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## The Origins of Restorative Justice

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### **Abstract:**

Government institutions are increasingly interested in the concept of restorative justice and many are officially adopting restorative justice principles and programs in one form or another. Accompanying this growing interest is a concern that the principles of restorative justice will be lost or diluted in the process of institutionalization. This paper provides an examination of the origins of the movement as a reminder of its original goals and objectives. The restorative justice movement in North America originated from four main sources: aboriginal justice/teachings, faith communities, the prison abolition movement, and the alternative dispute resolution movement. These origins provide an insight into the rationale behind the restorative justice movement.

### **Introduction**

Restorative justice initiatives began as an experiment in alternatives to criminal prosecution and conventional sentencing. In the past decade, the concept has received widespread attention in mainstream justice systems. In 1989, the New Zealand government enacted the *Children, Young Persons and their Families Act*, which introduced family group conferencing, a program based on restorative justice principles. Australia followed with the implementation of family group conferencing in several jurisdictions. Corrections Canada has introduced restorative justice programs in many of its prisons and in 1996, commissioned the Church Council on Justice and Corrections to compile a list of community-based responses to crime, many of which were restorative justice initiatives. The Law Commission of Canada recently released a framework paper and a discussion paper on the topic. Closer to home, the B.C. Ministry of Attorney General announced in September 1998 that the department had established and adopted the Restorative Justice Framework, which applies to criminal and civil matters. The interest in restorative justice continues to grow among communities and the government.

The interest shown by mainstream institutions in restorative justice leads to a concern that such institutions are promoting restorative justice programs "more for reasons of expediency and cost than for creating a higher quality of service".<sup>1</sup> The concern is that cash-strapped governments are simply cutting expenditures and off-loading programs to communities in the name of restorative justice. In addition, institutionalization may result in the co-option of the movement into the retributive system, rather than moving the current system away from retribution. Therefore, it is important at this time to bring together in one paper the different roots of restorative justice, as a reminder of the original goals and objectives of the movement. This paper begins with a definition of restorative justice, using comparisons with the retributive and restitutive justice paradigms, and then explores the roots of the North American restorative justice movement, both in terms of its historical and modern origins.

### **I. What is Restorative Justice?**

#### 1. Definition

Restorative justice has been defined in a number of ways. On the abstract level, "restorative justice is fundamentally concerned with restoring relationships, with establishing or re-establishing social equality in relationships".<sup>2</sup> On a more concrete level, restorative justice "involves the victim, the offender, and the

community in a search for solutions which promote repair, reconciliation, and reassurance".<sup>3</sup> The unifying concept behind restorative justice is the restoration of relationships.

Church Council on Justice and Corrections, *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures* (Ottawa: Church Council on Justice and Corrections, 1996), online: Correctional Service of Canada <[http://www.csc-scc.gc.ca/text/ipblcl/satisfy/index\\_e.html](http://www.csc-scc.gc.ca/text/ipblcl/satisfy/index_e.html)> (date accessed: 14 October 1999)

2 J.J. Llewellyn and R. Howse, *Restorative Justice - A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998), online: Law Commission of Canada <[www.lcc.gc.ca](http://www.lcc.gc.ca)> (date accessed: 25 September 1999).

According to Howard Zehr, a leading restorative justice advocate, the assumptions behind restorative justice are: "(1) crime violates people and relationships; (2) justice aims to identify needs and obligations (3) so that things can be made right; (4) justice encourages dialogue and mutual agreement, (5) gives victims and offenders central roles, and (6) is judged by the extent to which responsibilities are assumed, needs met, and healing (of individuals and relationships) is encouraged".<sup>4</sup> Although Zehr speaks in terms of criminal law, restorative justice blurs the line between criminal and civil wrongs by focusing on the harm done and the solutions required for healing, rather than the action itself or the need for punishment. Therefore, the principles of restorative justice are applicable to both criminal and civil conflicts where a wrongdoing is at issue.

**H. Zehr**, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo, ON: Herald Press, 1990) at 181.

<sup>4</sup> *ibid.* at 211.

## 2. Principles of Restorative Justice and Restoration

At the centre of the restorative justice concept lies the idea that crimes or wrongdoings are violations of people and relationships and that acceptance of responsibility is required before the process of restoration can begin. The most basic principles of restorative justice are:

1. Holding the wrongdoer directly accountable for the individual victim and the specific community affected by the wrong act;
2. Requiring the wrongdoer to take direct responsibility for making "things whole again" to the degree that this is possible;
3. Providing the victim(s) purposeful access to the courts and correctional processes, which allows them to assist in shaping the wrongdoers' obligations; and
4. Encouraging the community to become directly involved in supporting victims, holding wrongdoers accountable, and providing opportunities for wrongdoers to reintegrate into the community.<sup>5</sup>

Although the exact goals of restorative justice programs differ from one another, depending on the social and cultural context, the above principles demonstrate the crucial role of victims, wrongdoers, and the community in facilitating the restoration of relationships.

Restoration does not mean returning to the relationship prior to the conflict.<sup>6</sup> In many cases, this is

neither applicable nor desirable. For example, a victim who has never met the offender prior to the crime may not want further contact with the person. In the case of spousal abuse, the abused is unlikely to wish for a return to the relationship of abuse. Restoration, in the context of restorative justice, refers to "the process of 'righting wrongs' or healing wounds".<sup>7</sup> This means different things for the different parties. Victims may use the process to restore a sense of control over their lives, to obtain answers for questions about the incident, or to express their anger over the wrongdoing and the impact the event has had on them. For offenders, restoration means "accepting responsibility for their actions by repairing the harm they have caused" and "addressing the issues that contribute to their propensity to engage in harmful behaviour".<sup>8</sup> In the case of the community, the process of restoration includes "denouncing wrongful behaviour and reaffirming community standards".<sup>9</sup> Restoration also means successful reintegration of the offender into society, particularly in situations where the victims and offenders live in the same community.

Carey (1996) in P. Hahn, *Emerging Criminal Justice: Three Pillars for a Proactive Justice System* (California: SAGE Publications, Inc., 1998) at 135.

<sup>6</sup> Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper* (Ottawa: Law Commission of Canada, 1999) at 33.

<sup>7</sup> *Ibid.* at 27.

The processes of restoring relationships and re-integrating individuals into the community often involves transformation on the part of those involved in the healing process. For this reason, restorative justice is often referred to as transformative justice. The restorative or transformative paradigm can best be understood against the backdrop of the mainly retributive and restitutive paradigms of the current legal system in North America.

### 3. Retributive Justice

Retribution is the dominant framework in modern criminal law theory. From the view of retributive justice, "[c]rime is a violation of the state, defined by lawbreaking and guilt" and "[j]ustice determines blame and administers pain in a contest between the offender and the state directed by systematic rules".<sup>10</sup> According to Zehr, the retributive system is founded on the following assumptions:

1. crime is essentially *lawbreaking*;
2. when a law is broken, justice involves establishing *guilt*;
3. so that *just deserts* can be meted out;
4. by inflicting pain;
5. through a *conflict* in which *rules* and intentions are placed above outcomes.<sup>11</sup>

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Zher, *supra* note 3 at 181.

