RESTORATIVE PRINCIPLES IN THE CRIMINAL JUSTICE SYSTEM:
ALTERNATIVES FOR SATISFYING JUSTICE?

by

JOBINE VAN 'T WESTEINDE

Masters in Civil Law, Rijksuniversiteit Leiden, 1996

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 1998

© Jobine van 't Westeinde, 1998
In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of **Law**

The University of British Columbia
Vancouver, Canada

Date **August 25th, 1998**
ABSTRACT

The subject of this thesis is criminal justice policy. It focusses on diversion, that is, alternatives to the court system. I argue that the current criminal justice system, which is rooted in retributive principles, has shortfalls which are of such a degree that it makes sense to consider alternatives. A new movement in criminal justice policy, restorative justice, reflects a theory that may provide a framework for new programs. Restorative justice is based on principles that are fundamentally different from retributive ideology and the translation of these ideas results in dramatically different programs.

In my thesis I delineate the differences between restorative and retributive principles. The retributive system leads to dissatisfaction among the stakeholders in the criminal process. The purpose of the thesis is to investigate whether implementation of restorative justice principles could lead to more satisfaction and a higher quality of justice. The restorative justice theory has a strong rhetoric, as will be made clear. The implementation of restorative programs, however, does not develop quickly. There are several reasons for the slowness, including the reluctance of criminal justice officials to give new initiatives a chance to develop and to co-operate in their development.

I describe three restorative programs that divert criminal cases from the court system, they are: mediation, dading, and family group conferences. On the basis of these programs I make clear which are the strengths and the possible weaknesses of restorative justice. The comparison of different programs from different countries, provides a useful insight in the dynamics of restorative justice in practice. International research and comparison will lead to understanding in how to design a suitable and valuable process. My conclusion is that a truly restorative system is neither a realistic,
nor a wished situation. For a variety of cases, though, restorative programs provide a better locus for resolving the problems involved in crime, than the court process does. I therefore advise that the development of restorative programs must go on.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abstract</td>
<td>ii</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>iv</td>
</tr>
<tr>
<td>Acknowledgement</td>
<td>vi</td>
</tr>
<tr>
<td><strong>CHAPTER 1</strong> REtributive or ReStorative?</td>
<td>1</td>
</tr>
<tr>
<td>1 Introduction: Choice of Topic and Purpose of the Study</td>
<td>1</td>
</tr>
<tr>
<td>2 The Retributive Criminal Justice System</td>
<td>4</td>
</tr>
<tr>
<td><em>Underlying Principles and Values of the Current Criminal Justice System: The (Neo-) Classical School</em></td>
<td>5</td>
</tr>
<tr>
<td>Shortfalls</td>
<td>11</td>
</tr>
<tr>
<td>3 Restorative Justice: The Theory</td>
<td>16</td>
</tr>
<tr>
<td><em>Scholars on the Theory of Restorative Justice</em></td>
<td>17</td>
</tr>
<tr>
<td>4 Implications of Implementation</td>
<td>26</td>
</tr>
<tr>
<td><em>Encounter, or Communication: Conflict</em></td>
<td>26</td>
</tr>
<tr>
<td><em>Reduction through Dialogue</em></td>
<td>28</td>
</tr>
<tr>
<td><em>Reparation</em></td>
<td>30</td>
</tr>
<tr>
<td><em>Reintegration</em></td>
<td>31</td>
</tr>
<tr>
<td><em>Participation</em></td>
<td></td>
</tr>
<tr>
<td>5 From Retributive to Restorative</td>
<td>33</td>
</tr>
<tr>
<td><strong>CHAPTER 2</strong> Alternatives to the Court System: Mediation; Dading; and the Family Group Conference</td>
<td>39</td>
</tr>
<tr>
<td>1 Introduction</td>
<td>39</td>
</tr>
<tr>
<td>2 Mediation</td>
<td>39</td>
</tr>
<tr>
<td>3 Dading</td>
<td>45</td>
</tr>
<tr>
<td>4 Family Group Conferencing</td>
<td>50</td>
</tr>
<tr>
<td><em>The Wagga Wagga Model, Australia</em></td>
<td>55</td>
</tr>
<tr>
<td><em>Family Group Conferences for Young</em></td>
<td>57</td>
</tr>
<tr>
<td><em>Offenders in Winnipeg</em></td>
<td></td>
</tr>
<tr>
<td><em>The Sparwood Youth Assistance Program</em></td>
<td>59</td>
</tr>
<tr>
<td>5 Evaluation</td>
<td>61</td>
</tr>
<tr>
<td>CHAPTER 3</td>
<td>QUI BONO?</td>
</tr>
<tr>
<td>-----------</td>
<td>----------</td>
</tr>
<tr>
<td>1 Introduction</td>
<td>64</td>
</tr>
<tr>
<td>2 The Criminal Justice System</td>
<td>64</td>
</tr>
<tr>
<td>3 The Offender</td>
<td>71</td>
</tr>
<tr>
<td>4 The Victim</td>
<td>73</td>
</tr>
<tr>
<td>5 The Community</td>
<td></td>
</tr>
<tr>
<td>Defining the 'Community'</td>
<td>77</td>
</tr>
<tr>
<td>The Role of the Community</td>
<td>80</td>
</tr>
<tr>
<td>6 Evaluation</td>
<td>83</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 4</th>
<th>QUESTIONMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Introduction</td>
<td>86</td>
</tr>
<tr>
<td>2 Offender's Rights</td>
<td>87</td>
</tr>
<tr>
<td>Juvenile Rights</td>
<td>91</td>
</tr>
<tr>
<td>3 Place of the Victim in the Process</td>
<td></td>
</tr>
<tr>
<td>Cases of Domestic Violence</td>
<td>95</td>
</tr>
<tr>
<td>If the Victim is a Large Company</td>
<td>100</td>
</tr>
<tr>
<td>4 Disparity in Outcome; Inequality between Similar Cases</td>
<td>103</td>
</tr>
<tr>
<td>5 Net-Widening</td>
<td>106</td>
</tr>
<tr>
<td>6 Resources</td>
<td>107</td>
</tr>
<tr>
<td>7 Evaluation</td>
<td>109</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CHAPTER 5</th>
<th>ALTERNATIVES FOR SATISFYING JUSTICE?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Retributive or Restorative?</td>
<td>111</td>
</tr>
<tr>
<td>2 What Else Needs to Be Done?</td>
<td></td>
</tr>
<tr>
<td>Commitment of Criminal Justice Officials</td>
<td>116</td>
</tr>
<tr>
<td>3 Which Cases?</td>
<td>120</td>
</tr>
<tr>
<td>4 Conclusion</td>
<td>123</td>
</tr>
</tbody>
</table>

Bibliography | 127 |

APPENDIX I | Retributive versus Restorative Justice | 138 |

APPENDIX II | A Restorative Justice Yardstick | 141 |
ACKNOWLEDGEMENTS

This has been a fantastic year; a great learning experience in an environment that was extremely supportive and encouraging. I would like to thank my supervisors, Dr. John Hogarth and Prof. Michael Jackson, for their feedback and support and for stimulating me in what turned out to be a challenging intellectual journey. I further thank my friends Gabby Vitali, Lorna Lynch, Jacqueline Jago, Geoff Davenport and David Hannigan for correcting my English, my colleagues in the Masters program at U.B.C., and Prof. Wes Pue for sharing their versatile insights and ideas. I am indebted to the people from "Projekt Dading Nederland", in particular Mr. Mark Kooij, for providing me with the information about dading, and Prof. Emeritus J. Leijten, for sharing his ideas about this Dutch initiative with me. I thank the Honourable Judge Bria Huculac for her advice and stimulating comments; Sergeant Jake Bouwman for his first-hand information on experience with the Sparwood Youth Assistance Program; and Mr. Brian Tkachuk for providing me with a large amount of litterature on restorative justice, without which I probably would not have been able to finish this project within a year. This year has been of great value in my intellectual and personal development.
CHAPTER 1

RETRIBUTIVE OR RESTORATIVE?

1 Introduction: Choice of Topic and Purpose of the Study

There has been a lot of controversy in the criminal justice area in the last few decades. Society has called for harsher punishment of offenders, and citizens have expressed feelings of insecurity. There is a feeling that ‘nothing works’ in the criminal justice system. What we ultimately want is a safe society. The question is how we can best achieve this. Politicians promote 'Law and Order' in their battle for votes, regardless, it seems, whether that is a sensible approach.\footnote{Mark W. Bakker, "Repairing the Breach and Reconciling the Discordant; Mediation in the Criminal Justice System", North Carolina Law Review, Volume 72, No. 6, at 1522 argues: "Certainly, the call for greater punishment of criminals resonates with voters. In response, legislators yielded to the appeal of more prisons, longer sentences, mandatory life sentences, and limited parole opportunities. However, even the most diehard of "law and order" advocates must question the cost of incarcerating offenders for a long enough time to make the desired impact on crime. More law enforcement, greater conviction rates, and longer prison sentences all result in a greater expenditure of limited resources. These ideas have been tried in the past and have not proven to be effective."}

Policy-makers respond in different ways. In the United States, for example, there is a growth of prison facilities. The crime rates do not, however, appear to have diminished. Furthermore, prisons are places where offenders learn from each other and where they are alienated from society. It appears to be difficult to resocialise after having done time behind bars. As well, for victims there is little space in both the process and the outcome in the criminal justice system. Obviously, the system has shortcomings.

In New Zealand the government chose an alternative for dealing with offenders. In the juvenile justice system, a bold new initiative has been implemented. Instead of
the courtroom, the Family group conference, is now the main locus for problem solving in cases involving young offenders. Since the implementation of this concept, incarceration rates decreased dramatically and the parties involved generally express satisfaction. In addition, victims have the opportunity to participate in the process.

New Zealand implemented a new vision that attracted more and more interest over the last two decades, i.e. restorative justice. Restorative Justice is a new movement in the area of criminal law. It is conceived in terms which are opposed to the current retributive justice system. The two visions differ from each other in significant ways, as this thesis will demonstrate.

Initiatives in this field show that restorative justice implementations have many advantages. However, there are possible shortfalls as well - such as coercion, revictimization, violation of the rights of the offenders, and disparity in outcomes. Repetition of the shortcomings that exist under the retributive system is a possible, if not likely, outcome. Abel argues:

> There is reason to think that some of the inadequacies and dilemmas of the formal legal system that generate the enthusiasm for informal alternatives will bedevil the latter as well.²

A new vision, or new paradigm, cannot be implemented overnight. Not only must new programs be implemented, but these must be accompanied by a change in attitude of the people who work in the field, by public acceptance, and by a variety of new resources. The aim is to reach a qualitatively better and more satisfying justice system for offenders, victims and their communities. Satisfying justice can be described as:

---

[A] response to crime that takes victims seriously and helps them heal, a response that calls offenders to account and deals with them effectively, a response that 'gets tough' on the causes of crime and does something about them.3

The question is whether the restorative justice vision can provide the vehicle to achieve this aim. The purpose of my study is to explore alternative options to respond to the problems of crime and that fit into the restorative paradigm.

In this thesis I will argue that the current retributive criminal justice system fails the parties involved in a crime and that it therefor makes sense to consider alternatives. My focus will be on diversion: programs that divert offenders from the court system. In this chapter I will describe the retributive criminal justice system. Then, I will delineate what restorative justice means; which principles it embraces; and how we can make the step from theory to practice. I will discuss various scholarly approaches to the new vision. This discussion, and my discussion of the practical implications of the idea will bear in mind the positive features, as well as potential negative outcomes. Restorative Justice is still developing and both unexpected weaknesses and positive features have surfaced over the last years. In chapter 2, I will describe initiatives that have developed such as Mediation (which took place first in Canada), Dading (developing in the Netherlands) and Family Group Conferencing (which has its origins in New Zealand). These informal processes reflect restorative principles and during their development both positive and negative features have surfaced. In chapter 3, the advantages for the different stakeholders in diversion will be discussed. Many

questions remain to be answered, as will be made clear in chapter 4. By comparing programs and the information gathered through experience from different countries, we can focus on a larger variety of pro's and con's than if only one program in a single country was considered. In the conclusion I will answer the question whether restorative justice can result in satisfying justice.

I hope to provide some insight about how these initiatives operate and will point out that caution is needed when considering implementing such programs. I will also try to formulate resolutions that minimize the risk of possible shortfalls and maximize benefits.

2 The Retributive Criminal Justice System

The retributive criminal justice ideology is based on the idea that man is a responsible moral agent to whom punishment is due when he makes wrong moral choices. It is assumed that the consequence of wrongdoers being made to suffer for their misdeeds needs no pragmatic justification; that individuals upon whom the wrong was inflicted seek revenge and that society demands for an authority to punish the wrongdoer. These are the underpinnings of liberal legalism. The purpose of punishment in this setting is to inflict deserved suffering (or 'pain') and the criminal law is to provide an acceptable framework for doing so. The roots of the current mainstream criminal justice system can be traced back to the age of enlightenment. Beccaria paved the way in the 1760's with his Dei deliti e delle pene (On Crime and

---

4 Herbert Packer, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford, 1968, at 9. See also George B. Vold and Thomas J. Bernard, *Theoretical Criminology*, 3rd edition, NY, Oxford University Press, 1986, at 27, the doctrine of the neo-classical school "continued to be that humans are creatures guided by reason, who have free will, and who therefore are responsible for their acts..."

5 Ibid., at 10
Punishment). His ideas form the pillars of what is known as the classical school and most of the principles are also present in the neo-classical school. The rationalistic, bureaucratic approach to criminal justice originated in this era. After a 100 years of reform in the criminal justice system, applying the principles Beccaria had formulated, dissatisfaction with the fact that the classical ideas did not seem to be able to reduce crime rates, resulted in a new movement, that is, the positivist school of Lombroso et alia. Instead of punishing offenders for their criminal behavior, positivists argue that it is more important to address the causes of crime, be they social, biological or psychological. The ideas of this school did not appear to be able to control criminal behavior in a substantive way either and were source of indeterminate sentencing structures. Therefore there was a revival of the (neo-) classical ideas, emphasizing determinate sentencing, in the 1960's. Since these ideas appear to have most influence on our way of thinking about criminal justice today, I will discuss the classical and neo-classical principles and values. I will then go on to point out what the negative consequences are of this formalistic system.

Underlying Principles and Values of the Current Criminal Justice System: The (Neo-)Classical School

In the area of criminal law, the era of enlightenment gave rise to two demands. Firstly, that human conduct be directed as little as possible: punishment should not exceed that what was necessary to prevent people from recidivism and to prevent others

6 See, Vold and Bernard, supra, note 4, at 20 ff.
7 Ibid., at 33
8 Ibid., at 30. At 27 they mention the widespread acceptance of the classical and neo-classical principles in contemporary legal systems.
from committing a crime. Secondly, the demand for clarity about which sanction was to be the response to which crime, so as to promote certainty.9

Beccaria, in opposition of the inconsistencies in the management of public affairs and arbitrary decision making by judges, proposed reforms to make the criminal justice system more logical and rational. He lays emphasis on the autonomy of the individual and presumes that the individual makes independent and rational decisions and that he or she is therefore responsible for his or her own decisions. The law can be the only basis for punishment and it is the exclusive authority of the legislator who represents the entire society, to define those laws.10 Judges apply the law as it is formulated by the legislator, they are essentially instruments to apply the law. They are not allowed to interpret them, for that would open the door to uncertainty.11 The seriousness of the crime is measured by the harm done to society, not in the intention of the person who commits it. Beccaria defines the principle of proportionality between crimes and punishments, the principles of parsimony, promptness of punishment and the certainty of punishments.12 Finally, he formulates the goal of prevention of crimes and argues for publicity of laws so that the public may know what they are. Summarizing, Beccaria concludes:

---


In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws.\textsuperscript{13}

French legislators used Beccaria's principles in the French Code of 1791 which was implemented after the French Revolution of 1789. In practice, the implementation of these principles led to both administrative and legal order. The classical conception of justice provides an exact scale of punishments for equal acts without leaving scope for taking into account the special circumstances in which a crime was committed or reference to the individual involved.\textsuperscript{14} It soon became clear that, because of the strictness of the rules, it was impossible to apply the principles in everyday situations. The main practical problem in the application of the Code of 1791 was that it ignored differences in the circumstances of the particular situation: no consideration was able to be paid to mental illnesses, no difference made between adults or minors, first-offenders or repeaters. Reforms were formulated and the system that is a result of these modifications forms the basis of the neo-classical school. Judges were given some degree of discretion to consider age, mental conditions and extenuating circumstances.\textsuperscript{15} The doctrine of the classical and neo-classical school can be summarized as follows:

\textsuperscript{13} \textit{Ibid.}, at 24
\textsuperscript{14} \textit{Ibid.}, at 26
\textsuperscript{15} \textit{Ibid.}
Humans are creatures guided by reason, who have free will, and who therefore are responsible for their acts and can be controlled by fear of punishment. Hence the pain from punishment must exceed the pleasure obtained from the criminal act; then free will determines the desirability of noncriminal conduct.\textsuperscript{16}

Contemporary classicism focusses on two issues mainly, that is, the focus on deterrence and economic theory analysing criminal behavior.\textsuperscript{17} The classical principle of deterrence provides a general justification for the use of punishment and has always been used for that purpose in the criminal justice system. The economists argue that the decision to commit a crime is made on the basis of a cost-benefit analysis (in which also non-financial factors may play a role).

The translation of all these principles in today's criminal justice system results in proceedings that are formal and governed by a wide range of legalistic rules such as the right of fair trial, due process and the right against self-incrimination. The system is based on the protection of the rights of the offender against intrusion by the State. As the power of the state is so vast, and the implications for the liberty of the individual so profound, complex safeguards for the procedures are crucial. The system focuses on process rather than outcome, and on the law that was broken, rather than on what the offender and the victim experienced. The moral, social and personal implications of the act often become irrelevant. We are used to think that if the right procedures and rules were followed, justice was done.\textsuperscript{18} The process centers around the 'criminal act', which is narrowly and technically defined.\textsuperscript{19}

\textsuperscript{16} Ibid., at 27
\textsuperscript{17} Ibid, at 30-32
\textsuperscript{18} Howard Zehr, \textit{Changing Lenses}, Herald Press, Scottdale, PA, 1990, at78
\textsuperscript{19} Ibid, at 81
The system aims to protect society, deter and punish offenders and minimize reoffending. To reach these goals in the traditional retributive mindset, the sentence should be “proportionate to the gravity of the offense and the degree of responsibility of the offender - the principle of just deserts.” Through punishment, a message of censure is sent to the offender. The severity of the punishment reflects how much the misbehavior is disapproved. The focus is on abstractions, rather than on the harm done. In the restorative justice view this emphasis is challenged as I will discuss later.

Society relies heavily on officials to deal with criminals, and members of the community do not tend to be involved in the process other than as witnesses. The existence of officials is considered a necessity in order to avoid anarchy and retaliation by community members. As a principle, victims should not be the ones to initiate a criminal case, since the vindication of the public should not depend on the decision of an individual to institute legal proceedings. Therefore, the institution of the

20 See for further discussion of the rationale behind punishment: Packer, supra, note 4, chapter 3, "Justifications for Criminal Punishment", describing the ideas behind punishment or sentencing, that is, retribution; deterrence (utilitarian prevention); special deterrence or intimidation; incapacitation; and rehabilitation.

21 Jackson, Michael, “In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities”, U.B.C.Law Rev. 1992 (Special Edition on Aboriginal Justice), at 181. See also Packer, supra, note 4, at 14. It should be noted that in the behavioral (or 'treatment') model, where the focus is on the offender, rather than on the offense, the focus is different. Punishment, or better, treatment, is individualized. The focus is mainly on incapacitation and rehabilitation.

22 von Hirsch, supra, note 12, at 24

23 The professionals have taken up particular roles in the dynamics of the system: Prosecutors often see themselves in the role of the community's voice for the demand for retribution; judges conceive their sentencing function as the expression of society's demand that the offender expiate his crime; and police officers play their roles in 'combatting crime', or in the 'war on crime.' Packer, supra, note 4, at 10

24 See e.g. Andrew Ashworth, "Some Doubts about Restorative Justice", Criminal Law Forum 4, 2 (1993), at 282-3

prosecutorial office was created to participate in the proceedings in the name of society. The criminal process offers a forum with a judge who will make an independent and objective decision on the case, relying on universal rules that promote uniformity in sentencing of cases that involve similar offenses. Judges are not as the victim is influenced by the experience of what has happened and the chance that they are biased towards one of the parties is minimal, for they are trained to approach the case objectively and rationally. Issues of imbalance in the power of the parties will not be given a chance to influence the outcome of the process. Criminal law is an instrument of censure and it offers universal rules so that offenders that have committed similar offenses, will receive similar punishment and will receive similar protection of their rights, which creates a certain level of predictability on the outcome of a case. The severity of the sentence is related to the gravity of the offense, rather than to the individual offender. This also forms an important safeguard against arbitrary judgments. A consequence of universal rules is that cases that may seem similar on the surface, but that are dissimilar if looked at more closely, will be lumped together. There is not much scope for creativity or for adjusting a sentence to the individual

26 The rules of evidence, for example, promote fairness in public proceedings. The right to counsel assures the defendant of the possibility of legal advise in critical stages of the criminal process. See Jennifer G. Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique", 43 Emory Law Journal (1994), at 1288 ff.

27 This can be an issue in alternative dispute resolution where lay persons are in charge of the process and who are not trained in being objective and impartial. Power imbalances may influence the dynamics of such a process. See for further discussion, infra, chapter 4, section 2.

28 Although it is recognized that equal treatment of similar cases can result in dissimilar impact on different offenders, e.g. if they come from different economic backgrounds, and that not all similar cases are being treated equally in the formal system. See also, infra, chapter 4, section 4. See for a discussion of censure and proportionality, Andrew von Hirsch, supra, note 12, chapter 2.

29 Ashworth, supra, note 24, at 284, and at 288: "Sentencing should provide an official response to crime that is deserved, proportionate, and fair as between offenders." See also Andrew von Hirsch, supra, note 12, at 6. The focus of his book is on the discussion of the principle of proportionality.
offender. Even carefully designed categories of proportionality can only result in a certain level of equality among 'similar' cases. It is assumed that punishment should be defined by the state and be exercised in the public interest, because of the assumption that the offense as an act is inflicted not only against the victim, but against society as a whole and that, therefore, the state has the primary interest in sentence.

