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Canada

FROM CRIMINAL JUSTICE TO RESTORATIVE JUSTICE: A MOVEMENT SWEEPING THE WESTERN COMMON LAW WORLD

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1. Introduction

All societies have to constantly grapple with how they are to deal with those individuals and groups in society who offend against the rules of conduct that have been laid down by the society in which they live. The rules of conduct which societies believe are the most important to which to adhere are usually given the imprimatur of criminal acts and placed in criminal codes or legislation. The most serious of these acts, or the multiple repetitions of less serious ones, usually attract heavy penalties, the most serious of which in countries that still impose capital punishment, are the loss of life, and in those that do not do so, life imprisonment. Other offences are similarly ranked and placed upon a continuum from the most serious to the less serious (which may warrant a fine or caution). Each society differs in the types of conduct that warrants punishment, especially imprisonment, and this is particularly so at the lesser ends of the scale when dealing with smaller offences and those who continue to commit them.

This paper will outline a brief history of the criminal law in England and other common law jurisdictions in the western world and the changing attitude of those countries towards crime; culminating in the movement today towards restorative justice, a concept that is endorsed by the United Nations and that is sweeping the world. Accordingly, the paper will first examine the changing face of the criminal justice system in England and elsewhere and how this fits with theories of punishment. Next the paper will explore what is meant by restorative justice, how it operates in communities especially in Canada but drawing on research from communities around the western world. Finally the paper with highlight the major opportunities and challenges of Restorative Justice Processes and look towards the future development of these processes in Canada, the Western World and Internationally.

2. A Brief History of Criminal Law and Punishment in England

Different Theories of Punishment and their Relationship to Retributive Justice and Restorative Justice.

John Braithwaite[1], one of the leading exponents of Restorative Justice, outlines his theory of changing attitudes towards punishment in his influential article, *A Future Where Punishment is Marginalised*. He posits the theory that the more punitive the system, the greater the demonstration of weakness by the state, organisation or parent who is imposing it. Those States who are fearful and insecure are more likely to resort to harsh punishment that those states who are more secure. He evidences the notorious and public hangings carried out in Britain and France before the rise of the nation state. Punishments were harsh, cruel and public because the state did not have a sufficiently large apparatus to regulate the population or indeed to catch most criminals given the lack of a police force and very weak institutions. Therefore, he hypothesises that the brutal public punishments were a show of strength designed to hide the underlying weakness of the ruling elites, with the hope of creating deterrence. Interestingly even with very harsh penalties, the crime rate remained very high all through the middle ages.

In the cases of lesser offences, like vagrancy and prostitution, other methods were employed primarily in the form of the creation of the workhouses of England. The workhouses were not specifically designed for petty criminals but they housed many of them.

Indeed the first record of a workhouse dates back to 1652 which declared its stated purpose to be, "for the poor of the city and also a house of correction for the vagrant and disorderly people within this city."(sic). A previous workhouse, set up in 1631, in Abigindon was built in order to have "erected for our borough a workhouse to set poor people to work."[2] (sic) However as time went on, more and more workhouses were built particularly to deal with the real rise in poverty, homelessness and crime as England moved from an agrarian society towards an industrialised one, where many people were dispossessed of land and access to food. As the costs of the workhouses soared, conditions of the workhouses were increasingly horrific to dissuade people from entering them. Able-bodied people were required to work, if there was work, and in some cases, subsidised wages were paid to encourage work. It should be clear, that although they had started out life as being a means of dealing with vagrants and other petty criminals, they did not end as such. Many reforms to the *Poor Laws* and to the living conditions in the workshouses took place. People were free to leave the workhouses when they wished, and indeed due to the

[1] John Braithwaite, A Future Where Punishment is Marginalised, 46 UCLA L. Rev. 1727 (1999)

[2] See The Workhouse: An Introduction, from which these citations and indeed the information outlined here on workhouses, was accessed on April 12, 2006 at http://users.ox.ac.uk/~peter/workhouse/intro.html

burden of costs placed onto the local communities, were actively encouraged to do so. Poverty rather than any form of judicial or other process sent people to the workhouse, although magistrates did have the authority to send people to the workhouse.

Towards the end of the nineteenth century, after the exposition of the vile conditions of the workhouses and with the advocacy of influential prominent people, conditions improved considerably especially for the children who inhabited the workhouse. Children were sent to special schools and provided with education and small luxuries like books. Workhouses were finally abolished officially on April 1, 1930.

The decline of the workhouses not only tracked increased prosperity but also the rise of the nation state. As states became stronger, with strong institutions and justice systems, around the time of the rise of Napoleon to the advent of World War 11, there was also a considerable drop in crime rates. This is in keeping with Braithwaite's theory about the rise of secure states and their relationship to crime rates within a country. He cites as further evidence of his thesis the increasing influence and power of the state, which he equates with rise of civility during the period, 1820 to 1970. During this time the nation state flourished[3]

However this trend has started reversing, as nation states were faced with increasingly complicated issues, including the rise of globalization during the 1970s to the present, punishments and incarceration has risen again. Braithwaite attributes the recent emphasis in political campaigns, in the last decade in western countries, on law and order, crime and punishment to the fact that politicians and the nation state do not appear to have control over other important aspects of the lives of its citizens, like the economy and employment levels. In essemce, Braithwaite's theory is that the rise of globalization has made nation states weaker, which in turn drives them to be more punitive to show strength and to hide their weakness. .

Braithwaite ends his argument by suggesting that states that turn to greater punishment for criminals and for more crimes in order to appear to have, or to have, more control is not only

[3] Braithwaite does acknowledge that his theory of powerful states, less crime and punishment does not hold true for the United States where the imprisonment rate has steadily and substantially increased since the mid 19th Century whereas in the rest of the West, for the most part, has declined.

morally wrong but also tactically a mistake. He argues that the empirical evidence demonstrates that those states that are the most brutal in their criminal justice systems actually foster the very conditions to support the very thing they fear: insurrection, civil unrest or revolution. Punishment, he argues, engenders defiance and if enough people feel defiant it will create civil unrest. In his own words, "treat people like knaves, and they will become knaves".

And Braithwaite ends with a plea, that justice "has more meaning when it is about healing not hurting."[4]

And finally he sets out his five prerequisites for justice system design that will assist in crime prevention:[5]

1. *You need to motivate crime prevention to get it to work*
2. *You need community ownership to get crime prevention to work*
3. *You need to bring out the perspectives of a plurality of stakeholders for it to work*
4. *You need citizens to freely choose to change their behaviour rather than being coerced into change by the state*
5. *You need crime prevention to be transacted within the bonds of social support*

Following from this, Braithwaite exhorts the world to consider replacing retributive justice with restorative justice and it is to that issue I now turn

The next section will concentrate on an exploration of restorative justice, how it works and why, with a specific concentration on the Canadian context but drawing liberally from international experience around the world. I will then address the opportunities and challenges posed by Restorative Justice Processes and will finally conclude with recommendations for the future.

