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Restorative Justice and The Incorporation of Dispute Resolution into the Criminal Justice System: *Playing Devil's Advocate*

Introduction

Canada, in common with many other countries around the world, is caught in the grip of a *collective schizophrenia* over reform of the criminal justice system. This is demonstrated most notably in the youth justice system where there is the current thrust to make the existing system *tougher* on crime by advocating measures such as: making stiffer sentencing options available for violent or chronically offending youth'; reducing the lower age limit of *Young Offenders2;* making it easier to transfer *Young Offenders* to adult court for the most serious crimes3. This *get tough on youth crime* groundswell has been fuelled in part by media focus4 on a few extremely violent youth crimes that have fed a general fear about public safety issues and concerns.

Yet, at the same time, there is a growing national and international movement that believes our historic approach to crime, in general, has proven unsatisfactory from all points of view including that of victims, offenders and society5.

1 *Young OffendersAct,* R.S.C. 1985, c. Y-1, as am. by S.C. 1995, c. C-37.

2 Bala, Nicholas and D'Arcy Mahoney, 1995. *Responding to Criminal Behaviour of Children*

Under 12: An Analysis of Candian Law and Practice. Paper submitted to the House of Commons Committee on Justice and Legal Affairs for Phase II of Young Offenders Study, July 1995, located on the internet at http://qsilver.queensu.ca/law/bala/papers/crimbeh.htm

Young Offenders Act, R.S.C. 1985, c. Y-1, as am. by S.C. 1995, c. C-37.

4 1997. *Youth Crime in Canada: Public Perception vs. Statistical Information.* Publication of the John Howard Society of Alberta, located on the internet at http://www.acjnet.org/docs/01paper.html For a general reference to the growing global interest in *restorative justice* see Braithwaite, J. 1996. *Restorative Justice and a Better Future,* Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, at p. 7.

Restorative justice 6 is the umbrella term that best defines and describes the nature of the reforms being advanced through this movement. Advocates of *restorative justice* believe that the historic approach to the administration of justice has failed, and will continue to fail7 regardless of how "tough" it is made, for these reasons:

It treats criminal acts as *acts against the state* rather than *breaches of relationship* with individuals or community and, consequently, hinders restoration and reconciliation.8

It focuses on the offender and, therefore, excludes the interests of the victim and the community.9

It fails to recognize the long-term incongruity between the objective of protecting society and the destructive use of incarceration and punishment.

As a result, it promotes increased spending on prisons and a thrust towards harsher sentences, neither of which have been demonstrated to serve the long term interests of societal protection10.

6 For the purposes of this paper, *restorative justice* can be defined as *"a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it... The goal of the process is to heal the wounds of every person affected by the offence, including the victim and the offender"* (Consedine, A. 1994. *By Their Fruits - A Future for Restorative Justice,* paper presented to the National District Court Judge's Conference, 6 April 1994, Rotorua, New Zealand, p. 158.

7 Price, Marty, 1997. *Can Mediation Produce Justice? A Restorative Justice Discussion for Mediators.* ADR Report, News and Strategies for Alternative Dispute Resolution Practitioners, Volume 1, Number 13: October 29, 1997, published by Pike & Fischer, Inc., a subsidiary of The Bureau of National Affairs Inc. at p. 2.

8 Beigrave, John, 1995. *Restorative Justice: A Discussion Paper,* Ministry of Justice, New Zealand. Located on the internet at http://www.justice.govt.nzipubs/reports/1996/restorative/ Default.htm

Berzins, Lorraine, 1991. *Is Legal Punishment Right?,* speech to the Canadian Council on Justice and Corrections and the NAAJC Congress, Victoria B.C., October 1991.

On the United States scene, Price (1997) has observed:
"Human beings are the only species on earth that recognizes what is not working and then does more of the same. Politicians cry out for more and longer prison terms and the building of prisons has become a major growth industry... Unless we stem this monumental draining of the public coffers, it is unlikely that there will ever be stable and adequate resources for the human services needed to address the societal roots of crime-poverty, injustice, illiteracy and unemployment."

How, then, are these competing interests and concerns to be reconciled in the criminal justice system? Perhaps more importantly, if *restorative justice* advocates succeed in advancing their agenda for change, what evidence exists that the new approach will yield a more positive result than has the offender-based, punitive model of justice? These are critically important questions to answer. The momentum that the *restorative justice* campaign is building globally carries with it a number of serious risks. Perhaps the most serious risk is the potential backlash against justice reform that will surely accompany the failure of the initiative if it should prove unable to deliver on its promised results (i.e., victim-offender reconciliation, reduced recidivism, reduced crime, community healing). If *restorative justice* is to succeed (and it is the contention of the author that it can and must succeed or it may be a long time before support for reform can be garnered again), what are some of the potential pitfalls and risks associated with the magnitude of change being considered?

10 Montgomery, Andrew N., 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review,* Nova Scotia Department of Justice, at p. 7.

Restorative Justice: The Promise of a New Age

Before reviewing the use of ADR in *restorative justice,* it is important first to clearly state the context in which advocates proclaim the potential benefits of the new paradigm. The province of Nova Scotia is implementing a program of *restorative justice,* which is to commence in early 1999. In its report *Restorative Justice: A Program for Nova Scotia12,* the government states:

"The time has come to give our justice system a deeper social justice and social science context. A

promising road toward improvement is both old and new. Amidst the ancient traditions (notably aboriginal) of a surprisingly large number of cultures is a way of thinking about conflict and crime that has been captured by the modern phrase restorative justice" 13 [emphasis in the original].

The report clearly defines the expected outcomes of the new approach as:

- Reduced rates of recidivism
- Increased victim satisfaction
- Strengthened communities
- Increased public confidence in the justice system.14

11 Price, *loc. cit.*, footnote 7.

12 1998. *Restorative Justice: A Program for Nova Scotia,* published by the Nova Scotia Department

of Justice through Communications Nova Scotia, 32 pages.

13 Ibid, footnote 12, at p. 1.

14 Ibid, footnote 12, at p. 5.

15 1997. *Getting Smart About Getting Tough: Saskatchewan's Restorative Justice Initiative***,** report of the Saskatchewan Department of Justice, 18 pages.

In Saskatchewan, the government's *restorative justice* initiative is outlined in the report *"Getting Smart About Getting Tough: Saskatchewan's Restorative Justice Initiative" 15.* The stated goals of the program are to:

- Enhance community safety and protection
- Reserve the formal justice system for the most serious of matters
- Develop alternative measures for less serious crime
- Strengthen communities by involving victims, offenders, government and community members in a balanced approach to criminal behaviour
- Reduce crime by increasing offender accountability to victims and community, and
- Increase public trust justice process.16 and public perception of the fairness of the criminal

In British Columbia, Goundry (1997)17 discusses the promise of restorative justice as offering *"high levels of victim and offender satisfaction which is largely a function of addressing those perceptions of unfairness and injustice by directly involving all of the parties.* "8 Other potential benefits identified by Goundry include:

Benefits to the community from focusing on the resolution of broken relationships and situating the control of crime within the community.19

The provision of a more culturally relevant response to offending by making alternatives to the mainstream justice system that reflect traditional decision-making models. 20 [emphasis in the original]

16 1997. *Getting Smart About Getting Tough: Saskatchewan's Restorative Justice Initiative,* report of the Saskatchewan Department of Justice, at p. 3.

17 Goundry, S.A. 1997. *Restorative Justice and Criminal Justice Reform in B.C.: Identifying Some Preliminary Questions and Issues.* Draft discussion paper prepared for the B.C. Association of Specialized Victim Assistance and Counselling Programs 37 pages.

18 *Ibid.* footnote 17, at p. 5.

While minor variations are reflected in the objectives of restorative justice programs that have been initiated around the world, the significant areas of commonality seem to include:

- A shift in the locus of control over certain elements of criminal justice from the state to the community;
- Greater emphasis on victim/community rights and concerns;
- An emphasis on restitution, healing breaches of relationship and restoring the parties (both victims and offenders) to health within the community; and
- Reducing the risk of recidivism for offenders, thus decreasing crime rates.