**Shortfalls**

Despite the procedural safeguards and the rational underpinnings of the criminal justice system as it operates today, many disadvantages have surfaced over the time that it has operated. One of the main disadvantages is that the formal process provides no scope to pay attention to the context in which the offense occurred. Equity of process is given higher priority than circumstances and it is therefore assumed that little attention should be paid to the circumstances in which the act occurred. The system does not take into account that "the motivation to do wrong is much more complex than our individualistic approach acknowledges."\(^{30}\) The principles of the current system are personified by the blindfolded goddess holding a balance, our symbol of justice. It demonstrates how old and entrenched our way of thinking about criminal justice is. The legally relevant facts are weighed, not the circumstances. The balance refers to balance between the rights of the offender against the power of the state. The victim is essentially ignored, and there is a lack of balance between the rights of the offender and the needs of the victim and the community. As Judge McElrea put it:

\(^{30}\) Zehr, *supra*, note 18, at 71
The overriding issue is whether fair procedures are followed - not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong.\textsuperscript{31}

One could view the process as a kind of game, played in the courtroom. The case goes through a test: is the prosecutor able to prove the crime the accused is alleged to have committed? In the courtroom a 'new', reduced, reality of what happened is constructed: the legal reality. The crime is translated into legal definitions, as are the consequences for the victim. This translating in abstract terms has a dehumanizing effect, and for both offenders and their victims it is often hard to identify themselves with what occurs in this formal setting. The lawyer who assists the offender will sometimes advise his/her client not to say anything, in order to 'make it a better case'. The offender is not encouraged to take responsibility for his or her actions and because of the impersonal nature of the process (all professionals that 'play the game' will probably be unknown to the accused) many offenders will not feel responsible towards the people involved in the process. It may appear to be even wiser not to accept responsibility, to deny everything and hope to get off. The threat of the imposition of 'pain' that is often the result of the criminal process, will further make the offender more reluctant to admit the truth. Judge Fafard had the following description for the current system:

I believe we have an offender-processing system, but I am not sure if we have a criminal justice system.\textsuperscript{32}

\textsuperscript{31} Frances W.M. McElrea, \textit{Accountability in the Community: Taking Responsibility for Offending}, Paper presented for the Legal Research Foundation's Conference, Auckland, New Zealand, May 1995, at 5

\textsuperscript{32} Claude Fafard, "On Being a Northern Judge", in Richard Gosse et al., \textit{Continuing Poundmaker & Riel's Quest}, Purich Publishing, Saskatoon, 1994, at 403
Historically, there has been distinction between the civil law of torts and criminal law. Both systems are meant to regulate social order in society. The paradigms differ in the nature of the sanctions. Whereas the criminal law reflects punitive purposes, and is distinguished by high procedural barriers to conviction, its focus on the culpability of the defendant and severe punishments, the civil law is based on compensatory schemes, focuses on damage rather than guilt and provides less procedural safeguards to the defendant, which is because the outcome is considered to be less serious to the defendant (the process cannot result in taking away the liberty of the person who is subject to the trial).\textsuperscript{33} In order to obtain a conviction, in a criminal case the prosecutor must prove beyond reasonable doubt that the offender is guilty. In a tort case, the plaintiff (victim of the defendants wrongful behavior) must prove by preponderance of evidence that the defendant is liable. A criminal process ends - in case of a conviction - in a penalty in the name of society, the civil process leads to a civil remedy to compensate the private party for the losses that were suffered as a result of the act of the perpetrator. The civil law centers around the compensation of the party who suffered from the act of another person. In criminal law, however, the compensation of the victim is degraded to a secondary level (or is not even considered in the criminal court process), even though the consequences of the act may have been more serious to the injured party. This difference is remarkable and constitutes, in my view, a serious shortcoming of the criminal system. The often heard reason for different treatment of similar wrongful acts under civil and criminal law is that civil cases are concerned with individual rights, while criminal law is concerned with wider societal rights.\textsuperscript{34} The criminal law protects the common interest. The system does not


\textsuperscript{34} See also van Ness and Heetderks-Strong, supra, note 25, at 46-47
seem able to provide the victim with a meaningful role or a satisfying position in the process. Christie argues that the state has stolen the case from the victim and has thereby pushed the victim out of the process:

[T]he one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life.35

The restorative justice theory recognizes this shortfall and pays more attention to the position of the victim in the process and argues for mechanisms for compensation, as I will discuss in section 3 of this chapter.

If an offender is sent to prison he or she is told, thereby, to repay the debt to society.36 In prison, however, one does not come to understand the impact of one’s act on others; nor does one do something good towards society or the victim of one’s crime. Furthermore, incarceration results in stigmatization, which isolates offenders and reinforces criminal identity in a subculture.37 Thus, sending people to jail is, in

35 Nils Christie, "Conflicts as Property", British Journal of Criminology, Vol.17, No. 1, at 3
36 As Zehr explains, the imposition of incarceration on the offender does little good for the community. It merely adds to the amount of harm in society. Further, it costs the community money to have the offender 'repay' the debt. Zehr, supra, note 18, at 75
37 The 'quality' of being guilty and having done time will stick with the offender. It becomes a part of the identity of the offender and is difficult to remove. Zehr, supra, note 18, at 69, stressing that this quality will overshadow the good qualities the person might have: it will influence his or her career potential, finding a job, the rest of his or her life.
most cases, counterproductive. As may be clear there should be more meaningful ways to deal with offenders and their victims.

Few victims can reasonably expect to receive redress under the present system. Because of this, offenders who do not present a serious risk to the community should be sentenced to adequate supervision in settings that permit them to work, repay their victims, avoid the debilitating conditions in prison and save the community the tax burden of unnecessary incarceration.

The present formal system has its shortcomings. It assumes that the existence of rules that promote uniformity and predictability in the outcome of similar cases, will provide justice. The question is whether that is a valid assumption. Justice for whom? The offender? The victim? Society? The restorative justice theory argues that more attention be paid to what the directly involved parties in a crime think provides justice. As will be made clear, the theory of restorative justice argues for radical changes in the criminal justice paradigm. The differences between the retributive and the restorative justice theories are profound and so are the implications of implementation of new principles as will be made clear in this thesis. The main challenge is to figure out whether informal processes are able to dispense justice for offenders, victims and their communities, without all the rules that reign the formal process.


39 Van Ness and Heetderks-Strong, supra, note 25, at 160
3 Restorative Justice: The Theory

Reform in the criminal justice system should be about re-creating bonds of support and concern lost through processes of modernization, urbanization, bureaucratization, and individualization.\textsuperscript{40}

[C]riminal justice systems should be as accountable for the reparations paid to the victims as they are for the care and recidivism of offenders.\textsuperscript{41}

The rethinking of the criminal justice system started in Canada in the 1970s when movements that stressed the importance of restitution and the place of victims in the process became stronger.\textsuperscript{42}

In the restorative view of the criminal justice system a crime is seen as an act inflicted against another person or property. There is more consideration of all the players in the crimes, that is, the offender, the victim, and society. As the name suggests, the aim of a restorative process is to repair the damage done by the act or to restore the wrong done.\textsuperscript{43} Victim reparation is a goal. Another description used for the process is that of healing. The purpose is to heal the wounds caused by the crime. Through a range of processes the offender is encouraged to take responsibility for the act and to do something good for the victim or society. Victims and community members are involved in many of the alternative, more informal programs.

\begin{itemize}
\item \textsuperscript{40} Carol LaPrairie, "Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?", Criminal Law Forum, Vol. 6, nr. 3 (1995), at 582
\item \textsuperscript{41} Van Ness and Heetderks Strong, \textit{supra}, note 25, at 161
\item \textsuperscript{42} As well as emphases on rehabilitation, victim-offender reconciliation, community crime prevention, and volunteer-based services for offenders and victims. See Van Ness, Daniel, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", Criminal Law Forum, vol. 4, no. 2 (1993), at 257
\item \textsuperscript{43} This idea challenges the separation of civil and criminal law in most modern jurisdictions.
\end{itemize}
Participation of community members is seen as essential, and this leads to a more holistic approach. In addition, the state should not intervene and use its coercive power in cases that citizens are able to resolve themselves. As the Norwegian criminologist Christie has pointed out, the conflict of a crime is the property of the victim and its perpetrator that is 'stolen' by the state. If there is an opportunity for the parties to resolve a case without state involvement, such a resolution is preferable to state intervention. The use of alternative, informal processes reflects the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Principle 7 declares:

Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Scholars on the Theory of Restorative Justice

Several scholars have elaborated on the ideas of restorative justice. One of the leading criminologists in this field is the Australian, John Braithwaite. In his opinion,

---

44 As Judge Stuart, quoted in Satisfying Justice, supra, note 3, at XII, has pointed out: “The health of a community improves when its members participate in conflict resolution. When they leave the task to others, the quality of life declines. Gone is a collective sense of caring, of respect for diverse values, and ultimately a sense of belonging. Gone as well is the community’s natural capacity to prevent crime, redress the underlying causes of crime, and rebuild the broken lives and relationships caused by crime.”

45 Nils Christie, supra, note 35

46 In a case where there are several victims who cannot be involved in the informal process, it may be better to have the state taking over the cases in the name of society.

reintegrative shaming is the key to crime control. He argues that there is a correlation between low crime rates and the high social power of shaming. Internal, rather than external, control will be effective in restraining crime. The greatest deterrent effect will be reached if the offender's act is disapproved by the members of his or her immediate community while respect for the offender's person is maintained. Disapproval of an act is communicated while the identity of the actor is sustained as good. Judge Brown translated this as "[W]e love you but that is unacceptable behavior." Consequently, reintegrative shaming will have most effect if it is done by a person that is important to the offender. Von Hirsch questions the link between the element of shaming and desistence. He argues that even if the offender has expressed feelings of remorse, as long as other incentives for criminality remain, the offender may continue offending. He adds to his concern, that empirical research may answer his question.

Reintegrative shaming is opposed to disintegrative shaming, which implies stigmatization and creates alienation from the community, especially when incarceration is the result of the process. People who have been stigmatized will form a group of outcasts whose deviancy is an important part of their identity. According to Braithwaite, the concept would work best in a society with dense networks of interdependencies and with strong devotion to the mutual obligations created by those interdependencies. Here we touch upon a point that may be problematic in the


50 Von Hirsch, supra, note 12, at 72

51 Braithwaite, supra, note 48, at 85
theory. Many crimes take place in urbanized and individualized societies. In these settings, where relationships are less tight than in more rural communities, it is more difficult to use the reintegrative shaming as an effective response to crime. The theory may, therefore, be less successful in providing solutions in these cultures. Sandor has expressed concerns as to the applicability of Braithwaite's theory. He states:

Braithwaite's optimistic characterization of families as caring and respectful will too often not apply.\textsuperscript{52}

White mentions another issue that, in his view, Braithwaite does not discuss in depth in his theory:

[M]ajor issues of today are those of social resources, jobs and a living income. Without this kind of social justice, "shame and reintegration" strategies will exist as the hollow response of an unjust system - and those who utter "shame, young person, shame" will not know who, really, they hold to blame.\textsuperscript{53}

In my view, a realistic concern is that the implementations of reintegrative shaming ceremonies \textit{alone} will probably not resolve the problems society has related to crime.\textsuperscript{54}

\textsuperscript{52} Danny Sandor, "The Thickening Blue Wedge in Juvenile Justice", in Christine Alder and Joy Wundersitz, eds., \textit{Family Conferencing and Juvenile Justice; The Way Forward or Misplaced Optimism?}, Canberra, Australian Institute of Criminology, 1994

\textsuperscript{53} Rob White, "Shame and Reintegrative Strategies: Individuals, State Power and Social Interests", in Christine Alder and Joy Wundersitz, \textit{supra}, note 52, at 195

\textsuperscript{54} Marshall, T, \textit{The Search for Restorative Justice}, A paper presented on a speaking tour of New Zealand, May 1995, cited in Ministry of Justice New Zealand, \textit{Restorative Justice: A Discussion Paper}, Ministry of Justice, Wellington, NZ, 1995, at 9: "The introduction of restorative practices can only take place if there is, at the same time, a real effort to combat institutionalized injustice. Without this, new initiatives are doomed to having only a marginal effect on the overall problem of crime."
Another concern is that the theory is still offender-centered. Although the idea is that the act, not the offender is disapproved, and that the focus is turned away from the offender to the act. The point is that, though one of the features of restorative justice is to provide more space for the victim, in Braithwaite’s formulation, more attention is paid to the shame and reintegration of the offender. The participation of the victim is considered a key to the success of the outcome, but this refers primarily to the outcome for the offender. As LaPrairie explains:

The absence of a victim ... creates a situation where the offender is engulfed by family and supporters and disapproval is absent. Without this disapproval, an understanding of the consequences of behavior and symbolic reparation, necessary to reaching a settlement and to reconciliation, are less likely to occur.55

This focus on the offender may be an obstacle to reaching the goal of victim reparation and satisfaction. The victims come next, which may have given rise to the dissatisfied feelings among them.56

Braithwaite’s central idea that reintegration, not stigmatization, should be encouraged can also be found in views of other scholars in the restorative justice field. Howard Zehr is said to be the 'grandfather' of restorative justice. In his book


56 Maxwell, Gabrielle and Allison Morris, “Youth Justice in New Zealand: A new Paradigm for Making Decisions about Children and Young People who Commit Offences”, Commonwealth Judicial Journal, vol. 9, no. 4, December 1992, at 27. “Many victims were not notified in time, or not at all, and half of the victims that participated in a conference, felt worse afterwards. More attention will need to be paid to the participation of the victims.” This problem will be discussed in more depth in chapter 4.
'Changing Lenses'\textsuperscript{57} he states that it is time to view the criminal justice system through a restorative, rather than retributive, lens and argues for a more social, rather than legal, criminal justice system.\textsuperscript{58} In his view, crime should be seen as a violation of people and relationships, that leads to obligations to 'make things right'. The criminal justice system should include processes that provide all the parties involved in crimes with reparative, reconciling and reassuring solutions. He suggests a shift in paradigm, which describes processes that are more satisfying to all parties. One might wonder how these good ideas can be translated into realistic, effective programs in our complex modern societies. There is no reason to be pessimistic about realization of the ideas, for there are some promising processes that reflect the restorative ideas, such as Family group conferences, Circle Sentencing and Victim-Offender Reconciliation Programs. All of these have possible negative side effects (as I will discuss in chapter 4) and it can be questioned how these can be avoided, especially when standardization of these initiatives is aimed at.

Mark Umbreit, an American criminologist who has done much research in this field explains the concept of accountability in the context of restorative justice:

The definition of accountability in the restorative justice paradigm is based on recognition that when an offense occurs, the offender incurs an obligation to the victim. This definition of accountability has both a cognitive meaning (understanding impact of their behavior on the victim) and a behavioral meaning (taking action to make things right).\textsuperscript{59}

\textsuperscript{57} Howard Zehr, \textit{supra}, note 18

\textsuperscript{58} Appendix I, \textit{infra}, at 138, gives an overview of the differences between the two lenses or views of the criminal justice system.

\textsuperscript{59} Mark Umbreit, "Holding Juvenile Offenders Accountable: A Restorative Justice Perspective", Juvenile and Family Court Journal (Spring 1995), at 32
The educational aspect of this concept is important. It is probably more useful to confront offenders with the victims and give them insight into the impact of their acts, than to process them through an impersonal court system. Furthermore, in the restorative models, offenders can repair the harm done to either the victim, or the community. More importantly, the option of incarceration, with all its negative aspects, can be avoided. Instead of being among other (probably more serious) offenders, the accused has the opportunity to derive something positive out of the experience by making reparation, while at the same time receiving a chance to start over in his or her community without the stigma of having been incarcerated.

Van Ness and Heetderks-Strong provide a comprehensive overview of the present situation in restorative justice. In their book “Restoring Justice” they describe what can be considered ‘universal’ features of restorative justice. In their vision:

The overarching purpose of restorative justice, and consequently of the various goals it encompasses, is the reintegration into safe communities of victims and offenders who have resolved their conflicts.\textsuperscript{60}

According to these authors three principles underlie the restorative justice model. They state that since crime is more than law breaking (it also causes intrusion into the lives of individuals), the injured parties must be healed; all the parties should be involved in the justice process as early and as fully as possible. The government should be responsible for order - the community for peace. There are four

\textsuperscript{60} Van Ness and Heetderks-Strong, \textit{supra}, note 25, at 51
cornerstones in the implementation of truly restorative justice: encounter, reparation, reintegration and participation. These will be discussed in the sections that follow.

Some people fear that implementation of the restorative idea of justice will mean that we are 'going soft' on crime. Bazemore and Umbreit argue that this is a consequence of the retributive way of thinking:

Perhaps the most damaging effect of the retributive paradigm in the ... justice system has been its tendency to make nonpunitive "alternative sanctions" appear weak and less adequate than incarceration, thereby closing off consideration of inexpensive and less harmful responses to (youth) crime.  

However, as Judge McElrea (New Zealand) put it:

It is harder for an offender to confront his or her victim than to stand in court and accept punishment.

As may be clear in the restorative view the focus for sentencing is turned away from giving the offender a just desert. Instead, more emphasis is laid on reconciliation, reparation and reintegration. The victim becomes an important factor in the sentencing process, and in some initiatives, the community. The sentence will not only be defined by the abstract criteria of gravity of the offense and the degree of


62 F.W.M. McElrea, "The New Zealand Youth Court: A Model for Use with Adults", in Restorative Justice: International Perspectives, Burt Galaway and Joe Hudson, eds., Monsey, NY, Criminal Justice Press, 1996, at 81. Similarly, Rupert Ross, “Duelling Paradigms? Western Criminal Justice versus Aboriginal Community Healing”, in Poundmaker and Riel's Quest, supra, note 32, "The word healing seems such a soft word, but the process of healing ... is anything but."
responsibility. In addition, there is scope to take into consideration the underlying causes of the offense. As a result, a more meaningful response can be tailored to the offender while at the same time the victim’s needs can be dealt with.

A last, but very important, feature of the restorative vision is that it provides space for culturally sensitive initiatives. Aboriginal peoples are overrepresented in the criminal justice system in Canada, New Zealand, and Australia. They express concern that the current system is failing them. They view it as imposed and foreign. It does not fit with their concept of justice. Space should be created to allow a place for different initiatives. The restorative criminal justice vision provides this opportunity since many of the values embraced by the restorative vision are not unknown to First Nations peoples in Canada or to Maori in New Zealand.

Before discussing the cornerstones of the restorative vision it must be stressed that the restorative justice paradigm is not a panacea for all problems in the criminal justice system. There will always be criminals who show no respect to whoever may be involved, challenge officials, show no remorse, and who are unwilling to accept responsibility for their acts. Community members may not be able to resolve anything for these exceptions, nor, for example, for offenders who are mentally ill or drug abusers who fall back into drug use. Institutionalization and treatment may still be the best solution in cases involving such offenders. It is not my view that the court process

---

63 Royal Commission on Aboriginal People, Bridging the Cultural Divide, Ottawa, Canada Communication Group Publishing, 1996, at 58 ff., also: LaPrairie, supra, note 40

64 Furthermore, before the retributive system was implemented in England after the Norman Invasion, the system that was used in England also contained ideas that are currently reflected in the restorative approach of criminal justice. The restorative vision is, then, reemerging, rather than being entirely new.
should be abolished and that all correctional institutions or prisons should be closed.

The point is:

not that custody should never be used, but that its proper purpose is safety, not punishment, and that it should not be made to carry all the other functions for which it is useless and costly. Neither does this mean that there shouldn't be consequences for illegal activity ... but the consequences should make sense and take seriously the real problems that must be identified.65

This is not to say that in prisons more meaningful ways to spend time should not be developed or that more appropriate accommodation for criminals with (mental) health problems should not be investigated. The scope of my thesis, though, does not allow me to elaborate on this particular issue.

Furthermore, it is important to realize that the restorative justice model is not yet a complete model. It is possible that there will never be a complete restorative justice system at all and that a place remains for other options. For example, for some cases, such as environmental or economic crimes, restorative justice initiatives may not provide all the envisaged solutions as described in different theories about the idea.

Finally, initiatives that work for some communities, may - for different reasons - not have the same positive effects in others. It is important to realize this and research the possibilities of alternatives first, for example in pilot studies. As Van der Laan points out:

65 Satisfying Justice, supra, note 3, at XIX
One should not just look at the actual programmes (features, contents) but at the system and the populations as well. Simply taking over a programme is not enough … Comparative research is a must.

4 Implications of Implementation

Now that the theoretical background has been discussed it will be useful to consider how these ideas can be translated into real programs. In the following subsections I will follow the four cornerstones described by Van Ness and Heetderks-Strong. In order to reach a truly restorative program, these cornerstones should be visible in the process. While describing this, different practical features of restorative justice will be discussed, as will possible grounds for critique.

**Encounter, or Communication: Conflict Reduction through Dialogue**

Before discussing this first cornerstone I have to say that I find the term "encounter" problematic. In my view, the encounter (or confrontation) is the framework. The main feature of the encounter that Van Ness and Heetderks stress is important and can therefore be considered a cornerstone, is the discussion or communication that takes place during that encounter. Therefore, I would suggest calling the first cornerstone ‘communication’ (or ‘discussion’), rather than ‘encounter’. The encounter, then, describes the overall process, during which the four cornerstones

---


67 Supra, note 25
of discussion, reparation, reintegration and participation have to be present in order to produce a truly restorative process.

[In contrast to the rule-driven, impersonal procedures of retributive justice focused on defining winners and losers and fixing blame, a restorative process relies heavily on informal sanctioning and resolution of underlying problems, conflict reduction through dialogue and mediation, and efforts to achieve mutually satisfactory agreements.68]

One of the features of restorative programs is that victim and offender (and their supporters or community members) meet face-to-face in an informal setting without the interference of professionals (to ‘do the talk’). Both the offender and the victim(s) get the opportunity to describe what happened. The victim can make clear to the offender what impact the act on him or her had and vent anger or frustration. The communication makes it possible for the parties to place themselves in some kind of relation to each other.69 This is an important aspect of the discussion: that the parties can express their emotions, which is something there is no space for in the formal court room setting. In the formal court process the role of the victim is purely functional. No attention is paid to possible interpersonal conflict structures that may have a large impact on the case. Restorative justice programs move beyond the idea of purely restitution and emphasize the importance of a dynamic, interactive process that can establish justice and fairness. In Family Conferences the participation of family members of the offender can provide more information about the offender. The


69 See Heinz Messmer and Hans Uwe Otto, "Restorative Justice: Steps on the Way Toward a Good Idea", in Restorative Justice on Trial, supra, note 66, at 12, further explaining: "To the extent that clients are free to speak for themselves and to the extent that one listens to them, opportunities are increased for all participants to understand each other in a contingent world - not only with reference to others but also with reference to oneself."
interaction between the parties of a crime can lead to more understanding among participants. One of the advantages of victim participation is that the offender obtains a better idea of what his or her action actually caused. I think it is important to realise, though, that there will be offenders who do not feel connected to the people present at a conference or mediation session and who do not feel remorse or shame. The communication could, in such a situation lead to frustration and disappointment on the side of the victim(s).

**Reparation**

A major priority of any justice system is to publicly denounce harmful behavior and to provide consequences for offenders.\(^{70}\)

In the retributive model, the incarceration of offenders is the primary means of sanctioning offenders for violations against the state. The restorative model, however, gives priority to holding the offender accountable, having him or her actively making amends to the victim and making the offender understand the consequences of his or her act. Thus, restorative programs aim at providing reparation for the victim of a crime, for the intrusion of the crime into their lives. In the discussion that takes place if victim and offender meet, reparation is one of the central issues. It is acknowledged that it is impossible to turn back the clock and make good the harm done, but the aim is to repay the debt. It is important to determine what will be the primary aim of the reparation: should it be a message to the offender, a penalty; or should it be a service to the victim, a compensation for the loss?\(^{71}\) It may be possible to reach both aims in

\(^{70}\) Bazemore, *supra*, note 68, at 50

\(^{71}\) See Burt Galaway, "The New Zealand Experience Implementing the Reparation Sentence", in *Restorative Justice: International Perspectives, supra*, note 68, at 67-68
the same process, however, this will not always be the case, for example where the offender not able to fully compensate the victim's loss. Does partial compensation suffice fully as a fair 'penalty' or is full compensation more important (however severe the consequences will be for the offender)? This ambiguity must be resolved if reparation is to be consistently administered. Van Ness argues that victim reparation should be the primary goal and that fairness will be the limiting factor to this aim, as it would be unjust for outcomes to fall more heavily on some offenders than others, for social, economic or political reasons.\(^{72}\) He argues for the establishment of minimum and maximum amounts of restitution for particular offenses.\(^{73}\)

Several other questions arise in this context. What should happen if the victim is extremely vengeful and requires a disproportionally high compensation? Can it be justified to have similar cases have different outcomes, because the victims have different needs?\(^{74}\) What should happen if the offender cannot afford to make reparations? Given that, as Ashworth points out, crime is more than a harm inflicted on a victim, how should others who are affected by the crime be compensated? He argues:

Restorative theory seems not yet to provide clear criteria for victim restoration, let alone for restoration of the community.\(^{75}\)

\(^{72}\) Daniel Van Ness, supra, note 42 at 270.

\(^{73}\) Ibid.

\(^{74}\) See for further discussion, infra chapter 4

\(^{75}\) Andrew Ashworth, supra, note 24, at 289 and at 284
Zehr does not provide much clarity on this issue either, when he points out that:

Communities feel violated as well ... and they have their needs too. Since one cannot ignore the public dimensions of crime the justice process in many cases cannot be fully private. Crime undermines the sense of wholeness in a community. For a community, reparation often requires some sort of symbolic action that contains elements of denunciation of the offense, vindication, reassurance and repair.\footnote{Howard Zehr, \textit{supra}, note 18, at 194-195}

It remains to be seen how the goals of both victim and community reparation can be reached, while not putting disproportional demands on the offender. The community can derive satisfaction from the idea that the offender has reconciled with the primary victim(s) and has learned from that experience. The symbolic impact of this act can contribute to community satisfaction. Furthermore, in the case where public property is damaged,\footnote{For example, graffiti on the buildings of a public school.} the reparation of that damage by the offender is a reparation to the community.