[4] Ibid., at 1743
[5] Ibid, at pp 1748-1749

3. Crisis in the Justice System: Past, Present, and Future

In Canada, there has been increasing frustration and disillusion with the mainstream justice system particularly as it relates to Aboriginal People, who are vastly overrepresented on a per capita basis in the courts and correctional centres of Canada. The Supreme Court of Canada itself recently referred to the depth of this problem in the 1999 case of *R.* v. *Gladue*.[6]

In 2004, in *Canada's Performance Report*, the President of the Treasury Board of Canada Secretariat reported that:

> There is an increasing over-representation of Aboriginal offenders in the Canadian justice system.[7]

The retributive theory of punishment and criminal justice systems are simply not working in practice as society sees alarming rates of recidivism among offenders.

Due in part to the rates of recidivism, despite the declining crime rate in Canada, the public perception is that it is rising. Moreover many Canadians are concerned that sentencing is too lenient but also recognise the revolving door of the correctional centres, whereby many of those who are released from prison recommit offences and end up back in the correctional centre from which they were recently released, is an inadequate response, especially to those offenders who commit minor, but often repetitive, minor crimes, like petty theft or shoplifting. Increasingly, there is a recognition that the current mainstream criminal justice system of courts and incarceration is simply not working.

There have been two distinct and opposite reactions to this challenge. One is to insist on harsher penalties for offenders usually involving minimum and longer sentences for offenders. The other response is to reconceptualise the system by which we hold offenders to account for breaching the criminal code. And it is to this system that I now wish to turn: the place of restorative justice systems within, or without, the criminal sphere.

[6] *R.* v. *Gladue,* [1999] 1 S.C.R. 688 [hereinafter *Gladue*].
[7] *Canada's Performance, supra,* at 84.

4. Re-conceptualizing Justice Strategies: Restorative Justice not Retributive Justice[8]

It is important, first, to explore the concept restorative justice and explain its shift in focus, as compared to the mainstream criminal justice system. Next, the paper will describe what restorative justice is and how and why it works. Recommendations will be made, gained from existing restorative justice systems[9] and from considerable and mounting Canadian and International literature regarding the utility of these approaches to criminal justice. This paper argues that these processes, when conceived broadly, can increase their potential to assist in dealing with the more systemic harms to communities, within both rural and urban context. This re-conceptualization places restorative justice processes in a position to contribute greatly to community development. Finally, this paper will identify challenges relating to designing, implementing, and maintaining these Restorative Justice processes.

[8] This section is based and some sections are taken from part of the contribution the author made to John Borrows, Maureen Maloney and Dawnis Kennedy," *Developing Justice: The Interrelationship Between Economic Strategies and Justice Strategies"* (Institute for Dispute Resolution, 2006) and is also based in part, on a report completed in 2003 for the federal Department of Justice, Maureen Maloney, *The Aboriginal Justice Strategy: An Assessment and Recommendations,* (2003) and also on unpublished conversations that the author (or research assistants) had with the coordinators of sixteen Aboriginal Restorative Justice Processes located in British Columbia in the spring of 2003.

[9] See Maloney, *supra*.

5. What is Restorative Justice?

Restorative justice[10] is an attempt to re-conceptualize the way a society or community views a criminal offence and consequently the process used to deal with it. The philosophy underlying restorative justice is dramatically different than that of the mainstream Canadian criminal justice system. The mainstream Canadian justice system is predicated on the understanding that when conduct breaches the Criminal Code, that conduct is also a breach of a social contract with the state. As such, the state is the main actor involved in bringing the offender to account for his conduct. An adversarial approach is used to determine guilt or innocence of the alleged offender. This adversarial system is a system based on a belief that two, often competing, narratives of events will lead an independent and neutral arbiter, the judge, to determine the truth. In cases where guilt is determined, the offender is punished, usually by fine, probation, or incarceration, primarily for the purposes of denunciation, deterrence, and to some extent, rehabilitation.[11] Rehabilitation is difficult for the court to pursue because of the limited tools at any judge's disposal: imposing conditions, probation, and/or incarceration. Moreover, courts are only able to deal with the individual before them; they are unable to address community, structural, or systemic issues that may have created the conditions for the offence(s) that have been committed.

Restorative justice processes differ radically in philosophy and approach. Restorative justice processes view the conduct as a sign of a breakdown in the relationship between the offender and the victim and to some extent the community. Therefore, the crime or conduct is not seen as an offence against the state for which the state must punish the offender. The role of 'the State" is minor in this scheme. To the extent that the crime is seen as a breakdown in relationships, the

[10] For a detailed discussion of the nature and principles of restorative justice, and the types of models see *Restorative Justice in Canada: a Consultation Paper* (Ottawa: Canada. Department of Justice, 2000). See also, Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003) [hereinafter *Transforming Relationships*]; Robert B.Cormier, *Restorative Justice: Directions and Principles – Developments in Canada* (Ottawa: Public Works and Government Services Canada, 2002), presented at the Technical Assistance Workshop of the Programme Network of Institutes at the 11th Session of the commission on Crime Prevention and Criminal Justice, held in Vienna from April 16 to 25, 2002.

[11] The Criminal Code was amended in 1996 to broaden the principles of sentencing to include, "to provide reparations for harm done to victims and to the community" and "to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community." *Criminal Code* R.S.C. 1985, c. C-46, s. 718(e) & (f).

central roles are played by the offender, victim, and community, as they are the ones who are involved in the broken relationships and who hold the means collectively of healing that relationship. The Commission on First Nations and Métis Peoples on Justice Reform speaks eloquently of the principles underlying restorative justice in the following way:

> The principles that these methods are based on are; the value of each person, the earth and all that is contained within it, including those from the spirit world. The principles are concerned with reciprocal, respectful and responsible relationships, based on a holistic perspective of health. This holistic approach is the need to heal and balance all areas of ones being – physical, spiritual, emotional and mental. The cyclical holistic approach values the interconnectedness of ones relationships to the earth, animals, people and the spirit world. [12]

This is a movement towards creating different dispute resolution processes, which are more culturally appropriate to and sustaining for communities. This movement was embraced officially, for Aboriginal people at least, by the Canadian Department of Justice, in its Aboriginal Justice Strategy. The Aboriginal Justice Strategy (AJS) was set up by the federal Department of Justice in 1996. Originally, the intention was that the AJS would exist for a time-limited period of five years, the idea being that this period would enable First Nations communities to set up the types of dispute resolution systems that would work best in their communities. On March 31, 2001, the Strategy was renewed for a further five years in recognition of the important work being carried out in both rural and urban Aboriginal communities.