11 *Ibid.* at 81.

The first premise, crime as lawbreaking, results in an emphasis on the act of breaking a defined rule, rather than the harm done or the experiences of those affected. Under this system, the victim is the state and "crime is an offence against the state", not against the individual.<sup>12</sup> The real victims, those who suffered the actual harm, are left out of the equation and only called upon to be witnesses or other secondary players in the process. The singular focus on legal guilt, not moral, social, or even factual guilt, further isolates victims.

In addition, much of society is obsessed with making sure offenders receive "what is coming to them" or their "just deserts", as Zehr calls it.<sup>13</sup> This approach leads to the view that punishment and the infliction of pain are the appropriate responses to crime. Because of the severity of the punishment if an accused is found guilty, safeguards are put in place to ensure due process. Justice, from this viewpoint, is served when rules and procedures are followed, rather than when a wrong is made right. Table 1 summarizes the difference between retributive and restorative justice in its understanding of justice.

The cumulative effect of retributive justice is isolation of the victim and the offender from their personal experiences. This system is not only problematic in that it results in an expanding prison or incarcerated population, but also because it fails to engender empowerment of those directly and indirectly affected. For offenders, there is potentially a greater reward for denying than accepting responsibility. For victims, their limited role in the process makes empowerment difficult. Because the community has little or no say in the outcome, members of the community tend to feel entirely alienated and helpless. The result of retributive justice is a system where few are satisfied with the outcome and many are rendered worse off.

12 *Ibid.* at 181.

13 *Ibid.* at 74.

**Table 1: Understandings of Justice 14**

| <u>Retributive Lens</u>                       | <u>Restorative Lens</u>                         |
|---|---|
| Blame-fixing central                          | Problem-solving central                         |
| Focus on past                                 | Focus on future                                 |
| Needs secondary                               | Needs primary                                   |
| Battle model; adversarial Dialogue normative  |   |
| Emphasizes differences                        | Searches for commonalties                       |
| Imposition of pain considered normative       | Restoration and reparation considered normative |
| One social injury added to another            | Emphasis on repair of social injuries           |
| Harm by offender balanced by harm to offender | Harm by offender balanced by making right       |
| Focus on offender; victim ignored             | Victims' needs central                          |
| Victims lack information                      | Victim and offender are key elements            |
| Restitution rare                              | Restitution normal                              |
|   |   |

|   |  |
|---|--|
| Victims' "truth" secondary                              | Victims' suffering lamented and acknowledged             |
| Action from state to offender; offender passive         | Offender given role in solution                          |
| State monopoly on response to wrongdoing                | Victim, offender, and community roles recognized         |
| Offender has no responsibility for resolution           | Offender has responsibility in resolution                |
| Outcomes encourage offender responsibility              | Responsible behavior encouraged                          |
| Rituals of personal denunciation and exclusion          | Rituals of lament and reordering                         |
| Offender denounced                                      | Harmful act denounced                                    |
| Offender's ties to community weakened                   | Offender's integration into community increased          |
| Offender seen in fragments, offense being definitional  | Offender viewed holistically                             |
| Sense of balance through retribution                    | Sense of balance through restitution                     |
| Balance righted by lowering offender                    | Balance righted by raising both victim and offender      |
| Justice tested by intent and process                    | Justice tested by its "fruits"                           |
| Justice as right rules                                  | Justice as right relationships                           |
| Victim-offender relationships ignored                   | Victim-offender relationships central                    |
| Process alienates                                       | Process aims at reconciliation                           |
| Response based on offender's past behavior              | Response based on consequences of offender's behavior    |
| Repentance and forgiveness discouraged                  | Repentance and forgiveness encouraged                    |
| Proxy professions are the key actors                    | Victim and offender central; professional help available |
| Competitive, individualistic values encouraged          | Mutuality and cooperation encouraged                     |
| Ignores social, economic, and moral context of behavior | Total context relevant                                   |
| Assumes win-lose outcomes                               | Makes possible win-win outcomes                          |

14 *Ibid.* at 211-4.

#### 4. Restitutive Justice

Another underlying principle of the current legal paradigm is restitution, which is generally used to resolve civil wrongs, such as torts. Restitution "roughly denotes the idea that a gain or benefit wrongly taken or enjoyed should be returned".<sup>15</sup> This is based on the notion that a wrongdoer has been unjustly enriched by his or her action at the expense of the sufferer. For example, if A stole a bike from B and was caught, then a restitutive approach would require that A return the bike to B.<sup>16</sup>

This approach is similar to restorative justice and the term, restitution, is often mistakenly used to refer to

restoration. Restitution is similar in that it offers "wrongdoers the opportunity to put right the wrong by making good the damage that was caused"<sup>17</sup>; however, restitution does not capture the full essence of restorative justice. Restitution assigns a value to the material losses suffered by the victim and requires that the wrongdoer balance the scale by paying that amount to the sufferer. Restoration, on the other hand, looks beyond the material harm to non-material disruptions, such as the loss of a sense of security or the loss of trust. In addition, restitution only considers harm done to the victim; whereas, restorative justice attempts to address the needs of the victim, offender, family members, the community, and others affected by the offence.

Llewellyn and Howse, *supra* note 2.

<sup>16</sup> *Ibid.*

Restitutive justice, as it is administered through the current adversarial system, often serves to divide the parties, rather than restore relationships. For example, a wrongdoer generally denies or claims only partial responsibility in order to minimize assessed damages. For a victim, making oneself seem more victimized provides a greater potential for a larger compensation package. The adversarial system necessarily places the parties at diametrically opposed sides, thereby reducing the few benefits of restitutive justice. In contrast, restorative justice encourages the victims and offenders to move beyond their differences.

## **H. Origins of Restorative Justice in North America**

In North America, the historic underpinnings of restorative justice are found in traditional Aboriginal teachings and the teachings of the Christian faith. In the criminal sphere, the modern restorative justice movement flowed out of the prison abolition movement and the application of aboriginal and Christian teachings to informal dispute resolution methods. In the civil law context, restorative justice is beginning to be recognized as an important aspect of alternative dispute resolution in situations where wrongs have been committed. Although restorative justice also has origins in other cultures, the major influences on the North American movement are aboriginal teachings, faith communities, prison abolition advocates, and the alternative dispute resolution movement.

<sup>17</sup> Law Commission of Canada, *supra* note 6 at 20.

### **1. Aboriginal teachings/ justice**

Aboriginal groups around the world, and even within Canada or British Columbia, have diverse cultures, beliefs, and practices. It is presumptuous to speak of "aboriginal teachings" or "aboriginal justice" as one common set of principles. However, similarities exist among the underpinnings of these diverse cultures, beliefs, and practices. Because the First Nations in Canada and the United States and the Maori of New Zealand have had the most impact on the North American restorative justice movement, the following is based mostly on the practices of these groups.