\textit{Reintegration}

Van Ness and Heetderks-Strong emphasize that restorative justice initiatives should aim at the reintegration of both the offender and the victim into their communities. The establishment of relationships characterized by respect is essential. The same concern as expressed by Sandor, may be repeated here. Is it realistic to assume that both victim and offender have their networks to return to? If not, what can be done? Should we speak of re-integration, or rather of integration for many offenders, since they already led marginal lives to begin with? Von Hirsch points out:
Real reintegration is the most ambitious version of rehabilitative success, and is notoriously difficult to achieve: it involves not just inducing the offender to cease from offending, but creating or reviving in him a sense of solidarity with the community.78

Furthermore, social services will need to be available. Van Ness and Heetderks suggest that self-help or support groups may provide solutions. They see a role for faith communities as well. Research will have to show how realistic this idea is, but it may be that in some communities networks will be available, while in others they will not.

Participation

Participation of the relevant people in the encounter process is essential. In processes such as family group conferences, so called ‘communities of care’ are invited to participate at the side of the offender. Victims can bring supporters as well. The benefit of victim-participation has been described earlier. The participation of community members is important because they are the ones that provide opportunities for the offender and the victim to reintegrate. As such, they play a role in the rehabilitation of the offender, rather than that officials fulfill this task. Furthermore, some of the causes that had led the offender to committing the crime may lay in the community and, when community members participate, these causes can be addressed. During the process, solutions can be discussed. Ideally, this leads to a stronger sense of community as well. As Judge Stuart pointed out in relation to Sentencing Circles:

78 Andrew von Hirsch, supra, note 12, at 72
The principal value of Community Sentencing Circles cannot be measured by what happens to offenders, but rather by what happens to communities. In reinforcing and building a sense of community, Circle Sentencing improve[s] the capacity of communities to heal individuals and families and ultimately to prevent crime. Sentencing Circles provide significant opportunities for people to enhance their self-image by participating in a meaningful way in helping others to heal.\textsuperscript{79}

The participatory position of the community in the restorative theory may in some societies be problematic:

A primary distinguishing characteristic of a restorative ... justice is its emphasis on engaging communities in sanctioning and rehabilitation of offenders, restoring victims, and enhancing public safety. The magnitude of this challenge is exemplified by the fact that the disperse, transient and disconnected residential enclaves of the modern urban metroplex often bear little resemblance to any standard notion of community in which residents experience a sense of connectedness to others.\textsuperscript{80}

Van Ness and Heetderks-Strong stress that the participation of victims and offenders should take place on a voluntary basis. This may raise problems. In processes like the FGC and circle sentencing, that are assumed to be restorative, the participation of offenders is required, as it is for their sake that the conference or circle is convened. Processes like the FGC start from the point that the offender has admitted (or not denied) guilt. Victim-Offender Mediation is an alternative that provides more space for voluntary participation. However, one can wonder how voluntary participation is, if the alternative is the less preferable court process. The risk of coercion is present. As far as victim participation is concerned, the risk of re-

\textsuperscript{79} Judge Barry Stuart, cited in Zehr, \textit{supra}, note 18, at 261. See further, \textit{infra}, chapter 3.

\textsuperscript{80} Gordon Bazemore, \textit{supra}, note 68, at 61
victimization should be taken into account and minimizing the risk of coercion at this side is an aim which must be taken even more seriously. Some victims feel unable to face the offender for a period of time, if at all. As well, in some cases there are no specific, individual victims, for example, economic or environmental crimes. Who should participate in a process with the offender in such a case? What will happen if the victim is a company or other institution? Or if the offender is a company (or other institution)? These may be cases that better remain in the hands of the state, which can deal with it in the name of society as a whole.

Community members have their questions and anxieties as well and they may want to participate in the discussion. However, we have to address the risk that the offender feels outnumbered by victims and community members, as well as the risk that the process becomes stigmatizing. Community members can participate as supporters on the sides of either the victim or the offenders or, for example, as mediators.

5 From Retributive to Restorative

This thesis argues for the implementation of new principles and values in the criminal justice system. A new theory has emerged and the argument is that it may provide a framework for more meaningful programs, that is, processes that can lead to more satisfaction among the stakeholders in a crime. The question we should also ask is whether it will lead to a better quality of justice. Whether the use of these processes provide just and fair fora that will dispense just and fair outcomes and that will ultimately lead to a safer society. Since the theory of restorative justice is fairly young,

81 See for further discussion, infra, chapter 4
not much empirical research has been done to show the impact of restorative processes on criminal behavior for example or its impact on the criminal justice system. Why then are certain proponents so strong in their believe that restorative justice provides a better framework for criminal justice policy than retributive principles? Vold and Bernard explain that "a theory is a way of understanding or 'making sense' of a phenomenon".\(^{82}\) They go on to argue that

\[
\text{[t]here is an obvious and logical interconnection between what one wants done about crime and the explanation of crime in which one believes.}
\]

\[
\text{[P]eople tend to believe in one or another theory of crime because its policy implications are consistent with what they believe should be done about crime.}\(^{83}\)
\]

The reason why many scholars argue for the implementation of new principles, is that the current system has some serious shortfalls. Restorative justice principles seem to make more sense in how we should respond to criminal behavior.

The differences between principles of the mainstream criminal justice system and the restorative justice theory are profound. Both have a rhetoric and rationale that are strong and both theories have attracted proponents and opponents. The main strength of the classical ideology of criminal justice is that it supports the uniform application of law. It does so, however, without questioning whether those laws are fair or just.\(^{84}\) The present criminal justice system has many disadvantages and it appears to be difficult to resolve these within the traditional paradigm. It can be

\(^{82}\) Vold and Bernard, supra, note 4, at 342

\(^{83}\) Ibid., at 343

\(^{84}\) Ibid., at 28
questioned whether it provides fair and just outcomes. As argued before,\(^{85}\) we assume that if we provide a fair trial, a fair outcome will be the result. However, the main stakeholders in the criminal process often do not perceive the criminal justice system as fair. In addition, one can question the argument of inflicting pain on someone who has done wrong for the reason that it will deter others from doing the same and will prevent the offender in case of reoffending:

[i]n general, the infliction of pain as an object in itself can produce benefits only if offenders (or potential offenders) reevaluate their actions as a result of this suffering and choose not to continue committing crimes.\(^{86}\)

There is evidence, that the deterrent effect of punishment is questionable and that dropping punishment does not increase the risk of recidivism.\(^{87}\) Therefore, it does indeed make sense to create space for the development of new initiatives that do not center around fixing blame and inflicting pain on someone for misbehavior, but that rather focus on the acceptance of responsibility by the offender and making amends to the victim of that misbehavior and that makes the wrongdoer do something useful. Further, the negative social consequences the court process and of incarceration or punishment are avoided. The new vision of criminal justice, \textit{i.e.} restorative justice that I have described in this chapter, may provide a useful foundation. The challenge of a new paradigm is to provide a framework that \textit{in practice} will lead to more satisfaction among stakeholders in the process, by providing outcomes that are perceived as fair and that are able to fulfill the purposes of a criminal justice system. The question is

\(^{85}\) \textit{supra}, at 8

\(^{86}\) Vold and Bernard, \textit{supra}, note 4, at 350

\(^{87}\) Von Hirsch, \textit{supra}, note 12, at 41
whether a system that is based on informal processes that do not primarily aim at uniformity can support fairness and justice.

The theory of restorative justice allows for new initiatives, but it gives rise to questions as well. For a variety of reasons, it may be possible that truly restorative initiatives will not work in practice for some communities or do not provide solutions for specific offenders or offenses. If we want a satisfying justice system we will need restorative programs that can provide satisfaction in the context of our modern societies. The aim of a shift from a retributive to a restorative focus is a major challenge. The traditional retributive view has reigned for ages and a change as big as suggested cannot be introduced overnight. It challenges our deeply rooted ideas of how to perceive a criminal justice system and it will, therefore, not be easy to change the basic principles of our criminal justice system. Such a change would mean replacing the formal process, surrounded by a multitude of rules, with an informal setting that is characterised by the lack of strict regulations. It would leave the rational and universal rules of sentencing and use more open ways to define an appropriate outcome to each individual case. Predictability and uniformity are not as essential in the restorative mindset, for it is more important that each case can be considered in its context and that attention be paid to all the (social) circumstances of each individual. It would mean that we shift the ideology of the willful individual to a more contextual, relational and holistic approach of crime.

If we want to give new initiatives a chance, it is crucial to change the underlying principles and values of the system in which these initiatives have to operate. As Umbreit warns us:
It is extremely important ... to avoid the “trap” of simply adding new programs without changing the underlying values and the fundamental logic of traditional casework supervision.\(^88\)

The question is if all the stakeholders in the system are willing to make a commitment to such fundamental changes in the roots of the system. I will discuss this issue in chapter 5. And more is necessary to make implementation of a new vision a success: Creativity and enthusiasm are of major importance to start with. Public support and a belief among professionals that work both in the field and in these programs and their desire to change are essential. New initiatives will probably have to prove their value more than existing ones, even if they appear to have more advantages than the currently used processes. Because of this need to prove itself, a new program runs the risk of drawing cases into the criminal justice system that would otherwise have been dismissed with a warning. This mechanism is called net-widening and should be avoided.\(^89\) As may be obvious, there are all kinds of issues that have to be considered thoroughly before implementation of restorative principles is proceeded with. In this thesis, I will discuss a variety of these issues and try to formulate resolutions to minimize the possible shortfalls and maximize the benefits of restorative programs.

Since there are particular processes that have proved successful in providing more satisfaction among offenders, victims and their communities, it is worth taking these into consideration for implementation. It is not clear, however, if (enacted) standardization of these processes is the best option available to us today. Statutory

\(^{88}\) Mark Umbreit, *supra*, note 59, at 39. See also Lilles, *supra*, note 38, at 47 who stresses as well the importance of a change in principles. He adds to this: “To be effective, principles and guidelines must be consistent, in that they communicate a similar message to all participants in the ... justice system. Principles that are too general will also be ineffective.”

\(^{89}\) See for further discussion, *infra*, chapter 4
rules may narrow the space for creativity. In addition, not only new processes are needed to make new initiatives successful as pointed out before.\textsuperscript{90} One argument should not be overlooked in discussing new options. As Lilles explains in relation to the Family group conference:

Although there are ... bona fide criticisms of the ... Family group conference, they should not be considered in isolation, but in the context of the formal court alternative. In that light, the FGC must be judged far superior as far as police, offender, family and even victim satisfaction is concerned.\textsuperscript{91}

The development of new initiatives for implementation of restorative ideas must go on, not only because they offer alternatives to the present failing system, but also because of their inherent positive features. At the same time evaluations must go on, so as to refine the programs and to have them fit the contemporary demands. Idealistic goals may be critical to ensure that reform in the criminal justice field proceeds in a positive way:

Giving priority to reparation rather than retribution calls for a change in social ethics and a different ideology of society. That means a society governed with the aims of individual and collective emancipation, in which autonomy and solidarity are not seen as diametrically opposed, but in view as mutually reinforcing principles. A society doing its utmost to avoid exclusion of its members, because it is a society which draws its strength not from fear but from the high social ethics by which it is governed. ... Is this utopia? Yes, but we need a utopia to motivate us and provide guidance for our actions in society. There is nothing more practical than a good utopia.\textsuperscript{92}

\textsuperscript{90} At 2

\textsuperscript{91} Lilles, supra, note 4, at 56

\textsuperscript{92} Walgrave, Lode, cited in Bazemore and Umbreit, supra, note 61, at 313
CHAPTER 2

ALTERNATIVES TO THE COURT SYSTEM: MEDIATION; DADING; AND THE FAMILY GROUP CONFERENCE

1 Introduction

In this chapter I will discuss three alternatives to the court process, alternatives which involve both victim and offender. The first is mediation, which has its origins in Canada. Mediation is used both as a pre-charge and as a post-charge process. Since my thesis concentrates on diversion, I will focus on the pre-charge version of mediation in criminal cases. The second is dading which is a process that has developed in the last decade in the Netherlands. Dading is a diversionary process that is used in cases involving adult offenders of minor offenses. The third is family group conferencing (FGC) which evolved initially in New Zealand. FGC diverts young offenders from the court system and not only involve the victim and the offender, but the offender's family and the victim's supporters as well.

2 Mediation

Mediation is above all an interpersonal negotiation strategy, in that persons confront others about individual needs and cognitive differences with the help of a third person.\(^93\)

\(^93\) Messmer and Otto, supra, note 69, at 11
Mediation is a “[p]rivate informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties.”

Having been used successfully for decades in private law matters such as labor and family disputes, mediation has recently attracted interest in the criminal law area. Compared to the formal process, in which one party is the 'winner' and the other the 'loser', the mediation process offers the advantage that not just one but both conflict parties can profit from an agreement, resulting in a so called 'win-win situation'. Mediation in criminal cases is quite different from the average civil court mediation model, which mostly involves disputes among parties who know each other and which is more legalistic, is controlled by stricter rules and is settlement driven. For criminal cases, programs have been developed and mediators have been trained to facilitate face-to-face meetings between victims and perpetrators of a crime. Victim-Offender-Mediation (VOM) is based on two premises: first, it aims at making right the wrong done by the offender to the victim. It focuses on restitution. Second, there is space for a settlement of the conflict that both victim and offender perceive as fair. The process allows for the imposition of a measure upon which the directly involved parties (rather than an unknown third party) agree this agreement seeks to provide justice by empowering the participants to resolve the conflict themselves in an informal (rather than a legalistic and formal) atmosphere. The participants have an increased sense of identification with the process and its outcome. The discussion can be emotional and the talks are usually accompanied by feelings of insecurity and anxiety.

95 See e.g. Howard Zehr, supra, note 18, 1990
of the process, a change in attitude or goals frequently takes place. Where victims, for example, initially say their interest is purely material or financial, as the discussion progresses the non-material and emotional aspects of the conflict gain importance.97

The two premises of VOM are expanded in the VORP model: in the mediation meeting there may be space for reconciliation: feelings may be expressed; greater understanding by the parties of the event and each other can be gained, facilitating a sense of closure. If these goals are also aimed at, the description used is Victim-Offender Reconciliation Process (VORP). In VORP, more attention is paid to what is called the relational aspects of crime. The term 'reconciliation' has given rise to concern. It has been argued that the name 'reconciliation' suggests a duty on the victims that they reconcile with their offenders. Furthermore the term may suggest that the parties knew each other before the crime occurred and that they want to reconcile:

Participants tended to get very concerned if this idea of victim and offender (re)establishing a relationship was included in the description of restorative justice. They either interpreted it as referring to a loving affection, and found it repugnant to suggest that the victim should establish such a relationship with an offender, or they thought that the use of the word relationship implied that restorative justice would only be used when the victim and offender knew each other.98

The reconciliation process is relatively short and it can therefore be expected that apology and forgiveness can only be offered in a limited way.99 In my view it is important not to put too much emphasize on the goal of reconciliation because this can

97 See e.g. Lutz Netzig and Thomas Trenczek "Restorative Justice as Participation: Theory, Law, Experience and Research", in Restorative Justice: International Perspectives, supra, note 68, at 256

98 See e.g. Angela Lee, "Public Attitudes Towards Restorative Justice", in Restorative Justice: International Perspectives, supra, note 68 at 344, quoting a research study by the New Zealand Department of Justice that investigated the public attitude towards restorative justice.

99 See for a further discussion of this debate, Van Ness and Heetderks-Strong, supra, note 25, at 70-71
put unrealistic expectations or demands on the parties and the program. For instance, as Brown states:

> What many victims want most from offenders - true remorse, and an acknowledgment of responsibility for the harm they've done - may be unavailable in many cases.\textsuperscript{100}

I will therefore use the term 'Mediation' rather than 'Reconciliation' in the discussion of the process. VORP was initiated by Mennonite reformers in Canada\textsuperscript{101} and the United States, and is based on Christian theological foundation. Judeo-Christian ideas have also contributed to the development of the new vision of justice, i.e. the restorative justice vision.

Some argue that mediation is “the clearest expression of restorative justice theory”.\textsuperscript{102} I would argue that the FGC corresponds even more with the restorative principles and goals, since they allow for more community participation. The aims of mediation are to hold the offender personally accountable for behavior; to emphasize the human impact of the crime; to provide opportunities for the offender to make reparations to the victim and to promote active community and victim involvement in the justice process.\textsuperscript{103} Most of these aspects can also be found in the dading and conferencing processes. Mediation provides a negotiation process in which the participants must be open to discussion and in which they have to co-operate in

\textsuperscript{100} Jennifer G. Brown, \textit{supra}, note 26, at 1281

\textsuperscript{101} The first VORP was established in Kitchener, Ontario, see Dean E. Peachy, "The Kitchener Experiment", in \textit{Mediation and Criminal Justice: Victims, Offenders and Community}, M. Wright and B. Galaway, eds., London, Sage Publications Ltd., 1989, at 14

\textsuperscript{102} Umbreit et al., \textit{supra}, note 96, at 5

\textsuperscript{103} \textit{Ibid.}
deciding on what is relevant and what is important.\textsuperscript{104} The acceptance of the outcome, then, will depend on the participants ability to control the decision-making process: after all, individuals want to reach the result that is best in their own interests. A process that is fair to both the offender and the victim, therefore requires "that information that is individually held to be relevant is assessed and discussed; that decision-making rules are defined, and, if necessary, modified; and that both expectations of treatment equality and social need are taken into account."\textsuperscript{105}

A mediation session typically begins with the mediator explaining his or her role and the basic communication rules that may be necessary for the parties, and stating the agenda of the process. Then, the focus of the discussion turns to the facts of the case and the expression of feelings: the identification of the injustice. Victims can ask questions such as “why me?” and through the communication that takes place between victim and offender more understanding of the circumstances and personalities of the other party can evolve. The process “allows victims and offenders to deal with each other as people, oftentimes from the same neighborhood, rather than as stereotypes and objects.”\textsuperscript{106} When the facts are known and the responsibility understood, the discussion of how to make things right will follow. The loss of the victim has to be identified and ways will be sought in which the offender can repair the harm caused by his or her act. The last part of the session focuses on the restitution agreement: how this will be fulfilled, how the agreement will be monitored or if there will be a follow-up meeting, for instance.

\textsuperscript{104} Messmer and Otto, supra, note 69 at 11
\textsuperscript{105} Ibid
\textsuperscript{106} Umbreit et al., supra, note 96, at 9
Umbreit shows in evaluations of victim-offender mediation programs in Canada and the United States that this process can have a beneficial impact on both victims and offenders. Victims and offenders who participate in a mediation process are more likely to be satisfied and to report that they have been treated fairly by the justice system than those who have had their case referred to mediation but did not participate.\textsuperscript{107} Both victims and offenders who participated in mediation are more likely to value the opportunity to communicate with the other party. Victims value the opportunity to receive answers to questions from the offender, to discuss the impact of the act on them and to discuss and receive restitution. Offenders value in turn the opportunity to tell their stories, to be able to apologize and to negotiate restitution to the victim.

The studies have also brought to the surface some critical aspects of the process.\textsuperscript{108} Some victims, for instance, felt that the offenders did not receive a severe enough measure, which is an interesting finding since the outcome is supposed to be a consensual agreement, and the victim has at least in theory had the opportunity to object to the outcome. Apparently the process can fail on this point. Other critical remarks that were made by victims were as to dissatisfaction with the mediator; disappointment with the offender's (unco-operative) attitude; the presence or absence of the offender's parents in the process; and coercion and revictimization. The last two issues of coercion and revictimization seem to be linked. Even though victim participation is voluntary, some victims felt coerced to participate and re-victimized during the mediation process. Similarly, the objections that offenders expressed were,

\textsuperscript{107} Ibid., chapter six "Quality of Justice Impact: Client Satisfaction and Perceptions of Fairness" and Mark S. Umbreit, "Restorative Justice through Mediation: The Impact of Programs in Four Canadian Provinces", in Restorative Justice: International Perspectives, B. Galaway and J. Hudson, eds., supra, note 68, at 373-386

\textsuperscript{108} Umbreit et al., supra, note 96, at 97-100
for instance, feelings of disempowerment or a sense of injustice; dissatisfaction with
the mediator; being overly criticized by the victim; uncomfortable feelings with the
meeting, and coercion.109

3 Dading

Dading is a type of contract that is set out in the Dutch Civil Code.110 Parties
settle a dispute without the intervention of a judge. If they agree and make a contract
there is no role left to be played by the judge. In criminal cases that involve individual
victims dading means that victim and offender enter a process of negotiation, thereby
avoiding an appearance in court. The process has been experimented with for several
years in three judicial regions and Parliament has recently decided to investigate the
different ways in which the program can best be implemented in all (the 19) judicial
regions in the Netherlands.111

Dading grew out of the awareness that the criminal justice system should only
be an ultimum remedium; that it should only be used when all other options are
exhausted.112 It is acknowledged that often an offense also constitutes a tort, and that
therefore the option of a civil law resolution of the problem should be available. Many

109 Ibid., at 105-107

110 Section 7:900 of the Dutch Civil Code defines the contract that since 1 September 1993
(introduction of this part of the new Civil Code) is called vaststellingsovereenkomst. Act of 27th of May
1993, Stb. 309. The new definition has had no consequences for the operation of dading in criminal
cases.

the assembly of January 15, 1998

112 See e.g. J. Leijten, "Strafrecht moet laatste redmiddel blijven", NRC Handelsblad, 2 December
1997, who argues that criminal law should remain the last resort for dealing with crime and is a
proponent of the implementation of dading.
rights of citizens are protected under both the criminal and the civil code and it is sometimes considered more appropriate and practical to resolve a criminal issue through a civil process, rather than through the criminal. The opportunity to include restitution in the outcome of dading is considered to have a pedagogical effect on offenders, since it confronts them with the consequences of their act. Pure restitution orders that are used in the criminal process, however, do not allow for active victim involvement. Dading, then, offers a possibility for victims to participate in the process and negotiate an outcome that they find appropriate and agree with.

In principle all cases are eligible for dading in which the maximum sentence is six months incarceration.\footnote{Which appears to be about 75\% of the criminal case load on a yearly basis, see Yvo Baudoin, "Dading in Nederland?", NJB 10 oktober 1997, No. 36, at 1671, referring to Jaarverslag OM 1994.} The case is given back to the directly involved parties which have most interest in it.\footnote{Compare to the idea of Christie that the conflict should be 'owned' by the people who have most interest in it. Supra, note 35} They are given the opportunity to resolve the case among themselves and make an arrangement about compensation. Through the facilitator or their lawyers the parties negotiate a resolution of their problem. The process ends in an agreement. When a contract is made the prosecutor will not bring the case before court.

Dading can only take place on the basis of voluntary participation of the involved parties. The parties can be assisted by lawyers if they so wish. The process contains a reconciliatory element: the directly involved parties of a crime or offense have the opportunity to obtain more understanding for one another's situations and discuss a just outcome. The process embraces restorative ideas.\footnote{See for discussion of these ideas, chapter 1} It should be noted, though, that as dading currently operates, most negotiations take place through either
the parties' lawyers or a facilitator. It may be useful to have the parties meet face-to-face, for this could enhance the process of healing. When there is no direct contact between the two parties this may obstruct the possibility of communication and the process of obtaining more information about the other party which can lead to better understanding of what happened and why. The actual face-to-face meeting a mediation session includes, can have beneficial impact on the parties. On the other hand, these face-to-face meetings can have disadvantages as well. For instance, not all victims feel they can face their offenders or are not yet ready to do so. This reluctance can be for emotional reasons, but for more pragmatic reasons as well. Some victims have expressed that they don't see a need in meeting their offenders because, for example, their insurance has already paid for their losses and they do not want to take time to meet with the offender and discuss what happened. Therefore, there should be at least a choice for victims between meeting the offender in person or having the negotiations done through the parties' lawyers. Yet, I do believe that if lawyers are in control the outcome of a process will be different than when the parties themselves would do the negotiations, supervised by a mediator. Lawyers, I think, tend to strive for narrower goals than the parties themselves do. As Christie argues:

Lawyers are ... trained into agreement on what is relevant in a case. But that means a trained incapacity in letting the parties decide what they think is relevant.

---

116 F. Denkers, psychologist and policy advisor of the Amsterdam Police has recently expressed a similar opinion in view of cases of assault. He stresses the importance of communicating about what really happened (instead of creating the legal reality in court) to even the road to forgiveness and healing. “Goed gesprek met dader ‘zinloos’ geweld”, discussion of his article in the magazine Speling in NRC Handelsblad, 9 January 1998.