The Aboriginal Justice Strategy provides funding for First Nations communities and Aboriginal organizations, allowing them to assume a larger share of the responsibility for the administration of justice and for resolving disputes in their own communities. The funding is intended to be cost-shared with the provinces (which have the constitutional responsibility for the administration of justice) and the territories.

Across Canada, there are currently eighty-eight agreements serving over 280 Aboriginal communities, on and off reserve, that allow those communities to develop their own restorative justice process.

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[12] Commission on First Nations and Métis Peoples and Justice Reform, *Final Report from the Commission on First Nations and Métis Peoples and Justice Reform: Volume II Submissions to the Commission* (Regina: Commission on First Nations and Métis Peoples and Justice Reform, 2004), Section 1 at 54.

6. Description of Selected Restorative Justice Processes

These Restorative Justice Systems are diverse in process and practice. They are also at different stages of development; some have been in existence for decades while others are just commencing. Clearly the Restorative Justice Systems employ a rich variety of processes of helping resolve disputes and assisting the communities' healing. They include: peace circles, circle sentencing, house meetings, clan meetings, family group conferencing, mediation, victim/survivor and client/offender mediation and reconciliation. Family group conferencing, sacred circles, and victim-offender reconciliation processes are the most common forms of existing restorative justice processes.

Restorative justice processes may take place at any time during the criminal justice system process: after the offence is discovered and offender identified by the community, after police arrest, or, after a charge has been laid, after a judge or jury has determined the guilt of the offender, after incarceration, during or after probation or parole. The stage at which the restorative justice process takes place is important as it may determine the extent to which the Restorative Process will be governed by, or interact with, the mainstream justice system later and speak to the opportunities and challenges that arise when two very different approaches to criminal conduct intersect.

Although different types of processes of dispute resolution are used in the respective communities, there is one common feature and understanding. All of the dispute resolution systems are based on a restorative justice philosophy concentrating on the need for reconciliation between the victim[13] and offender and for healing the relationship between the offender and victim and community. The three most common types of restorative justice are: mediation, family group conferencing and victim offender reconciliation processes.

a. Mediation

Where mediation takes place the offender and victim (if they both consent) may be placed in the same room or separate rooms. There is a neutral, skilled third party, a mediator who assists the

[13] The words "offender" and "victim" are utilised for relative ease of comparison with the mainstream justice system. Many of the restorative justice processes reject this labelling and refer to the offender as "client" and to the victim as "survivor". The gender of the offender is set out as male and the victim as female as this is statistically the most likely scenario.

parties to talk with one another. The offender will explain why he has committed the offence and explain how he feels about it. The victim, if she is willing, will explain how the offence affected her. Again with the assistance of a skilled facilitator, the parties will attempt to reach agreement as to what the offender might do that will atone for his conduct and that might allow the victim to feel that she has been heard and that she has been compensated materially or otherwise by the offender for his acts.

b.Family Group Conferencing

Family group conferencing, which is the most favoured form of restorative justice process, in Canada and elsewhere, is similar to mediation but much wider in its scope, including not only family, friends and supporters of both the offender and victim, but also the wider community.

The restorative justice process is usually, though not invariably, facilitated by someone. All of the participants in the process, for example in a family group conference or circle, may speak if they wish. Depending upon the type of process, there may be an order as to when people speak or not. However, the process will usually commence with the offender acknowledging his wrongdoing. If the victim wishes to do so, she will speak of how the conduct has harmed and affected her and her family. She may choose to elaborate on how the conduct has affected her material, social, psychological, emotional, and spiritual well-being. Family members and other support people, of both the offender and victim, may also express how they have been affected. Other community members will often also be present to share their thoughts and to bear witness. Elders' advice and wisdom will also be sought during the process. In cases that are more serious there may be many community members present. Community members or others present may also speak to share their thoughts and feelings regarding the conduct that has taken place and its affect on the community.

c. Victim Offender Reconciliation Process

This type of process happens most often after the offender has been found guilty and incarcerated and usually for a serious offence, including murder. An extremely skilled facilitator will act as either a go-between the offender and victim, and/or her family to assist them to some healing and resolution concerning the horrific events which have taken place in their lives. There

is usually no agreement reached in these processes, it is primarily aimed towards helping both sides to heal from the events that have shaped their lives so dramatically.

d. General

There are many common characteristics for all restorative justice practices, however diverse their approach. All restorative justice processes require that the participation of offenders be voluntary. Offenders participate for a variety of reasons, for example, "to get the whole experience behind them" and a desire to "payback the victim." [14] However, in order to participate, the offender must acknowledge the wrong that he has committed, accept responsibility and be willing to be accountable for healing the harm that has resulted from it. Similarly, participation by the victim is welcomed, indeed encouraged, but is not essential for a restorative justice process to take place. Again, such participation must be voluntary. Victims agree to participate for several reasons: to obtain reparation, to hold the offender accountable, to express their pain, to avoid the court system, and to see the offender punished.[15] Consent is predicated on full information. Offender and victim are also encouraged to bring families, friends, or other support people with them to the process.

The role of the offender is to accept responsibility and accountability for the conduct. At some point, the offender may explain what motivated him to act as he did. He may explain in some detail why he committed the conduct outlining his own psychological, emotional, and physical state both when the wrongdoing took place and at the present time.

The victim may express an opinion as to how the offender could repair some of the damage done to her, and in the case of family group conferencing, community members may also speak to how the healing might take place. In response, the offender may explain how he intends to make amends for the harm he has caused. An apology for the wrongdoing will usually be offered.

Most often, except in the case of Victim Offender Reconciliation Processes, the process will conclude with a written agreement being made by the offender to repair some of the damage, and will detail how and in what manner he will do so. Reparation may be made to the victim

[14] Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in 5 Countries* (St. Paul: Center for Restorative Justice and Peacemaking, 2002) at 3.
[15] *Ibid*. at 3, Although again it is difficult to extrapolate this reason within a small community where the ties of family and kin may make the issue more complicated.

financially or in kind, for example by agreeing to work for the victim or agree to help with work in the community. The agreement will also outline a healing plan that the offender intends to undertake. At its best, the discussions will have identified potential causes of the offence, for example unemployment, lack of education or perhaps alcohol or drug abuse. As a result, the offender may agree to go for further education or job training, for drug or alcohol treatment, or anger management courses. Community member who are present may also suggest how the offender could give back to the community perhaps through community service. One or more of the community members will also agree to assist the offender on his healing journey and working towards repairing the weaknesses in the community that have contributed to the conduct. In the more serious cases, a healing plan will also be developed for the victim, for example, to provide counselling or other supports. In cases of violence, it is also essential that the agreement address the need for the victim to feel and be safer and to reduce the risk of reoccurrence.