In summarizing the fundamental elements of restorative justice, Bontrager (1997) states:
"True justice systems are those which are restorative in purpose and method. They:

- *Open avenues for repair of the fractures;*
- *Actively involve victims, offenders and communities in the process at the earliest possible moment, and to the maximum extent possible;*
- *Recognize that in promoting justice, government is responsible for preserving order, while community is responsible for establishing peace;*
- *Offer the offender restoration through forced confrontation with truth, and the facing of all real victims (including family and community);*
- *Offer the victim restoration by the opportunity to be heard -- by system and offender -- and then by releasing anger, bitterness, a sense of helplessness, etc;*

19 Ibid. footnote 17, at p. 5.

20 *Ibid.* footnote 17, at p. 5.

In summary, it is clear from a comparison of the old and the new paradigms, that the changes being advocated are both fundamental and sweeping.

Restorative Justice: Understanding the Magnitude of the Change

Understanding the magnitude of change being considered by justice reformists is vitally important. *Restorative justice*, at its roots, is qualitatively and fundamentally different from the historic western approach to justice. Implementing *restorative justice* has enormous implications for our present system that is deeply entrenched, centuries old and, expensive. Advocates of *restorative justice* do not talk in terms of adding new programs to the system, nor of fine-tuning, adjusting, or modifying the current system. Rather, *restorative justice* involves a fundamental shift in the way we perceive ourselves, perceive criminal behaviour, behave as a community and act to redress the harm done in the community.

John Braithwaite (1997) states boldly: "*... all Western criminal justice systems are brutal, institutionally vengeful, and dishonest to their stated intents"22.* By contrast, Braithwaite goes on to suggest *"Restoring community is advanced by a proliferation of restorative justice rituals in which social support*

Offer the community restoration by being a part of the restorative justice process between offenders and victims, including the bearing of burdens."21

around specific victims and offenders is restored At this micro level, restorative justice is an utterly bottom-up approach to restoring community 23. Braithwaite, in effect, turns our concept of justice on its head making it primarily the responsibility of individuals in community and not the responsibility of an impersonal state actor. By any measure, this must be regarded as antithetical to our current system of justice.

21 Bontrager, Bill, JD, 1997. *Restorative Justice: A concept whose lime has come.* International Institute of Christian Studies, located on the internet at http://www.goshen.net/iics/, at p.3.

22 Braithwaite, J. 1996. *Restorative Justice and* a *Better Future,* Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, at p. *5.*

Restorative Justice: Understanding the Quality of Change

While it may be something of a surprise to some, building a *restorative justice* paradigm at the end of the twentieth century has involved a deliberate *reaching back* to social, moral and philosophical belief systems of other ages and other cultures24. The objective, then, has been to bring those belief systems forward, implant them in western culture and reengineer justice. On one level, the process can be considered analogous to the transplant of organs in a body. A very basic concern, following from this analogy, is that the same potential that exists for rejection of an implanted organ by the host body exists also for western society which could reject this new justice paradigm that is rooted in belief systems and models of community which, arguably, no longer exist in western cultures.

23 *Ibid.* footnote 22, at p. 14.

24 Whether one considers the religious roots of *restorative justice,* as outlined by Bontrager, Bill, JD, 1997. *Restorative Justice: A concept whose time has come.* International Institute of Christian Studies, located on the internet at http://www. ; or Price, Marty, 1998. *The Mediation of Drunk Driving Deaths and other Severely Violent Crimes.* Victim-Offender Reconciliation Program Information and Resource Centre, located on the Internet.

Restorative Justice: Consequences of Underestimating the Change

The degree and quality of the change being advocated should not be underestimated. Failure to recognize the degree of change leaves the *restorative justice* campaign for reform vulnerable to at least two negative outcomes:

Collapse under the weight of resistance and inertia in the old system, or

Superficial changes that will, in the long term, leave the old system essentially intact but dressed in the garb of change.

Given the magnitude of the change being envisioned, and the potential implications *restorative justice* holds for the current system of criminal justice, it is imperative that the possible risks and pitfalls be identified clearly in advance. While there is no shortage of published information on the positive side of *restorative justice,* there has been comparatively little written about the potential shortcomings of the concept25. While it is true, that there is a significant body of feminist literature on the risks of ADR for

women in specific contexts (see for example Astor (1996)26 and Astor (1996)27) there is no comprehensive and coherent body of literature on the risks associated with the implementation of *restorative justice* in general Nonetheless, it is clear that even in the absence of a suitable critique *restorative justice* is gaining significant political and social momentum. While this may provide understandable encouragement for advocates of *restorative justice,* we should be cautioned to examine its complexities more carefully.

25 A simple search on *restorative justice* on the World Wide Web generates hundreds of sites that, conservatively, are 8O-90% in favour of restorative justice to the exclusion of any substantive risk analysis.

26 Astor, H. 1996. *Gender Issues in Dispute Resolution,* located on the internet at http://www.anu.edu.au/law/pub/teaching_material/genderissues/civilprocedure.html

27 Astor, H. 1996. *Gender and Dispute Resolution in Family Law,* located on the internet at http://www.edu.au/law/pub/teaching_materials/genderissues/FAMILYLAW.html

Political momentum can be a double-edged sword for it can produce shallow understanding and fragile adherence to what should be deep and profound changes. At its worst, political momentum can mask ulterior motives which appear supportive of change but which can ultimately prove antithetical to the long term objectives of restorative justice advocates.

Thus, it is the author's opinion that if we are to make an informed assessment of the true value of the *restorative justice* approach to crime in our society, this can only be accomplished by playing *devil's advocate.* In other words, we must critically analyze the risks and the pitfalls associated with the implementation of the concept. In so doing, we may discover that much of what is being promulgated as *reform* is at best shallowly conceived theory or, at worst, is being advocated with ulterior motives.

The Nature of the Risk

In a study28 commissioned for the Ministry of Justice in New Zealand, one particular public respondent stated:

"One of the hallmarks of a civilized society is a criminal legal system which is fair, reasonable, predictable and dispassionate. Restorative justice abandons all those aims in favor of a systemwhich would be inconsistent, capricious and emotional. Far from being "new" this would be a giant leap backwards."29

28 Graham, Douglas, 1994. *Restorative Justice: The Public Submissions,* Ministry of Justice Publications, New Zealand, report located on the internet at http://www.justice.govt.nz/ pubs/rep.8/restorativejustice.html

29 Graham, Douglas, 1994. *Restorative Justice: The Public Submissions,* Ministry of Justice

Publications, New Zealand, report located on the internet at http://www.justice.govt.nz/pubs/rep... 8/restorativejustice/html , at p. 3 of the introduction.

While it is difficult to argue with the theoretical tenets of *restorative justice* (e.g., victim-offender reconciliation, victim/offender/community healing, reduced crime, etceteras), there are cogent reasons to be concerned with how and whether its objectives are going to be met in practice. What is the nature of

the risk embodied in the *restorative justice* paradigm that might justify the strength of the objection referred to above? The risks are both inherent to the concept on the one hand, and external on the other. They are inherent in the sense that they are risks associated with the substantive content of the new paradigm. But they are also external in the sense that they concern the approach taken to implementing *restorative justice;* that is, even if the concept is internally sound, the approach taken to implementing it may so compromise its integrity as to jeopardize its success. Internal risks will be addressed first. Assuming that these may be negated, or at least minimized, the external risks will be subsequently shown capable of reviving internal risks or, of fatally compromising the integrity of the initiative as a whole.

Internal and Systemic Risks

The potential pitfalls and risks that are internal to the implementation of restorative justice are numerous. While it may be argued that, with proper safeguards, the risks can be minimized if not negated, many of the risks have the potential to be fatal, if not to the concept as a whole, certainly to its application in specific circumstances. To determine the potential risks involved, there are a number of critical issues to examine:

- How do we know it works?
- Predictability, consistency, quality control
- Evolution of law
- Victim participation
- Re-victimization
- Privatization of women's issues
- Socio-cultural insensitivities
- Inability to control power dynamics
- Insensitivities to cognitive or social differences amongst participants
- Inadvertent discrimination
- Net broadening
- Unrealistic expectations
- Lack of expertise in community-based, volunteer organizations

How Do We Know it Works?