117 See for further discussion of the place of the victim in the process, infra, Chapter 4, section 3.

118 Nils Christie, supra, note 35, at 8.
If lawyers are involved in the negotiation, there is no space for the so-called therapeutic effects a discussion between victim and offender may have on the parties. Victims and offenders will not have the opportunity to listen to each other and see each other as human beings, rather than as stereotypes. The involvement of lawyers, however, can also have benefits, for they can advise their clients on which other options they have and what a court process would probably result in. Their involvement, however, should focus on ensuring beforehand that neither the victim nor the offender enter a process they would not want to enter if they knew of their other options. In my view, the role of the lawyers should be to provide their clients with information about the different options the clients have. During the process itself, then, the parties should be the main actors. An alternative to the involvement of lawyers could be to provide help from probation services to assist the offender and someone from a victim support group to assist the victim. They could advise their 'clients' beforehand and perhaps afterwards (especially when for instance problems with the fulfillment of the agreements arise). I would suggest, though, that during the process there is as little intervention of assistants as possible, for they will influence the parties' own ideas of what should happen and this would mean that the goal of restorative justice is missed, the goal that the directly involved parties in a crime - rather than a third party - decide on the appropriate outcome of the case.

Evaluations of the pilot-programs119 have shown that most of the suspects and the victims choose in favor of alternative restitution negotiation rather than the criminal prosecution of the suspect. Of all the cases that were selected for the program, almost

119 Pilot-programs were set up in the regions of Haarlem, Amsterdam and Tilburg/Breda. See e.g. Verslag 1996 Projekt Dading Breda/Tilburg and Dading in plaats van strafrecht, Verslag van de begeleidingsgroep voor het experiment Strafrechtelijke Dading, Amsterdam, Humanitas, 1991
one third ended in a negotiated agreement. For suspects the primary motivation for participating was to avoid the court process. For victims it was the possibility of obtaining compensation for their losses in a relatively easy way. Offenders chose not to participate when they (or their lawyers) thought that the formal criminal process would lead to a more favorable result. Victims who chose not to participate had two major reasons: firstly, that they viewed the offense as too serious and consequently believed that the case was better dealt with in the criminal justice system, and secondly that they did not consider it worthwhile, for the loss was too little (cost-benefit calculation) to make the restitutionary aspects of the process attractive for the victims.

A critical issue surfaced in the evaluation. A case is dismissed when the agreement is formulated and signed by the parties, which can lead to problems for the victim if the offender does not fulfill the obligations in the agreement. In the experimental phase of the project, victims who did not receive the monetary compensation that was agreed upon, could get compensated out of a state owned fund. The state would then collect the money from the offender. In the future, though, it seems likely that the fund will be abolished. The victim has a legal document in hand to enforce in a civil court with, but the inconvenience that this brings along may prevent some of them from taking action to enforce the agreement. For this reason, it might be better not to dismiss the case before the offender has fulfilled the agreement.

---

120 In 1996 in the region of Breda, the percentage was 46.5%, see notitie inzake invoering dading, Winnie Sorgdrager, d.d. 23 oktober 1997, at 9

121 J.M. Wemmers, "Restitution and Conflict Resolution in the Netherlands", in Restorative Justice: International Perspectives, supra, note 68, at 442 concludes: "The factors associated with successful negotiations suggest that the process is based on rational calculations rather than on ideological arguments, such as a sense of duty, to make restitution to the victim."

122 Beleidsnotitie Minister Sorgdrager, supra, note 120, at 4
There should be an incentive for the offender to do what is agreed upon. Another option would be to combine the agreement with a conditional sanction. The prosecutor can help the victim enforcing the agreement.\(^{123}\)

4 Family Group Conferencing

Family Group Conferencing has its origins in New Zealand. It is a kind of mediation meeting involving the offender, the offender’s family, the victim and the victim’s support persons. The process replaces the court process in cases involving young offenders.

In 1989 the new Young Offenders and their Families Act was adopted in New Zealand. The Act was revolutionary in that it defined the Family group conference as the main locus for decision-making in criminal cases involving young offenders. It provides families with the primary responsibility for problem solving.\(^{124}\) It is envisaged that young offenders will feel more accountable to their families (or other people whose opinion they value, such as sports coaches) than to judges they do not know. Furthermore, the family involvement is considered important since it is in many cases the family where the youth has developed. In addition, the Act provides for the involvement of the victim in the process.

The Act is a result of a growing preference for voluntary and co-operative, rather than coercive, processes and interventions. It is an example of social policy

\(^{123}\) See also Wemmers, *supra*, note 121, at 442

\(^{124}\) Families that were previously dismissed as ‘disinterested’, ‘incapable’ or ‘dysfunctional’ appeared to be well able to reach an agreement in the Family group conference, See Allison Morris et al. *Family group conferences: Perspectives on Policy & Practice*, Monsey, NY, Willow Tree Press, 1996, at 223
legislation. In a Family group conference the relevant people are brought together. In this way, more information is available, which, in and of itself, creates better opportunities to reach a more satisfying resolution of the problem. It is a process that can assist police, school officials, and probation officers in responding to juvenile crime.

The Family group conference is different from the court process in various aspects. The setting is more informal. The Conferences often appear to be emotional. There are stages of tension, anger, shame, remorse, apology, forgiveness and finally cooperation.

For the offender the participation in a conference is different from the court process in that he or she will hear how the offense has impacted on the victim, usually directly, and will thus have a better idea of the consequences of his or her actions. The process encourages the youth to take responsibility for those actions and to make good the wrong done.

The victim is given the opportunity to participate as a full party to the proceedings. He or she can vent anger and frustration and can hear first hand the personal circumstances of the offender and what motivated him or her to commit the offense. The victim is empowered by taking part in the consensual decision making of the conference and by participating in the process of restitution and reparation. This empowerment is underscored by the victim's power of veto as to the final recommendation of the Conference. The opportunity of active participation and personally holding the offender accountable can offer a greater sense of closure.

The family of the offender can obtain a better understanding as to why the offense occurred and what plan should be made to minimize the likelihood of
reoffending. The process holds the family accountable and makes the family take responsibility for the young offender's future behavior.

The expression of emotions is considered critical for the short- and long-term successes of the process. It is important for identifying the feelings that were caused on all sides by the offense and releasing these feelings. The offender is encouraged to show remorse rather than acting uncaring or tough. Greater understanding of the other party will be fostered and, as I just argued, they will see each other as persons, rather than as stereotypes.

It is useful to have a look at the research done in the early years of the process. This research investigated the views of the program among the participants of the process, and it gives a good picture of what the strengths and weaknesses are of this initiative, especially at its beginning. The research indicates that offenders and their families felt more involved in the process than those who had been part of the court process. The young offenders, however, did not always feel involved in what happened. Some indicated that they were excluded by the adults present or that they did not feel able to participate because of, for instance, feelings of shame and embarrassment. The involvement of victims in the process was seen positively by most offenders and their families, but some expressed negative feelings, for instance when they felt the victims were extremely vengeful. In my view, information beforehand may prepare the offenders and their families on what may happen and it can give them more understanding of the process; especially in view of the fact that it concerns

125 supra, at 43

126 Maxwell, G., and A. Morris, Family Participation, Cultural Diversity and Victim Involvement in Youth Justice: A New Zealand Experiment, 1993, Department of Social Welfare and the Institute of Criminology, Victoria University of Wellington. See for a discussion of this survey the same authors in "The New Zealand Model of Family group conferences", in Alder and Wundersitz, eds., supra, note 52, 15-43
young people, who have less understanding of the criminal process than adults. Adequate provision of information is essential. This also appears to be crucial with respect to victims. The victims appeared to be the least satisfied of all the participants with the process. Few participated, which was sometimes caused by the fact that they were not invited; others could not come on the day planned, and a few indicated that they did not want to face the offender. Most of those who participated, however, felt better after the conference. However, a quarter felt worse, expressing feelings of depression, fear, distress and unresolved anger; or they felt they were seen as 'the problem'; or felt neglected; or that the offender was uninterested. Often, victims who did not participate expressed feelings that they were not aware of the eventual outcome or that they doubted the genuineness of the written apologies or thought the disposition was too light. Often, victims who did not participate expressed that they were not aware of the eventual outcome or that they doubted the genuineness of the written apologies or thought the disposition was too light. I will discuss this issue more closely in the next chapter, but would like to stress at this point that the provision of information could probably avoid some of these problems. As Maxwell and Morris point out:

It is a mistake to assume that victims and offenders can simply be brought together without first careful briefing of the parties and without adequate training of coordinators to manage such an emotional and, by its nature, unpredictable meeting.

If victims attend FGCs with false or unrealistic expectations, it is not surprising that they remain dissatisfied; for instance, victims may be unaware of the relatively moderate penalties that are normally handed down by the courts for similar offences and may believe that the court would have been more severe.\textsuperscript{127}

\textsuperscript{127} \textit{Ibid.}, at 33 and at 35
In the conference various issues are discussed, such as disapproval of the offense, an apology from the offender, forgiveness shown by the victim and reparation for the wrong done. Such discussion should lead to an appropriate outcome. Participation of the victim is essential in the process, and the Conference facilitator should pay sufficient attention to the victim, who should be well informed and advised beforehand.

Often more meaningful solutions than incarceration are reached in the negotiated agreement. Common outcomes are apologies and work in the community. As a result, incarceration rates have fallen considerably. The figures are telling. While in 1986 incarceration among youth was over 4,000 in New Zealand at the cost of $206 million, in 1991 this rate had been reduced to under 1,000 at the cost of $113 million. Court appearances decreased from between 10-13,000 cases a year to 1,800 in 1993.128

Some important features of the New Zealand criminal justice system have contributed to these results. As Judge Brown mentioned:

New Zealand is favored ... in having a police culture sympathetic to diversion and in the social atmosphere there is an understanding of the need for the indigenization of the staff and raising of the levels of multicultural understanding.129

128 Lilles, supra note 38, at 56
129 Brown, supra, note 49, at 9
The Wagga Wagga Model, Australia

Wagga Wagga is a community in New South Wales, Australia. There the Family group conference is operated as an extension of police cautioning. The reason for this is that there was no statutory space to implement the conference. To be able to use the concept that appeared to be successful in New Zealand, the 'back door' of police cautioning was used.

The Wagga Wagga approach is similar to that used in New Zealand, except for the fact that it is led by the police. The police act as facilitators. Furthermore, the Wagga Wagga model was designed so as to implement the idea of 'reintegrative shaming' as developed by the Australian criminologist John Braithwaite and which I have described in chapter 1.

In the Wagga Wagga model, victim restitution is the central aim. Remarkably, the issue of compensation has appeared to be less problematic than expected. Offenders were willing to impose more demands on themselves than even the victims thought appropriate.\textsuperscript{130} This may be a result of all parties participating in the discussion during the process. There is much more scope to communicate about the background of the offender and the impact the act has had on the victim than in the formal courtroom setting. This leads to better understanding by both sides which makes it easier to find a resolution that is satisfactory and therefore more meaningful to all participants. Secondary victims are encouraged to participate in the Wagga Wagga model. This contributes to understanding of all the parties and allows the secondary victims to vent anger or frustration as well. The outcome has generally been

\textsuperscript{130} \textit{Ibid.}, at 8: "I have (...) spoken of the incredible generosity and concerns which victims have exhibited towards offenders and their families..."
satisfactory. Since a larger number of involved people are brought together, the meeting may be a more powerful experience, for both victim and offender more support can be available and there may be more people present who can help the offender and the victim to reintegrate into their communities after the event. For these reasons one could say that this process fits even better into the restorative justice philosophy than mediation does.

A concern expressed by some people about the ‘police model’ of the Family group conference is that it places too much power in the hands of the police. Carroll wonders how “neutral” young offenders and their families will perceive the police to be; how police officers can combine their role of law enforcers with the role of an impartial reconciliator “who must often have to handle emotionally and psychologically charged sessions with all the inter and intra-personal trauma associated with them”; and how their roles in all the different stages of the process can be justified:

---


132 See e.g., Kenneth Polk, “Family Conferencing: Theoretical and Evaluative Concern”, in Family Group Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?, supra note 52, at 134: “Bearing in mind that the police operate as part of the coercive system of justice, what concrete evidence over time is there that this expansion of police powers has not brought about an expansion of the most negative aspects of coercion?”

133 Milt Carroll, “Implementational Issues: Considering the Options for Victoria”, in Family Group Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?, supra note 52, at 174
the fact that a police agency ... is placed in the position of not only apprehending the offender and “proving” the allegation, but also of ensuring that the rights of both offender and victim are promoted or at least protected, adjudicating an outcome ... and finally, enforcing compliance with the outcome, I would suggest this is an inappropriate mix of roles for any agency -especially one with such a high level of perceived authority and control.\textsuperscript{134}

Some system of control might therefore be needed. On the other hand, if the police are not willing to participate in an alternative program, this program is destined to fail, for they are the first to deal with the offenders:

If police do not believe in Conferencing and are required to refer young people to someone else to run a conference, they will not refer many cases. Worse, the cases they do refer will be cases they do not regard as serious enough to justify laying a charge themselves. Worse still, conference co-ordinators will seek to “prove” themselves to the police by showing that they can be tougher than courts, as happened with Community Aid Panels ... \textbf{[T]he effect will be net-widening of an unacceptable sort}.\textsuperscript{135}

This is not to say that there could not be other possibilities which both involve the police more and let a third institution facilitate conferences.

\textit{Family Group Conferences for Young Offenders in Winnipeg}\textsuperscript{136}

Closer to home, a similar pilot study took place in 1993. In that year in Winnipeg, Family group conferences were convened in cases involving Aboriginal

\textsuperscript{134} \textit{Ibid.}, at 174-175

\textsuperscript{135} John Braithwaite, “Thinking Harder about Democratising Social Control”, in \textit{Family Group Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?}, supra note 52, at 208

\textsuperscript{136} Lyle Longclaws, Burt Galaway and Lawrence Barkwell, “Piloting Family group conferences for Young Aboriginal Offenders in Winnipeg”, Canada, in A. Morris et al. Family group conferences, \textit{supra} note 124
young offenders. The convenor of the Conferences was an Aboriginal graduate student. He also consulted with the families of the offender about incorporation of culturally appropriate practices in the Conference process. The process was not used in the diversionary way, that is, it did not replace the court process. The outcome of the Conference was meant to be a recommendation in the sentencing process. In this way, it comes close to a Sentencing Circle, except for the fact that there were less participants.137

Families, extended family members, the victim and the victim's supporters were invited. Some victims who could not participate delivered victim impact statements. In all the conferences an agreement was reached. All the plans that were formulated and recommended to the court included a cultural component, such as culturally relevant educational programs, probation supervision by an Aboriginal community agency, referrals to the Native Addictions Council or attendance at traditional ceremonies.

The families felt involved in the process and the overall feeling of the participants was positive. However, lawyers and police did not participate in the process. The lawyers stated they had no time and that the legal aid funds did not allow them to participate. The police explained that they saw no point in participating since charges were still pending in court. Judges ignored most of the recommendations formulated in the Conferences and neither defense lawyers nor prosecutors tended to emphasize or advocate for the recommendations to be included in the court's orders.

Here we touch upon a major problem. As argued before, the use of an alternative process alone is not enough. As long as the professional players of the court

---
137 In a Sentencing Circle not only family members and a support group of the victim can be present, but also other members in the community. See for a more detailed discussion of the dynamics of sentencing circles, Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares", in *Restorative Justice: International Perspectives*, supra, note 68, 193-206
system are not willing or ready to implement the recommendations suggested by a family group conference (or if the outcome reached by consensus is mostly ignored) the value of the Conference process will be undermined. If, however, the family group conference would take place as a diversionary process - which I would argue is most appropriate - this problem can partly be avoided. It will be the responsibility of the community to organize the process and, as well, to provide resolutions and monitor the outcome of the process. A problem that I could foresee remaining, is the co-operation of the Police, if they are the institution to screen cases for a Conference, to refer offenders to this community process. It may also be appropriate to have an Aboriginal youth justice worker at the police level that decides on the reference of young Aboriginal offenders to a Conference.

The Winnipeg experiment might seem discouraging. However, there are also judges that favour alternatives like the Family group conference; among them Judges Lilles and Stuart from the Yukon and Judge Fafard from Saskatchewan.

*The Sparwood Youth Assistance Program*

As a result of the article written by Judge Lilles in 1995[^138] about the Family group conference and the positive results it can lead to, Sergeant Bouwman started the Sparwood Youth Assistance Program in British Columbia in 1995. This program has led to more satisfactory results than the Winnipeg experiment. The Sparwood program is modeled on the Australian Wagga Wagga model. A difference however, is that the Sparwood program is run by volunteers such as a school teacher, a pastor and defense

[^138]: Lilles, *supra* note 38
lawyers, instead of police officers. It is an innovative, community based justice system. A youth that has been identified as an offender in a case involving something other than homicide, armed robbery or serious sexual assault will not be charged. Instead he or she enters an informal procedure, called a Resolution Conference.

The offender has the choice to participate. He or she must admit the offense and provide the police with the relevant details. The offender must participate in a "resolution conference" and comply with the resolution reached with the victim. If the offender agrees with these conditions the victim is approached.

In Sparwood the Crown appears to have been supportive. Cases that are brought into this program include those involving first offenders and repeat offenders that have not been rehabilitated by the traditional youth justice system. The resolution reached in the conference must include full compensation and facilitate the offender’s reintegration into society by doing work for the victim or the community. The participants appear to be well able to come up with appropriate solutions, sometimes creating unique dispositions. Parents are taking an active role in ensuring accountability for the youth.

The results have been encouraging. The success of the diversion has resulted in a significant decrease in the court-based workload of the RCMP. It is estimated that $100,000 in court costs have been saved. These savings should be spent on studies on and implementations of other alternatives and to facilitate necessary resources like job training, alcohol counselling and parent education. Co-operation of youth and other

139 The program is based upon a police officer’s discretion as to whether to lay a charge or not, s3(1)(d) of the Young Offender Act.

140 See, Bouwman, Jake and Glen Purdy, “Sparwood Youth Assistance Program,” Paper presented at Dawn or Dusk in Sentencing; Conference of the Canadian Institute for the Administration of Justice, Montreal, April 1997
members of the community has increased. They feel a young offender will be assisted by the Program, and dealt with fairly.

As the program has been operating only for three years, the statistical data concerning offense and re-offense rates may not be very significant. However, in 1994, before the Youth Assistance Program was implemented, 64 youths were dealt with within the court system. Since the implementation of the program only one young offender in the Sparwood area has entered the court system. All but one of the offenders complied with the resolution and victim satisfaction has been high. The re-offense rate has been below 10%, as compared to the national average of 40%. Major factors in the success of this program are the willingness of officials to co-operated and the community support:

The community is involved...We provide the vehicle. We do very little... We strongly believe the solution to youth crime is in the community. Give the community the ability to deal with it and they will.  

The positive outcome of the Sparwood program has led to the expansion of the program to surrounding communities and has inspired the RCMP of Iqualuit to implement a similar program.

5 Evaluation

Mediation and dading are processes typically used with adult offenders, although mediation has also been used much with juveniles. FGC has only been used

---

141 Quotation derived from House of Commons, Canada, Renewing Youth Justice; Thirteenth Report of the Standing Committee on Justice and Legal Affairs, April 1997, Chapter 6
with young offenders. Mediation and FGC are similar in that they both involve a face-to-face meeting of the victim with the offender, although FGC also takes place if the victim is not willing to come or when there is no individualized victim. In the mediation/conference meeting the parties discuss the act and the impact it had on the lives of the participants and how the wrong done can be compensated. The participation of the family members in the FGC can be beneficial in addressing the more structural problems the offender may face. Expressing feelings can be an important factor in the process of healing and in triggering feelings of shame and remorse by the offender. In the family group conference there is more space for such events than in the mediation process. *Dading* does not recognize this possible effect: in principle there is no space for discussing the feelings or emotions of the participants in this process.

McElrea argues that the concept of Family Group Conferencing could also be used for cases that involve adult offenders.142 These Community Group Conferences would involve friends or colleagues or other people who are close to the offender, if the bond with the family is no longer as strong as during childhood. Similarly, Braithwaite and Daly see a possibility in using the conferencing model in cases involving violence against women.143

In my view, McElrea too readily assumes that the beneficial results that occurred in the youth model, will also occur if the process is used with adult offenders. He does not discuss the differences between juvenile and adult offenders and it may

142 F.W.M. McElrea, *supra*, note 62

well be possible that some of the positive outcomes with juveniles will not take place if the process is used with adults.
CHAPTER 3

QUI BONO?

1 Introduction

Who will benefit from restorative programs and in which ways? In this chapter I will give an overview of how restorative, informal programs will affect the key players in the criminal justice arena. The impact and consequences on the criminal justice system as a whole; the victim; the offender; and the community will be reviewed. I will start with the impact on the criminal justice system, approaching this issue from the alternative dispute resolution perspective.

2 The Criminal Justice System

Diversion of criminal cases can be considered a product of the Alternative Dispute Resolution Movement. Alternative Dispute Resolution (ADR) is a concept that has attracted much interest over the last few decades. Particularly in private law cases, many mechanisms have emerged that can replace the money consuming, and often slow court process. It has shown merits and has secured its own place in and next to the court system for conflict resolution. In the field of criminal law, alternative dispute resolution raises issues, such as the protection of the rights of the offender and has therefore not gained as much attention. One of the reasons for the difficulty in using ADR is the special character of criminal cases. If a suspect is found guilty, the state is justified to impose a sentence upon the offender. Because of this intrusion into a person's life, the process that leads to such a result must be surrounded by guarantees
of a due process. Victims should not be the ones to judge what happens to their offenders, for a victim's perception of a just response may be colored by their status as a victim. Instead, the state should fulfill this task. As Jeremy Bentham argued:

The balance in the hands of passion will always incline to the side of interest. To the miser you can never give enough: to the revengeful, the humiliation of his adversary never appears sufficiently great. It is necessary, then, to imagine an impartial observer, and to regard as sufficient the satisfaction which would make him think that, for such a price, he would hardly regret to receive such an injury.144

However, court adjudication has also shown disadvantages in criminal cases, as I have argued in Chapter 1. It is useful, therefore, to give thought to alternatives and to reconsider the question of who should 'own' the process. Is it really the state that can best serve the interest of the parties involved in crime? We have taken it for granted that the state, in the capacity of the prosecutor, takes care of dealing with criminal cases, but is the state always the most appropriate party? Could a neutral mediator fulfill the task of providing or guiding conflict resolution? If it is true that "[t]he perception that crime is prosecuted has no practical relevance to norm-compliant behavior"145, why then do we always rely on the prosecutor to handle criminal cases? Alternative Dispute Resolution may provide a useful starting point for exploring alternatives to the current situation: not only because it provides an alternative for the courtroom process; but also because of its inherently beneficial features. Better access to justice can be provided, as well as justice that is more oriented toward individual


145 Messmer and Otto, supra, note 69 at 1, adding to this that "[i]n contrast, there is growing evidence that dropping formal punishments in no way increases the risk of recidivism, at least in the field of petty crime."
Diversion of criminal cases is one of the ideas that alternative dispute resolution reflects. The question is how a process that is not primarily focused on principles such as due process, the right against self-incrimination and the right to remain silent can be justified applying to criminal cases. In my view, this brings us back to the question of how we view criminal justice. In the formalistic, retributive view such a process may be hard to defend. If a process aims at imposing 'pain' on someone, this process should be surrounded by safeguards, in order to avoid punishment of innocent people. However, if we approach a crime from the restorative view, where a crime is primarily seen as an act inflicted against a person, and where the act, rather than the person is denounced, the idea of a process that focuses on the restoration of the harm done, conducted by the parties who have most interest in it, is not so strange. The case goes back to the ones that were the most directly involved, being the offender - who has admitted the commission of the offense, or at least not denied it - and the (individualized) victim(s). Citizens are often able to competently resolve their conflicts themselves and, where this is the case, the state should refrain from intervention. A division should somehow be made between the cases that are suitable for diversion and cases that should be dealt with by the prosecutor in the name of society. The public opinion about this issue is that property crime and minor assaults are suitable for diversion, but crimes that are more serious are not. Perhaps crimes that heavily shock the community ask for a response in the name of that community. The state prosecutes the offender in the name of the citizens. However, even in these cases, more consideration still be paid to the victim. In the Netherlands,

146 Ibid., referring to another, closely related 'movement' that has led to restorative justice, that is, informal justice.

147 As argued in Chapter 1, supra, at 17

148 Umbreit et al., supra, note 96, at 10-13, and Lee, supra, note 98
the victim can participate as a *partie civile* and bring a simple and clear-cut claim in the
criminal process.\textsuperscript{149} Such an option could be considered in the Canadian system.

Some opponents of alternative processes argue that all offenses should be dealt with by
the state, since rules that reflect common values have been breached. They are afraid
that the prosecution loses its public function.\textsuperscript{150} One could also argue, however, that in
some cases the private interest weighs heavier than the communal interest and that,
therefore, there should be an opportunity for conflict resolution on a smaller scale.