Empirical evidence evaluating restorative justice processes is still relatively scarce. This is particularly the case with respect to such processes occurring in urban contexts. Clearly, there is much that needs to be accomplished in this area. However, what evidence exists is encouraging in many respects.[16] Statistical analysis of offenders and victims participating in restorative justice processes have been carried out internationally and domestically.[17] They conclude that offenders and victims are generally more satisfied with participating in a restorative justice process, certainly in comparison with the mainstream court process. Victims feel that they have been given a voice to explain the effect that the conduct has had on them. One study of participant

[16] See *Ibid*. at 6 to 7, describing the empirical work conducted on circles in Canada.

[17] See in particular Jeff Latimer & Craig Dowden, *The Effectiveness of Restorative Justice Practices: A Meta Analysis*, (Ottawa: Department of Justice Canada, 1991) which covered a meta analysis of 35 empirical studies, both in Canada and internationally, of individual restorative justice programmes generated from 66 effect sizes. These studies mainly involved young males. The studies selected had to meet four criteria [at 5]: (1) The study evaluated a restorative justice programmes that fell within their working definition [at 1] (2) The study used a control group or a comparison group that did not participate in a restorative process (3) At least one of the following four outcomes was reported for both the treatment and control group/comparison group and (4) Sufficient statistical information was reported in order to calculate an effect size. These studies did not differentiate as to nationality or ethnic origin and therefore caution must be exercised in extrapolating from this evidence directly to Aboriginal Nations and communities. See also See Maloney, *supra* note 193; For a comprehensive listing of recent work, see J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25:1 *Crime and Justice* 1. See also Latimer & Kleinknecht, *The effects of Restorative Justice Programming: a Review of the Empirical* (Ottawa: Department of Justice Canada, 2000). For a recent Annotated Bibliography, see Trevethan, Steele & Krstic, *Selected Annotated Bibliography: Aboriginal Justice and Corrections Research*, (Ottawa: Canada. Department of Solicitor General, 2004).

satisfaction in the Healing/Sentencing Circles programme in Whitehorse found victim satisfaction "very high."[18] Participant satisfaction in restorative justice circles in South Saint Paul, Minnesota, dealing with young offenders, was also found to be high.[19] Comments of victims included: that they liked being able "to tell their story," "listening to others," and "connecting with people in the circle."[20] Offenders have for the most part been seen to have listened and responded.

The majority of victims are significantly more satisfied with these processes than with the mainstream court system.[21] In the mainstream court system, victims have little or no role to play, except as a witness to the case where they may endure tough cross-examination by defence counsel. Such cross-examination is usually designed to reveal that the victim has told lies, exaggerated, or, in the alternative, is mistaken or confused as to what actually happened. The only vehicle through which victims may express the effect the conduct has had on them is with a "victim impact statement" in which they may narrate the impact of the wrongdoing upon them and their family.[22] In restorative justice systems, victims are given a more substantive role, if they are willing to assume it, and allowed to detail the material, emotional, and psychological effects the conduct has had. Attendance at such processes may also alleviate feelings of shame, anger, and helplessness. Benefits to the victim may include reaffirming their identity and self-esteem in the eyes of the offender and the community. In addition, agreements made for compensation or reparation as part of the healing plan are substantially more likely to be adhered to after a restorative justice process than a traditional court process.[23]

Offenders also express greater satisfaction with restorative justice processes,[24] except in the case of post-sentencing restorative justice processes.[25] Accepting responsibility and making amends will allow the offender to move on with his life. Australian research also suggests that offenders who participate in restorative justice processes rather that the mainstream court systems are more

[18] Umbreit, Coates & Vos, *supra* at 7.
[19] *Ibid*.
[20] *Ibid*.
[21] Latimer & Dowden, *supra*, at 9, except in the case of post-sentence (or corrections) entry point.
[22] *Criminal Code* R.S.C. 1985, c. C-46, s. 722 of the Canadian Criminal Code (In cases of special permission by the judge, the victim may read her statement into the court record.
[23] Latimer & Dowden, *supra, at 12*
[24] *Ibid*. at 11, but only when excluding one very negative study of the two negatives, which again was a process involving post-sentence restorative justice processes.
[25] *Ibid*.

likely to feel more shame and remorse and also more forgiveness.[26] These feelings subsequently translate into a desire to change behaviour and lead to reductions in recidivism. The empirical research confirms a significant reduction in re-offending between those offenders who participate in restorative justice processes and those in the court system. For example, in an analysis of thirty-five statistical studies of restorative justice processes, Latimer and Dowden conclude that, "compared to the comparison/control groups that did not participate in a restorative justice program, offenders in the treatment groups were significantly more successful in follow-up periods.[27] On the other hand, Latimer and Dowden also cite studies that conclude that restorative justice processes "did not have nearly as strong an impact on re-offending as psychologically informed treatment."[28] In addition, another study has illustrated the importance of culturally specific programming, especially in the case of Aboriginal offenders, like training and education, and delivery in helping to reduce re-offending.[29] These studies are not contradictory. Indeed, the evidence from both should be utilized in a complementary fashion. Restorative justice processes are important and will be more successful if they produce multi-faceted healing plans that include psychological treatment, and attend to an individual offender's needs and circumstances. There has been considerably less research documenting the views of the community regarding such processes, and clearly, this is an area for investigation. It is also crucial to conduct further quantitative and qualitative empirical research on restorative justice systems operating in urban areas.

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[26] See Braithwaite, "Restorative Justice; Assessing optimistic and pessimistic accounts" in M. Tonry (ed) *Crime and Justice: a Review of the Research* (Chicago: University of Chicago Press, 1999).

[27] Latimer & Dowden, *supra*, at 14. However the authors advise caution as the results depend on those offenders willing to participate in the study. In this regard they draw attention to empirical research conducted by McCold and Wachtel (1998) which found clear differences in recidivism rates between "the restorative justice participants (20%) versus individuals who refused participation in the program (48%) versus the comparison group (35%)" (At 17). Latimer and Dowden cite other studies to show that restorative justice processes "did not have nearly as strong an impact on re-offending as psychologically informed treatment" (at 18). This evidence does not mean that psychologically informed treatment be utilized rather than restorative justice processes. Rather it speaks to the need to ensure that culturally relevant treatment accompanies restorative justice processes to have the greatest effect on recidivism.