The answer to the question of "does ADR and *restorative justice* work?", in the context of criminal justice, has two basic requirements. First, that performance indicators have been established against which success is to be measured and, secondly, that the tools and procedures for monitoring performance exist.

Presumably, any number of performance indicators could be selected to monitor progress towards the central goals of *restorative justice* including, *inter alia:* victim/offender satisfaction; recidivism; reduction in custodial sentences; crime rates; community safety (et cetera). Precisely how these indicators would be monitored is a separate issue.

The problem in evaluating *restorative justice* programs in existence today lies in the absence of empirical data and study. Schiff (1998) has observed:

"One of the important issues in studying restorative justice is understanding whether restorative interventions are having the desired effects on victims, communities and offenders. At present it is difficult to know whether and how well restorative justice is working. There is a lack of empirical research that uses valid and reliable effectiveness measures to evaluate restorative justice interventions. "30

The problems with measuring impacts of *restorative justice* at the community level are even more difficult due to the uncertainty of what community means and how it is to be defined, particularly in large urban settings.31

Although there are studies32 that report consistent offender satisfaction with contracts achieved through ADR, Schiff (1998) challenges the value of the results obtained due to *"a lack of consistency in definitions of satisfaction across programs and studies."33*

When it comes to recidivism rates of offenders processed through *restorative justice*, research studies are limited and represent a mixture of results. Pate (1990)34, Umbriet and Coates (1992b 35, 1993 36) and Nugent and Paddock (1995)37 report lower recidivism rates for offenders processed through *restorative justice* as opposed to the conventional court process. Rock (1992)38, on the other hand, in a Texas study reports no real difference in rate of recidivism between offenders who participated in *restorative justice* as opposed to those dealt with in the convention court system. Montgomery (1997)39 reports only a modest effect of alternative measures on recidivism rates.

30 Schiff Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade.* Western Criminology Review 1(1). Located on the internet at http://wcr.sonoma.edu/vlnl/schiff.html, at p. 1.

31 Bazemore, G and Mara Schiff, 1996. *Community Justice/Restorative Justice: Prospects for a New Social Ecology for Community Corrections.* International Journal of Comparative and Applied Criminal Justice. 20(1): 311-335.

32 Coates, Robert and John Gehm. 1989. *An Empirical Assessment.* In *Mediation and Criminal Justice,* edited by M. Wright and B. Galaway London: Sage.

Umbreit, Mark and Robert Coates, 1993. *Cross-Site Analysis of Victim-Offender Programs in*

Four States. Crime and Delinquency 39(4): *565-585*

33 Schiff Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade.* Western Criminology Review 1(1). Located on the internet at http://wcr.sonoma.edu/v1n1/schiff html, at p. 3.

34 Pate, K. 1990. *Victim-Offender Restitution Programs in Canada.* Criminal Justice Restitution and Reconciliation, edited by B. Galaway and J. Hudson. New York: Willow Tree Press.

A significant part of the problem, in evaluating the impacts of any particular program on recidivism rates, lies in the lack of effectively controlled study groups. Failure to control for demographic and structural variation between groups being processed through *restorative justice* and groups being processed through the conventional court system leaves any study result obtained open to criticism. Montgomery (1997) 40reports that, while an analysis of the "raw" data between similarly situated alternative measures youth and youth processed through court indicates a dramatic difference in recidivism rates, the difference becomes modest once the groups are controlled for variations in gender, age, education level, socio-economic status and other variables. Similarly, Schiff (1998) finds:

"A significant problem with current research on VOM is the lack of

sufficient control groups, which would perm it more definitive conclusions about the impact of restorative interventions on recidivism. Only after studies have controlled for the impact of structural or

demographic variables on recidivism."41

35 Umbreit, Mark and Robert Coates. 1992b. *Victim-Offender Mediation: An Analysis 0f Programs in Four Stales of the US.* Minneapolis, MN: the Citizens Council Mediation Services.

36 Umbreit, Mark and Robert Coates, 1993. *Cross-Site Analysis of Victim-Offender Programs in*

Four Stales. Crime and Delinquency 39(4): *565-585*

37 Nugent, W.R. and J.B. Paddock. 1995. *The Effect of Victim-Offender Mediation on Severity of*

Reoffense. Mediation Quarterly, 12(4): *353-367.* Rock, J. 1992. *An Evaluation of the Juvenile Offender Mediation Program.* Masters Thesis, University of Houston, Clear-Lake, Texas.

Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review.*

Report for the Nova Scotia Department of Justice, Halifax, 143 pages.

40 Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review.*

Report for the Nova Scotia Department of Justice, Halifax, 143 pages.

41 Schiff, Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research*

Agenda for the Next Decade. Western Criminology Review 1(1). Located on the internet at

http://wcr.sonoma.edu/vlnl/schiff html, at p. 4.

With respect to the incorporation of *restorative justice* into pre-sentencing considerations for offenders who have been processed through court, the evidence concerning impact on sentencing is inconclusive. Marshall (1990)42 reports in Great Britain that victim-offender mediation resulted in a decreased use of custody, while Marshall and Merry (1990)43 report that, in cases where a mediation goes wrong, the offender's sentence can just as likely be increased.

The answer to the question of how do we know restorative justice works, is best summarized by Schiff (1998) who suggests that the lack of controlled studies; the lack of consistently applied performance indicators and, the recency of many restorative interventions precludes making definitive statements about the long term efficacy of *restorative justice. 44* This state of affairs, begs the question of "why the groundswell of support, in the absence of definitive results-oriented research" and further, "why the absence of clearly stated performance indicators and structured evaluation protocols in most *restorative justice* initiatives (including Nova Scotia's program)45

42 Marshall, Tony. 1990. *Results From British Experiments in Restorative Justice* in *Criminal*

Justice, Restitution and Reconciliation, edited by B. Galaway and J. Hudson. New York: Willow

Tree Press

43 Marshall, Tony and Sally Merry. 1990. *Crime and Accountability: Victim Offender Mediation in Practice.* London, U.K.: Home Office.

Schiff, Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research*

Agenda for the Next Decade. Western Criminology Review 1(1). Located on the internet at

http:llwcr.sonoma.edu/vlnl/schiff.html, at p. 9 1998. *Restorative Justice: A Program for Nova Scotia,* published by the Nova Scotia Department of Justice through Communications Nova Scotia, at page 20.

Predictability. Consistency and Quality

Among the hallmark characteristics of the criminal justice process are the principles that citizens of a state should know what constitutes a criminal offence; should know with certainty what the outcomes of the criminal justice process will be; should be able to predict, under a given set of circumstances and procedures, what range of outcomes are possible and, should be assured of consistency in outcomes for offences of a similar nature under similar circumstances. In this context, one submission to Nova Scotia's Restorative Justice Steering Committee stated:

"We must, however, be vigilant in avoiding wholesale changes that sacrifice valuable principles of the existing justice system that have developed over many generations. The current system effectively guarantees the protection of individual rights, it recognizes the importance of conducting a fair hearing and making objective supportable decisions.'

In Australia, Zariski (l997)47 has surveyed the legal profession with respect to beliefs about alternate dispute resolution in general. He suggests:

"[m]any lawyers may distrust or lack respect for resolution methods which are informal, unfettered by legal norms and which lack coercive power. Lawyers may consider such alternative forms of dispute resolution to be second class justice."48

Ibid, footnote 45, at *p.* 1.

Zariski, Archie. 1997. Lawyers and Dispute Resolution: Whal Do They Think and Know (And Think They Know)?- Finding Out Through Survey Research, Murdoch University Electronic Journal of Law, v.4 n.2, located on the internet at http://www.murdoch.edu.au/elaw/issues/v4n2/zaris422.html

48 Zariski, Archie. 1997. Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)?- Finding Out Through Survey Research, Murdpch University Electronic Journal of Law, v.4 n.2, located on the internet at http://www.murdoch.edu.au/ elaw/issues/v4n2/zaris422.html, at p. 3.