The ultimate goal is to enhance the quality of justice as perceived by both
victims and offenders, or to provide for a process that both victim and offender
perceive as fair. First of all, mediation, *dading* and FGC provide a better opportunity
for victims to obtain compensation for their injury. In the criminal process there are
very few ways for victims to obtain compensation and only under certain conditions.
Commencing a civil suit against an offender to obtain compensation for the damage that
resulted from the offense is a time and money consuming activity (and for these reasons
can also be an emotional burden) which often prevents victims from starting one.

*Dading*, mediation and FGC offer a quick and easy way for victims to receive attention
and to actually have the damage restored. The parties are free to fill in the contract as
they find appropriate. This includes the possibility of enclosing compensation of
emotional loss. In the criminal process there is no scope for such a thing. Not only
can the contract result in the offender paying compensation to the victim, the parties
can also agree that the offender refrains from certain behavior - the contract can, for

\textsuperscript{149} According to the Terwee Act, Act of 23 December 1992, Stb.1993, 29 and implemented in all
judicial regions per 1 April 1995, claims are limited to financial compensation.

\textsuperscript{150} See e.g. C.P.M. Cleiren, "De logetallen van het recht op vervolging bij strafrechtelijke *dading*", in
*Dading in plaats van het strafrecht* (Proceedings of a conference held at the University of Amsterdam, 9
example, contain the prohibition of the offender showing up in the neighborhood of the victim - or the agreement that the offender will do community work or will donate money to charity. For each case the most suitable outcome can be discussed.

Secondly, the operation of the alternative processes is cheaper than the operation of the court system. By making an agreement the court process is avoided which saves the (large) amount of money that is related to the formal process. Only in the case of non-compliance of the offender with the contract will a (civil) court procedure be required. This will happen in far fewer cases than otherwise would have had to take place in the criminal court. The third aspect is that the discussed alternatives prove a quicker way to end a criminal case. It provides a quicker response to the unacceptable behavior of the offender and a quicker way for victims to receive compensation. Fourthly, for both victims and offenders the processes are less intrusive and more humane. For victims, a criminal process in court is often an emotional experience that in most of the cases does not enhance the dealing with emotions. For offenders the court process is stigmatizing and, in the case of a conviction, leads to a criminal record. As stated before, the process is impersonal. A negotiated agreement will probably lead to more satisfaction for both the offender and the victim as they both have more control over the outcome of the process. Finally, in the processes of dading and mediation the parties are more equal. The victim has more say than in the criminal process and even becomes an active party in the resolution of the problem. Both parties have the possibility to take part in discussing the outcome of the case. Surveys on mediation, for example, have shown that the perception of fairness of the process was higher among the parties who participated in the mediation process than among those who had their case dealt with in the formal system.\textsuperscript{151} Thus, alternative or restorative programs can result in a higher

\textsuperscript{151} Umbreit, \textit{supra}, note 107
quality of the criminal justice system as a whole, at the same time contributing to its credibility and its ability to provide justice.

A positive consequence of the diversion from the court of minor cases is that the workload of the court system diminishes.\textsuperscript{152} The courts will have more time to concentrate on more serious and complex cases. In 1997 in Rotterdam, the prosecutor had to dismiss 200 cases because there was no time to process them and the time that the cases could be reasonably held before a trial would start had (long) expired.\textsuperscript{153} This gave rise to negative reactions toward the whole system. The court system is under a lot of pressure. For victims (and also, for example, for offenders in similar cases that had their cases tried in court and got punished) it is hard to deal with the fact that the case will not go to trial. The dismissal of certain cases also led to inequality for offenders in similar cases whose cases went to trial and resulted in a punishment. Such inequality is unjustifiable and undermines the potential and credibility of the judiciary. If cases that are appropriate for alternative (more informal) processes are diverted a repetition of this situation does not need to take place.\textsuperscript{154}

The state's role should be tracing offenders who have not yet been detected and providing the necessary resources for both the facilities of the process and of the follow-up on the agreement. If the agreement comes with a conditional sentence, the prosecutor keeps an eye on the fulfillment of the contract and undertakes action when

\begin{itemize}
\item \textsuperscript{152} In case of \textit{dading}, for instance, in principle all offenses that would lead to a maximum of half a year incarceration or a fine are eligible for \textit{dading}. These are minor cases. However, as mentioned before, \textit{supra}, note 113, they constitute 75\% of the workload of criminal courts.
\item \textsuperscript{153} See Baudoin, \textit{supra}, note 113, at 1671
\item \textsuperscript{154} The question is, however, if criminal justice officials will be willing to hand over some of their tasks to lay persons. I will discuss this issue in chapter 5.
\end{itemize}
the offender fails to observe the obligations. As argued before, the state should not intervene during the course of the process. The argument that the state acts in the name and interest of the victim has proved to be flawed, for victims appear to have different needs and wishes than those the state represents. Surveys have shown that in cases of property crime and minor assault, for example, victims preferred to obtain compensation or see the offender do community service, rather than having the offender convicted to incarceration or the payment of a fine. There also appears to be interest in participating in programs that involve a meeting with the offender\textsuperscript{155}. As Van Ness and Heetderks-Strong argue, the community should be responsible for peace and the government for order,\textsuperscript{156} but both should aim for the same goals, being victim reparation and community safety. It is a task of the government to create space and offer (financial) support to make alternative, informal and restorative programs work. Furthermore, since participation in restorative programs is based on voluntariness, the government has to provide an 'alternative' to these programs in case either party does not wish to participate. For offenders, the 'threat' of the formal process with its stigmatizing effect and the risk of incarceration may provide a sufficient incentive to opt for the informal process.

The state could further provide for an institution that participants of alternative processes can address in case they have complaints, such as complaints about the (quality of the) course of the process or the follow-up. In my view there is a gap in the literature on this issue. Insufficient attention has been paid to the question of how the quality of these processes can be guaranteed. It is acknowledged that the programs have possible weaknesses (as will be discussed in chapter 4) and for most of them

\textsuperscript{155} See for an overview of several surveys, held in different countries, Lee, \textit{supra}, note 98

\textsuperscript{156} \textit{supra}, note 25, at 35
resolutions can be found, but there seems to be no real answer to how to control the quality of alternative processes. In my opinion, there could be a role for an ombudsperson in this area. Participants who have complaints about the quality of the process could address this person, who would then investigate the complaint and, if necessary, undertake action.

3 The Offender

What are the consequences of diversion for offenders? First of all, by participating in an alternative process, the offender avoids the stigmatizing court process. This is not to say that alternative processes will never be stigmatizing. The Family group conference, in which a larger group of community members can participate, may be as stigmatizing and punitive as the formal court process, if operated in the wrong way. The offender may feel outnumbered by the other participants and, should the atmosphere turn aggressive or punitive, the result may be counterproductive to the goal of the meeting. Careful training of facilitators is essential to avoid such a result.

A second consequence (which is attractive to offenders) is that by participating in the diversionary process, a criminal record will be avoided. This is a particularly strong incentive for first offenders. The threat of a court process and conviction may, however, have offenders participate in the alternative process even though they do not believe they are (fully) guilty. As Brown argues "[u]ncertainty can pressure people away from their ordinary preferences". 157 Especially when the offender cannot assess the outcome the court process would lead to, pressure by the prosecution to participate

157 Jennifer G. Brown, supra, note 26, at 1268-1271
in diversion may lead to involuntary participation. Furthermore, if the diversion process fails and this results in prosecution, the threat of prosecution may influence the position the offender has in the process as well. Offenders may feel coerced into agreeing to victims' demands that they find inappropriate, but that they accept because they do not want to enter the formal system. It is important that the offender is fully informed as to their prospects in court and of the outcome if the diversion does not succeed. Legal advice before deciding to enter diversion may help an accused to make a considered decision.

The third consequence is that the offender receives the opportunity to make good the wrong done. The offender will play an active role in discussing the compensation of the victim, rather than awaiting passively the verdict of a judge. Offenders can tell their sides of the story and will be listened to. If there are factors that the offender feels he or she is not (fully) responsible for, these can and should be addressed. In addition, there is more scope for creativity in the constitution of a proper answer in every particular case. There are more options than the choice between incarceration and fines (and community service in the Netherlands) or probation. Creative solutions can be used to tailor the result to the particular offender and his or her own unique background. In this way, more attention can be paid to structural problems that the offender has and that may have led to the committal of the offense. It will be decided how the offender can be reintegrated into the community, rather than excluded from his or her environment. In Sparwood, for example, the participants of a Resolution Conference (FGC) agreed that a young offender who had shoplifted a shoe store would work for the store owner for several weeks. The owner taught the boy several skills of running a business and after the disposition had been fulfilled and the
young person kept frequenting the store and do work for free, the owner decided to give the former offender part time employment at his store.\textsuperscript{158}

4 The Victim

In restorative programs, victims receive the chance to play an active role in the process that establishes what will be the answer to the particular offense. Instead of being left out, or being used solely as a witness, victims can tell their stories and the impact the act had on their lives, they finally have a voice in the process. There are several benefits - first, this can enhance the process of healing that victims are experiencing. Second, it gives the offender a better sense of what results their act actually caused. In addition, the victim has a say in the outcome of the process. Receiving compensation - rather than having to be satisfied with the idea that the offender has to pay a fine to the state or spent time behind bars where the problem will not be addressed - will give the victim a more concrete sense of vindication. The feeling of disempowerment that victims are left with after the occurrence of an offense, may be restored by active participation. It can give victims a sense of control and often leads to less fear for reoccurrence. This is particularly important in incidents involving neighbors or colleagues. Not only can restitution be discussed, but also other solutions, such as an apology, an agreement that puts an obligation on the offender to work for the victim or a behavioral contract may be considered. Further, there is an opportunity to address underlying problems and for conflict resolution. Many victims participate because the offense frightened or confused them and by asking the offender questions they can come to terms with what happened. Victims want to know what kind of

\textsuperscript{158} See Bouwman and Purdy, \textit{supra}, note 140
person the offender is and what made him or her commit the offense. It is important for them to confront the offender with the consequences of the act.

It is important not to assume the impact on victims as inherently positive, or something inherently right. As Brown highlights:

[A] victim's recovery in the wake of crime is a delicate process, and generalizing about what is best for victims is very difficult and dangerous .... Rushing to judgment about victims and their needs could lead to poor policy choices and "reforms" of the system that only cause victims greater potential harm.159

Furthermore, some offenders do not feel remorse or guilt, or are not able to feel the pain of another person and it is not hard to imagine the impact on a victim having to face such a person. It may make the process of healing extra hard to complete. Caution is needed on this point, as will be discussed more in depth in the next chapter. Victims should be informed about the different options they have before they have to decide whether to participate in a diversionary process or not. Some may want to have their case dealt with in the formal system. Lerman, for example, argues that cases of domestic violence should not be dealt with in mediation.160 She describes a case in which a woman had no other choice than to participate in mediation in order to have her case dealt with, which resulted in no final resolution of the problems. Lerman argues that the woman should at least have had other choices among the remedies to stop violence and have been informed about these.

159 Brown, supra, note 26, at 1273-1274. This issue will be discussed more thoroughly in Chapter 3, section 3.

160 Lisa G. Lerman, "Mediation in Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women", Harvard Women's Law Journal, 7 (1984), at 57-60, for further discussion of mediation in cases of violence against women, infra, Chapter 4, at...
In the Netherlands victims also have the option to take part in the criminal court process as a *partie civile*. If their case is simple - which means that no experts or witnesses need to be brought before court to support the claim - restitution can be obtained through the trial process. Since the trial remains focused on the offender there is no opportunity for the victim to claim non-pecunary damages which are often more complicated to establish. There is an opportunity to split the claim in a part that is easy to prove and which can be dealt with in the criminal trial; and in a part that is more complicated and has to be taken to the civil court. As may be clear, the possibility for victims to obtain restitution with the criminal justice procedure only focuses on monetary compensation for material damages. Starting a civil suit often takes excessive time, money and effort and victims may not favor this option. *Dading* provides an option that creates space for discussing restitution of both material and immaterial losses and may therefore resolve some burden on the victim. Furthermore, solutions other than monetary compensation can be agreed upon, such as the obligation on the offender to refrain from certain behavior, or for example, a result that forbids the offender to enter a certain shop or neighborhood.

5 The Community

In modern industrial societies, citizens tend to delegate responsibility to anonymous institutions. Government and insurance companies, lawyers, and police are supposed to enforce the citizen's interests.\(^{161}\)

In the establishment of the retributive criminal justice system, community members have become used to the idea that the state takes care of crime. Local

\(^{161}\) Netzig and Trenzcek, *supra*, note 97, at 241
communities rely on officials to deal with offenders and are not encouraged to take responsibility themselves to do something about the problems of crime, or to deal with aspects in the community that may have assisted or caused the occurrence of crime.

The restorative justice philosophy recognizes the importance of community involvement in the course of the criminal process, of recreating bonds between the members of the community that the victim and the offender come from. What is this community? Who are its members? As Brown argues, what does the strengthening of a community mean when we do not even know who belong to the 'community' that is referred to?162

In other words, it is important to define the concept of 'community' in the context of restorative justice and also to consider the question whether those communities will exist.163 Compared to the critique on Braithwaite's theory that loving, strong communities that offenders and their victims can reintegrate to, do not always exist,164 it is recognized that communities that are homogeneous in norms and values that can be imposed on an offender through a mediation process, are not necessarily present in all our complex, modern societies. When a mediation takes place in an environment in which people have different ideas of what is right and what is wrong, the process is destined to fail to offer a constructive resolution of the conflict.165

---

162 Brown, supra, note 26, at 1292 "[W]hen pressed to identify the community they have in mind, proponents are not forthcoming." Also, Sally E. Merry and Neal Milner, "Introduction", in The Possibility of Popular Justice: A Case Study of Community Mediation in the United States, eds., Sally E. Merry and Neal Milner, Michigan, The University of Michigan Press, 1993, at 11: "But exactly what community meant remained elusive."

163 Ibid, "There is some question about whether the 'community' so celebrated by VOM proponents even exists."

164 supra, chapter 1, at 19

165 Brown, supra, note 26, at 1294
Defining the 'Community'

Paul McCold has elaborated on the concept of 'community' in the restorative justice context.\textsuperscript{166} He stresses that an active inclusion of the local community can contribute to decriminalization.\textsuperscript{167} Deviant behavior becomes a social concern and the relational and causal aspects of offending will be paid more attention to. Taking part in the resolution of a conflict among its members is supposed to have a strengthening effect on the community.\textsuperscript{168} Christie has great expectations of the vitalizing effect of neighborhood justice on its community:

The more fainting the neighborhood is, the more we need neighborhood courts as one of the many functions any social system needs for not dying through lack of challenge.\textsuperscript{169}

Similarly, LaPrairie:

Greater involvement by ordinary community members in finding solutions to problems directly affecting their own families and indirectly their communities may in a subtle way influence the building of community institutions on a wider social base and reduce the control by an elite group of community decision-makers.\textsuperscript{170}

\begin{thebibliography}{99}
\bibitem{166} Paul McCold, "Restorative Justice: The Role of the Community", Paper presented to the Academy of Criminal Justice Sciences Annual Conference, Boston, March 1995
\bibitem{167} See also Raymond Shonholtz, "Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program", in The Possibility of Popular Justice, supra, note 162, at 236: "[C]ommunity justice and citizen intervention are the prerequisites to successful crime prevention."
\bibitem{168} \textit{Ibid.}, at 237: "The promise of community justice is to transform the dormant power and responsibility of citizens and communities into a dynamic form of service and justice."
\bibitem{169} Christie, \textit{supra}, note 35, at 12
\bibitem{170} LaPrairie, \textit{supra} note 40, at 594. This is a comment that is also used in relation to the practice of Sentencing Circles, the so called 'empowerment of the community', see e.g. Judge Barry Stuart, quoted in LaPrairie, Carol, \textit{supra}, note 55, at 81-2: "[I]n reinforcing and building a sense of community, Circle
\end{thebibliography}
Bringing about 'neighborhood cohesion', however, may be too high a goal. For the more culturally varied and individualistic communities it probably makes more sense to define less ambitious goals as far as this issue concerns.

There are different levels of community and different levels of dispute. In cases of domestic violence, for instance, the community is relatively small, that is, the family setting. If a serious crime has occurred, though, in which the offender is not known, a larger community is affected, since more people will feel frightened or threatened by the event. The definition that McCold uses for local community, is "a social group of any size whose members reside in a specific locality, share government, and have a common cultural and historical heritage." Besides the local community, a personal community will exist, which is smaller in scale and includes the individuals who know and are personally involved in the lives of the victim and/or the offender. The (extended) family is an example of this. One of the aims of Family Group Conferencing is to enhance the well-being and strengthen the families of the (young) offender. During the conference, problems that the family has can be addressed and plans developed regarding the services the family could access. The expectation is that this will decrease the chances of re-offending of the child. An important condition,

---

Sentencing improves the capacity of communities to heal individuals and families and ultimately to prevent crime.

171 This was one of the major goals of the San Francisco Community Boards. However, it was not reached. See, Peter Fitzpatrick, "The Impossibility of Popular Justice", in *The Possibility of Popular Justice*, supra, note 162, at 472, referring to DuBow.


then, is that resources exist to make this goal attainable. The necessary resources have not always been available, as will be discussed in chapter 4.

Peter Fitzpatrick argues that the concept of 'community' is a mythic figure, which is a formed, historical construct. The concept that is used in the alternative justice perspective is a "reduced and contained 'native' or 'peasant' community whose diversity and organizational complexity have been denied."174 This mythic figure of the community provides "a shared, consensual domain", it also "imports a unity and a distinct integrity."175 It is important to realize that these features will not exist in all the communities that are the entity that fits in the restorative justice picture. Another risk is that we assume that that community will have a singular idea of what justice is:

[T]he legal mentality is far from homogeneous. It can accommodate a diversity of conflicting aspirations and contents.176

It is also possible that the members of the community who are the mediators will not be neutral and 'agents of reality'.177 The more culturally complex a society is, the less likely it is that there is a set of shared norms and values that can be imposed on an offender.

174 Peter Fitzpatrick, supra, note 171, at 467
175 Ibid.
176 Ibid., at 471
177 Ibid., at 461
The Role of the Community

Why not bring the desperate sectors of neighborhood life and the alienated individuals in our communities and bond them in civic work that directly relates to their own safety, quality of life, and community stability? Who, better than citizens themselves, can do this work? And, why should we have anyone else do it, if they are competent and most able?\textsuperscript{178}

Who but citizens can prevent crime or harm before it happens? Who but communities can actually realize and promote the early peaceful settlement of conflict?\textsuperscript{179}

These questions reflect a positive view of what a community is able to and what citizens can be held responsible for. But how will this ideology work in practice? An experiment with a community-mediation board in San Francisco, has shown that, however strong the rhetoric may be, in the end, the program was still not operating entirely out of the criminal justice system.\textsuperscript{180} On the other hand, the board was far more responsive to community desires and needs.

A local community has needs and responsibilities. It needs a sense of justice and a knowledge that certain behavior will not be tolerated. Ultimately, communities want safety. The responsibilities local communities have are to take care of the victim after the occurrence of the offense and offer protection if necessary; to protect the

\textsuperscript{178} Shonholtz, supra, note 167, at 236

\textsuperscript{179} Ibid, at 237

\textsuperscript{180} Merry and Milner, supra, note 162, at 11, stating that "[t]he San Francisco Community Boards was one of the most prominent examples of a form of community mediation deeply rooted in community life. Its ideology focused on the capacity of popular justice to embody community power and to express community values", however;" A significant shift in relations of power and a substantially empowered local community seem beyond the possibility of popular justice." Ibid, at 9
offender against vengeance; to accommodate a process that will promote healing and resolution of the conflict; and to offer facilities so that restoration can take place and victim and offender can re integrate into their communities.\textsuperscript{181} If a community provides an opportunity for reconciliation between the victim and the offender, the peace and balance of the community will be restored as well. This idea is reflected in what some call "transformative justice"\textsuperscript{182}: the community must take (partial) responsibility for the occurrence of the crime and the healing process by supporting the offender in making right the wrong, and offering structural support so that recurrence of the offense is less likely. The involvement of community members offers an opportunity to transform those people and relationships that can do something about the causes of crime. The involvement of the community leads to a more holistic approach of the offense. Having said all this, I realize that such participation demands effort and energy from a community, and a will to unite forces to combat crime and to create a peaceful environment. The knowledge of having "done something about it", that is, contributed to the resolution of the conflict, may restore the sense of peace and control in a community, but then there must first be a real effort and investment in taking up the responsibilities.

It requires a community's commitment to respect the rights of its members and to help resolve conflicts among them. It requires that those members respect community interests even when they conflict with their own interests. It is in this context that communities and their members assume responsibility for addressing the underlying social, economic and moral factors that contribute to conflict within the community.\textsuperscript{183}

\textsuperscript{181} McCold, \textit{supra}, note 166

\textsuperscript{182} E.g. Ruth Morris, \textit{A Practical Path to Transformative Justice}, Toronto, Rittenhouse, 1994, referred to by Van Ness and Heetderks-Strong, \textit{supra}, note 25, at 25

\textsuperscript{183} Van Ness and Heetderks-Strong, \textit{supra}, note 25, at 35
In small, homogeneous communities these ideas might realistically be implemented. In larger, more varied and individualized communities, however, in which not much culture or heritage is shared, it may be too large a demand to expect a community to fulfill all the conditions that will lead to a more peaceful and safe environment for its members.

In the mediation process the community which the offender and victim come from has a role in providing mediators and facilities in the mediation process. Some mediation centers are driven by neighborhoods or religious institutions. Others are sponsored and driven by the government. In the dading process some of the negotiations are done through a facilitator. This facilitator is not part of the criminal justice system and can therefore also be considered as operating as a member of the community. In the Family group conference the role of the community, especially the family of the offender and the supporters of the victim is even more evident. They take part in the negotiation of the appropriate measure that will be given to the offender.

Community members can furthermore have some sense of control in providing facilities for the process and also for the outcome, such as facilitating community service. Instead of incarceration, the offender will most likely remain in the community and may need an occupation to make money to repay the victim. Supervision of the offender may be needed, which can also be provided by community members (or probation officers).
6 Evaluation

Restorative programs can contribute to more satisfaction among victims, offenders and their communities and it can have positive consequences for the criminal justice system as a whole as well. They have positive features that cannot be found in the traditional process, such as inclusion of the stakeholders (especially the victim); the possibility of discussing compensation among them; the opportunity for the offender to accept responsibility and make amends; and the opportunity of resolution of underlying conflicts. The three-dimensional influence of victim, offender and community can make this happen. Furthermore, aspects as speed and the fact that these processes offer an easier and quicker way to receive compensation are advantages. Opponents of these programs tend to discredit them by stating that they do not lead to lower rates of recidivism or deterrence. The traditional system, however, has not proved its ability to reach those goals either.

The question we should ask ourselves, is how we measure success? Do we measure it in terms of recidivism and deterrence or should the emphasis lie on the evaluation of the quality of the process and the satisfaction among the stakeholders in the process? The answer depends on what we consider to be the goals of the criminal justice system. If its goals are retribution, (general) deterrence and incapacitation - as they are in the traditional retributive paradigm - the evaluation of restorative programs may not result in much success, although they may 'score' on specific deterrence. The sense of these goals are questioned in the restorative paradigm. As argued in chapter 1, one may wonder how effective the retributive goals will be in providing a safer

184 See, for instance, Brown, supra, note 26, at 1298, arguing that VOM does not promote general deterrence. She admits, however, that VOM might have the potential of promoting specific deterrence and rehabilitation.
community and more satisfaction among the stakeholders in the process. Within the
restorative paradigm success will be measured in terms of holding the offender
accountable; providing the victim with the opportunity to confront the offender with
the consequences of the offense and negotiate compensation; enhancing and
strengthening the families and or communities and the reintegration of victim and
offender in their communities; and reducing the time frames of the process.