[28] *Ibid*. at 18

[29] See R. Sioui & J. Thibault, *The Relevance of a Cultural Adaptation for Aboriginals of the Reintegration Potential Reassessment Scale (RPRS), Research Report R-109* (Ottawa: Correctional Service of Canada, 2001), as cited in Shelley Trevethan, "Is there a Need for Aboriginal-Specific Programming for Aboriginal Offenders?" in David Newhouse & Evelyn Peters, eds., *Not Strangers in These Parts: Urban Aboriginal Peoples* (Ottawa: Policy Research Initiative, 2003) at 198, who found that participation in programmes focusing on employment and education in correctional centres reduced recidivism, but only if they were Aboriginal specific.

Clearly, restorative justice processes have much to commend them. Victims' voices are heard; their pain is described and acknowledged by the one who has caused it. Their narratives are heard and witnessed by community members. Offenders are held accountable to the victim, to the community, and to themselves. In return, the community reintegrates the offender back into the community by supporting his healing. Community members assist in the healing process by supporting the victim and offender to heal themselves and their relationship, which in turn will assist in healing community relationships. In doing so, communities are being strengthened by moving its members to a place of peace and by having taken responsibility for their own healing and destiny.

There are also challenges in the design, implementation, and administration of these restorative justice processes. Given that existing restorative justice processes, at least in Canada, are to a large extent relatively recent this is not surprising.

Accordingly the next section of this paper will explore some of the challenges and opportunities that existing restorative justice processes have encountered. Addressing the challenges is important to open up great opportunities for healing within communities; by fostering inclusiveness, social ties and social systems will be strengthened and community development will flourish. Restorative justice processes have the potential to assist in the healing and sustainability of a community, in addition to overcoming specific areas of dispute or conflict.

7. Re-conceiving Restorative Justice Processes as Community Building

Restorative justice systems have potential as powerful mechanisms for healing and strengthening relationships between victims, offenders, their families, and the community generally. As such, restorative justice systems are able to participate in building and sustaining the relationships that comprise community. These processes also hold promise as ways to reduce recidivism, prevent crime,[30] and create safer, stronger communities. However, the potential of restorative justice systems extends beyond criminal justice matters. Lessons learned by the community during these processes may also strengthen the community's capacity for inclusive decision-making,

[30] John Braithwaite, "Linking Crime Prevention to Restorative Justice," online: International Institute for Restorative Practices website: < http://www.iirp.org/library/nacc/nacc_bra.html> (date accessed: 30 March 2005).

which could have positive direct and indirect economic development consequences – in effect, providing the very type of dispute resolution process that Cornell and Kalt found to be "essential for successful economic development."[31]

Restorative justice processes are uniquely situated to help build strong and healthy communities for a number of reasons. First, the community is one of the main players in the restorative justice processes. Community members, working with leadership organization, will take responsibility and accountability for the design and implementation of the restorative justice processes to ensure that they meet the needs of the offender, victim, their families, and the community in a culturally appropriate manner. In this way, the construction and maintenance of the processes will itself provide a template for building social capital, so essential for strong vibrant social and economic communities. Consider the following quote from the Law Commission of Canada:

> Restorative justice offers the possibility of harnessing the power of individuals to create the social capital required to build strong communities. Social capital refers to the other elements of social organization, such as networks, norms and social trust that foster coordination and cooperation for mutual benefit. Social capital helps create interconnections between community members and networks of civic engagement. The interconnectedness of community members often encourages trust, discourages political and economic opportunism, and facilitates collaboration for a common goal.[32]

Conflict and disharmony should be seized as opportunities to reclaim the relationships within the community, to provide ways for marginalized people, who are often the offenders for petty crimes[33], to take up their place within the community, and to continually foster inclusion and

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[31] Stephen Cornell & Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations" in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* at 46, The Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University website: online: <http://www.ksg.harvard.edu/hpaied/pubs/pub_120.htm> (date accessed: 30 March 2005) [hereinafter *Reloading the Dice*].

[32] *Transforming Relationships, supra,* at 57.

[33] In a 1994 study of four major cities in Canada, Carol La Prairie found that Aboriginal people whose childhoods were filled with violence and abuse were more likely to commit serious violent offences.33 These same offenders were also the most marginalized and victimized. La Prairie concludes by emphasizing that if society wishes to reduce violent crime and keep Aboriginal men out of jails, there is an urgent need to create social stability for these offenders and for the communities in which they live. Social stability will be created by addressing family violence, safe and secure housing, unemployment, and a host of other issues identified throughout this report. La Prairie also noted the different subpopulations of Aboriginal people, which had to be targeted specifically and appropriately if strategies and programming were to be effective.

participation. At their best, restorative justice processes enable the community to understand who has been affected by the conduct, and why the conduct has occurred. In turn, this understanding of the causes of the conduct should empower communities to take shared responsibility for changing the conditions under which such conduct has been allowed to flourish. In essence, restorative justice systems should not only deal at the micro level cause of the conduct (anger, violence, addictions). The processes must address the macro issues that underlie criminal activity, for example, unemployment, lack of opportunities, structural inequalities.. These challenges must be faced by the community; they cannot be overcome by individuals alone.

If communities are to achieve this potential, they will have to work in partnership with all levels of government, municipal, provincial and federal. Again to quote the Law Commission of Canada:

> Restorative Justice is part of a larger movement, in which governments are entering into partnerships with communities. These new partnerships raise a number of issues regarding the relationship between governments and communities. Partnerships are voluntary agreements between two or more individuals or organizations that agree to work cooperatively towards a common goal. Successful partnerships extend further than consultation. Successful partnerships are those in which there is a recognition that all parties may not come to the table with equal power and in which steps are taken to ensure that even the least powerful members of the partnership are given equal standing. Partnerships must involve a willingness on the part of government to share power and decision-making with the community. But community members must also be encouraged to assume control of the decision-making process.[34]

8. Opportunities and Challenges of Restorative Justice Processes

Other opportunities for building and expanding upon the potential of Restorative Justice Processes can be found in the important lessons and cautionary tales from other countries' experiences of them, the academic literature, and evaluation reports of restorative justice processes and practices. A large body of work exists concerning restorative justice processes and this paper is not intended to canvass the many challenges in this short piece.[35] Instead, this paper

[34] *Transforming Relationships*, *supra*, at 59-60.
[35] For a recent Annotated Bibliography, see Trevethan, Steele & Kristi, *supra*.

will concentrate on five crucial areas: the design of the process, community, youth, gender, and the interaction with the mainstream justice system.

a. Design of the Process

It is absolutely essential that communities take the time required to design a culturally appropriate restorative justice system. Moreover, the process should be designed by as broad and as inclusive a group as possible from within the community. To the extent that a broad representation of the community is involved in designing, implementing, and administering Restorative Justice systems, the community will gain an institution that the community can identify as its own and for which the community is willing to take responsibility. Such a system will have more vitality, legitimacy, and validity.