In the context of business law (but not unrelated to criminal justice) one Australian Judge, Sir Gerard Brennan, has observed:
"At present there is some misgiving about the capacity of the courts to deal with business disputes with the understanding, speed and expertise which the business community desires. It must be admitted that in some instances this concern is justified But the answer is not to turn away from the courts and to seek alternative methods of dispute resolution: such a course weakens the very institution on which the orderly conduct of trade and commerce depends. "49

Essentially, the concerns that are being voiced focus primarily on the impacts that moving the locus of control of the justice system out of the courts and into the community will have on the quality and consistency of justice. This question of course has far reaching implications in the context of criminal justice where the objective of protecting society is one of the principal aims. In a discussion paper prepared for the Ministry of Justice in New Zealand, one public submission stated:

"Restorative justice denies the inherent interest the rest of society has in the relationship between a criminal and his or her victim. Every individual is part of a society, and society, as a whole is affected by agreements between individuals. For example, if a criminal and a victim agreed to only a slight penalty for committing a particular crime, others could be less deterred from committing the same crime. The incidence of that crime may increase. The whole of society is made worse off because of the agreement made by one particular criminal and victim. For this reason, societies demand a say in the punishments meted out to particular offenders. The appropriate punishment is not a matter for criminals and victims to settle between themselves. "50

Brennan, Gerard, Hon. Sir. 1990. *Professional Orientation: Business or Law?"* Australian Dispute Resolution Journal, vol.1, no.2, pp 225-226. 50 Graham, Douglas. 1995. *Restorative Justice: The Public Submissions,* report of the New Zealand Ministry of Justice, located on the internet at http://www.justice.govt.nz/pubs/rep... 8/restorativejustice/chapter_1 html at p.2.

If, indeed, the increasing use of *restorative justice* and ADR in the criminal justice system results in moving greater numbers of (and more serious) offences out of the court system into the community, what assurances will there be of predictability, consistency, fairness and equity? What will happen to precedent? What does it mean if similar offenders, involved in similar offences, in two different communities receive dramatically different dispositions through community-based justice? Will the one receiving the harsher treatment have an avenue of appeal? What if a community-based disposition is comparatively out of. proportion, with respect to the offence, as compared with a disposition that might be expected from court? Clearly there is concern being expressed in a number of countries, both in and outside the legal profession, about the impacts of *restorative justice* and ADR on a justice system that has been constructed carefully over hundreds of years and countless numbers of cases. In essence, that concern is that we should be careful, in our dissatisfaction with the current system and our zeal for reform, not to "throw the proverbial baby out with the bath water".

Evolution of Law

Law, in western society, has developed over generations by a combination of judicial decisions and government legislation. With *restorative justice,* significant elements of the criminal justice system are intended to be moved out into the community51. Beyond dealing with simple misdemeanors, *restorative justice* advocates talk of moving more serious offences such as assaults (not causing bodily harm) out of the courts at either the pre or post-charge stage52. Offences such as robbery, aggravated assault, kidnapping, manslaughter, spousal/partner violence would be introduced to a *restorative justice* forum at the post-conviction/pre-sentencing point53, presumably with a view to mitigating the severity of the sentence if the mediation goes well. If, in the context of business law, there are those who question the use of ADR as threatening the orderly evolution of the law54, how much more significant a question will this be in the context of criminal justice. The essence of the concern is captured by Zariski's analysis of the remarks of an eminent Australian judge:

"[h]e saw danger for the administration off justice if business lawyers refrained from bringing important legal principles and pressing practical issues to the courts, thereby depriving judges of the opportunity to keep the law up to date with the needs of society." 55

51 1996 *Satisfying Justice: Saft Community Options that Attempt to Repair Harm From Crime and Reduce the Use or Length of Imprisonment.* Published by the Church Council on Justice and Corrections, Ottawa Ontario, at p. ifi.

52 1998 *Restorative Justice: A Program for Nova Scotia,* published by the Nova Scotia Department of Justice through Communications Nova Scotia, at p. 16. *53 Ibid,* footnote *52,* at p. 16.

54 Zariski, Archie. 1997. *Lawyers and Dispute Resolution: What do They Think and Know (And Think They Know)? - Finding Out Through Survey Research* Murdoch University Electronic Journal of Law, v4 n2, located on the internet at http://www.murdoch.edu.au/elaw/issuesl v4n2/zaris422.htmI, at p. 3. "Zariski, Archie. 1997. *Lawyers and Dispute Resolution: What do They Think and Know (And Think They Know)? - Finding Out Through Survey Research* Murdoch University Electronic Journal of Law, v4 n2, located on the Internet at http://www.murdoch.edu.au/elaw/issuesI v4n2/zaris422.htm1, at p. 3.

A similar argument can be found in the feminist literature on the use of ADR in the arena of family violence. While this perspective will be dealt with in detail in a later section of the paper, it can be pointed out here that concern has been expressed that one outcome of alternate dispute processes might be the "reprivatization"56 of certain "women's issues". Society's ability to respond to, and effectively deal with, domestic violence has been dramatically improved by having the problem brought into the "public arena" of the formal court process. In feminist thinking mediation, as a restorative justice practice, is seen as a regressive step which will take domestic violence back out of the public eye and into the private arena.

56 Astor, Hillary. 1996. *Gender Issues in Dispute Resolution,* report located on the internet at

http://www.anu.edu.au/law/pub/teaching_material/genderissues/CIVILPROCEDURE.html

Concern about the evolution of the law obviously overlaps with the issues of consistency, quality control and predictability. If community based ADR alternatives to the court process are used to resolve minor to moderately serious criminal offences, what is the potential for system of law to develop parallel to that which is administered by the court? What if a disposition arrived at through community mediation differs substantially from what would result through court? Does it matter? At the very least, these questions need to be posed and answers sought.

Victim Participation

It goes without saying that the efficacy of alternate dispute resolution methods in resolving criminal matters is compromised significantly in cases where victims refuse to participate. Studies on victim participation in various ADR forums have produced significantly different results. Montgomery (1997) found, in a survey of alternative measures participants, that victim participation was rated the most ineffective of all participants including, police, parents, youth and victims. 57 Emery (1996), who studied the alternative measures program in the Halifax area, found that less than 13% of mediation sessions conducted in the Halifax area were attended by the victim.58 Montgomery's (1997) study indicates that the low rate of victim participation, overall, in alternative measures was related to the high percentage of shoplifting offences and the fact that *"across the province, the absence of corporate victims in the alternative measures process is virtually universal."59*

By way of contrast, Gehm (1998) suggests that research in the United States indicates a stronger likelihood of participation on the part of institutional victims (i.e., including corporate victims) as opposed to personal or individual victims.60 Gehm surmises that the reason for this may be rooted in the personal nature of individual victim/offender mediation (as opposed to institutional! corporate victim/offender mediation) and the special issues of discomfort, fear of re-victimization that may accompany the former.61However one is to interpret these differences in terms of research results, it becomes clear that *restorative justice* programs will have to monitor victim participation closely, analyze the patterns that emerge and, implement appropriate support programs that will encourage improved participation rates.

57 Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review.*

Report for the Nova Scotia Department of Justice, Halifax, at p. 64.

58 Emery, Kimberley Christine, 1996. *Alternative Measures in the Halifax Area: The Presence,*

Involvement and Impact of Victim Participation in the Alternative Measures Process. Unpublished MA Thesis, Daihousie University, at p. 32.

59 Ibid. footnote *58* at p. 66.

6°Gehm, John R., 1998. *Victim Offender Medialion Programs: An Exploration of Practice and*

Theoretical Frameworks. Western Criminology Review, 1(1). Located on the internet at

http:llwcr.sonoma.edu/vlnl/gehm.html , at p. 9.

Of more concern than the straight participation rates of victims, however, is the suggestion by researchers such as Gehm (1998) that ADR programs may discriminate against certain racial/ethnic groups by racially motivated victim refusal to participate62. Racially or ethnically motivated refusal, on the part of the victim, to participate in ADR effectively denies certain groups the opportunity to be diverted out of the formal court process into an alternate dispute resolution forum. In a 1990 study63, Gehm analyzed victim participation in *535* cases and focused specifically on the racial question. Gehm found that common race/ethnicity of victim and offender was statistically significant in explaining the success or failure of referring a particular case to an ADR forum. This raises critically important questions for Gehm:

"If subsequent more rigorous studies determines that when the victim is white and the offender is non-white the probability of a meeting declines, the logical next question would seem to be: what, if any, are the consequences of this disparity?... If the victim controls whether a meeting will occur or not, and if one of the controlling variables in the victim's decision is the race/ethnicity of the offender, then examining sentencing outcomes solely on the basis of meeting/no meeting merits some attention.