Much of the synthesis below comes from Rupert Ross' book, *Returning to the Teaching: Exploring Aboriginal Justice*.<sup>18</sup> Ross is himself a non-Aboriginal who learned these teachings from speaking with Aboriginal people, mostly in Cree and Ojibway First Nations in northwestern Ontario, during the course of his work as a Crown prosecutor. *Returning to the Teachings* is his interpretation of and attempt to communicate Aboriginal views on justice. Based on Ross' analysis, the key concepts of justice in traditional aboriginal cultures are founded on the following teachings:

1) First and foremost, teachings are the most important source of how people live and conduct their lives, not laws or rules: "justice involves far more than what you do after things have gone wrong ... instead it

involves creating the social conditions that minimize such wrongdoing."<sup>9</sup> These teachings serve as proactive means of promoting harmony in a community. Western models of justice begin with the premise that there will be conflicts, whereas aboriginal notions of justice "[start] on the presumption that people in communities wish to live nicely together".<sup>20</sup> Children are exposed to these teachings from the day they are born, either through the oral tradition of storytelling or through appropriate behaviour, conduct and actions on the part of adults and elders. Justice, from this perspective, means showing the wrongdoers the correct path in life, rather than seeking to punish the individual for the particular act. In fact, the term justice cannot be directly translated into many aboriginal languages. The notions of justice below are informed by aboriginal teachings.

18 R. Ross, *Returning to the Teachings. Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996).

2) Aboriginal teachings speak of all things in the universe as part of a single whole, interconnected through relationships.<sup>21</sup> The whole includes the physical and the spiritual. Realizing the interrelationships among humans, the Earth and the spiritual builds healthy relationships, which are the foundations of a harmonious society. When a person commits a wrongdoing, a relationship is broken and needs to be made healthy again. The duty to heal the relationship, however, does not rest solely on the offender. Rather, justice means seeking out all factors that may have contributed to the offence and setting an action plan for how the wrongdoer and victims can proceed on a path of healing, both spiritual and physical. This process includes "a greatly expanded circle of friends, family, employers and other influence" - the whole rather than merely the individuals.<sup>22</sup>

19 *Ibid.* at 256.

20 P. Monture-Okanee (now P. Monture-Angus), as quoted in *Restorative Justice: Four Community Models* (Four Community Models - A Conference, Saskatoon, 17-18 March 1995).

3. According to traditional teachings, people will always have different perceptions of the truth and the events that occurred. From this perspective, the truth has more to do with "each person's *reaction to and sense of involvement with* the events in question, for that is what is truly real to them".<sup>23</sup> Thus, objectivity is an illusion and the question of the seriousness of the crime a futile one. The focus of justice, then, is to address the harm done and the causes of the wrongdoing, rather than the severity or the details of the offence.<sup>24</sup>

4. In aboriginal teachings, leadership is not based on hierarchical power over others. Rather, it is based on the ability to express the sentiments of the people and reliance on influence and moral stature.<sup>25</sup> Under this system, one person, particularly a stranger, does not possess the authority to tell others what to do. Decisions arise out of the families and clans, from the bottom up, not the top down.<sup>26</sup> Therefore, the responsibility for addressing wrongdoings lies with those most affected by the harm. For this reason, the practice of having a stranger adjudicate a conflict and establish the punishment or solution is a foreign concept.

5. Traditional teachings also provide that everything is constantly changing and such change occurs in patterns and cycles.<sup>27</sup> Since things neither stay constant nor happen in random, justice means looking beyond the actual event to the relationships between the event and other factors and determining how change can be effected in a positive way. This notion of justice is fundamentally different from the way Western legal systems freeze offenders, and victims in some cases, in the moment of the crime and define them forever in terms of offenders and victims.

21 P. Lane, J. Bopp, and M. Bopp (1984) in Ross, *supra* note 18 at 275.

22 Ross, *supra* note 18 at 64.

23 *Ibid.* at 98.

24 *Ibid.* at 91.

25 *Ibid.* at 58.

26 *Ibid.* at 54.

27 Lane, Bopp and Bopp, *supra* note 21.

The above teachings are interrelated and operate together to form the core foundations of aboriginal justice. These teachings are by no means the only principles from Aboriginal cultures relevant to the administration of justice in traditional communities. Also, many aboriginal communities nowadays have lost some or all of these roots. However, these teachings played and continue to play an important role in shaping the modern restorative justice movement.

Using the traditional teachings on the administration of justice, many aboriginal communities as well as judges serving these communities have established justice programs more suitable to aboriginal views and needs. Examples include circle sentencing in Canada and the Navajo Peacemaker Court in the United States. In New Zealand, Maori practices provided the foundation for the family group conferencing model, which is available to aboriginal as well as non-aboriginal youth. These programs are well-known around the world as ways of using aboriginal values/teachings to reform the justice system towards restoration.

#### Canada: Sentencing Circles and Healing Circles

In Canada, the idea of alternative approaches to justice in aboriginal communities began in the North (northern BC, Alberta, Ontario, and the Yukon and Northwest Territories) and Manitoba, where circuit court judges frequently saw "harsh and careless

justice ... meted out to natives".<sup>28</sup> B.C. Provincial Court Justice, Cunliff Barnett, was one of the first judges to initiate community involvement in sentencing, which eventually evolved into circle sentencing. His earliest such sentence was in 1978, when he ordered that a fourteen year-old Heiltsuk youth be sent to a remote island, rather than jail, on the recommendation of his uncle and other band leaders.<sup>29</sup> The remote island was one of the band's reserves and the teenager's uncle was working on a project which took him there almost every day, therefore, the teenager was isolated but not abandoned. Spending eight months in banishment changed the boy's life and he eventually became a leader in the community. Premised on the grounds that prison sentences are more likely to entrench an emergent criminal identity, Justice Barnett continued to consult with the community and draw on applicable cultural traditions.

Justice Barry Stuart of the Yukon Territorial Court was another judge who favoured community consultation through circle sentencing.<sup>30</sup> Circle sentencing refers to a process whereby the offender, family members, friends, members of the community, and sometimes, the victim or victims are involved in establishing a community-based remedy.<sup>31</sup> The process and remedy is intended to help heal and restore the victim, the offender, and the community, and promote healthy relations among them. Justice Stuart first experimented with circle sentencing in 1992 with a twenty-six year-old offender who had forty-three previous convictions. The offender "pleaded guilty to carrying a baseball bat with the intention of assaulting an RCMP officer."<sup>32</sup> Instead of sending him to jail, as the Crown prosecutor had suggested, Justice Stuart invited family and friends to provide input into the sentence at the court, which

he reconfigured in a circle. Upon hearing the family and friends' willingness to help with rehabilitating the offender, Justice Stuart suspended sentencing and issued probation for two years, on the condition that the offender live at home and be treated for alcohol abuse. His decision, *R. v. Moses*<sup>33</sup>, was the first officially reported case to provide for circle sentencing. The judgement describes the process in detail. Through the efforts of judges, like Justice Barnett and Justice Stuart, the formal legal system in northern communities has awakened to the potential of culturally-appropriate forms of sentencing.