Sufficient time is necessary to implement the process. Community members must continue to be involved at all stages of the process design and implementation and administration. In the past, communities have rushed to set up a system to avail themselves of the available funding. Adequate resources must be devoted to the design and capacity building process prior to commencing operation of a particular process within a community. Community members must be given ample opportunity and time to play their role, conduct appropriate research, and to build capacity. On occasion, programmes have been started with little community input and support. This has caused, and continues to cause, difficulties for those communities. Systems set up in haste, with inadequate resources, are more likely to fail and will produce, *inter alia*, safety concerns for the clients and victims and for the community generally.

Other issues to address concurrently include clearly delineating objectives and processes, with input and agreement, on the rights and responsibilities of all involved in the process: the leadership of the community, facilitators and organizers of the restorative justice processes and citizens of the community, individually and collectively. Attention must be paid to the type and extent of capacity building, skills training and education that is appropriate and required.. Furthermore, an inventory of available resources should be taken, needs assessed, and gaps

identified.[36] Other areas that have been deemed important include selecting the appropriate staff. The family ties of restorative justice coordinators to others in the community are both a strength and weakness. Awareness and education of the community on a continuous basis is also pivotal. There should be regular communications about the restorative justice processes, goals, and objectives and reporting on assessments and evaluations.[37]

b. Concept of Community

Communities are key to restorative justice processes. The community gives life and legitimacy to such processes. As noted above, a crucial requirement will be determining who constitutes the community; this is particularly important in new urban settings. The community may be defined by territory, by residence, or by partnerships between such communities. There is concern that some restorative justice processes have not been sufficiently inclusive and broad enough in their constitution. Inclusiveness is key to both legitimizing the process and ensuring that the process operates appropriately and fairly. If restorative justice processes give power to the community to resolve disputes and only certain members take part, they may simply be reinforcing and replicate existing inequalities and power structures.

Furthermore, it is essential to have clear protocols of accountability to the leadership and community. To avoid any appearance (and actual) political interference, protocols must set out clearly the respective roles, responsibilities, and accountabilities of the coordinators, mentors, volunteers, and, if used, advisory boards. In addition, protocols should clearly delineate the roles, responsibilities, and accountabilities of the leadership and members of the community.

These issues also link to broader concerns with respect to the "privatization" of justice and concerns over the lack of procedural safeguards.[38] If disputes are solved within communities

[36] For a useful handbook on practical issues in design, see Don Clairmont & Rick Linden, *Making it Work: Planning and Evaluating Community Corrections and Healing Projects in Aboriginal Communities and Developing and Evaluating Justice Projects in Aboriginal Communities* (Ottawa: Ministry of the Solicitor General of Canada, 1998) [hereinafter *Making it Work*].

[37] See for example, *ibid*. at 198) See more broadly an excellent annotated bibliography of Restorative Justice by Shelley Trevethan & Amey Bell, *Selected Annotated Bibliography: Restorative Justice* (Ottawa: Correctional Service of Canada, Research Branch, 2002).

[38] See Kent Roach, "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise" (2000) 24:3 *Canadian Journal of Criminology* 249 at 268. Roach feels the concerns over due process can be dealt with by the federal government using the funding they provide as leverage for due process. To the extent that Aboriginal communities are reclaiming their authority over the design and administration of conflicts in their territory, this may be unacceptable. See also Patricia Hughes & Mary Jane Mossman, *Re-thinking Access to Criminal Justice in*

without records or outside scrutiny, offenders may re-offend many times in different communities without the knowledge of any particular community. Therefore recidivism will be difficult to gauge, which may create more victims as the conduct will not be seen and appropriately dealt with as cumulative. Offenders may also be able to consciously manipulate these processes.

Offenders may also be disadvantaged by the privatized nature of the process. Offenders who are responsible for the same type of conduct may be treated differently. Moreover, the offender may be "punished" too much, that is, the agreement that he signs may be too harsh and not proportionate to the conduct he has committed.

While there are aspects of these concerns that should give rise to caution, these criticisms seem to miss the point. Restorative justice processes are not simply different methods of achieving the same goal of punishment that operates in the mainstream justice system, the goal which motivates concerns regarding due process, equality for like offenders, and proportionality. The objective of restorative justice is not to punish or set deterrents based on a "just desserts" and "treating like offenders like," the crucial tenets of punishment in the criminal justice system. The goal of restorative justice processes is quite different and distinct: it is to heal that particular offender and that particular victim. Accordingly, the agreements and healing plans may be very different for offenders who have committed similar wrongdoings, even within the same community. Likewise, the plans may be very different from community to community

Concern has also been expressed that systemic practices and conduct will not be highlighted with smaller and varied systems. However, the community is closer to the ground to recognize and deal with the systemic issues more easily than the criminal justice system. Indeed, as discussed above, doing so is an important role of restorative justice processes.

Finally, the restorative justice processes and the people who administer, advise and participate in them, must be accountable to the political leadership and communities that they serve at all times. Clear outlines of how, when, and in what manner these accountabilities will take place will be important. In particular, the processes must demonstrate themselves to be applied

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Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives (Ottawa: Department of Justice, 2001) which goes into considerable detail about many of the critiques of restorative justice processes that are dealt with in this report.

equitably within the communities. Kinship, family, or political ties are extremely important and valuable concepts in communities and will play a role in some Restorative justice processes. However, it is essential that they not be seen as reasons for privileging certain offenders especially at the expense of others, particularly the victim.

c. Youth Considerations

Restorative justice processes are most often utilized for young offenders. Indeed, the *Youth Criminal Justice Act* specifically authorizes the use of such processes. Indeed some of the existing restorative processes are often exclusively used for, or largely focus on, young offenders. This focus stems, in part, from the recognition that keeping a young person out of the criminal justice system will reduce the risk of re-offending. These considerations are particularly pertinent for male youth who are at high risk of offending and being incarcerated.[39] Empirical work of successful family group conferencing with youth offenders also illustrates the importance of focusing on the family unit and community support, allowing for consensual decision-making, providing opportunities for parental responsibility, and expressing sensitivity for family culture.[40] If appropriate healing plans are developed and carried out, they may also improve the young person's life chances. To be successful, a healing plan will have to be predicated on an understanding of the socio-economic factors that underlie the offence. In particular it should be noted that the extent of violence and homelessness to which the young offender has been subjected during his life is often a major predictor of offending. These factors loom large in the lives of many youth offenders especially repeat offenders.[41] These issues will have to be addressed on a community wide basis, in a holistic manner. Youth participation is essential to addressing some of these issues. Young people should be involved at all stages of the design, implementation and administration of the processes and restorative justice programmes should be accountable to youth.