Zehr offers a tool to measure the success of a restorative program, that is, his
'Restorative Justice Yardstick'. The five primary questions that need to be answered
are: do victims experience justice? do offenders experience justice? is the victim-
offender relationship addressed? are community concerns being taken into account?
and, is the future being addressed? As for the first two questions, surveys show that
victims and offenders in alternative programs report a higher perception of fairness than
those who participated in the formal process. The third question has given rise to
questions. The description 'victim-offender relationship' suggests that the victim and
the offender knew each other before the offense occurred, which is surely not always
the case, and that they had some kind of relationship. What is meant with the third
question is whether an opportunity exists for the victim and the offender to meet and
communicate with each other, to tell their stories, express feelings and emotions, to
obtain a better understanding of one another as persons with certain backgrounds,
rather than as stereotypes. I would suggest putting the third question in terms of
whether the victim and the offender are being given the opportunity to tell their stories
and whether they have a voice in the process. The question whether community
concerns are being taken into account may raise the most difficulty. In processes like

185 Zehr, supra, note 18, at 230-231, appendix II, infra, at 141
186 Umbreit, supra, note 107; Umbreit et al., supra, note 96
mediation and dading there is no scope to discuss this issue during the process. The victim and the offender are the main stakeholders in these processes and there is little opportunity to consider community needs. It will be a task for the facilitator to keep an eye on issues such as community protection and restoration. The family group conference is more likely to fulfill this aim: since more community members are involved, they can speak for themselves. The last question concerns the outcome of the negotiation process, that is, whether the problems caused by the offense are resolved, compensation discussed and monitoring provided. The issue of resources is crucial at this stage. Offenders who do not have sufficient means to compensate their victims will need an opportunity to earn money to pay back their debts; in order to resolve more structural underlying problems, services should be available that can assist in dealing with these; and there should be mechanisms that can be addressed in case of problems or complaints about the (course of) the process. As mentioned in section 2 of this chapter, an ombudsperson might provide an institution that could fulfill this task. Other resources that are necessary for a successful outcome are, for example, family counseling, education programs and community service facilities and will be discussed in the next chapter.
CHAPTER 4

QUESTIONMARKS

1 Introduction

In the previous chapters I have mentioned some of the risks that restorative programs may entail. Since restorative programs emerged partly as a reaction to the flaws of the traditional criminal justice system, it is important that they do not encompass similar defects. Several scholars have pointed to the fact, revealed by empirical research, that informal processes tend to formalize and ultimately become similar to the processes they were initially opposed to. In addition, even though the rhetoric surrounding restorative programs tends to be strong and brings about positive reactions, the actual implementation of such programs seems to be a slower process. The idea of a consensual, non-violent resolution of conflicts is attractive. Why, then, is the step towards administration of these programs so hard to take? One part of the answer is that restorative programs have disadvantages which need to be considered. The other part of the answer lies in the fact that the officials in the formal criminal justice system are generally not supportive of these new programs from the outset,

187 e.g. Abel, supra, note 2, at 268: "State informal procedures historically have displayed a recurrent, and apparently irresistible, tendency toward reformalization."

188 Adler, "The Future of Alternative Dispute Resolution: Reflections on ADR as a Social Movement", in The Possibility of Popular Justice, supra, note 162, at 81: "Both scholars and practitioners should be questioning why it is that the mediation movement's concepts and symbols are so powerful and attractive yet so very difficult to operationalize."
although surveys have shown that this attitude changes when officials realize the potential of restorative programs.\textsuperscript{189} As Volpe and Lindner explain:

\[\text{[S]everal factors may contribute to this phenomenon. Mediation is neither broadly known nor understood within the criminal justice system, so court staff often fail to identify appropriate cases. ... Furthermore, some view programs offering conciliation and restitution "as mere lenience allowed by soft-hearted judges." Moreover, the criminal justice community may resist mediation because it distrusts all programs outside of the system.}\textsuperscript{190}\]

A frequent problem, even when a program has been implemented and revealed its benefits, is that too few cases are referred and that those cases referred tend to be minor ones.\textsuperscript{191} This can lead to the programs remaining caught on the margins of the mainstream justice, which is not what they are designed for. In this chapter I will discuss the problems that restorative programs have faced and will try to outline ways to diminish the risks of such programs.

\textbf{3 \hspace{1em} Offender’s Rights}

One of the main concerns that opponents have expressed relating to the position of the offender, concerns the protection of his or her rights.\textsuperscript{192} They fear that when more attention is paid to the needs of victims, this will lead to a lapse in the protection

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{189} Mark S. Umbreit, \textit{Cross-national Study of Victim Offender Mediation: Final Report #7}, unedited, Department of Justice, Canada, September 1994, at 5
\item \textsuperscript{190} Maria R. Volpe and Charles Lindner, "Mediation and Probation: The Presentence Investigation", Mediation Quarterly 9 (1991) at 53
\item \textsuperscript{191} Umbreit, \textit{supra}, note 189, at 6
\item \textsuperscript{192} e.g. Brown, \textit{supra}, note 26, at 1281ff
\end{enumerate}
\end{footnotesize}
of the rights of the offender. The lack of safeguards to ensure due process, and to protect the right against self-incrimination and equal protection has been criticized. These issues are often not addressed by proponents of restorative programs. As Adler points out:

Paramount ... is the avoidance of any real mention of rights and the function of rights in determining just and fair outcomes to disagreements. Nor is the role of law as a source of rights critiqued either favorably or unfavorably.\(^{193}\)

He also goes on to explain this omission:

This lack of discourse is an interesting omission and understandable given the mediation movement's general goal of converting rights battles into an analysis and meshing of interests.\(^{194}\)

Participation in the mediation, *dading* or family conference process is based on voluntariness. The offender has the choice either to enter such a process and avoid prosecution, or to enter the formal system. If he or she does not consider him or her self responsible for the act or thinks him or herself not guilty, meeting with a victim may not feel right. In this situation, the case can be tried in the courtroom. The threat of a conviction and the stigmatizing effect of the formal process may, however, realistically influence the choice. Not the will to mediate, but the wish to avoid prosecution may be the main incentive to co-operate. Even though surveys have shown that after the mediation process offenders had a more positive view of it than previous to participation,\(^{195}\) the level of coercion forcing offenders to participate can still be

---

193 Adler, *supra*, note 188, at 73
194 *ibid*, at 74
195 See e.g. Umbreit, *supra*, note 107, and Umbreit et al., *supra*, note 96
questioned. As Van Ness explains, "there is no such thing as completely voluntary action in a coercive environment." He stresses, though, that the assumption of responsibility by the offender should be encouraged.

By choosing not to participate in the formal process, offenders waive some of their rights and accept responsibility for their acts. The reason offenders enjoy expansive rights under the formal process, is due to the inherently intrusive nature of the system. The state uses its powers against an individual and this intrusion can lead to the imposition of 'pain'. It is a deep-rooted principle of the formal system that the individual is accorded rights to protect him or her self against an abuse of power by the state. It has been argued, however, that even the highly formal system is often quite informal, rather than adversarial, in practice. Furthermore, it is often based on negotiation and bargaining in the service of the retributive ends of the retributive system, rather than the interests of fairness and due process. The claim of opponents of restorative processes that they do not promote due process and fairness, should be considered in this context.

The restorative programs that form the subject of this thesis are different to the formal system. For example, an individual will not be incarcerated, but rather the programs aim to encourage the offender to take responsibility and to attempt to make right the wrong done and the offender has the choice to terminate the process - at

---

196 Van Ness, supra, note 42, at 275
197 Ibid.
198 Although in New Zealand participation is encouraged for those who do not deny responsibility
199 Bazemore, supra, note 68, at 59, referring to J. Hackler, *The Possible Overuse of Not Guilty Pleas in Juvenile Justice* (monograph), 1991, Edmonton, Centre for Criminological Research, University of Alberta
200 Martin Wright "Can Mediation be an Alternative to Criminal Justice?", in *Restorative Justice: International Perspectives*, supra, note 68, at 236: "[T]he human rights implications are less serious
any stage - in the case of dissatisfaction with either the course of the process or the outcome. Thus, offenders do not waive their rights entirely. On the other hand, the lack of protection of their rights may have serious consequences in cases of serious power imbalances in the course of the alternative process. For example, if the victim is a large company, the offender may feel overwhelmed by that victim's power and feel not able to defend him or herself properly, particularly taken into account that in most cases the accused do not have access to counsel during the informal process. Or the mediator (or process facilitator) could be a strong and actively involved person, pressing through decisions that the offender feels are not just or unfair, as Brown argues:

Because [victim-offender mediation] stresses substantive outcomes rather than procedural regularity it cannot protect offenders from unfairly subjective assessment of their culpability or from well-intentioned but restrained exercise of discretion by program administrators.202

For such situations, there should be a safeguard to protect the offender against arbitrary decisionmaking by lay persons and coercion. If offenders choose to take part in a mediation process they choose the possibility of an alternative resolution to the case by weighing their chances in the courtroom against the possible outcome of the alternative. Not all offenders will be able, however, to make this decision on an entirely voluntary basis, simply because they do not have all the necessary information they need to make a fully informed decision, such as their chances in court. Again,

when it is a question of how much good a person should be required to do, rather than how much pain he or she should be required to suffer."

201 See for a discussion of this situation, infra, this chapter, section 3.

202 Jennifer G. Brown, supra, note 26, at 1288
offenders often do not even have access to a lawyer. As argued previously (chapter 2, section on dading), it may be a good idea to provide both victims and offenders with the opportunity to consult with a lawyer before they make a choice concerning participation in a restorative program.

**Juvenile Rights**

The issue of offender's rights has particular implications in the case of juvenile offenders. The concept of the Family group conference is sometimes criticized as undermining principles such as the presumption of innocence and the right against self-incrimination. Darby has expressed serious concerns about the position of children's rights under the South Australian 1993 Young Offenders Act. The concept of family group conference lies at the core of this act. Darby states that the Act "fails to give due weight to the accused child's particular vulnerability in the face of legal authority." The child is referred to a Conference by the police. This stage of the process is important, for the child has to admit responsibility to the police. If the child denies the charge, he or she will then encounter the formal justice process. Since children have a preference for informal mechanisms, the choice to admit to or deny the charge may be influenced by the knowledge that the option of engaging with the formal process is not an attractive one. Furthermore, juveniles may have the perception that they might be treated more favorably if they plead guilty and agree to an alternative process. The police may also use this to put pressure on the young offenders. Darby

---

203 Christopher Darby, "The Young Offenders Act 1993 (SA) and The Rights of the Child", (1994) 16, Adelaide L.R., at 303: "The introduction of family conferences encompasses a juvenile justice strategy which may be attacked at a number of levels for its infringement of children's rights."

204 Ibid., at 293
argues that the guilty plea can, therefore, have a coercive impact on the child. At this level the child is afforded very little protection of his or her rights.

The positive philosophical conception of the juvenile offender in the theoretical basis of the FGC is clear. However, this recognition merely reiterates the necessity of assuring children's rights given the problematic nature of access to this mechanism for reintegation and reconciliation. The fact, for example, that the process ... presumes the child's legal culpability upon a process which fails to recognize the child’s vulnerability compromises its conceptional foundations. Without guarantees of fundamental rights at the screening level it is difficult to see how such community based justice can be incorporated into the ‘current paradigm of state-centred justice’.

In New Zealand there has been discussion of this issue as well. The protection of the children's rights have not always been respected:

sections of the Act concerning young people's rights were not always followed, with the police sometimes failing to caution young people properly before questioning, failing to notify the parents as soon as young persons were taken to a police station, and/or taking statements before an adult nominated by the young persons was present.

There has been controversy concerning the question as to whether or not to limit the rights of the child at the police screening level. The police stated that since some young offenders “might be children by age, but by attitude, demeanor and physical

205 Kate Warner, “The Rights of the Offender and Family group conferences”, in Christine Alder and Joy Wundersitz, supra note 52, at 143, highlights another issue. She states that “[i]ssues of guilt and innocence are not always black and white (...). [T]here is evidence (...) that the summary of facts for prosecution files frequently allege that “the defendant fully admitted the offense” when this is not legally accurate.”

206 Darby, supra note 203, at 305

207 David Swain, “Family group conferences in Child Care and Protection and in Youth Justice in Aotearoa/New Zealand”, Int. J. of Law and the Family, 9 (1995), at. 180
size, they are adults … who cannot be treated with kid gloves", they should be given more leeway to deal with them. Even though some young offenders are more streetwise than other children of the same age, I do not agree that in order to allow for these exceptions, the rules to protect children’s rights should be narrowly defined.

In general children need more protection than adults for they have less understanding of the process:

> Even more than adult defendants, children … may be characterised by their powerlessness. They may generally be described as poorly educated, inarticulate and ignorant of the legal process. Indeed on almost every social indicator, child defendants can be characterised by their disadvantage.

I would suggest that the police should be very cautious in exercising their powers. They are in a more powerful position than the young offenders and should therefore take into consideration the rules that protect the offenders. Furthermore, in practice the infringement of the rights of a child forms seldom the basis for complaint, mainly because the juveniles believe that filing complaints will have negative consequences for them. Therefore, as Naffine points out:

---

208 Ibid., at 189. The Chief Executive of the Youth Affairs Ministry has stated that the Ministry would be opposed to any changes that would undermine the legal rights of young people. The section is designed to protect young people from their vulnerability, confusion and fear of authority.

209 Ibid.


211 Jenny Bargen, “Complaints Against the Police: The Trend to External Review”, (Book Reviews), Current Issues in Criminal Justice, July 1995, 7, 1, at 99, “not surprisingly … young people rarely report that they have been treated badly by the police. Even more rarely do young people utilise official avenues for making complaints about police behaviour towards them. How, then, can young people with genuine complaints … be encouraged to utilise official complaint mechanisms?”.
In the case of children it may be more useful to think in terms of protecting their interests by controlling the behavior of others, by placing obligations on those others, than by seeking to enhance the self-determination of child defendants ...  

For example, the presence of a third party at the police interview may be a good safeguard for the protection of the child’s interests. In New South Wales, Australia, where this requirement is in place, it appears to have ensured significant control on police discretion.  

The last point relating to the issue of children’s rights concerns the unique importance of upholding the rights of young offenders. As Darby points out:

It is difficult to see how a child in this situation can be expected to uphold the values of society without being accorded the basic rights to which a member of that society is entitled. The alienation and subordination of the will of the child at the police screening level is not consistent with ensuring that the child identifies with the values of the society into which they are to reintegrate. Such a denial of rights does not accord with the process of disapproval - nondegradation - inclusion fundamental to the object of reintegrative shaming underpinning the family conference.  

---

212 Naffine, supra note 210, at 16  

213 Ibid.  

214 Darby, supra note 203, at 306. See also Bargen, supra note 211, at 101: “Attitudes towards police inculcated through negative experiments with police during adolescence may well be carried over into adulthood.” Darby is most critical about the current situation of children’s’ rights under the YOA (SA) 1993. He concludes: “Consequently, the family conference has the potential not to heal but rather to be fundamentally scarring and alienating. This is particularly true given the alleged offender’s confrontation of the victim and the subsequent imposition of sanctions in the absence of direct judicial control”, Ibid., at 306. He states that there should not only be a recognition that “children can be the recipients of rights but that it is absolutely vital that they be guaranteed such rights”, Ibid., at 307
Since children control the future of society, the protection of their rights is not only fundamental to their existence, but that of society as a whole. Where defendants perceive themselves as blameless or innocent, a Conference should not take place. Otherwise, there is a risk of the process becoming an adjudicative forum. Besides, with an offender denying charges, the chances for victim satisfaction will dramatically decrease.

3 Place of the Victim in the Process

While crime victims are encouraged to consider the possible benefits ..., they must not be coerced into participation. To do so, even with the best interest of intentions, would be to revictimize them.\textsuperscript{215}

The very rhetorical appeal of the program may induce a sense of guilt in a reluctant victim. If the victim is asked to take part in a program that is intended to "enable the parties to communicate and reach some understanding, rather than to force an outcome", the victim may feel obstructionist, selfish or uncooperative if she chooses not to participate.\textsuperscript{216}

These two quotes reflect the issue of voluntary victim involvement. On the one hand, it may seem obvious that victims should not be coerced to participation. On the other hand, this is easier said than done, for victims may feel an obligation to participate. An issue that relates to all restorative programs is how to balance the rights and needs of the offender with the needs and wishes of the victim. Victims should have a voice in the process seeking to compensate their losses. Offenders should be

\textsuperscript{215} Umbreit et al., \textit{supra}, note 96, at 8

\textsuperscript{216} Brown, \textit{supra}, note 26, at 1266-1267
encouraged to accept responsibility, but not be forced to pay for more than is reasonable (than they are responsible for) or fair.

The participation of victims is valuable for several reasons, such as the offender having to face the consequences of the offense first hand, and therefore it is important that they are provided with accurate information about the program and the impact that this process can have on them. Participation should be voluntary so as to minimize the risk that the victim feels worse after attending the conference or mediation session. In family group conferences, where the offender is accompanied by family, the victim should have the opportunity to bring supporters so that he or she will not feel outnumbered by the people that attend on behalf of the offender.

Some victims prefer not to participate because they find the setting threatening and feel unable to face the offender so soon after the offense occurred, if at all. Additionally, some victims fear retaliation from the offender (or his or her supporters) at or after the meeting. In those cases it may be helpful if the victim provides a victim-impact statement; or if a representative of the victim participates in the process. One risk, especially in small communities with strong kinship and family ties, is that victims may experience pressure to accommodate to the needs of the offender. This issue needs special attention. Focusing on the future, rather than the past behavior of the offender may ignore the victim's need to discuss and understand the past. Another restriction may be the limited space for venting anger and frustration due to the focus on the future. Not all victims will be able to forgive their offenders and it would be

217 Mark Umbreit, cited in Van Ness and Heetderks-Strong, supra, note 25, at 80, suggests the following approach of victims might be appropriate: “Many victims have found it helpful to confront their offender, to let them know what it felt like and to have direct input into developing a restitution agreement. You may or may not find it helpful. If you would like to hear more about the program, you can then make your decision about whether you would like to get involved in it.”

218 Brown, supra, note 26, at 1277
a mistake to expect this from all of them. To do so may harm the victims once again and interfere with the process of healing that they are going through. Professional handling of this issue is essential. It may be appropriate to involve counselors to approach the victims and advise them about participation in a conference and the healing effect that it may bring. The participation of victims should, however, be instituted on a voluntary basis. I should mention, however, that victims do not always wish not to participate because of fear or uncomfortable feelings. In cases of property offenses in which the loss has been minor and the emotional loss negligible, for example, they often find a face-to-face meeting too complex and unnecessary for the settling of their financial compensation.219

**Cases of Domestic Violence**

Cases involving domestic violence form a special category. This type of offense is often of repetitive, and of an escalating and coercive character.220 The aim of the process that deals with this type of offense, be it the formal process or an alternative, should not focus on reconciliation between the parties, but rather on the safety of the abused party since the violence has to stop.221 Some argue that an informal process is a better setting for resolving personal conflicts than the courtroom. For women who have been abused it is often a big step to move towards the prosecution of their

---

219 Netzig and Trenczek, *supra*, note 97, at 253

220 Lerman, *supra*, note 160, at 75

221 *Ibid.*, at 100: "Often the goal of stopping violence is entirely at odds with the goal of reconciliation; to promote reconciliation may simultaneously perpetuate violence."
partners. Furthermore, a verdict may result in incarceration, which is not always what the woman wants. Obviously the formal system has no special rules for cases of domestic violence or abuse and does not offer a suitable process to deal with these specific problems. Economic circumstances, the presence of children, pressure from the neighborhood, school, family and sometimes even love may prevent a victim from wishing to separate from the abusive partner. The option of a program that is not as intrusive as the formal system may appeal to this particular type of victim. It also offers a process which is not as public and may therefore seem less threatening. It is hard to speak about domestic relations in a courtroom, which is another factor that can prevent victims from bringing a case to court. A more informal environment can make the victim feel more at ease. Additionally, in a negotiation or mediation process, the parties are forced to talk and listen to each other. There is space for more effective communication. A solution for the future can be discussed in an environment where both parties occupy an equal position. Both of them can be assisted by someone they trust or have confidence, be that a lawyer or someone else.

There are also arguments against the use of an informal process to deal with these cases. Historically, there has been reluctance to interfere with cases of domestic violence, even in the formal system, for families are seen as sacred and a romantic view of marriages persists. As a result of these perceptions, there has been widespread failure to recognize the reality that there are relationships that are not based on mutual trust and respect and in which one party is subject to the abuse of the other.

222 e.g. H.M. Verrijn Stuart, "Dading tussen strafrecht en civielrecht: Een uitweg voor mishandelde vrouwen", in Dading in plaats van het strafrecht, supra, note 150, at 34. See also Lisa G.Lerman, supra, note 160, at 68: "Almost invariably, wife abuse cases are regarded as controversies too trivial to deserve court attention."

223 For further discussion of the historical development in these cases, see Lerman, supra, note 160
This leads us to the following considerations concerning domestic violence offenses. First of all, one must question how equal the parties in this situation really are. Most of the times, there is an imbalance of power between the victim and the offender. The argument that both parties may be culpable and that therefore mediation is preferable to prosecution, because then the responsibilities of both parties can be addressed\(^{224}\) is, I think, a strange and dangerous assumption. In my view, if a mediation or negotiation process takes place, special attention must be paid to the probable inequality of the parties. The only way to get violence to stop is to send a clear message to the abuser that it is intolerable, and not that it may partly be a responsibility of the abused.

Furthermore, it can be questioned whether a structural resolution to the problems can be found, taking into account that an average mediation session takes only a few hours. Verrijn Stuart\(^{225}\) advocates a process that takes several weeks or months and that consists of several, small steps that are taken and reviewed which allows for the relationship to change over time. Another problem is that the violence itself is not always properly addressed\(^{226}\) and thus a resolution of the problem is not always searched for. In addition, the agreement does not always have legal force. The questions that need to be answered are how the problem can be solved and how the abused can be protected. These are difficult questions and there is probably no one right answer. In some cases, the participation by both parties in an informal process may help the communication between them and lead to a fruitful resolution without

\(^{224}\) Paul Rice, quoted in Lerman, supra, note 160, at 74, similarly the view of two mediators who argue that it is often hard to determine to what extent the victim has contributed to her own victimization and that therefore an interactive process is appropriate. Ibid., at 86-87

\(^{225}\) Verrijn Stuart, supra, note 222, at 36

\(^{226}\) Lerman, supra, note 160, at 84 mentions the fact that often the agreements do not reach the issue of violence, or address them only in euphemistic terms. She stresses that the issue should be addressed in the agreement; that there should be no conditions on the side of the victims, for the offender to stop the violence; that protective orders should be included if the victim so wishes. Ibid., at 106-107
state intervention. In other cases, the root of the problem may be ignored and no change in the behavior of the offender occur. In any case it is of major importance that the occurrence of violence is identified and recognized by both parties and that the agreement deal with the resolution of that particular issue. The monitoring of compliance with the agreement is also important. In cases of excessive or continuous abuse the best solution may be to separate the offender from the victim through the use of state coercion. The choice as to which process to use will depend on which one is most likely to offer effective protection against the abuse. In any case, the institution that deals with the case, be it the court system or a mediator or negotiator, should be specially trained for dealing with these particular problems and, the victim should have a choice between several options to decide how she wants the problem be dealt with.227

**If the Victim is a Large Company**

Another situation in which there is an imbalance in the power of the parties, occurs in cases of shoplifting from a large company. In these cases not the victim, but the offender may be in the weaker position. Large companies normally have more access to legal advise than the shoplifters. In the Netherlands where many cases of shoplifting were subject of the *dading* process a standard contract quickly emerged that companies would use for different situations. The offender does not have much choice but to cooperate, for otherwise the case will go to court. It is argued that the company takes over the role of the judge in deciding what will be an appropriate answer to the offense.228 The idea of a negotiated agreement is lost, especially when one takes into

---

227 *Ibid.*, at 60. During the screening level, the victim should be informed of what the process can offer her and which other legal options are available. If the victim opts for mediation, this should not prevent her from obtaining a protective order in addition, if necessary. *Ibid.*, at 102-103

228 See Van Driel, Mark, "Slachtoffer kan dader straf opleggen", Volkskrant, 16 November 1996
account that the offenders often do not have a lawyer to assist them. In the case of such powerful victims it is important that the offender has access to legal assistance. The company has to indicate how it wants its loss to be compensated. Some required a payment to a charity organization, other let the shoplifters work for the company for several hours, or prohibit them from entering the store for a specific length of time. 229

Studies have shown that much work remains to be done on achieving the aim of victim participation in and satisfaction with restorative programs. 230 First of all, meeting the needs of both the offender and the victim in the same process, can be problematic. 231 On the one hand, victims can use the threat of the court process in forcing their wishes to be met. On the other hand, however, - and this appears to be a bigger problem - studies have shown that a number of victims felt worse after attending a mediation or family conference session (despite having expressed satisfaction with the process and its outcome). 232 Several reasons were identified for this. Some victims felt that the offenders were not truly apologetic; some did not receive compensation or, when they did, it was a very slow process 233; in some cases of family conferencing the victim felt that the family of the offender were excusing the behavior of the

229 E. Lissenberg, "Biedt het strafrecht meer dan dading?", in Dading in plaats van het strafrecht, supra, note 150, at 110, 112

230 “Family group conferences can be either a positive or re-victimising experience for victims”, Ministry of Justice New Zealand, supra, note 54, at 28

231 There may be significant imbalance in power between the parties. This can arise from a variety of factors, such as education, personality, upbringing, or age. As well, this may be a result of the type of offense. There is no consensus yet on whether all types off offenses are suitable for alternative measures.