<sup>28</sup> D. Cayley, *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives* (Toronto: Anasi, 1998) at 239.

<sup>29</sup> *Ibid.* at 240.

<sup>30</sup>*Ibid.* at 182. British Columbia Ministry of Attorney General, "Restorative Justice Framework" (1998), online: British Columbia Ministry of Attorney General <[www.ag.gov.bc.ca/public/98003.htm](http://www.ag.gov.bc.ca/public/98003.htm)> (date accessed: 14 September 1999).

Circle sentencing, however, is not only taking place at the judicial level. The Kwanlin Dun Community Justice Project is a community-based program in the Yukon that facilitates offenders and victims through the process of circle sentencing.<sup>34</sup> The process involves seven steps:

Step 1: The offender is referred by police or peace makers for diversion or mediation.

Step 2: An application is made to the Kwanlin Dun Justice Project. The application involves many parties, including an elder, the victim coordinator, probation officer, community members, etc.

Step 3: The community justice committee makes a decision to accept or reject the application. The offender, victim, justice system and community may provide input to the committee. Cases that are rejected go to court. If a case is accepted, the committee makes a decision on when, where, and who to include in the circle sentencing process.

<sup>32</sup> Cayley, *supra* note 28 at 182.

<sup>33</sup> *R. v. Moses*, 3 C.N.L.R. 116. Church Council on Justice and Corrections, *supra* note 1

Step 4: The offender support group and the victim support group prepare for the circle. This may involve meetings and possible mediation between representatives of the groups.

Step 5: The circle sentencing hearing takes place.

Step 6: The sentence is implemented.

Stage 7: The community pardons the offender.

Central to the Project are "values such as respect, compassion, forgiveness, sharing, spirituality and wholeness".<sup>35</sup> Re-integrating the offender into the community and monitoring the sentence by the community are crucial to the process. To date, the Kwanlin Dun Justice Project has dealt with most forms of offences, with the exception of manslaughter and murder. However, the Project purposely refuses to handle sexual assault cases because the community feels that "more community mobilization and preparedness" is required before such offences can be tackled.<sup>36</sup>

The Hollow Water Community Holistic Healing Program in Manitoba, on the other hand, was set up especially to deal with sexual abuse problems in Hollow Water and its three adjacent First Nations communities.<sup>37</sup> Located 150 miles northeast of Winnipeg, the communities faced serious problems of alcoholism and sexual abuse, like many First Nations communities throughout Canada. The Community Holistic Circle Healing Program is a thirteen step process for dealing with sexual abuse:

- 1) disclosing abuse, by abuser or abused;
- 2) protecting the victim/child;
- 3) confronting the abuser;
- 4) assisting the spouse;
- 5) assisting for the family/ies and the community;
- 6) meeting of the Assessment Team (Native Alcohol and Drug Addiction Program -NADAP, Child and Family Services, volunteers, community health representatives, etc.) and the RCMP and Crown;
- 7) abuser admits and accepts responsibility for action;
- 8) preparing the abuser;
- 9) preparing the victim(s);
- 10) preparing family/ies;
- 11) the Special Gathering, where the Healing Contract is created;
- 12) implementing the Healing Contract; and
- 13) the Cleansing Ceremony.<sup>38</sup>

The Healing Contract is designed and signed by all parties affected by the offence and signifies each parties' commitment to bringing about certain changes and additions to the relationship. Such contracts rarely provide for a timeframe of less than two years and Rupert Ross reports that one "is still being enforced six years after its creation".<sup>39</sup> As with the Kwanlin Dun Justice Project, the Hollow Water Community Holistic Circle Healing Program only accepts offenders who take responsibility for their action, in that they have submitted a guilty plea. This ensures due process for offenders who maintain their innocence or prefer adjudication through the formal legal system.

The Kwanlin Dun and Hollow Water programs are two examples of the numerous aboriginal restorative justice projects taking place throughout Canada. These programs provide alternatives that better serve the goals of restoration and healing, devolve decision-making to the community level, and allow for transformation of the individuals involved, all of which are important to aboriginal notions of justice. Although a far cry from the traditional dependence on teachings, these programs are also a far cry from the "nail them, jail them" attitude prevalent in Western legal systems.

C.T. Griffiths, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" (1996) 20:2 International Journal of Comparative and Applied Criminal Justice 195 at 202

and Ross, *supra* note 18 at 32-3.

### United States: Navajo Peacemaker Court

The Navajo Nation, which covers a territory of 25,000 square miles in the states of Arizona, New Mexico and Utah, has had its own justice system since 1892.<sup>40</sup> This system, however, was based on Western-style justice, with family and clan being replaced by police, lawyers, judges and courts. By the early 1980s, after many reforms, the Navajo Nation judges realized that, despite the use of Navajo customs and traditions, the process continued to be "a powerful person (a judge) handing down decisions and rules from on high".<sup>41</sup> In 1982, the Navajo Nation Judicial Conference established the Peacemaker Court to complement the four other courts of the Navajo Nation (the district, family, small claims and appellate courts). The Peacemaker Court is "a court-annexed system of popular justice, whereby respected community leaders organize and preside over the traditional Navajo trial, '*ahwinititi* (where they talk about you), in the community in which the dispute arises".<sup>42</sup> The idea is based on the traditional Navajo institution of *hozhooji naal 'aanii*, or peacemaking.

In Navajo tradition, "a person who claims to be injured or wronged by another [would] make a demand upon the perpetrator to put things right"<sup>43</sup>. The demand was referred to as *nalyeeh*, which means compensation as well as a request to make the relationship right. If the person was unable to approach the wrongdoer himself or herself, it was common for a relative to do so. If these informal methods failed, the victim or victim's relative would approach a respected community leader, referred to as a *naat 'aanii* or peacemaker, to assist with the problem.

<sup>39</sup> Ross, *supra* note 18 at 33

<sup>40</sup> J.W. Zion, "Navajo Restorative Justice: The Law of Equality and Justice" in B. Galaway and J. Hudson, eds. *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996) 157.

<sup>41</sup> *Ibid.* at 159-60.

<sup>42</sup> *Ibid.* at 160.

In modern times, this is where the Navajo Peacemaker Court comes into play. Within the Navajo Nations' 110 communities, there is a combined total of over 250 trained peacemakers or *flaw 'aanii*.<sup>44</sup> These individuals are respected members of their community, both female and male, and "include medicine people, traders, lawyers, Native American church leaders and non-Indian clergy".<sup>45</sup> Selected on the basis of their "demonstrated character, wisdom and the ability to make good plans for community action", the peacemakers receive training and are supervised by a local judge if the case is referred by the courts.<sup>46</sup> Disputes can also be referred to peacemakers by the police, social services, health services, and other Navajo Nation service providers. The majority of cases, however, are self-referrals in that the disputants mutually agree to bring their case before a peacemaker. The types of dispute include civil and criminal matters. Because the peacemakers usually have some relationship with the parties, they are not intended as neutral mediators.