61 *Loc. cit.,* footnote 60.

62 Ibid. footnote 60, at p. 10.

63 Gehm, John R. 1990. *Mediated Victim-Offender Restitution Agreements: An Exploratory*

Analysis of Factors Related to Victim Participation. In *Criminal Justice, Restitution and*

Reconciliation, edited by Joe Hudson, J. Galaway and B. Galaway. Monsey N.Y.: Criminal

Justice Press.

64 Gehm, John R., 1998. *Victim Offender Mediation Programs: An Exploration of Practice and*

Theoretical Frameworks. Western Criminology Review, 1(1). Located on the internet at

http://wcr.sonoma.edu/vlnl/gehm. html , at p. 10.

Although, Gehm's evidence is not conclusive of the matter, it does raise the specter of ADR, in the

criminal justice context, being an alternative that favors the interests of one racial group over another. If ethnicity influences who may be diverted, under particular circumstances, and who may not be diverted, then serious questions of discrimination, equity and fairness come quickly to the fore. It would indeed be an irony if, the "new" paradigm of restorative justice, which clearly bears much closer resemblance to aboriginal justice then traditional western justice, should somehow inadvertently become "white man's" justice to the potential detriment of native and other racial/ethnic groups. A number of studies in the United States are already indicating that a higher percentage of white, middle-class offenders are diverted into ADR programs than other racial groups.65 At the very least, it behooves advocates of *restorative justice,* and other ADR forums, to monitor this potential problem closely and to take the necessary steps to remedy it.

65 See for example:

Kigin, R. and S. Novak, 1990. *A Rural Restitution Program for Juvenile Offenders and Victims in Victims, Offenders and Alternative Sanctions,* edited by J. Hudson and B. Galaway. Lexington, MA: Lexington.

Coates, Robert and John Gehm, 1985. *Victim Meets Offender: An Evaluation of Victim Offender*

Reconciliation Programs. Vaipraiso, IN: PACT Institute of Justice.

Umbreit, Mark and Robert Coates, 1992a. *The Impact of Mediating Victim Offender Conflict: An*

Analysis of Programs in Three States. Juvenile and Family Court Journal, 43(3): 2 1-28.

Warner, Sue. 1992. *Reparation, Mediation and Scottish Criminal Justice.* Pp 197-2 10 in

Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation- International

Research Perspectives, edited by H. Messmer and H.U. Otto. Netherlands: Kliewer Academic

Publishers.

Re-Victimization

Belgrave (1996) summarizes succinctly, the basis of concerns that many victims have of re-victimization in ADR settings:

"Many victims may find the thought of meeting the offender threatening, and not feel able to face them directly for a very long time, if at all... There may also be issues ofpersonal safety for victims in respect of some offending or offenders. Victims may fear retaliation from the offender or the offender's supporters at the meeting or after the event.

One of the fundamental claims of *restorative justice* advocates is that the use of community-based ADR alternatives to the conventional justice system ensures that the needs of victims are more clearly recognized and provided for. Beigrave counters:

"While restorative justice proponents argue that victim's needs can be better met through such a system... there is a risk that victims will be re-victimized by the process and actually end up feeling worse."67

Maxwell and Morris (1993)68, in a New Zealand study, report *a 25%* dissatisfaction rate amongst victims participating in family group conferencing related primarily to disappointment in outcomes and failure to meet anticipated needs.

Warner, Kate. 1994. *The Rights of the Offender in Family Conferences* in *Family Conferencing*

and Juvenile Justice: The Way Forward of Misplaced Optimism?, edited by C. Alder and J.

Wundersitz. Canberra, ACT: Australian Institute of Criminology.

Belgrave, John. 1996. *Restorative Justice: A Discussion Paper,* Report of the Secretary of

Justice, Ministry of Justice New Zealand. Located on the internet at http://www.justice.govt.nzi

~ubs/reports/1996/restorative/chapter5.html , at p. 4.

67 Ibid, footnote 66, at p. 4.

68 Maxwell, G. and Morris A. 1993. *Family, Victims and Culture: Youth Justice in New Zealand*

Social Policy Agency and Victoria University of Wellington New Zealand, Institute of

Criminology, New Zealand.

Beigrave (1996) adds further (and this concern appears lost on many advocates of *restorative justice)* that:

"Restorative processes take time and may cause inconvenience to victims, particularly where programmes operate during working hours, and when victim participation is in addition to attendance at court hearings."59

Fear of re-victimization can be expected to be exacerbated where the victim is personal/individual, as opposed to institutional/corporate, and where the offence becomes increasingly serious and/or violent. This has significant implications for the way in which *restorative justice* programs are designed and resourced and, it is not evident that many proponents understand this.

When *restorative justice* initiatives envision the diversion of more than minor offences, time and resources will be at a premium if programs are to be effective in achieving stated objectives while, at the same time, capable of processing cases more efficiently than the courts. Price (1997) states:

"The mediation of severely violent crimes is not commonplace. However, in a growing number of victim-offender programs, victims and survivors of severely violent crimes, including murders and sexual assaults, are finding that confronting their offender in a saft and controlled setting... returns their stolen sense of safety and control in their lives... Such violent offences are usually mediated upon the initiation of the victim, and only after many months (sometimes even years) of work with a specially trained and qua! if led mediator, collaborating with the victim's therapist." 70

69 Ibid, footnote 66, at p. 4.

70 Price, Marty. 1997. *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims*

and Offenders. Victim-Offender Reconciliation Program Information and Resource Centre, located on the internet at http://www.vorp.com/articles/crime.html, at p. 3,

In situations where program proposals do not make provision for adequate time and resources to prepare both victims and offenders for mediation, the *de facto* results will either be that:

The risk of re-victimization and/or victim dissatisfaction will be high due to inadequate time and resources, which precludes necessary screening and preparation of victims and offenders, or

Programs will bog down quickly because the time frames for dealing effectively with victim needs and support will, given the limited fiscal and human resources available, severely limit the processing of cases, or

Unreasonable expectations of benefits will be raised, and lost, due to rapid processing times that will not allow for addressing root issues and causes.

Privatization of Women's Issues

The history of ADR, particularly in the context of criminal and family law, has followed an interesting path in terms of the feminist literature. What was originally conceived of as an alternative to a "male controlled" and "male oriented" formal legal process, and thus heralded as a progressive option for providing a voice for women's interests and perspectives71 has, with experience and time, become for many feminists nothing short of a proverbial leap from the "frying pan into the fire". Astor (1997) asks:

71 Rifkin, J. 1984. *Mediation from a Feminist Perspective: Promise and Problems.* 2 Law and

Inequality, 21 at 22.

"Have women found ADR a good forum for the resolution of their disputes? The work of Rifkin and Menkel-Meadow represents a period of optimism about the potential of ADR for women which was comparatively short lived Many scholars have since

suggested that, whatever potential mediation might have for women, the reality is much less promising. In particular it has been argued that, in practice, many women going to mediation will be disempowered compared to the men with whom they are negotiating."72

The negative response to ADR amongst women's groups is multifaceted and will be referred to in a number of contexts within this paper (e.g., revictimization, power imbalances). One of the more interesting aspects, however, is the issue of *privatization* of domestic violence. Years of struggle have gone into bringing the specter of family violence out of the privacy of the home into the public arena of the courts. This has raised the profile of the problem and consequently attracted significant change in how society views domestic violence and the approaches that society will take to dealing with it. With pressures increasing to incorporate ADR into many areas of law, feminists are concerned that domestic violence will be returned to the private arena where incidents and solutions will remain hidden from public view73. The re-privatization of domestic violence, it is argued, can only lead to dulling society's awareness of the issues and the likely failure to deal effectively and decisively with it74.

72 Astor, Hillary. 1996. *Gender Issues in Dispute Resolution.* Located on the internet at

http://www.anu.edu.au/law/pub/teaching_materiallgenderissues/ClVLPROCEDURE.html , at p. *9.*

Mack, K. 1995. Alternative Dispute Resolution andAccess to Justice for Women. 17 Adelaide

Law Review, at p. 124.