Concerns have arisen in two main areas with respect to the participation of youth in restorative justice processes: involuntariness and net widening.[42] As previously mentioned, restorative

[39] La Prairie & Stenning, *supra,* at 194.
[40] Joe Hudson et al. (eds.) *Family Group Conferences: Perspectives on Policy and Practice* (Annandale: Federation Press, 1996).
[41] See Anna McCormick "Running for their Lives: The Impact of Family Violence on Youth Homelessness" (2004) 11:3 *Aware* 13.
[42] Roach, *supra,* at 276.

justice processes are absolutely voluntary for offenders. However, in the case of a young person, the concept of voluntary may be more difficult to ascertain. Parents, family, teachers, police, or other officials may be able to exert undue pressure on an offender to participate. A separate, though allied, concern is that justice processes are simply 'net widening,' that is, bringing more young people into the system than would not have been brought into the mainstream justice system because of insufficient evidence, resources, or inclination. Clearly, the offender must want to participate, for not to do so undermines the very process of accepting responsibility, therefore this must be carefully evaluated. However, the more general concerns about net widening misses the point of restorative justice processes: it is not to punish the offender but to assist him with healing that will improve his life chances. If restorative justice processes are able to accomplish this, the concern fades. As Roach notes, "[o]f course another word for social control is caring and the control exercised by an offender's friends or family or even by others may be better than apathy."[43] Cautions regarding net widening and increased social control may be warranted in cases where restorative justice processes are captured by criminal justice professionals. Clearly caution should be exercised in this respect.

d. Gender Considerations

Women must play a central role in the design, implementation, and running of restorative justice processes. Considerable concern has been raised about the potential for restorative justice processes to replicate the existing power structures and inequalities within the community.[44] This is a particular concern with respect to the unequal position of women within many communities and the violence perpetrated against them.[45]

Women have spoken movingly and eloquently about the violence and inequality that they endure within and outside of their communities especially those women who are most marginalised by

[43] *Ibid*. at 260.
[44] See Wendy Stewart, Audrey Huntley & Fay Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia* (Ottawa, Law Commission of Canada, 2001); See for example, Teressa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter: in Aboriginal Peoples and the Justice System" in *Aboriginal Peoples and the Justice System, Report of the Roundtable on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993).
[45] See Emma D. LaRocque, "Violence in Aboriginal Communities" in *Royal Commission on Aboriginal Peoples: The Path to Healing* (Ottawa: Canada Communications Group, 1994).

society, for example sex trade workers and the very poor. Violence against women is endemic in many communities for many reasons.

Women have voiced considerable concern regarding the impact of restorative justice processes on women, especially where those processes deal with issues of violence against women in intimate relationships. If the community power structures are imbued with inequality, especially gender inequality, then placing "the community" as the central agency in the process merely recreates and reproduces those same inequalities. Similarly, the emphasis on healing and restoring harmony to the relationship between offender and victim may ring hollow to those who live far from harmonic lives.

The results of two recent participatory action research studies undertaken in partnership with Aboriginal women in Alberta and British Columbia are informative and troubling.[46] In both studies, Aboriginal women express the extent and intensity of the powerlessness, alienation and fear that they experience in their daily lives. Women who have participated in restorative justice processes (regarding violence against them) speak of being silenced by those processes, of being coerced, of being threatened, of being afraid.[47] Fear has driven some women to leave their communities.[48] In this same conversation, women expressed a lack of knowledge of restorative justice processes. Others worried that the restorative justice process places the offender in the role of victim.[49]

Unless restorative justice processes provide a safe environment for all members of the community, they have remaining work to do. If the community has internalized and normalized notions of inequality and violence against women,[50] it is difficult to see how these processes can provide a safe and secure place for all community members. The community must first find the processes that will help heal it. Issues of inequality, fear, and violence must take centre stage in the design of restorative justice processes. Women must be given voice, time, and resources to

[46] Institute for the Advancement of Aboriginal Women, *Can you Hear Me? How to get your voice heard for Aboriginal Women*, online: Institute for the Advancement of Aboriginal Women website: <http://www.iaaw.ca/Pubs/Can%20you%20Hear%20Me.pdf> (date accessed: 30 March 2005).
[47] See Stewart, Huntley & Blaney, *supra*, at 38-43.
[48] *Ibid*. see generally the connection between violence and homelessness Charlotte Mearns, "Family Violence and Homelessness: an Aboriginal Women's Perspective" (2004) 11:3 *Aware* 22.
[49] Stewart, Huntley & Blaney, *supra* note at 55.
[50] See *ibid*.

assist in redressing these issues. A safe place must be created for women to speak to their experience of violence in the community.

After interviewing Australian indigenous women, Kelly[51] concludes that restorative justice might prove valuable in dealing with issues of family violence subject to certain conditions. However, such processes must fulfill four essential elements: they should be community driven by the grassroots, respected Elders must control the programme and process (including gate keeping); there must be support from the criminal justice agents (however the level of involvement should be decided by the community), and they must be part of a holistic strategy.

There is a scarcity of empirical research in Canada regarding the use of restorative justice processes for family or women in relationships violence. This type of research is imperative to inform communities as they design their processes. Australian research provides some interesting comparisons and conclusions. Blagg documents a number of research reports, undertaken in Western Australia, on aspects of Indigenous family violence prevention, intervention, and treatment[52] Aboriginal women in Western Australia also experience horrific levels of violence.[53] Blagg is critical of the current use of restorative justice processes, particularly family conferencing, as a way to heal and prevent violence. Instead, he posits a move away from discourses focusing on domestic violence in terms of patriarchal notions of privacy and individuality to one dealing with family violence in the context of colonization and the feelings of powerlessness and hopelessness of Aboriginal people and communities. Restorative justice processes should be framed in the context of Aboriginal self-determination and healing. Self-determination is central for Blagg because the "very cultural and physical survival of Aboriginal People is dependent upon self-determination."[54]

The Australian research also strongly recommends that interventions around family violence should build on existing agencies and community structures. Blagg suggests that family violence should not be dealt with as a criminal justice issue but as a community service issue:

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[51] *Ibid*.
[52] Harry Blagg, "Restorative Justice and Aboriginal Family Violence: Opening a space for healing" in H. Strang & J. Braithwaite, *Restorative Justice and Family Violence* (New York: Cambridge University Press, 2002) at 191-205.
[53] *Ibid*. at 192 ("Aboriginal women were found to be 45 times more likely to be a victim of serious "domestic" assault than non Aboriginal women").
[54] *Ibid*. at 199 (footnote omitted).