The actual process of peace-making involves the parties talking over their problem(s) and coming to a solution.<sup>47</sup> The peacemaker designates the location and invites family and community members with an interest in the matter to attend. The process starts with a prayer, which summons the assistance of spiritual powers as well as provide "an opportunity for the *naat 'aanii* to focus the minds of the parties on a process that is conciliatory and healing, not confrontational and winner-take-all".<sup>48</sup> After the prayer,

the parties lay out their grievances in terms of the facts as well as its impact. The disputants, both the victim and the accused, and their relatives have a chance to convey their feelings and thoughts on the event. Generally, the parties present not only talk about the event, but also make demands for something to be done. The roles of the peacemaker are "[assisting] disputing parties by encouraging them to talk through the disagreement, counselling or lecturing the parties based on Navajo spiritual narratives, helping the parties arrive at a solution to the problem, and assisting them to achieve consensus and harmony".<sup>49</sup> Peacemakers only have persuasive authority; they do not have "the authority to make a decision for others or to impose a decision".<sup>50</sup> However, because of their stature in the community, their opinions are influential. The solution that the parties arrive at through the peace-making process may be enforceable through a court order if the dispute was referred by the court.

43 *Ibid.* at 163.

44 *Ibid.* at 171 and M.O. Nielsen, "A Comparison of Developmental Ideologies: Navajo Nation Peacemaker

Courts and Canadian Native Justice Committees" in B. Galaway and J. Hudson, *supra* note 40, 207 at 209.

45 *Ibid.*

46 *Ibid.*

Zion, *supra* note 40 at 164.

Like the sentencing and healing circles initiated in Canada, peace-making entails the application of traditional values to a semi-traditional, semi-modern process. The traditional values found in the Navajo Peacemaker Court include: "the equality of all participants; the need to talk things through; the invocation of spiritual powers to assist in the process; the need for informality; the guiding and persuasive role of Elders (*Naat 'aanii*); the need to identify the underlying problems; the need to plan solutions; the origins of counselling and lectures in Navajo values; the need to establish consensus among participants; the need to re-establish and maintain solidarity (and obligations) in clan and other relationships; and the need to restore community, family, and individual well-being and harmony".<sup>51</sup> The Western component of the process is the role of the judiciary and the appointment of peacemakers.

48 *Ibid.*

Neilsen, *supra* note 44 at 210.

#### New Zealand: Family Group Conferencing

New Zealand's family group conferencing model is unique in that it is the only restorative justice program to be officially endorsed by government legislation. In addition, although the principles are based on the traditions of the Maori, New Zealand's indigenous people, the program is available to both aboriginal and non-aboriginal offenders, and in urban and rural areas. Family group conferencing, however, is limited to young offenders; although, there has been discussions about extending the program to adult offenders.

In 1989, the New Zealand government enacted the *Children, Young Persons and their Families Act*, which provides for family group conferencing as a voluntary alternative to formal adjudication. Family

group conferencing is premised on wider family involvement and "personal obligation to others within a community of concern".<sup>52</sup> The process can involve as many as 30 participants, including victims and their family or other supporters, the offender and his/her family and supporters, police officers, school counsellors, and social workers.<sup>53</sup> A trained conference coordinator prepares the individuals prior to the process and then facilitates discussions during the meetings. The conference is fairly lengthy and does not focus solely on the victim and the offender.

**50** Zion, *supra* note 40 at 167.

**51** Neilsen, *supra* note 44 at 211.

**52** Church Council on Justice and Corrections, *supra* note 1.

Although the process is not rigidly controlled, the conference is usually divided into three stages. First, the police officer describes the offence following introductions, greetings and sometimes a prayer. Then, victims and others affected by the offence have an opportunity to express their emotions and tell their stories. Offenders usually respond by acknowledging the effects of their crime and then expressing remorse and shame. In the next phase, the offender and his/her supporters establish an action plan for the offender. This is done in private so that families can address personal and private matters. The third stage involves reconvening as a conference to see if the other parties, particularly the victim, agree to the proposed plan. If the parties agree, the solution is binding on the offender and a youth worker is assigned to monitor the offender's progress. If the offender completes the actions required by the plan, the charge against him/her is usually withdrawn. However, if the offender fails to carry out the plan, a youth court judge has jurisdiction to make a determination.

Despite its roots in Maori traditions, family group conferencing does not completely reflect Maori practices.<sup>55</sup> The idea of involving the victim and offender's support network and the use of remorse to bring about change is consistent with Maori traditions; whereas, the involvement of the judiciary is a foreign concept. Like circle sentencing and the Navajo Peacemaker Court, family group conferencing represents the compromise between Western and aboriginal means of administering justice.

M. Forget, "Crime as Interpersonal Conflict: Reconciliation Between Victim and Offender" (1999) [unpublished]

## **2. Christian Faith Communities**

Christian faith communities, particularly Mennonites, are another major force behind the restorative justice movement. In Christian communities, the idea of restorative justice has its origins in biblical concepts of justice. As with the concepts of aboriginal justice, one cannot speak of one "Christian" view. In fact, David Cayley, in *The Expanding Prison*, traces the history of the crime and punishment model of justice to reforms in the Christian church of the eleventh century.<sup>56</sup> According to Howard Zehr, however, biblical justice provided one foundation for the restorative approach to justice.

Many think of the expression, "an eye for an eye", when talking about biblical justice. This expression has been misinterpreted as a call for retaliation through English and European translations of the Hebrew text.<sup>57</sup> According to Zehr and other theologians, however, the principle of "an eye for an eye" was intended as a limit on retribution, i.e. "[d]o this much, but only this much", and as a tool for compensation, i.e. "the value of an eye for the value of an eye".<sup>58</sup> In addition, even if the expression was a call for retribution, it is not the overriding principle of biblical justice. The term *lex talionis* or "eye for

an eye" only appears only 3 or 4 times in the Old Testament.<sup>59</sup> The concepts of *shalom* and covenant are much more prevalent concepts in biblical justice.

Using Perry Yodor's discussions of *shalom*, justice, law and covenant and Millard Lind's works on covenant and law, Zehr traces the roots of restorative justice to Biblical concepts of *shalom* and covenant.<sup>60</sup> These concepts form the essential themes of both the Old Testament and the New Testament. *Shalom* is defined as "a condition of 'all rightness,' of things being as they should be, in various dimensions".<sup>61</sup> The dimensions referred to include: 1) "health and material prosperity and an absence of physical threats such as illness, poverty, and war"; 2) people living "in right relationships with on another and with God", including "living in just economic and political relationships"; and 3) "straightforwardness", which "refers to honesty or absence of deceit in dealing with one another, and to a condition of blamelessness (i.e., being without guilt or fault)".<sup>62</sup> The "rightness" or fulfillment of these three dimensions defines the vision of *shalom*.