Astor, Hillary. 1994. Violence and Family Mediation Policy. 8 Australian Journal of Family

Law, 3.

Socio-Cultural Insensitivities

It has already been suggested elsewhere that some evidence exists to suggest that ADR is developing as a "white, middle-class" alternative to the conventional justice system75. The possibility that other ethnic groups and social classes may be, however inadvertently76, excluded from participation is only one side of the socio-cultural insensitivity issue. Perhaps the more insidious side is summarized in the charge by Delgado (1988) that:

"Relegating many problems to alternative forums is enormously beneficial to those in power. It takes the sharp edge off claims, diffusing them into generalized grievances to be worked out, harmoniously is possible, on a case-by-case basis. It is an excellent way of seeming to be doing something about intractable social problems while actually doing relatively little. It enables us to bury claims in a mass of irrelevant detaiL ADR, in short, is a powerful means of replicating current social arrangements and power distributions." 75

Delgado argues that, while the conventional justice process (imperfect as it may be shown to be) contains numerous safeguards against bias and prejudice (e.g., the jury selection process, judicial disqualification for bias, rules of evidence, etc.), ADR not only incorporates few, if any of these safeguards, it is actually championed for its lack of procedural rigor on the basis that the process is *"speedy, flexible and nonintimjdating". 78 By* any analysis, informality and absence of procedural rigor must work to the advantage of some and the disadvantage of others. In all likelihood, Delgado argues79, ADR procedures will act to the advantage of the already empowered and the already enfranchised. He concludes by saying:

75 Loc. cit. footnote 64.

76 Gehm, John R. 1998. *Victim-Offender Mediation Programs: An Exploration of Practice and*

Theorectical Frameworks. Western Criminology Review, 1(1). Located on the internet at http:llwcr.sonoma, edu/vlnl/gehm.html

77 Delgado, Richard. 1988. *Law and Social Inquiry.* Journal of the American Bar Association. Vol.13, No.1, at p. 150-151.

78 Ibid. footnote 77, at p. 152.

"When ADR cannot avoid dealing with sharply contested claims, its structureless setting and absence of formal rules increase the likelihood of an outcome colored by prejudice, with the result that the haves once again come out ahead'

Space precludes examining this problem in more detail but Delgado's arguments indicate some real cause for concern in this area.

Inability to Control Power Dynamics

Seldom will it be the case that all parties involved in an ADR proceeding will be in precisely the same position of power. One of the goals of the mediator (and of the stated advantages of ADR), therefore, is to maintain the power balance or, more precisely, to neutralize the power imbalance. Is it realistic, however, to think that all power imbalances, particularly extreme imbalances, are amenable to control or can be effectively neutralized? This question is particularly pertinent in situations where protracted cycles of violence and abuse have characterized the relationship between the disputants, as is often the case in domestic violence.

Astor (1994) observes:

'Mediation requires the parties to have the capacity to negotiate with each other. There must be at least some capacity for consensual decision making; a willingness to be honest; a desire to settle the dispute; some capacity to compromise. These types of behaviours are very unlikely to be within the repertoire of behaviours of perpetrators of violence. The relationship between perpetrator and target is not characterized by consensuality, honesty, mutuality and compromise. It is characterized by coercion by the perpetrator and, almost certainly, by compliance to avoid violence by the target." 82

Astor, Hillary. 1994. Swimming Against the Tide: Keeping Violent Men Out of Mediation *in Women, Male Violence and the Law.* Julie Stubbs (ed.), Institute of Criminology, Sydney Australia

In as much as Astor's position can generally be regarded as representative of the feminist position on the use of ADR in domestic violence cases, it is not the only perspective. Advocates of ADR argue that neutralizing power imbalances is precisely what mediators are trained to do. Marthaler (1989)83 argues that a carefully controlled mediation process can effectively deal with all concerns associated with power imbalances between disputants even in cases exhibiting a long history of domestic violence.

"We think… special procedures can address the fears and concerns of those who claim such couples are inappropriate for mediation because of their history of abuse and propensity for further violence toward each other."84

Although we may not be able to draw a definitive conclusion from the literature, it is clear that mediating disputes involving strong power imbalances (and specifically power imbalances involving abuse and violence) requires a number of prerequisites that are not always evident in many mediation programs. These prerequisites include:

- Highly skilled and experienced mediators
- Mediators with special awareness of the dynamics and impacts of violence and abuse
- Sufficient time to prepare both victims and perpetrators in advance of the mediation session (suggested by Price(1997)85 to, in some cases, require months and maybe even years of preparation)
- The provision of counselling services as adjunct to the mediation process, that will serve to deal effectively with deeply entrenched patterns of behaviour and root causes
- Adequate guarantees for the security of the victim.

82 Astor, Hillary, 1994. *Swimming against the Tide: Keeping Violent Men Out of Mediation,* as referenced in Astor, HilIary, 1996. *Gender Issues in Dispute Resolution,* located on the internet at http://www.anuedu.au/law/pub/teaching_material/genderissues/CIVILPROCEDURE.html , at p. 11,

83 Marthaler, Dennis. 1989. *Successful Mediation with Abusive Couples* in *Legal Issues Affecting the*

Practice of Mediation, S.K. Erickson (ed.), Mediation Quarterly, no.23. *San* Francisco: JosseyBass, Spring 1989, pp. *53* to 66.

84 Ibid, footnote 83, at p. 66.

Given the importance of the above criteria to the dispute resolution process, it should be recognized that an implementation plan which gives inadequate consideration to these factors could prove devastating to the participants.

Cognitive and Other Social Disparities

In Nova Scotia, mediation in the criminal justice context has been used most extensively with *Young Offenders.* Following a comprehensive study of the alternative measures program, and a number of years experience in mediating with young persons accused of offences, Montgomery (1997)86 found that referral to the program, all other things being equal, usually came as a result of the investigating officer's assessment of the youth's attitude which was invariably determined on the basis of some indication of remorse and shame. This gives rise to the question of the average officer's ability to determine sincerity of attitude in a young offender, not to mention his or her degree of knowledge regarding other differences among youth, e.g., social disparities, cognitions and, cultural variables.

85 Price, Marty. 1997. *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders.* Victim-Offender Reconciliation Program Information and Resource Centre, located on the internet at http:/www. vorp.com/articles/crime. html, at p. 3,

This author's experience in mediating young offender offences has indicated that differences in social development, cognitive skills and even physical/mental health can easily be misinterpreted as lack of remorse, refusal to accept responsibility, or absence of empathy. Detecting and distinguishing socio-cognitive functionality, from anti-social behaviour is not easy, particularly for volunteer mediators and even experienced police officers who have had little training in, or exposure to, child development psychology.

Net Broadening

Net broadening, in the context of *restorative justice* and other ADR forums for criminal justice, refers to the phenomenon of increasing, however inadvertently, the reach of the criminal justice system, to draw in individuals who would not normally be charged with a criminal offence or be brought within the sphere of the criminal justice process. The phenomenon has been studied in a number of jurisdictions including, for examples, Nova Scotia87, New Zealand88 and the United States89. In theory, diversion programs such as *alternative measures* or *restorative justice,* are designed as alternatives to the conventional justice system and not as additional forms of sanction. Anecdotal evidence gathered by Montgomery (1997) through interviews with police, indicated that youth have been referred to the *alternative measures* program in Nova Scotia, on occasion, even where there was insufficient evidence to support the prosecution of any offence. 90 In the United States, Schiff (1998) suggests:

"Research must also examine the extent to which restorative programs may empower governments to systematically over control large segments of the youth population. It should identify if restorative sanctions are imposed, in addition to other, more traditional sanctions, or if offenders who would not otherwise be sanctioned are ending up in so-called restorative programs. "91

Although net broadening may be *"an unplanned outcome of a policy initiative with benevolent intentions" 92 the* danger appears in the use of the criminal justice system to achieve socio-behavioural reform

amongst a far broader segment of the population than would normally be considered "criminal". Strong arguments have been advanced in the literature against the use of the criminal justice system for any reasons other than dealing with offences as defined by legislation93. The demise of the *Juvenile Delinquents Act94 in* Canada in the early 1980s was due, at least in part, to the degree to which the Act inappropriately confused criminal and child welfare issues. The intent of the *Young Offenders* Act95was to draw a clear distinction between child welfare issues and criminal justice issues and to ensure that the criminal justice system was invoked exclusively to deal with a defined offence. If *restorative justice* and other ADR forums are used, in effect, to expand the reach of the criminal justice system to address socio-behavioural problems that go beyond what is *criminal* then we will, in essence, be returning to the days of the *Juvenile Delinquents Act* where children could be apprehended and removed from the home for non-criminal activities such as smoking, truancy and other perceived misdemeanors.

