.D. and Milovanovic, D. eds. 1996. *Race, gender, and class in criminology: The intersection*. New York: Garland Publishers.
- Scott, J., ed. and comp. 1997. *Achieving satisfying justice: Final report [of conference]*. Ottawa: Canadian Criminal Justice Association (CCJA).
- Shoom, S. 1966. Kingston Penitentiary: the early years. *8 Canadian Journal of Corrections*: 217. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 35.
- Skinner, S., Dreidger, O. and Grainger, B. 1981. *Corrections: An historical perspective of the Saskatchewan experience*: 171. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 16.
- Smandych, R.C. and Verdun-Jones, S.N. 1982. *The evolution of institutional mechanisms of social control in Ontario: An examination of the evidence and interpretations*: 19. Quoted in J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 31-32.
- Squires, G.D. 1994. *Capital and communities in black and white: The intersections of race, class and uneven development*. New York: State University of New York Press.
- Status of Women Canada. 1996. *Gender-based analysis: A guide for policy making*. Ontario: Status of Women Canada.

- Taylor, C.J. 1979. *The Kingston, Ontario penitentiary and moral architecture*: 407. Quoted in J.W. Ekstedt and C.T. Griffiths. *Corrections in Canada: Policy and practice*. 2d ed. (Toronto: Butterworths, 1988), 30-31 and 34.
- Umbreit, M. 1986. Victim-offender reconciliation programs: Urban and multicultural implications [video]. Michigan: National VORP Resource Centre.
- Umbreit, M. 1996. *Restorative justice: What works?* Draft paper commissioned by the International Community Corrections Association, Wisconsin, VA.
- Umbreit, M. and M. Carey. 1995. Restorative justice: Implications for organizational change. *Federal Probation* 59(1):47-54.
- Van Ness, D.W. 1989. Pursuing a restorative vision of justice. In *Justice: The restorative vision - Occasional papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice* (February, no.7). Indiana: MCC U.S. Office of Criminal Justice.
- . 1993. New wine and old wineskins: Four challenges of restorative justice. *Criminal Law Forum* 4:251-276.
- . 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), n.p.
- Van Ness, D.W. and Heetderks Strong, K. 1997. *Restoring justice*. Cincinnati: Anderson Publishing Co.
- Walgrave, L. 1995. Restorative justice for juveniles: Just a technique or a fully fledged alternative? *The Howard Journal of Criminal Justice* 34:228-249.
- Waller, I. 1990. Victims, safer communities and sentencing. *Canadian Journal of Criminology* 32:461-469.
- Weber, L. 1998. A conceptual framework for understanding race, class, gender and sexuality. *Psychology of Women Quarterly* 22:13-32.
- Weitekamp, E. 1991. Can restitution serve as a reasonable alternative to imprisonment?: An assessment of the situation in the USA. In *Restorative justice on trial*, edited by H. Messmer and H.-U. Otto. Dordrecht, The Netherlands: Kluwer Academic Publishers.

- West, D. A. 1995. Epistemological dependence and Native peoples: An essay on the future of Native/Non-Native relations in Canada. *The Canadian Journal of Native Studies* 15:279-293.
- Williams, F.P. and McShane, M.D. 1988. *Criminological theory*. New Jersey: Prentice Hall.
- Williams, F. 1989. *Social policy: A critical introduction: Issues of race, gender and class*. Cambridge: Polity Press in association with Basil Blackwell.
- Winegarden, D. 1997. Quoted in J. Scott, ed. and comp., *Achieving satisfying justice: Final report*. (Ottawa: Canadian Criminal Justice Association (CCJA)), 15-16.
- Wing, A.K., 1997. Essentialism and anti-essentialism: Ain't I a woman? In *Critical race feminism: A reader*, edited by A.K. Wing. New York: New York University Press.
- Wood, P.H. 1994. North America in the era of Captain Cook: Three glimpses of Indian-European contact in the age of the American Revolution. In *Implicit understandings: Observing, reporting, and reflecting on the encounters between Europeans and other peoples in the early modern era*, edited by S.B. Schwartz. New York: Cambridge University Press.
- Wright, M. 1991. *Justice for victims and offenders: A restorative response to crime*. England: Open University Press.
- Zehr, H. 1989. Justice: Stumbling toward a restorative ideal. In *Justice: The restorative vision - Occasional papers of the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice* (February, no.7). Indiana: MCC U.S. Office of Criminal Justice.
- . 1990. *Changing lenses: A new focus for crime and justice*. Scottsdale, Pa.: Herald Press.
- . 1995. Justice paradigm shift? Values and visions in the reform process. *Mediation Quarterly* 12:207-216.
- Zehr, H. and Umbreit M. 1982. Victim offender reconciliation: an incarceration substitute? *Federal Probation* 46(4):63-68.

Case Law

R. v. Cheekinew (1993), 80 C.C.C. (3d) 143 (Sask. Q.B.).

R. v. Johnson (1994), 91 C.C.C. (3d) 21 (Y.C.A.).

R. v. Joseyounen, [1995] S.J. No.362 (Prov. Ct.) (Q.L.).

R. v. Morin (1995), 101 C.C.C. (3d) 124 (Sask. C.A.).

R. v. Moses (1992), 71 C.C.C. (3d) 347 (Y. Terr. Ct.).

R. v. Rope, [1994] S.J. No.720 (Q.B.) (Q.L.)

R. v. Taylor (1995), 104 C.C.C. (3d) 346 (Sask. C.A.).