<sup>56</sup> Cayley, *supra* note 28 at 126. However, Cayley also recognized that Christian values have contributed to the rise of restorative justice.

<sup>57</sup> Bianchi (1994) in Liewellyn and Howse, *supra* note 2.

<sup>58</sup> Zehr, *supra* note 3 at 103.

*Ibid.* at 147.

Flowing from the vision of *shalom*, the concept of covenant provides a basis for and a model of how humans can understand and work towards *shalom*. Covenants are binding agreements between people and imply a relationship premised on mutual responsibilities and commitments. The foundations of such relationships are salvation and liberation as demonstrated by "God's righteous acts of salvation" in the Old Testament and "the life, death, and resurrection of Christ" in the New Testament.<sup>63</sup> In addition, God and Christ did not give because people deserved or earned it, but rather in the name of love and mercy. Therefore, the concept of covenant requires that humans reciprocate such acts of love and mercy in their relationships with God and among themselves. In doing so, humans are fulfilling their covenant obligations and working towards *shalom*, both of which run counter to a system based on retributive justice.

<sup>60</sup> *Ibid* at 130.

<sup>61</sup> *Ibid.*

<sup>62</sup>*Ibid.* at 131.

<sup>63</sup> *Ibid.* at 133-4.

Retributive justice is premised on the assumption that justice means fairly distributing punishment according to how much a person deserves such consequences.<sup>64</sup> From this perspective, offenders do not deserve the love and mercy of others. Although there is a recognition that "tit-for-tat" justice plays some role in society, the Bible demonstrates a clear rejection of such an approach to justice. Because God and Jesus gave according to need, not merit, justice is not defined by "whether the right rules applied in the right way."<sup>65</sup> Instead, it is measured by whether the outcome serves to restore the dimensions of *shalom*, making the situation right or better. Therefore, restitution, forgiveness, and satisfaction, rather than

retribution and punishment, are important concepts in biblical justice. To the extent that punishment plays a role, *shalom* ensures that it is not an end in itself, but is rather aimed at restoration or "vindicating" the oppressed.<sup>66</sup> In fact, all Biblical laws are intended as means to a better society, rather than ends in themselves. Law is "an instrument for building shalom, for building relationships that right" and "its characteristic purpose not to punish but to redeem, to make things right".<sup>67</sup> Unlike the modern justice system, Biblical justice is about the future, not the past. Table 2 summarizes the major differences between the principles of Biblical justice and the current justice system.

<sup>64</sup> *Ibid.* at 138.

<sup>65</sup> *Ibid.* at 140.

<sup>66</sup> *Ibid.* at 142.

<sup>67</sup> *Ibid.* at 144.

Table 2: Concepts of Justice, Biblical and Modern<sup>68</sup>

| Contemporary Justice   | Biblical Justice   |
|--|--|
| 1. Justice divided into areas, each with different rules                     | 1. Justice seen as integrated whole                                    |
| 2. Administration of justice as an inquiry into guilt                        | 2. Administration of justice as search for solutions                   |
| 3. Justice tested by rules, procedures                                       | 3. Justice defined by outcome, substance                               |
| 4. Focus on infliction of pain   | 4. Focus on making right   |
| 5. Punishment as an end  | 5. Punishment in context of redemption, shalom                         |
| 6. Rewards based on just deserts, "deserved"                                 | 6. Justice based on need, undeserved                                   |
| 7. Justice opposed to mercy  | 7. Justice based on mercy and love                                     |
| 8. Justice neutral, claiming to treat all equally                            | 8. Justice both fair and partial                                       |
| 9. Justice as maintenance of the status quo                                  | 9. Justice as active, progressive, seeking to transform the status quo |
| 10. Focus on guilt and abstract principles                                   | 10. Focus on harm done   |
| 11. Wrong as violation of rules  | 11. Wrong as violation of people, relationships, shalom                |
| 12. Guilt as forgivable  | 12. Guilt forgivable through an obligation exists                      |
| 13. Differentiation between "offenders" and others                           | 13. Recognition that we are all offenders                              |
| 14. Individual solely responsible, social and political contexts unimportant | 14. Individual responsibility, but in holistic context                 |
| 15. Action as free choice  | 15. Action as choice, but with recognition of the power of evil        |
| 16. Law as prohibition   | 16. Law as "wise indicator", teacher, point for discussion             |
| 17. Focus on letter of law   | 17. Spirit of law as most important                                    |
| 18. The state as victim  | 18. People, shalom, as victim  |
| 19. Justice serves to divide   | 19. Justice aims at bringing together                                  |

## Victim-Offender Reconciliation

The modern manifestation of the concepts of *shalom* and covenant, salvation and liberation, in the criminal sphere is victim-offender reconciliation. The idea grew out of two Mennonite criminal justice workers' frustrations with the usual court process.<sup>69</sup> In 1974, Mark Yantzi, a probation officer, and Dave Worth, then coordinator of Voluntary Service workers for the Mennonite Central Committee in Kitchener, Ontario, were part of an informal study group on questions of justice. One of the cases the group considered occurred in the nearby town of Elmira. Two young men vandalized twenty-two homes and businesses in one night during a drunken rage. The two offenders pleaded guilty. Instead of sending them to jail, Mark Yantzi suggested that "the best thing for the community would be to have the offenders meet their victims".<sup>70</sup> Dave Worth agreed wholeheartedly with the idea and the two presented the idea to the judge on the day of sentencing. At first, the judge rejected the idea; however, in his sentence, he gave the young offenders a further three-week remand and ordered them to meet their victims, with the assistance of Mark Yantzi and Dave Worth. The offenders were to return with a report on the damages suffered by the victims. Mark and Dave accompanied the two boys to the homes of the victims and negotiated restitution. The restitution agreements ranged from paying the victims money for the damage to working with the victims to repair damages. The judge gave three months for the offenders to carry out their agreements. At the end of three months, Dave Worth and Mark Yantzi returned to the victims' homes with the boys and noticed a remarkably positive change in the victims' attitudes towards the offender. From this experiment, the rudimentary foundation for other victim-offender reconciliation programs was born.

<sup>68</sup> *Ibid.* at 151-2.

<sup>69</sup> *Ibid.* at 158 and Cayley, *supra* note 28 at 215.

Since then, hundreds of victim-offender reconciliation or mediation programs have sprung up throughout Canada and different parts of the world, many of them initiated by organizations and volunteers from the Christian faith. According to a 1996 survey, there are over 600 such programs around the world (Table 3).

<sup>70</sup> Cayley, *supra* note 28 at 215.