80 Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review.*

Report of the Nova Scotia Department of Justice, Halifax, 143 pages.

87Ibid, footnote 86 at p. 39.

88 Belgrave, John. 1996. *Restorative Justice: A Discussion Paper,* New Zealand Ministry of Justice, located on the internet at http://www.justice.govt.nzipubs/reports/1996/restorativel

chapter5.html at p. 13.

Schiff, Mara F. 1998. *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade.* Western Criminology Review 1(1). Located on the internet at http:llwcr.sonoma.edu/vInl/schiff.html, at p. 10.

90 *Ibid,* footnote 86 at p. 40.

91 *Loc. cit.,* footnote 89.

92 Loc. cit. footnote 89. See for example; Riley, Paul. 1994. *Proportionality as a Guiding Principle in Young Offender Dispositions,* Dalhousie Law Journal. vol. 17, no.2, Fall 1994.

94. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

95 *Young Offenders Act,* R.S.C. 1985, c. Y-1.

Unrealistic Expectations

Anti-social behaviour that goes on to assume the character of criminal behaviour is an age-old problem that has defied effective control in all western societies. The punitive approach to controlling criminal behaviour has proven ineffective. It has increasingly become the subject of indictment at all levels of society. The question is "will *restorative justice* prove any more effective in the long run?" The contention of the author is that so long as our approach to criminal behaviour remains remedial (i.e., reacting after the event), and clearly *restorative justice* programs as they are currently conceived remain largely remedial in approach, the problem of reducing criminal behaviour will continue to be intractable.

Restorative justice is undoubtedly a major step forward in the approach taken to dealing with offenders, victims and communities. Nevertheless, the problem lies in the unrealistic expectations advocates of

restorative justice have, of the new paradigm's likelihood of making serious inroads on levels of criminal behaviour in general. Reacting after the fact, no matter how sophisticated and progressive the approach used, will not get at the root causes of social dysfunction that lead to criminal lifestyles in the first place. *Restorative justice,* alone, cannot be a panacea for all the social ills that contribute to the development of criminal behaviour through the early and adolescent childhood years. Failure to recognize this may well result in unreasonable expectations which could well result in a backlash against justice reform leading to a return to even more punitive approaches to dealing with crime.

Lack of Expertise in Community-Based. Volunteer Organizations

One of the primary elements of many *restorative justice,* and other ADR alternatives to the conventional criminal justice system, is simultaneously a strength and, an *Achilles' heel.* Advocates proclaim the new paradigm as a return of the administration of criminal justice, at least in part, to the community. Since many ADR programs are designed to be community based, community volunteers will be at the heart of most *restorative justice* initiatives. Yet, historically, most volunteer programs have dealt with minor and simple offences such as shoplifting, minor property damage and even minor assaults. Dealing with such offences through volunteer mediators, who have received the most basic of training, has proven reasonably effective in terms of agreements negotiated, victim satisfaction and offender restitution. Serious questions arise, however, as to whether the volunteer model is capable of dealing effectively with more serious and more complex situations that *restorative justice* programs propose to introduce. Multiple offences, serious assault cases, major property damage, or chronic offending are some of the types of cases that volunteer mediators may not be equipped to deal with? Once an offence situation begins to encompass serious, deeply entrenched behavioural dysfunction, psychological elements of fear, revictimization, manipulation and control, is it really fair or realistic to believe that a volunteer model will be effective given the limited training? This presents serious implications for the human resource and fiscal requirements of alternatives to the conventional justice system as they begin to encounter more serious and more complex cases. Very little is evident in the design of programs to-date, to indicate that such questions are being systematically addressed.

External and Administrative Risks

Even if it is possible to minimize the risks which are inherent or internal to the *restorative justice* concept, external risks can be even more insidious and, potentially more destructive. External risks do not relate so much to the substance or concept of *restorative justice* as they do to the *approach* taken to its implementation. Principle amongst these risks are:

- A lack of understanding of the magnitude and fundamental nature of the change involved;
- The historic, and on-going, absence of stable funding for alternative programs to the conventional justice system.
- The threat of *"window dressing"97*
- The possible existence of ulterior motives for implementing restorative justice.

Lack of Understanding of Change

It has already been argued elsewhere that *restorative justice* represents enormous change in our perceptions of community, justice, criminal behaviour and, individual and collective responsibility. Advocates of *restorative justice* are not simply talking about "new ways" of treating offenders, or even "new ways" of helping victims of offenders. At its roots, *restorative justice,* offers a new paradigm for how we *think* and *behave* as a society. It suggests that anti-social or criminal behaviour arises from within society and that it is, at least on some level, the product of systemic inequities and injustices in society for which we are collectively responsible. Crime represents a breach in the community, a fracture in

relationship that requires healing. Much the same as with the physical body, when a particular part malfunctions, rather than cutting out the offending part, we strive to bring the dysfunction back into harmony with the rest of the body. The analogy is illustrative of how *restorative justice* views community, and anti-social or criminal behaviour that arises within it. Healthy communities, the *restorative justice* paradigm teaches, are those in which the breach is healed i.e., victims are given restitution, offenders are reconciled, and community wholeness is restored. But the paradigm, by definition - since it focuses primarily on community -demands an informed response from the community. It requires that we individually and collectively embrace the new way of thinking. Herein lies a serious risk of failure. If governments believe that the simple articulation of the concepts, or the introduction of a few new programs, will achieve the required change they may be sadly mistaken. Fundamental, *grass roots work* is required at the community level to achieve the order of change required. The public needs to be effectively educated to a clearer understanding of the causal factors contributing to crime, the principles of restorative justice and the methodology of its implementation. There is little evidence of a coordinated effort to introduce these concepts to our population to-date and one is left wondering if the time and resources required by such an investment has simply been determined by government to be unnecessary or unaffordable?

Umbreit, Mark S., 1998. *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment.* Western Criminology Review 1(1). Located on the internet at http://wcr.sonoma.

Resource Commitments to ADR and Restorative Justice

In an earlier section of this paper reference was made to the need for stemming the flow of resources into custodial facilities if adequate and stable resources are to be made available to *restorative justice* programs98. In Nova Scotia, for example, the seven alternative measures societies that administer the only true ADR diversion program widely available in the province today, have historically operated on less than insufficient funding. At the very least, they have operated on funding contributions from the Department of Justice that the Department itself has acknowledged are not intended to cover all of the costs associated with the agencies' programs99. The net result has been under paid and over worked staff, minimal resources for staff and volunteer training, virtually no resources for victim support, and little experience in dealing with complex serious offences.

In practice, this approach to funding diversion has led to community-based societies constantly operating on the edge, even in delivering the modest programs currently offered. Clearly, to add newer, more demanding programs to their load without rationalizing their costs, and transferring adequate resources for implementation, leaves the agencies vulnerable either to financial collapse or to compromising the integrity of the new programs. While the *restorative justice* initiative in Nova Scotia recognizes the need for additional resources allocated to the community-based agencies that will be responsible for implementing the initiative, there is no clear indication of awareness:

98 Ibid, footnote *7,* at p. 2.

99 Gary Dupuis, Director of Community Corrections, Nova Scotia Department of Justice: personal communication

100 1998. *Restorative Justice: A Program for Nova Scotia,* published by the Nova Scotia Department of Justice through Communications Nova *Scotia,* at p. 19.

Of the projected costs associated with enhanced training, implementing new programs, requirements for additional staff or, needs for additional space.

Of what amount of new money might be made available to each agency.

Of the fact that the agencies have historically been under funded even in the context of existing diversion programs.

Of a strategic plan for moving resources out of the conventional justice system into community-based alternatives.