232 See e.g. Maxwell and Morris, supra, note 56

233 A proper system of follow-up may resolve this problem.
particular child; victims expressed fear of revenge by the offender on the victims for their participation in the conference; and some victims felt the outcome of the conference was too 'soft' on offenders, even though they had a say in the outcome.234

In Family group conferences, where participation by victims is not a necessary condition for the process to take place, "the goal of victim involvement is conceptually unclear and problematic." 235 Less than half of the victims in the survey attended the Conference. This, however, may not only be a consequence of their unwillingness to attend. Apparently, not all victims were notified in time to be able to attend, or some were not notified at all.236 This shows how offender-centered the process still is.237

The process facilitator plays an important role in assuring a balance between the needs and rights of offenders and the needs and wishes of victims. In case of dading, the parties' lawyers, who specialize in focusing on rights and obligations, may stress these issues more than in the mediation and conference models. This diminishes, however, the space for discussion of the emotional consequences of the crime, which is one of the specific strengths of restorative programs. So there need to be a balance between respecting the rights of the parties versus the space for discussion of other

234 See Swain, supra note 207, at 181 and Morris and Maxwell, supra, note 56, at 27.

235 Swain, supra note 207, at 181. The text of the New Zealand Children, Young Persons and their Families Act is too vague about the position of the victim. s208 states that any measures for dealing with offending by children or young persons should have due regard to the interests of the victims of that offending.

236 "[A]lthough the ... Act gave victims the entitlement to attend family group conferences, this means very little if in practice they are not informed of this right nor provided with sufficient opportunity to exercise it", Ministry of Justice New Zealand, supra note 54, at 34

237 See also Carol LaPrairie, supra note 55, at 89: "The emphasis on offenders in most diversion programs ... may have the unintended effect of marginalizing victims."
important factors. This is not an easy task and it takes time and training to appreciate the necessary balance. If the process is led by a volunteer; this may be easier than if the negotiations are controlled by lawyers, who have a different focus.

Research has shown that participants of Conferences became distressed when the process was not properly set up or managed.\textsuperscript{238} Not paying sufficient attention to the proper execution of the process can undermine the valuable features of restorative programs in general.

The officials that co-ordinate or participate in the Conference have a responsibility to maximize the advantages and to minimize the risks (to remain quality). Their role is crucial in bringing about satisfactory outcome and in determining the credibility of the process.\textsuperscript{239}

4 Disparity in outcome, Inequality between Similar Cases

Uniformity in sanctioning is one of the pillars of our criminal justice system. It provides certainty, and the knowledge that offenders who committed a similar misdeed received a similar sanction, gives us a sense of justice. In my view, particularly in the common law system, which is built on the principle that similar cases have equal outcomes, the influence of this principle may be very strong and the criticism against restorative justice on this point will be as severe. A criticism about restorative processes is that similar cases will not be treated equally; that offenders who face a vengeful victim, may receive a disproportionally harsh punishment, while offenders who meet with an understanding and forgiving victim, may ‘get off’ by giving an

\textsuperscript{238} Morris and Maxwell, \textit{supra} note 56, at 28

\textsuperscript{239} Ian Hassall, “Origin and Development of Family group conferences”, in \textit{Family group conferences: Perspectives on Policy \& Practice}, \textit{supra} note 124, at 33
apology.\textsuperscript{240} Yet, it is one of the features of the concept of restorative idea of justice to find the proper resolution of each individual case with each individual victim and each individual offender. Therefore, differences in outcome between similar cases may be justified. Furthermore, it must be said that few cases are in fact similar and, in my opinion, one can question how equally ‘similar’ cases are dealt with in the court system that rests on the principle that all similar cases are dealt with equally.\textsuperscript{241} Since the system is more concerned with the administration of law, rather than the causes of crime or the (social) context in which the offense occurred, it may lead to unequal results between cases that seem to be similar.

Depending on the type of offense, the circumstances and the behavior of the offender attention should be paid to disproportionately large disparities between similar cases. Substantial differences may give rise to feelings of unfairness both among offenders and victims and it would be wrong to assume that disparity can be justified with the argument that each case is different.\textsuperscript{242} Warner argues that justification of disparity in outcome is based on a number of questionable assumptions:

first, that the offender or victim will not subsequently become aware of inconsistent dispositions and become aggrieved; secondly, that there is no coercion and offenders will refuse to agree if aggrieved; and thirdly, that there is no public interest in consistent sentencing.

\textsuperscript{240} Inequality may also arise between similar cases in which in the one case the victim wishes to participate in the diversionary process, while in the other case the victim refuses so and the offender has no other option than to go to court.

\textsuperscript{241} See also Warner, \textit{supra} note 205, on this point, at 151: “It is acknowledged that the traditional legal system is not exemplary in these respects, that the practice of the law does not always measure up to the rhetoric (\ldots).” Also, Martin Wright, \textit{supra}, note 200, at 227

\textsuperscript{242} \textit{Ibid.}, at 148
Van Ness and Heetderks-Strong suggest that it may be appropriate to establish guidelines outlining the minimum and maximum levels of restitution for particular offenses. The guidelines will be based on the typical losses suffered by primary and secondary victims.243 Similarly, Wright argues for single quantums for offenses. If the victim would demand less for private reparation, the surplus would be owed to the community. Offenders who have committed similar wrongs, would thus pay equal amounts of reparation.244 This may be an effective safeguard against disproportional differences between similar cases. There should, however, be space, to take into account the specific features of each particular case and allow those in features to define an appropriate outcome. In my view this is one of the strengths of restorative programs: namely, that each case can have an outcome that seems most suitable and fair having regard to the participants. Excessively rigorous guidelines will limit the space for creativity. Both proposals do not address the question, for example, of what should happen if in a particular case the loss is unusually large. Should the offender pay for the actual loss, or is compensation of the standard amount sufficient? Should the answer to this question depend on the economic wealth of the offender? It may be unjust or unfair to have an offender with few economic means pay a similar amount as someone who has substantial means. The existence of strict guidelines would promote inequality in such a situation.

243 Van Ness and Heetderks-Strong, supra note 25, at 58
244 Wright, supra, note 200, at 236
5 Net-Widening

Net-widening occurs when the implementation of new programs leads to processing more offenders through the justice system than before. It means that control expands to more trivial cases; that offenders who would otherwise be given a warning for example, are now drawn further into the justice system. If it is used in this fashion, restorative programs will become a supplement, rather than an alternative to the mainstream system. According to Braithwaite, net-widening may be a good thing in certain circumstances. He states that if young offenders are confronted at an earlier stage with the processing of certain types of offenses (such as family violence by children) that are often not dealt with in a formal process, this may avoid future problems. In his opinion, it is useful to widen the nets in such cases and that conferences provide an appropriate process for doing so. At the same time, Braithwaite acknowledges that this assumption may be wrong. He suggests that research on this issue is needed.\footnote{John Braithwaite, supra note 134, at 202.}

Under the New Zealand system net-widening did not occur when family group conferences were introduced.\footnote{Morris and Maxwell, supra note 56, at 27} However, the Family group conferences more often resulted in the imposition of reparation, community service or some type of restriction of liberty than court processes did in similar cases. These more severe outcomes may also be considered as a kind of 'net-widening'.\footnote{Ibid.} However, doing community service or making reparation may be more meaningful in terms of educational impact for example, than getting away without a restorative measure. Again, the role of facilitator
is important for he/she will have to ensure against the imposition of unduly severe punishments. It may be helpful for them to have an idea of what kind of result would have occurred in similar cases, had they been dealt with in the courtroom. In addition, it is important that even if small numbers of hours of community service or participation in educational programs are imposed, a variety of resources should be available, so that the restorative process can refer the offender to the option that is most appropriate for him or her. This brings us to the last issue that I would like to mention in this chapter: that is the need for adequate resources.

6 Resources

[T]here are numerous examples of bold and creative social policy initiatives which fail, or succeed but imperfectly, because the necessary resources are not available.248

The lack of resources or sufficient funding is another aspect that can lead to the failure of the positive features of the restorative justice programs.

The implementation of the restorative justice programs alone is not enough to improve the quality of the system. In order to achieve the aim of meaningful solutions to problems related to crime, meaningful backup measures should be available. If the participants of a program decide that it would be best for the offender to participate in an educational program or do some kind of community service, there must be resources made available to provide for this. A network of agencies that co-ordinate and/or provide such programs or services has to be established.

248 Swain, supra note 207, at 199
The sharpest difference between assumptions and practice is the result of resource constraints: (family group conference) outcomes may be determined by the conference members, but their implementation either has to take into account limited state resources or to risk failure if the plans made are inconsistent with the resources which are made available.249

In addition, programs often suffer from unsecured funding, which threatens the chances for legitimization and credibility.250 If there is pressure on a program to prove itself, this may reinforce net-widening: in order to prove the benefits of the process, trivial cases may be drawn into the system.251 Taking into consideration that every program needs time to develop and to refine its measures, the need to prove the benefits of a process can lead to a difficult situation. Any initiatives should be given time and sufficient (financial) support to develop. There seems to be a consensus about that more cases should be referred to these alternative programs, for they are proving successful. One would think that obtaining funding would not be a problem. Unfortunately, even some developed programs, that have proved to result in satisfaction among the participants and the criminal justice system officials, have to struggle to secure funding.252

249 Ibid.

250 Bakker, supra, note 1, at 1509

251 Also: Van Ness, supra, note 42 at 272: "The court may respond by referring cases that are so minor they would have been dismissed otherwise. If offenders who fail to comply with the reconciliation agreement are then brought back before the judge and sentenced to jail or prison, the unintended effect of this arrangement, which was designed to be an alternative to incarceration, may actually be that more offenders are locked up."

252 Umbreit, supra, note 107, at 6


7 Evaluation

It is clear that restorative justice programs cannot be implemented without thorough consideration of important issues, such as resources, support, and the education of the public and of criminal justice officials. The strong rhetoric can only be translated into realistic, valuable and successful programs if resolutions are available to avoid or minimize the possible shortcomings. Program facilitators play an important role in securing the quality of the process and safeguarding the positions of the participants. Since mediation is a quasi-legal and quasi-therapeutic process, mediators need to possess the skills of both a legal advocate and those of a therapist.253 Their training, is therefore, of major importance:

It is not simply a transfer of technology. Teaching people to mediate is the key in this social-transformation theory, which links visions of informal justice to broader visions of social change. ... Training is the foundation for the strategies necessary to achieve these visions.254

Cases of domestic violence form a special category and mediators who deal with these kind of cases need special training. Lerman mentions some special skills that facilitators should have for handling these cases, including techniques for identifying cases of battery, the ability to counsel victims and abusers, a knowledge of local laws, law enforcement and court practices regarding domestic violence, an awareness of legal, mental health, and other services for people in violent relationships, awareness of

253 Lerman, supra, note 160, at 111

254 Vicki Shook and Neal Milner, "What Mediation Training Says -or Doesn't Say- about the Ideology and Culture of North American Community-Justice Programs", in The Possibility of Popular Justice, supra, note 162, at 29. Also Bakker, supra, note 1, at 1490: "Mediation Programs are only as good as the mediators they employ."
collateral services such as treatment programs for alcoholics; and a general
understanding of the political, psychological perspectives on wife abuse.255

Furthermore, a responsibility rests on the government to provide for the
necessary resources and support. Without sufficient funding and support, new programs
will not be able to prove their strengths and they will remain in the margins of the
criminal justice system.256 I will discuss the necessity of involvement of and support
by criminal justice officials and other stakeholders in the criminal justice system more
deeply in the following chapter.

255 Lerman, supra, note 160, at 111, also Braithwaite and Daly, supra, note 143, at 209
256 See, e.g. McElrea, supra, note 62, at 83
CHAPTER 5

ALTERNATIVES FOR SATISFYING JUSTICE?

New models with old philosophical roots will not a just society create, 
nor justice restore.257

[R]eforms in the process are largely pointless unless accompanied by 
equivalent attention to the ends for which the process is being used.258

In this final chapter I will summarize the differences between the retributive and 
restorative perspectives on justice and try to situate restorative programs in the current 
mainstream system. Both theories have strengths and weaknesses. The retributive 
system appears to have some serious shortcomings and I argue that it makes sense to 
investigate alternative initiatives.

The theory of restorative justice promotes some attractive ideas. As mentioned 
in chapter 1, we adhere a theory if we think it makes sense. I tend to incline more 
towards restorative principles than to the retributive ones. Restorative justice theory 
argues for responses to crime that seem more sensible to me than, for example, 
incarceration. On the other hand, I recognize certain shortfalls that can threaten these 
processes as well and I realise that the ideology is still young. It is hard to predict how 
widespread implementation of restorative principles will influence the quality of its 
programs. The results of research completed on the subject show that the practical

257 Kim Pate, "This woman's Perective on Justice. Restorative? Retributive? How about 
Redistributive?", Paper presented at the Achieving Satisfying Justice symposium, Vancouver, B.C., 
March 20-23, 1997

258 Packer, supra, note 4, at 365, further arguing that it is extremely important to answer the questions 
of "what" and "why", before asking "how". Ibid, at 366
implications of restorative justice have some (unexpected) disadvantages. Participants have not undividedly expressed positive feelings about the process and the availability of resources appears to be an important issue. Several questions remain to be answered: can restorative justice programs survive in our complex, modern and retributive-minded and educated societies with their focus on rules, rather than on context? can they be more than add-ons to the current system? What is needed to make them be favorable and credible options? Which cases will be suitable for diversion? Is an exclusively restorative criminal justice system feasible and/or desirable?

1 Retributive or Restorative?

In chapter 1, I have argued that some of the principles and values of the retributive criminal justice ideology (that is, principles as they were initially formulated by the classical and neo-classical school), such as the principles of uniformity in sentencing and certainty, have a strong appeal. I hope, however, to have also made clear the disadvantages of the current, retributive criminal justice system. The philosophy argues for a process that excludes the main stakeholders in crime - that is, victims, offenders and their communities - from meaningful, active participation, does not provide mechanisms to compensate victims and is abstract and dehumanized. The state deals with the case on behalf of the victim and on behalf of the society as a whole. Identification with the process is hard for its participants: everything is translated into legalistic, abstract terms and professionals decide what is important for resolution of the problem. The advantage of the system, however, is that through the uniform application of rules, predictability is promoted and that the equality among similar cases provides a sense of justice. In practice, though, sentencing does not take place in
the uniform way it is supposed to do.\textsuperscript{259} Apparently, the rhetoric of a theory cannot always measure up to the reality. The application of the current legalistic system leads to different results than it was designed for. This is an important indicator that criminal law can be very different in practice than it is in theory. Empirical research must therefore continue, so that it can bring to the surface how the law behaves in practice, rather than how it is supposed to behave.\textsuperscript{260} This is also important with regard to the practical implications of the restorative justice ideology. It is not unthinkable that in practice the implication of restorative principles lead to different results than they were designed for.

The Restorative Justice philosophy challenges the roots of the retributive ideas, it provides a different paradigm of criminal justice. It argues for an entirely different approach to crime and how we should deal with criminal cases. Restorative programs allow for active participation of the primary parties involved in crime. Communication between the parties aims at reaching a consensual settlement of the problem. The process is more dynamic and humanized and provides scope for creative solutions. It is acknowledged that all cases are different and that there may be outcomes that are different between cases that may seem similar on the surface. Offenders have the opportunity to accept responsibility and to make right the wrong done and victims have an opportunity to communicate to the offender what impact the offense had on the victim's live and to negotiate compensation. This may promote the healing process for the victims. Communities have a more inclusive position in the restorative justice paradigm. They are given responsibility in sanctioning and rehabilitating offenders, taking care of victims, providing a safe and peaceful environment.\textsuperscript{261} In chapter 3, I

\textsuperscript{259} See e.g. Wright, \textit{supra}, note 244, at 227

\textsuperscript{260} Vold and Bernard, \textit{supra}, note 4, at 363

\textsuperscript{261} See chapter 3, \textit{supra}, at 80-83
have pointed out that not all communities in our modern societies will be able to fit into this picture. Programs need to be designed in a way that makes them suitable for each community.

In this thesis I have described three different programs that reflect restorative justice principles. Mediation, dading and family group conferences are programs that have developed in different parts of the world at more or less the same moment in time. Obviously, the need for alternatives is recognized, but there is a difference in how important a place the initiatives are given in the mainstream justice system. New Zealand has gone furthest, by codifying the family group conference as the main locus for resolution of youth crime. In principle, all cases are referred to a conference. In the Netherlands, where historically more attention has been paid to alternative measures, the implementation of dading in all the judicial regions seems to be a matter of time and will, in principle, only be used for minor offenses. It is likely that the attitude of prosecutors will affect how much this alternative will be used in the future: whether it will develop into something widely accepted and used, or whether it will stay in the margins of the mainstream system. In Canada, where the idea of mediation has its origins, the process has - ironically - not gained major attention of criminal justice officials. I will discuss the importance of this issue in more depth in the following section.

On the basis of the three initiatives mentioned I have tried to outline the strengths and weaknesses of restorative justice initiatives. The rhetoric of restorative

---

262 See Michiel A. Rutten, "An Alternative Answer to Juvenile Delinquency", Paper presented at the Hungary Prison Administration Conference, 9-13 October 1994, at 1, describing the history of alternative measures, the most recent development being community service and restitution.
justice is strong and surveys have shown that participation in restorative programs has led to more satisfaction among victims, offenders, their families and also criminal justice officials. They expressed that they felt that justice had been done. This is not to say that there were no negative responses to be heard. It is of major importance that with the design of a program attention is paid to the possible weaknesses of restorative programs and to create mechanisms that safeguard the quality of the process. Taken into account, then, that for most of the disadvantages that restorative programs can entail, resolutions can be found - as described in chapter 4 - I come to the conclusion that restorative programs must be given scope to develop. Not only do they provide alternatives to a system that does not seem to be able to provide a high level of satisfaction among the stakeholders in the process, they also have their own, specific beneficial features, such as more meaningful victim involvement; the chance for offenders to make right the wrong and accept responsibility; and the scope for community involvement, which is crucial in creating more cohesion among community members and that may lead to a stronger community that is better able to deal with crime and its consequences: "to transform the dormant power and responsibility of citizens and communities into a dynamic form of service and justice." The identification of the participants with a restorative program is more likely, for the setting is more informal, the participants have a voice in the process and the procedures are focused on what really happened, rather than on the reduced and technically defined, legal reality. It brings justice closer to the participants. In my opinion, it is of major importance, though, that the implementation of restorative programs is accompanied by ongoing (empirical) research, investigating the strengths and

263 See supra, note 107, note 119, and note 126

264 Shonholtz, supra, note 167, at 237
weaknesses, so that the quality of a program can be improved. It is also important that the rights of offenders are safeguarded and that they do become subject to arbitrary judgment in a process that has no kind of judicial control.

If restorative justice programs are to be given a real chance, this will require commitment from criminal justice officials and the communities. They have to be willing to accept programs that are 'different' and cooperate in the process of making them a success. Further, new initiatives should not be implemented solely because they will save time and money.265

2 What Else Needs to Be Done?

The work ahead is to create policies that make the achievement and service of community justice an integral part of our daily lives.266

Perhaps we should not dream of dismantling the retributive system, but develop a parallel system with choices about which to use.267

Before a program is implemented, it is important that (representatives of) all stakeholders in the process have a voice in the design of it. Victim interest groups, probation officers and members of the local communities, in case of local programs, should be consulted.268 Even though the principles on which new initiatives will be

265 See Kay Pranis, in Achieving Satisfying Justice, Final Report on a Symposium on Implementing Restorative Models, Vancouver, B.C., March 20-23, 1997, Prepared by James Scott, at 55: "[r]estorative justice should be promoted on the basis of its values, not because it can save money." See also McElrea, supra, note 62, at 83
266 Shonholtz, supra, note 167, at 237
267 Zehr, supra, note 18, at, 216
268 Kim Pate, supra, note 257, "Some of the most effective approaches are those that are designed with, by and for the participants."
based are the same, every program will be designed to fit the local societal demands.\(^{269}\)

As I hope to have shown with this thesis, it is beneficial to exchange ideas with other countries and program designers; exchange experiences with the shortfalls that have surfaced; and to take advantage of good experiences. Although it should be noted - as mentioned before\(^{270}\) - that programs that work in some jurisdictions, may, for a variety of reasons, including cultural differences or a different approach of the system, not have the same beneficial effects in others. Comparative research and creativity are needed to design the program that is most responsive to the reality it has to serve:

"[t]he idea of restorative justice needs to be tested against the perspectives of a variety of cultures, traditions, and experiences."\(^{271}\)

Further, it does not make sense to implement new programs if the underlying values remain the same - retributive - ones. New and clear goals have to be defined and implemented. Evaluations must take place on a regular basis, so as to determine whether the goals have been reached and to investigate what the pitfalls and obstacles are.\(^{272}\) The goals must be revisited as well: are they still accurate? Need changes be made so that it is more responsive to the needs of the participants of the process? Do the goals as they are set connect with the practical reality? The implementation and further development will be a process of trial and error. We cannot foresee the practical implications and problems will arise, which will have to be resolved by the

---

\(^{269}\) Bazemore, \textit{supra}, note 68, at 58: "There is no single \textit{a priori} recipe for operationalizing restorative justice principles."

\(^{270}\) \textit{supra}, Chapter 1, at 26

\(^{271}\) Zehr, \textit{supra}, note 18, at 221

\(^{272}\) Van Ness, \textit{supra}, note 42, at 260-261: "[M]ore than models is needed - there is a continuing need for analytical precision in understanding the new vision, articulating purposes and outcomes, developing strategies for accomplishing those purposes, and evaluating results." Also, Hudson, "A Review of Research Dealing with Views on Financial Restitution", in \textit{Restorative Justice on Trial, supra}, note 66, at 275
operators of the programs, the communities, victims, offenders and their families.\textsuperscript{273} During the \textit{dading} process, for example, it became clear that when the participants were approached by a project staff member, the willingness to co-operate was significantly higher than when they were approached by the prosecutor with a letter.\textsuperscript{274} Such findings are typically found by executing a program and should be given thought when they occur. As Messmer and Otto described it, there is a "need for critical self-corrections as well as practical improvements in a complexly structured problem area."\textsuperscript{275} Possible weaknesses that all new initiatives encounter in early stages, should not prevent us from implementation of new ideas. We should keep in mind that the aim is to provide processes that are more responsive to the participants and lead to more satisfaction than the current system is able to and see the development of programs in this context:

\begin{quote}
[f]laws in the models and as-yet-unanswered questions should be viewed in the context of the less-than-perfect resolution of problems of crime in the current retributive justice system.\textsuperscript{276}
\end{quote}

In the early stage of the process it is important not to put too many rules around the experiment. By surrounding new programs with too many rules, the scope for creativity will diminish. If broad use of the program is aimed at, it is further essential that sufficient (human) resources are available to deal with the case load. Overburdened programs will not be able to provide the standard of quality that it would

\textsuperscript{273} Bazemore, \textit{supra}, note 68, at 58

\textsuperscript{274} See J. Soetenhorst-de Savornin Lohman, "Dading in plaats van het strafrecht: een troetelkindje", in \textit{Dading in plaats van strafrecht, supra}, note 150, at 30

\textsuperscript{275} Messmer and Otto, \textit{supra}, note 69, at 5

\textsuperscript{276} Bazemore, \textit{supra}, note 68, at 58
be able to when the case load was reasonable and it will cause burn-out of staff members. 277 There appears to be a tendency for criminal justice institutes to take over control over the process. State informal procedures historically have displayed a recurrent, and apparently irresistible, tendency toward reformalization. 278 We should keep in mind the underlying thought of having the least state intervention possible.