**Table 3: International Development of Victim Offender Mediation Programs<sup>71</sup>**

| Country     | Number of Programs             |
|-------------|--------------------------------|
| Australia   | 5                              |
| Austria     | Available in all jurisdictions |
| Belgium     | 8                              |
| Canada      | 26                             |
| England     | 20                             |
| Finland     | 130                            |
| France      | 40                             |
| Germany     | 293                            |
| New Zealand | Available in all jurisdictions |

|               |    |
|---------------|----|
| Norway        | 54 |
| Scotland      | 2  |
| South Africa  | 1  |
| United States | 15 |

Although not entirely restricted to faith communities, the idea of victim-offender reconciliation flows naturally from the Christian perspective that humans "are all children of God, worthy of redemption".<sup>72</sup> Christian values have always shown "compassion and forgiveness for the offender", on the one hand, and concern for "the pain and suffering of victims", on the other.<sup>73</sup> The notions of covenant, salvation and liberation are evident in the goals of victim-offender mediation programs: reconciliation, redemption and responsibility. Victim-offender reconciliation programs were established by faith communities in an effort to move towards a system of justice that aims for "a condition of 'all rightness,' or *shalom*, rather than retribution.

### 3. From Prison Abolition to Penal Abolition and Restorative Justice

The prison abolition movement has been around for as long as prisons themselves. Historically, the prison abolition movement was rooted in the Christian church's displeasure with the inhumanity and cruelty of prisons, particularly since the nineteenth century when imprisonment became the major form of punishment. Advocates "campaign[ed] for the rights of prisoners and for improvements in prison conditions, as well as for reductions in the use of imprisonment".<sup>74</sup> Such sentiments continue to inform the abolition movement.

71 The Network Interaction (Spring 1996), in Church Council on Justice and Corrections, *supra* note 1.

72 M. Umbreit, *Crime & Reconciliation: Creative Options for Victims and Offenders* (Nashville: Abingdon Press, 1985) at 83.

The modern abolition movement is more secular, although Christian communities continue to play an important role. The movement originated with a dissatisfaction with the "get tough" approach to criminal justice, as well as the recognition of the failures of the rehabilitative or welfare approach, in the early 1970s.<sup>75</sup> The abolitionist movement is very much connected with the prisoners' rights movement of the same period. Initially, prison abolitionists only endorsed 'negative' reforms, such as abolishing the worst aspects of imprisonment. At the time, the movement was influenced by Mathiesen's view on the reform/revolution dilemma:

*if* abolitionists propose reforms, implementation of these may strengthen the institution which they dislike, by making it less oppressive or arbitrary; if they publish more radical suggestions for change or abolition, they are likely to be marginalized and have no influence in the on actual prisons and punishment. <sup>76</sup>

Mathiesen suggested that abolitionists only support reforms that increased prisoners' rights, while weakening the institution of the prison and the authority of those in power.<sup>77</sup> This approach appealed to those in the movement at the time, many of whom viewed 'civilized forms of containment' as both acceptable and indispensable, but should be kept to minimum.<sup>78</sup> Most abolitionists saw a need for prisons for dangerous offenders and did not "advocate simply 'tearing down the walls' of the penitentiary".<sup>79</sup> The results of this approach to penal reforms were improvements in prison conditions and the rise of alternatives to imprisonment, such as community service, electronic monitoring, and group homes.

However, the system remained repressive and punitive, with imprisonment at its core.<sup>80</sup>

*Ibid.* at 85.

B. Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 25:2 *Journal of Law and Society* 237 at 239 .

W. de Hann, *The Politics of Redress: Crime, Punishment and Penal Abolition* (London, UK: Unwin Hyman Ltd, 1990) at 83.

76 "Challenge", *supra* note 74.

B. Hudson, *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory* (Philadelphia: Open University Press, 1996) at 142 "*Understanding Justice*

In the 1980s, prison abolitionists began to realize that 'alternatives-to-custody' simply meant spreading prisons into the community and into people's homes. As Foucault pointed out, the 'taken-for-grantedness' of punishment as the ordinary response to a crime means that 'alternatives-to-custody' must reflect the punitive character of the institution of imprisonment.<sup>81</sup> Therefore, abolitionism must encompass more than prison abolition. Hudson phrases this realization eloquently in the following quote:

If 'prison' was not merely a building, but a principle - the coercion of time and space -then not only was abolishing some of the worst features of prisons insufficient to make the response to crime more humane and constructive, but abolition of prisons themselves was also insufficient.<sup>82</sup>

The realization that prison abolition was insufficient engendered a move towards penal abolition or abolishing punishment as the central purpose of criminal justice. This change was also influenced by the feeling of dissatisfaction, "verging on despair", with the 'negative' reform approach:" the 'attrition' strategy ... turned out to require more patience than most abolitionists seemed to have".<sup>83</sup> In reaction, abolitionists became increasingly interested in 'positive' reforms, such as informal processes of conflict resolution and dispute settlement which provide for 'participatory justice'.<sup>84</sup>

78 de Hann, *supra* note 75.

"*Understanding Justice*", *supra* note 77 at 143.

80 "Challenge", *supra* note 74.

81 M. Foucault (1977), in "*Understanding Justice*", *supra* note 77 at 143.

82 "Challenge", *supra* note 74.

The aims of these theories and strategies were compensation and reconciliation, rather than retaliation and blame allocation. William de Haan termed these approaches 'redress' or the claiming of 'redress' by victims: " to claim redress is merely to assert that an undesirable event has taken place and that something needs to be done about it".<sup>85</sup> Redress rests on the assumption that: (1) crime is a complex event, the meaning of which is dependent on the circumstances of the offender, the victim, and the community, as well as the relationships between them and (2) all the parties involved deserve a hearing and have claims on the justice process.<sup>86</sup> In essence, 'redress' is restorative justice by a different name.

Because Christian communities have been most active in the prison and penal abolition movement, the types of programs operated by abolition activists are similar to those developed by faith communities. In fact, the first victim-offender mediation program in the United States was started by the group Prisoner and Community Together (PACT), a Christian organization focusing on "creative alternatives to incarceration".<sup>87</sup> The group also operates various decarceration programs popularized by the prison abolition movement, such as community service, residential programs for low-risk offenders, and halfway houses for ex-offenders. The development of these alternatives has given judges more flexibility in sentencing and influenced public policy away from imprisonment. However, despite the successes of the abolition movement, the underlying principle behind criminal justice remains punishment, not restoration. For this reason, abolitionists have joined with other restorative justice groups to advocate for a restorative paradigm.

<sup>83</sup> de Haan, *supra* note 75 at 84.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* at 158.

<sup>86</sup> "Challenge", *supra* note 74 at 241.

<sup>87</sup> Umbreit, *supra* note 72 at 11.