In attempting to implement restorative justice initiatives, this lack of attention to resources, both human and fiscal, has the potential to lead to these undesirable and unplanned results. First, the launching of a program in the absence of an adequate assessment of resource requirements which will severely limit its chances of success. Second, a budgeting precedent will be set which, should the implementing agencies be able to survive the initial years, will be difficult to change down the road. Third, in the interests of survival, implementing agencies may tend to bend over backwards to ensure that the programs operate or, at least appear to operate even if a lack of resources threatens to compromise the integrity or long term success of the new programs.

Perhaps the strongest indicator of commitment to restorative justice alternatives will be a measurable reduction in incarceration rates and a concomitant re-allocation of savings into community-based alternatives. In this respect, Umbreit (1998) has stated:

"The other major risk facing the movement is that of being so focused on restorative justice interventions that we ignore the larger issue of the tremendous overuse of costly incarceration. Unless the issue of overuse of incarceration is ultimately dealt with, there will simply not be the financial resources available to move toward a truly restorative justice model."[101]

If governments are serious about fundamental change, they will have to exhibit clearly that commitment in their budgeting processes. In Nova Scotia, in particular, the lack of support for alternative measures to-date, has produced the following observations from program participants.

"Office space is not adequate at all times, and part of the frustration is that if we are going to have an alternative measures program in _____ there is a base cost that must be faced to put the operational structure in place and this cost is independent of the size of the caseload It is simply the cost of opening up for business."

"Personal commitment and the belief of individuals in the alternative measures program can only carry the program so far. Staff and volunteer burn out is a serious concern and forcing people to operate continuously on the edge (financially and otherwise) invites burn out."

"Alternative measures should become a bigger part of the system and get the attention it deserves. It should be more than a tag on." 2

Window Dressing

Window dressing, which is not unrelated to the earlier discussion on "understanding the magnitude of change", has been aptly described by Umbreit (1998) as the single greatest risk faced by advocates of *restorative justice.*

101 Umbreit, Mark, S. 1998. *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment.* Western Criminology Review, 1(1). Located on the internet at http:/fwcr.sonoma. edu/v1n1/umbreit.html, at p.25.

"The restorative justice movement ...face a *number of important risks. Perhaps the greatest risk is that of* *window* *dressing* *in*

which criminal andjuvenile justice systems redefine what they have always done with more professionally acceptable and

humane language while not really changing their policies and procedures."103

In Nova Scotia, by way of example again, alternative measures has often been regarded, however unintentionally, as an experimental *add-on* to the real justice system104. If *it* does not work, little is lost since the program costs are minimal and the real justice system is always there to deal with offenders. So long as alternatives are regarded as experimental, there will be little incentive to direct significant resources to their development and, no incentive to change older, established programs. The fact that Nova Scotia is talking about "new community-based programs" without redressing the serious resourcing problems associated with existing community-based ADR programs, and without signaling an intention for major changes across the criminal justice system as a whole, does not inspire confidence that the *restorative justice* initiative will be adequately resourced. Nor does it inspire confidence that the new initiative will be considered more than an experiment or, will result in substantive change to the way in which criminal justice is administered in the province.

102 lbid. footnote 86, at pp. 30 and 115. Comments received from society board members and a Crown attorney.

103 *Ibid.* footnote 97, at p. 25.

104 Montgomery, A.N. 1997. *Alternative Measures in Nova Scotia: a Comprehensive Review.*

Report of the Nova Scotia Department of Justice, at p. 7.

The dangers associated with window dressing can be subtle and yet far-reaching. An analogy to immunization may be apt in this context as an illustration of the risk. In a very simplistic way, the concept behind immunization is that by introducing a small amount of a virus into the body, it is possible to stimulate the body's protective mechanisms so that the *full fledged* condition will not be caught. While it is obviously not the intention of the author to equate *restorative justice* to a virus, is it possible, that by talking extensively about the theory and concepts of *restorative justice,* while not actually doing the substantive work of *restorative justice,* we could somehow be convincing ourselves that we have acquired it? Could it be that we would, in effect, have immunized ourselves against ever *catching the real thing?* This is the threat of "window dressing".

Ulterior Motives

Of all the potential risks associated with the implementation of *restorative justice* and other forms of ADR in the context of criminal justice, none are more insidious and difficult to deal with than ulterior motives. The move to "community-based delivery" of programs and policies that were once clearly within the purview of provincial or federal governments has become pervasive at the close of the twentieth century. Environmental, economic and now justice responsibilities are being inexorably off-loaded by higher government levels to lower government levels and communities. This phenomenon is unprecedented and is being fueled by fixation on balanced budgets and deficit fighting. The problem comes when responsibilities are being transferred without a concomitant transfer of the resources required to assume them competently. The insidious part of this process is that there are cogent and demonstrable reasons for transferring government responsibilities out into the communities. Communities

have demonstrated that they are indeed capable of accomplishing measurable results in environmental remediation, local economic development and, probably as well, the administration of justice and crime prevention. Communities are limited, however, in what can be accomplished, not by any lack of resolve, or even necessarily by a lack of expertise, but by a lack of financial and human resources.

It costs approximately $10 billion a year to operate the justice system in Canada (including policing, courts, prison system, etcetera)105. Governments, which are cash strapped and intent on fighting deficits, have embarked on offloading responsibilities for programs such as health, education and, justice from the federal government on down. Those responsibilities ratchet down through the system until they land at the door step of communities whose hospitals now have huge operating deficits, whose school system operates under a cloud of deficit and, whose social service agencies struggle to survive with each passing year.

With *restorative justice,* and its emphasis on community based ownership, the temptation for governments to embrace the concept, not so much for its inherent "soundness" as for its price tag, is all too real. Our prisons our full, our court dockets crammed and, *restorative justice* appears to offer a relatively inexpensive *way out.*

105 Canadian Centre for Justice Statistics, *Justice Spending in Canada,* vol. 17, no. 3, 1994-1995.

Conclusion: Restorative Justice "A concept whose time has come?"

Bontrager (1997) entitles a recent article, *Restorative Justice: A concept whose time has come.*

Certainly if the level of government activity currently underway across Canada, being carried out under the label of *restorative justice,* is any indication, Bontrager's declaration would appear to be true. However, cautious optimism *is* probably more appropriately called for. It is not clear, based on the evidence gathered, that sufficient thought has gone into designing *restorative justice* initiatives in order to:

Identify the risks and ensure that they are eliminated or at least minimized.

Ensure that there is broad-based community understanding and support.

Adequately assess human and fiscal resource requirements to ensure a high probability of success.

Effectively monitor and evaluate new programs to ensure that they are delivering on anticipated results and not inadvertently creating new sources of abuse and disadvantage.

Restorative Justice: "A concept before its time?"

Arguably, it could be said that *restorative justice* has actually arrived too early or, before its time. While the concepts and ideas are laudable, it is not clear that they enjoy a broad base of support across society as a whole and, as already stated, little effort has been invested to-date in developing support and understanding at the grass roots level in communities. Nor is it clear that governments are embracing *restorative justice* with a full grasp of its implications for the administration of criminal justice. Of greater concern, is the likelihood that governments are advocating for its implementation as a means of reducing the costs of administering the existing system rather than as a result of a genuine understanding of and, commitment to, the new paradigm's spiritual and philosophical underpinnings. Perhaps it is even more regrettable that the most likely consequence of a poorly implemented, misunderstood justice reform initiative will be a dramatic swing back to punitive and retributive responses to crime which will never

afford society the opportunity to address the actual root causes of criminal behaviour which have been consistently neglected by past and present governments (e.g., poverty, racism, family violence, unemployment, educational inequities).

If this writer is correct in his assessment of the real nature and level of commitment to *restorative justice,* the greatest tragedy is that reform of the justice system (the need for which is undisputed) may be set back years in the wake of the failure of *restorative justice* initiatives. A failure that is not necessarily inevitable, but highly probable if the rhetoric of change is not transformed into substantive change evidenced by significant changes in government resource allocation and, program and policy development.

106 Bontrager, B., ID. 1997. *Restorative Justice: A concept whose time has come.* International Insititute of Christian Studies. Located on the internet at http://www.goshen.net'.

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