There should be an incentive for offenders to fulfill the agreement that was reached with the victim. For example, the dismissal of the case could be conditional. If the offender does not fulfill the contract (satisfactorily) the case would then go back to the criminal court. Or a penal sum could be included in the contract. In case of non-fulfillment, a civil action might be started. This requires action (and more energy) from the victim and it may therefore be better if the state takes responsibility in such a situation. The prosecutorial office could help the victim collecting the compensation if the offender appears to be slow in payment or unco-operative. As used to be the case in the Netherlands, the existence of a fund to repay victims from who have not received the financial compensation of their offenders that was agreed upon, could be a valuable option. 279 The victim is compensated by the fund and the state collects the money from the offender, depositing it in the fund. This would not even create a new function for the state, for it operates similarly when collecting fines. Such a fund would create security for victims that they will be compensated and offenders know that they will be made to pay whatsoever.

277 Messmer and Otto, supra, note 69, at 5

278 Ibid. Also, Richard Abel, supra, note 2, at 269

279 See chapter 2, section 3 on dialing
Commitment of Criminal Justice Officials

[Victim-offender reconciliation] is not an easy product to sell. The adversarial, retributive, rights based system is very strongly entrenched in the thinking of the various stakeholders in the criminal justice system. Accordingly, these stakeholders invariably resort to this framework in the order to make judgments about the place or value of such a programme.\(^{280}\)

Despite the positive outcomes of surveys investigating the satisfaction among victims, offenders and criminal justice officials, the implementation of restorative programs is not widespread in Canada. Re-education of the public, politicians, and even the people who work in the field is essential:

One of the biggest barriers to overcome is the false belief among the public, politicians and even some criminal justice officials that tinkering with penalty levels or other parts of the system will improve community safety in Canada. Accurate information which contradicts this view must be made known, without discounting people's legitimate concerns.\(^{281}\)

Measures other than the implementation of a program, should be taken to make restorative programs work. Most importantly, the criminal justice officials have to be supportive. If they do not value the program as much as the formal system, only marginal cases will be referred and the risk of netwidening becomes a serious issue. Not only must they say that they support the initiatives, they have to act accordingly. As Joe Hudson has found, support for the concept is no guarantee of putting it into

\(^{280}\) Sally Kift, "Victims and Offenders: Beyond the Mediation Paradigm?", Australian Dispute Resolution Journal, February 1996, at 75

\(^{281}\) Satisfying Justice, supra, note 3, at 186.
practice successfully. The legal scope for alternative measures is not as important as a change in attitude of the people who work in the field. In Finland, for instance, where the implementation of alternative measures has led to a drastic decrease in incarceration rates, it is believed that "these changes have been achieved not so much through legislative measures but through close collaboration and cooperation among lawyers, the judiciary and prosecutors." It is crucial that the crown is willing to empower local communities to resolve their conflicts at the expense of its own power. The implementation of restorative programs requires "a fundamental shift in the power related to who controls and owns crime in society - a shift from the state to the individual citizen and local communities."

In practice, this would mean fundamental changes in management and reorganization of priorities as regards resource allocation, job descriptions and performance evaluations. Mediators have to be trained. Special training may be needed for cases involving victims and offenders who know each other, or even have a relationship with each other. Special attention need to be paid to dealing with young offenders. A token of neutrality of the facilitator is essential for the

---

282 Hudson, supra, note 272, at 275: "What people say, and especially justice officials, and what they do are seemingly two very different forms of reality. In Canada, for example, despite strong support and endorsement for using restitution in the justice system by a variety of Parliamentary Commissions ..., Sentencing Commissions ..., Supreme Court decisions ..., national conferences ..., and legislative provisions ..., little substantive progress has been made at using restitution in the justice system."

283 See Satisfying Justice, supra, note 3, at 184; and Juhani Iivari, "The Process of Mediation in Finland: A Special Reference to the Question "How to get Cases for Mediation?"", in Restorative Justice on Trial, supra, note 66, at 137 ff, emphasizing that co-operation with officials has been vital for mediation in Finland.

284 Darrel Heidebrecht, quoted in Achieving Satisfying Justice, supra, note 3, at 56, is sceptical as to whether the crown will be willing to do this. Also, P.G. Wiewel, "Dading in plaats van strafrecht", Ars Aequi 46 (1997) 6, at 415, stating that criminal justice officials have to be willing to part with what it was entrusted with.

285 Umbreit et al., supra, note 96, at 162

286 Bazemore, supra, note 68, at 56
perception of fairness that the participants have of the process. This is also a factor that can and has to be evaluated and controlled. It also means that the almost exclusive focus on the offender and offender-directed services and surveillance needs to change so that involvement of communities and victims is accommodated. Furthermore, there must be resources that create opportunities for offenders to earn funds to compensate the victim. Employers will need to be engaged. McElrea very clearly summarized the importance of the issue of resources and I will therefore quote his concern about it:

     The chief danger is that restorative justice will be seen as a means of saving expenditure on courts and prisons and will be adopted for fiscal reasons, without the recognition that the community requires financial resources if it is to take on this new role. ... It would be better not to make any change at all than to do so without proper funding.287

As may be clear, the implementation of new initiatives demands structural and some radical changes in the operation of the criminal justice system. In my opinion, it is not surprising that the criminal justice officials are hesitant in accepting new roles and new principles. They have had to deal with new 'panacea' resolutions before, such as treatment or bootcamps, which failed to measure up to the expectations. They must be convinced about the value and accept the new underlying principles of the restorative ideology, for otherwise the measures that are meant to be primary restorative sanctions, may be used as punitive add-ons. In other words, criminal justice officials have to embrace the restorative principles and use them for restorative purposes, not to meet retributive ends.288

287 McElrea, supra, note 62, at 83
288 Bazemore, supra, note 68, at 59-60
3 Which Cases?

Another preliminary issue to be considered in discussing alternatives to the mainstream criminal justice system, is what cases are suitable for referral to the alternate process. One must appreciate differences between the various alternatives. By the nature of the processes - that is, based on the participation of both offenders and victims - mediation and dading only involve offenses with individualized victims. Family group conferences can also take place when the community as a whole was affected by the crime, for the setting of that process allows for the participation of more people involved. It seems to be widely accepted that diversion of criminal cases from the court system can only take place in cases involving minor property offenses or minor assault and that they will be most effective in cases involving first offenders. They will be most attracted by the prospect of the avoidance of a criminal record and the negative side-effects of the court process and a conviction. In addition, diversion can have beneficial consequences for young offenders. They can stay out of the stigmatizing system and receive a chance to make right the wrong and make a new start. As mentioned before, incarceration especially creates a group of outcasts and it is important to keep as many (young) people out of institutions as possible.

Offenders that have committed more serious offenses need to be prosecuted by the state in the name of society. It is not clear how the direct victim fits into that picture, although victims in the Netherlands have to opportunity to participate in the formal process as a *partie civile* and bring a simple, clear-cut claim in the criminal process.\(^{289}\) Processes such as mediation have also been used in cases of more serious offenses, but then it took place at the pre- or post-sentencing stage of the criminal

\(^{289}\) Terwee Act, *supra*, note 149
A difficulty with more serious crimes may be that the offenders have a more complex, problematic background. These offenders are often victims themselves and it can be questioned how the mediation process can possibly deal with these cases, especially when one takes into account the typically short timeframe of the process. Further, since the result of the process can include the deprivation of liberty of an individual it is important that this individual be given the safeguards of fair and due process. A family group conference may have more potential in dealing with such cases than the more limited mediation or dading processes. The (extended) family members or supporters may be able to come up with solutions of the more complex problems. More complex cases will demand more skills from the process facilitators.

4 Conclusion

It is clear that the mainstream criminal justice system deals with many problems which it does not appear to be able to resolve within the traditional paradigm. It therefore makes sense to give thought to alternatives to this system. In this thesis I have argued that a new vision of justice, i.e. restorative justice, may provide a starting point for a new direction with new programs and I have discussed the dynamics of three programs that reflect restorative principles, that is, mediation, dading and family group conferencing.

290 The Fraser Region Community Justice Initiatives Association in British Columbia, Canada, for example, has successfully run a Victim Offender Mediation Program involving the most serious crimes in the Canadian Criminal Code. since 1991.

291 Roger Bullock, Michael Little and Spencer Millham, "Applying Restitutive Justice to Young Offenders: Observations from the United Kingdom", in Restorative Justice on Trial, supra, note 66, at 376
Victims, the long-ignored parties in the retributive, mainstream process obtain a voice in the process and offenders are held accountable for their acts. The involvement of communities is another key element of the new vision. Their participation is essential for the recreation of bonds and the reflection of local values and norms. Restorative programs can lead to more satisfaction among victims, offenders and their communities and add to the credibility of the criminal justice system as a whole. The set-up of these programs allow for a more dynamic approach of the offense, the participants have a voice in the determination of the outcome. Rather than focussing on the bare facts of a case and on fixing blame, social factors surrounding the offense can be taken into consideration. The process allows for a more consensual approach of what is perceived as fair and just. Diversion programs provide speedier resolution of the case and more accessible justice, adding to more credibility of the criminal justice system as a whole. Both victim and offender can benefit from making a negotiated agreement.

Not all goals may be reached at the same time, but an important message is sent out: By constructing an alternative vision of justice, the legal system is persistently criticized.292

The task we have ahead of us now is that of implementing new initiatives and evaluating their practical impact. We will have to compare the impact on satisfaction among the participants of restorative programs to their opinion on their role in the formal process. Umbreit293 found more satisfaction and higher level of feelings that justice had been done under participants of restorative programs, but as Maxwell and

292 Messmer and Otto, supra, note 69 at 9

293 Umbreit, supra, note 107
Morris\textsuperscript{294} found in New Zealand, there have also been expressions of dissatisfaction. It remains to be seen how the lack of protection of the offenders rights will influence the level of fairness and justice and if the absence of securing uniformity will lead to disproportional inequality. Both theories will probably remain to have strengths and weaknesses and it may therefore be an option to have them operate in a parallel way.\textsuperscript{295} Through experience it will become clear which cases are suitable for diversion in restorative programs and which cases are more suitable for the formal system. What it will probably come down to is that minor cases will be processed through diversion, while the more serious cases, in which more complex issues are involved, will be treated in court. Since the court system will be relieved from a large workload that the minor cases cause, they will have more time to spend on the more complex cases. These are a lot of promises of the implementation of restorative justice principles in the criminal justice system. In my view, it is usefull to continue implementing new initiatives, while realizing that:

yes, the transitional phase will be unsatisfactory. ... As with the traditional system, there is no clear way of resolving all the competing requirements, and restorative justice is not necessarily the last word.\textsuperscript{296}

\textsuperscript{294} Maxwell and Morris, \textit{supra}, note 126

\textsuperscript{295} See Zehr, \textit{supra}, note 18, at

\textsuperscript{296} Wright, \textit{supra}, note 200, at 237
Bibliography

RESTORATIVE JUSTICE/CRIMINAL JUSTICE THEORY

Articles


Braithwaite, John, "Thinking Harder about Democratising Social Control", in Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism? eds., Christine Alder and Joy Wundersitz, Canberra, Australian Institute of Criminology, 1994


Christie, Nils, "Conflicts as Property", British Journal of Criminology 17 (1977), 1-15


House of Commons, Canada, Renewing Youth Justice; Thirteenth Report of the Standing Committee on Justice and Legal Affairs, April 1997


Jackson, Michael, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", U.B.C. Law Review 1992 (Special Edition), at 181


Shonholtz, Raymond, "Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program", in *The Possibility of Popular Justice*, Sally E. Merry and Neal Milner, eds., Michigan, Michigan University Press, 1993, 201-238


Books


Church Counsel on Justice and Corrections, *Satisfying Justice: Safe Community Options that Attempt to Repair Harm form Crime and Reduce the Use the Length of Imprisonment*, Ottawa, The Church Counsel on Justice and Corrections, 1996


Morris, Catherine, and Andrew Pirie, *Qualifications for Dispute Resolution: Perspectives on the Debate*, Victoria, UVic Institute for Dispute Resolution, 1994


**FAMILY GROUP CONFERENCES**

**Articles**

Bouwman, Jake and Glen Purdy, "Sparwood Youth Assistance Program," Paper presented at Dawn or Dusk in Sentencing; Conference of the Canadian Institute for the Administration of Justice, Montreal, April 1997

Carroll, Milt, "Implementational Issues: Considering the Options for Victoria", in *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* eds., Christine Alder and Joy Wundersitz, Canberra, Australian Institute of Criminology, 1994


Polk, Kenneth, “Family Conferencing: Theoretical and Evaluative Concern”, in *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* eds., Christine Alder and Joy Wundersitz, Canberra, Australian Institute of Criminology, 1994, 123-140

Sandor, Danny, “The Thickening Blue Wedge in Juvenile Justice”, in *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* eds., Christine Alder and Joy Wundersitz, Canberra, Australian Institute of Criminology, 1994, 153-166


Warner, Kate, "The Rights of the Offender and Family Group Conferences", in Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism? eds., Christine Alder and Joy Wundersitz, Canberra, Australian Institute of Criminology, 1994, 141-152

Books

Alder, Christine, and Joy Wundersitz, eds., Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism? Canberra, Australian Institute of Criminology, 1994


MEDIATION

Articles

Bakker, Mark W., "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System", North Carolina Law Review 72 (1994) 1479-1526


Kift, Sally, "'Victim and Offender: Beyond the Mediation Pardigm?' Australian Dispute Resolution Journal, Vol. 7, No. 1 (1996) 71-87


Umbreit, Mark S., "Canadian Component (Enhancement Grant) Cross-National Study of Victim Offender Mediation, Final Report #7", Unedited, Department of Justice, Canada, September 1994


Books


DADING

Articles

Baudoin, Yvo, "De firma dading", in Dading in plaats van strafrecht, (Proceedings of A symposium held at the University of Amsterdam, April 1992), Wiewel, P.G. et al., eds., Arnhem, Gouda Quint, 1993, 155-169

Baudoin, Yvo, "Dading in Nederland? Reactie op een beleidsnotitie", Nederlands Jursiten Blad 36 (10 October 1997), 1670-1674
Cleiren, C.P.M., "De lotgevallen van het recht op vervolging bij strafrechtelijke
dading", in Dading in plaats van strafrecht, Wiewel, P.G. et al., eds., Arnhem, Gouda
Quint, 1993, 117-134

Emmen, Mieke, "Buro’s voor Rechtshulp & dading: een toekomst?" Rechtshulp 10
(1997) 2-5

Emmen, Mieke and H.M. Hielkema, "Strafrecht en alternatieve geschilbeslechting",
Rechtshulp 8/9 (1995), 40-46

Griffiths, J., "Dading in plaats van strafrecht; Rechtssociologische reflecties op het idee
van dading in plaats van strafrecht", in Dading in plaats van strafrecht, Wiewel, P.G.
et al., eds., Arnhem, Gouda Quint, 1993, 135-154

Leijten, J.C.M., "Strafrecht moet laatste redmiddels blijven", NRC Handelsblad, 2
December 1997

Lissenberg, E., "Biedt het strafrecht meer dan dading?", in Dading in plaats van
strafrecht, Wiewel, P.G. et al., eds., Arnhem, Gouda Quint, 1993, 107-116


Schreuder, Arjen, "Over de afgrond heen", NRC Handelsblad, 23 December 1995

Soetenhorst-de Savornin Lohman, J., "Dading in plaats van het strafrecht; Een
troetelkindje", in Dading in plaats van strafrecht, Wiewel, P.G. et al., eds., Arnhem,
Gouda Quint, 1993, 27-44

Sorgdrager, Winnie, "Beleidsnotitie inzake (schade)bemiddeling in het strafproces", 24
maart 1997

Sorgdrager, Winnie, "Uitvoering Motie Van der Burg/Dittrich inzake dading;
beleidsnotitie", 23 October 1997

Stichting Garantiefonds Benadeelden, "Jaarverslag 1996", Amsterdam, October 1997

Stutterheim, R.H., and P.G. Wiewel, "Een variatie op het thema
slachtofferbescherming; De dader-slachtofferschaderegeling", in Dading in plaats van
strafrecht, Wiewel, P.G. et al., eds., Arnhem, Gouda Quint, 1993, 13-26

Tweede Kamer der Staten-Generaal, vergaderjaar 1996-1997 25,000 VI, No. 23 and 27

Van Driel, Mark, "Slachtoffer kan dader straf opleggen", Volkskrant, 16 November 1996

Van Dunné, J.M., "Privatisering van het strafrecht: beeld en spiegelbeeld", in Dading in plaats van strafrecht, Wiewel, P.G. et al., eds., Arnhem, Gouda Quint, 1993, 45-68


Van Zijst, Maud, "De vaststellingsovereenkomst", Nederlands Juristen Blad 29 (26 August 1993) 1049-1052

Verrijn Stuart, H.M., "Dading tussen strafrecht en civielrecht; een uitweg voor mishandelde vrouwen", in Dading in plaats van strafrecht, Wiewel, P.G. et al., eds., Arnhem, Gouda Quint, 1993, 33-44


Wiewel, P.G., "Dading in plaats van strafrecht; Een voorbeschouwing op Sorgdragers beleidsnotitie", Ars Aequi 46 (1997) 6, 412-417

Schreuder, Arjen, "Goed Gesprek met dader 'zinloos' geweld" (Comments on article of F. Denkers in Speling), NRC Handelsblad, 9 January 1998

Books

Begeleidingsgroep experiment strafrechtelijke dading, Dading in plaats van strafrecht; Verslag van de begeleidingsgroep voor het experiment Strafrechtelijke Dading, Amsterdam, Humanitas, 1991


## APPENDIX I

### Retributive versus Restorative Justice

#### UNDERSTANDINGS OF JUSTICE

<table>
<thead>
<tr>
<th>Retributive Lens</th>
<th>Restorative Lens</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Retributive Lens</strong></td>
<td><strong>Restorative Lens</strong></td>
</tr>
<tr>
<td>Blame-fixing central</td>
<td>Problem-solving central</td>
</tr>
<tr>
<td>Focus on past</td>
<td>Focus on future</td>
</tr>
<tr>
<td>Needs secondary</td>
<td>Needs primary</td>
</tr>
<tr>
<td>Battle model; adversarial</td>
<td>Dialogue</td>
</tr>
<tr>
<td>Emphasizes differences</td>
<td>Searches for commonalties</td>
</tr>
<tr>
<td>Imposition of pain considered normative</td>
<td>Restoration and reparation considered normative</td>
</tr>
<tr>
<td>One social injury added to another</td>
<td>Emphasis on repair of social injuries</td>
</tr>
<tr>
<td>Harm by offender balanced by harm to offender</td>
<td>Harm by offender balanced by making right</td>
</tr>
<tr>
<td>Focus on offender; victim ignored</td>
<td>Victims’ needs central</td>
</tr>
<tr>
<td>State and offender are key elements</td>
<td>Victim and offender are key elements</td>
</tr>
<tr>
<td>Victims lack information</td>
<td>Information provided to victims</td>
</tr>
<tr>
<td>Restitution rare</td>
<td>Restitution normal</td>
</tr>
<tr>
<td>Victims’ “truth” secondary</td>
<td>Victims given chance to “tell their truth”</td>
</tr>
<tr>
<td>Victims’ suffering ignored</td>
<td>Victims’ suffering lamented and acknowledged</td>
</tr>
<tr>
<td>Action from state to offender; offender passive</td>
<td>Offender given role in solution</td>
</tr>
<tr>
<td>State monopoly on response to wrongdoing</td>
<td>Victim, offender and community roles recognized</td>
</tr>
<tr>
<td>Offender has no responsibility for resolution</td>
<td>Offender has responsibility in resolution</td>
</tr>
<tr>
<td>Outcomes encourage offender irresponsibility</td>
<td>Responsibility behavior encouraged</td>
</tr>
<tr>
<td>Rituals of personal denunciation and exclusion</td>
<td>Rituals of lament an reordering</td>
</tr>
<tr>
<td>Offender denounced</td>
<td>Harmful act denounced</td>
</tr>
<tr>
<td>Offender’s ties to community weakened</td>
<td>Offender’s integration into community increased</td>
</tr>
<tr>
<td>Offender seen in fragments, offense being definitional</td>
<td>Offender seen holistically</td>
</tr>
<tr>
<td>Sense of balance through retribution</td>
<td>Sense of balance through restitution</td>
</tr>
</tbody>
</table>
Balance righted by lowering offender  
Justice tested by intent and process  
Justice as right rules  
Victim-offender relationships ignored  
Process alienates  
Response based on offender’s past  
Repentance and forgiveness discouraged  
Proxy professions are the key actors  
Competitive, individualistic values encouraged  
Ignores social, economic, and moral context of behavior  
Assumes win-lose outcomes  

Balance righted by raising both victim and offender  
Justice tested by its “fruits”  
Justice as right relationships  
Victim-offender relationships central  
Process aims at reconciliation  
Response based on consequences of offender’s behavior  
Repentance and forgiveness encouraged  
Victim and offender central; professional help available  
Mutuality and cooperation encouraged  
Total context of behavior  
Makes possible win-win outcomes

UNDERSTANDINGS OF CRIME

Retributive  
Crime defined by violation of rules  
Harms defined abstractly  
Crime seen as categorically different from other harms  
State as victim  
State and offender seen as primary parties  
Victims’ needs and rights ignored  
Interpersonal dimension irrelevant  
Confictual nature of crime obscured  
Wounds of offender peripheral  
Offense defined in technical, legal terms

Restorative  
Crime defined by harm to people and relationships  
Harms defined concretely  
Crime recognized as related to other harms and conflicts  
People and relationships as victims  
Victim and offender seen as primary parties  
Victims’ needs and rights central  
Interpersonal dimensions central  
Confictual nature of crime recognized  
Wounds of offender important  
Offense understood in full context; moral, social, economic, political
### UNDERSTANDINGS OF ACCOUNTABILITY

<table>
<thead>
<tr>
<th>Retributive</th>
<th>Restorative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wrongs create guilt</td>
<td>Wrongs create liabilities and obligations</td>
</tr>
<tr>
<td>Guilt absolute, either/or</td>
<td>Degrees of responsibility</td>
</tr>
<tr>
<td>Guilt indelible</td>
<td>Guilt removable through repentance and reparation</td>
</tr>
<tr>
<td>Debt is abstract</td>
<td>Debt is concrete</td>
</tr>
<tr>
<td>Debt paid by taking punishment</td>
<td>Debt paid by making right</td>
</tr>
<tr>
<td>“Debt” owed to society in the abstract</td>
<td>Debt owed to victim first</td>
</tr>
<tr>
<td>Accountability as taking one’s “medicine”</td>
<td>Accountability as taking responsibility</td>
</tr>
<tr>
<td>Assumes behavior chosen freely</td>
<td>Recognizes difference between potential and actual realization of human freedom</td>
</tr>
<tr>
<td>Free will or social determination</td>
<td>Recognizes role of social context as choices without denying personal responsibility</td>
</tr>
</tbody>
</table>

APPENDIX II

A Restorative Justice Yardstick

1. Do victims experience Justice?
   - Are there sufficient opportunities for them to tell their truth to relevant
     listeners?
   - Are they receiving needed compensation or restitution?
   - Is the injustice adequately acknowledged?
   - Are they sufficiently protected against further violation?
   - Does the outcome adequately reflect the severity of the offense?
   - Are they receiving adequate information about the event, the offender, and the
     process?
   - Do they have a voice in the process?
   - Is the experience of justice adequately public?
   - Do they have adequate support from others?
   - Are their families receiving adequate assistance and support?
   - Are other needs -material, psychological, spiritual- being addressed?

2. Do offenders experience justice?
   - Are they encouraged to understand and take responsibility for what they have
     done?
   - Are misattributions challenged?
   - Are they provided encouragement and opportunity to make things right?
   - Are they given the opportunity to participate in the process?
   - Is there encouragement toward changed behavior (repentance)?
   - Is there a mechanism for monitoring or verifying changes?
   - Are their own needs being addressed?
   - Are their families receiving support and assistance?

3. Is the victim-offender relationship addressed?
   - Is there opportunity for a meeting, if appropriate -either direct or therapeutic?
   - Is there opportunity and encouragement for an exchange of information -about
     the event, about one another?
   - Are misattributions being challenged?
4. **Are community concerns being taken into account?**
   - Is the process and the outcome sufficiently public?
   - Is community protection being addressed?
   - Is there need for some restitution or symbolic action for the community?
   - Is the community represented in some way in the process?

5. **Is the future being addressed?**
   - Is there provision for solving the problems which led up to this event?
   - Is there provision for solving problems caused by this event?
   - Have future intentions been addressed?
   - Is there provision for monitoring, verifying, and troubleshooting outcomes?