#### The International Conference on Penal Abolition

The transition of the abolition movement from prison reform to penal reform and restorative justice is best demonstrated by the work of the International Conference on Penal Abolition (ICOPA) (originally the International Conference on Prison Abolition), a gathering of active abolitionists from around the world. ICOPA was started in 1983 by the Quaker Committee on Jails and Justice, a Toronto organization, and convenes every two years in a different international location. To date, the conference has taken place in Toronto (Canada), Amsterdam (the Netherlands), Kazimierz Dolny (Poland), Bloomington (Indiana, USA), San Jose (Costa Rica), Barcelona (Spain) and Auckland (New Zealand). Initially, ICOPA was dedicated to the goal of prison abolition. The 1987 conference, titled "From Prison Abolition to Penal Abolition", marked the recognition that "[a] court and policing system based on revenge would need something just like prisons or even worse ... so it was logical to move to penal abolition: getting rid of revenge as the purpose of the whole system".<sup>88</sup> This conference signaled a transition towards a restorative justice approach. The conference in year 2000 marks the full embrace of restorative justice principles. Flowing from the theme of "Transformative Justice: New Questions, New Answers", the conference will "take crime as an opportunity to get to its root causes and transform them, bringing power to the community and healing to victims and offenders alike".<sup>89</sup> This conference will bring together activists and academics with roots in aboriginal justice, faith communities and the abolition movement.

<sup>88</sup> "Introduction: What is ICOPA?", online: International Conference on Penal OPA

#### **4. Alternative Dispute Resolution Movement**

The alternative dispute resolution (ADR) movement began in the United States in the 1970s because of dissatisfaction with the adversarial system and the perceived mismanagement of disputes by the judges.<sup>90</sup> The movement, which focused mainly on civil disputes, sought alternatives to the court process. It started as the "search for a more consensual approach to problem solving, more accessible community-oriented forms of dispute resolution ... for a process that generates 'win/win' rather than

'win/lose' or zero sum results".<sup>91</sup> Nowadays, however, ADR encompasses much broader processes, including negotiation, conciliation, mediation, early neutral evaluation, mini-trial, summary jury trial, mediation/arbitration, and arbitration.<sup>92</sup>

89 Letter from R. Morris to E. Rosenblatt, " PRISON ACT ICOPA: Conference on Penal Abolition" (6 July 1999), online: <[www.lbbs.org/Bulletins/picopa.htm](http://www.lbbs.org/Bulletins/picopa.htm)> (date accessed: 28 November 1999).

90 A. Pine, *Alternative Dispute Resolution: The Theory and Skills* (1999) and Alberta Law

Reform Institute (1990), in John Howard Society of Alberta, "Briefing Paper on Alternative Dispute Resolution" (1995), online: John Howard Society of Alberta <[www.acjnet.org/jhsa/res-pub.htm#adr](http://www.acjnet.org/jhsa/res-pub.htm#adr)> (date accessed: 28 November 1999).

91 D. P. Esmond (1989), in Liewellyn and Howse, *supra* note 2.

92 C. Stobo (1995), in Liewellyn and Howse, *supra* note 2.

According to Baruch-Bush, who conducted a synthesis of diverse qualitative ADR objectives, dispute resolution processes fit into the following categories of objectives:

(1) dispute resolution processes leave disputing parties feeling that their individual desires, as defined by themselves, have been satisfied, in terms of the experience and the outcome of the process (INDIVIDUAL SATISFACTION); or

(2) they strengthen the capacity of and increase the opportunity for disputing parties to resolve their own problems without being dependent on external institutions, public or private (INDIVIDUAL AUTONOMY); or

(3) they facilitate or strengthen the control of public and private institutions, and the interests they represent, over exploitable groups and over possible sources of social change or unrest (SOCIAL CONTROL); or

(4) they ameliorate, neutralize, or at least do not exacerbate existing inequalities in the societal distribution of material wealth and power (SOCIAL JUSTICE); or

(5) they provide common values, referents, or "texts" for individuals and groups in a pluralistic society, and thereby increase social solidarity among these individuals and groups (SOCIAL SOLIDARITY); or

(6) they provide opportunities for and encourage individual disputants to experience personal change and growth, particularly in terms of becoming less self-centred and more responsive to others (PERSONAL TRANSFORMATION).<sup>93</sup>

Many of these objectives are consistent with the goals of the restorative justice movement. For example, restorative justice also aims for individual satisfaction, individual satisfaction, social solidarity, and personal transformation. In addition, many restorative justice programs are informed by ADR practices, such as mediation. Therefore, although ADR cannot, in its entirety, be considered a restorative justice paradigm, the movement has contribute significantly to the development of restorative justice. In turn, restorative justice principles have been recognized as applicable and important in private disputes over wrongdoings, particularly in the context of ongoing relationships, such as employee-employer, business and family disputes.<sup>94</sup>

Despite the close relationship between the two movements, however, ADR continues to be identified with civil or private disputes and restorative justice with the criminal sphere. Moving to a justice paradigm based on restoration would result in the intertwining of the traditions. Because restorative justice focuses on the wrongness of the act, rather than the classification of the act, it blurs the line between criminal and civil law, between public wrongs and private wrongs. This makes sense from a historical perspective: prior to "the replacement of the victim by the monarch or state as prosecutor", conflicts were resolved in the private or civil realm, throughout non-judicial processes.<sup>95</sup> There is a growing recognition of the relationship between ADR and restorative justice and the applicability of one to the other. As these movements gain further importance in the legal world, there will likely be further cross-fertilization between the two traditions.

93 R.A. Baruch Bush, "Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments" (1989) 66 *Denver University Law Review* 335 at 347-8 and Pine, *supra* note 90, Chapter 1 at 29.

#### IV. Conclusion

Tracing the roots of restorative justice in North America demonstrates the similarities of the different origins of the paradigm. Both aboriginal and Christian traditions focus on community peace and harmony as well as emphasize the importance of relationships and mutual obligations. The modern applications of these traditions, as well as the prison abolition and the alternative dispute resolution movements, are founded on the dissatisfaction with the adversarial court system.

These similarities are not coincidences. Although these movements were discussed separately, many were intertwined from the beginning or were informed by the other traditions. For example, faith communities have been involved in the prison abolition movement throughout its history. As discussed earlier, alternative dispute resolution methods, such as mediation, provide guidance for programs like victim-offender reconciliation. These commonalities provide a strong basis for understanding the underlying themes of the restorative justice movement.

Liewellyn and Howse, *supra* note 2.

*Ibid.*

The common threads among the four origins of restorative justice include themes and principles such as:

1. restorative justice is sensitive to the needs of the victims;
2. material and non-material harm done to victims and the community need to be addressed;
3. victims, offenders, their support network and the community should be involved in determining solutions and repairing the harm;
4. restorative justice involves empowerment of those affected;
5. justice is achieved through accountability and restoration, not retribution;
6. the process is voluntary and based on consensus;
7. prisons and the courts are not appropriate places to resolve conflicts; and

8. culture plays an important role in determining the appropriateness of programs.

As the restorative justice paradigm gains importance in mainstream justice institutions, there is a need to monitor and assess its development in light of the roots of the movement. In addition, as restorative justice programs are more widely used for different situations and groups, the underlying assumptions of the movement needs to be re-examined for their applicability.

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