> Restorative Justice Practices around family violence should "add value' to these [community] initiatives, providing a diversity of healing, peacemaking opportunities – and resist the temptation to capture the issue or impose non-Indigenous structures and solutions[55]

In addition, he recommends that culturally appropriate "safe havens" or refuges be provided to afford space and time for Aboriginal women when needed.[56]

Clearly, these cautions and recommendations must be taken seriously in the design and implementation of the restorative justice processes. This is equally true for other processes that may precede and/or co-exist with Restorative justice processes that deal with family violence. Further research on successful strategies around violence in communities must be undertaken and disseminated widely. Again, the complexity of these issues highlight the urgent need to allow the design to take considerable time, to ensure that the community has available, adequate, and appropriate resources to allow healing plans to be effective for the offender, the victim, and the community itself. The women of the community must be front and center in the design, implementation, and ongoing evaluation of these processes.

The processes must also develop slowly to decide the types of disputes with which they should deal. Risk to the safety and security of all members of the community must be uppermost in the design assessment of the resources that are available.[57] Obviously, it is important that healing practices are placed within their cultural context or that the community has a culture which can adapt and utilize traditional cultures from other countries or communities. As was also identified in the designing, communication and education are essential during the development phase and beyond.

e. Interactions of Restorative Justice with the Criminal Justice System

The existing restorative justice processes may interact with the mainstream system at many stages: pre-charge, post-charge, sentencing, during and post incarceration. Restorative justice processes in Canada are currently authorized as "alternative measures" in the *Criminal Code* and the *Youth Criminal Justice Act*. Therefore, to the extent that restorative justice processes interact

[55] *Ibid*. at 199.
[56] *Ibid*. at 201.
[57] Lajeunesse, *supra*.

with the mainstream justice system they must comply with the conditions set out in those acts and by the officials who administer them.

Most, if not all, of the existing restorative justice processes in communities have considerable interaction with the mainstream justice system and the justice professionals who work in it, especially the local police officers. Indeed, many of the restorative justice processes depend heavily or exclusively upon justice officials to send the offenders to their programmes; the police officer who diverts the offender, prosecutors who utilise alternative measures; the judge conducting the circle sentencing; or the correctional, probation, or parole worker attempting to reintegrate the offender back into the community. The most successful programmes have strong networks and interactions with most of these officials.

There are, however, some less positive effects of the intersection of the mainstream justice system and restorative justice processes. To the extent that mainstream justice agents have control over who is sent to these processes, they may also dictate who is admitted, and the nature and form of that restorative justice process. Community gate keeping, especially in the formative stages, may be essential to a restorative process for a number of reasons. First, concerns have been expressed about the increasing demands being placed on existing restorative justice processes without the corresponding staff and resources to carry them out. Demands arise for a variety of reasons: changes to legislation (for example, the Youth Justice Act), legal decisions, for example, *Gladue*.[58] Even when changes are applauded as recognizing the specific needs of communities, it may place more pressure on already under-funded and overstretched Restorative Justice Processes in communities. The extent of the pressure varies greatly from community to community. It may depend upon the length of time the Restorative Justice system has been operating, the health of the community, and the general level of services and funding already available in the community. In addition, the type of dispute resolution system operating contributes to the length of time devoted to each client, survivor, their families, and if applicable, community members. Coordinators of existing RJ systems have also voiced concerns about the type of offender who is referred. Lack of resources to do follow up, or that can be accessed by the client, is a real limitation for most communities. Coordinators have also felt unable to refuse to admit an offender to their restorative justice processes fearing that such a refusal would harm

[58] *Gladue*, *supra*.

the relationship between the coordinator and the police officer or prosecutor. Such reticence and lack of resources pose issues of safety to community members and make the healing plan for the offender considerably impoverished or doomed to fail.

A second concern is that mainstream justice agents may, with good intentions, drive the design of the restorative justice processes. For example, the Royal Canadian Mounted Police require that most, if not all the coordinators of restorative justice processes to which they divert offenders, take their training: *Community Justice Forum*. This training module is based upon family group conferencing. Untrained coordinators may welcome this opportunity to learn new skills and build new capacities. However, this may dictate the type of process that is utilized in a particular community. Many of the existing restorative justice programmes are for these reasons, too wedded and intertwined with the mainstream justice system.

Others have seen restorative justice processes as driven by shrinking budgets and rising costs of enforcement.[59] Undoubtedly, the costs of operating the criminal justice system are very high from policing, prosecutors, courts, to corrections. Federal and provincial governments have certainly been attracted to these processes as a means of moving offenders out of the criminal justice system and into one that is much cheaper. Desires by governments to cut costs and have more efficient systems are completely legitimate and defensible. Indeed, governments should strive to be cost effective. The more trenchant critique is that governments are moving offenders into restorative justice programmes that are poorly designed, under-resourced, have little community support and untrained or ill-trained staff. Such processes, however named, are not restorative. Lack of community support means that processes lack legitimacy and are more likely to be captured and used by power groups in communities, particularly political leaders. Victims are more likely to be coerced or intimidated into participating. Inadequately resourced processes make healing plans unsustainable. Offenders will likely re-offend, thereby creating more victims in communities and making communities less safe. The financial costs of implementing restorative justice should be shared with the federal and provincial governments. Adequate financial resources will undoubtedly be extremely expensive. However, when measured against the existing funding that is allocated to the criminal justice system for policing, legal aid, crown counsel, the court system, corrections, parole and probation, they are clearly warranted.

[59] Roach, *supra*, at 262.

Taylor-Butts estimates that justice costs amount, in total, to approximately three percent of government expenditures for the last twenty years.[60] In 2001/2002, this amounted to approximately $11.14 billion. These figures exclude the cost of youth corrections. The justice system in Canada employs approximately 126,924 people.[61]

Financial considerations will best be met by having well-designed processes that have adequate resources to assist healing the relationships that will ultimately reduce recidivism, thereby reducing the number of people who enter the criminal justice system. The intergenerational impacts of these processes could be dramatic. If communities, families and individuals are healed in this generation, the benefits to future generations will be significant. Clearly, there will be a great deal of interaction between these restorative justice processes and the criminal justice system for decades to come. Given the numbers of people who are in and will continue, for the foreseeable future, to encounter the mainstream system, it is inevitable that there will be close ties and good relationships between the two systems. These relationships will have to be carefully worked out in partnership with community members and the mainstream justice officials. Partnership, not domination, is the key to those decisions being workable.

Finally, a caution: to the extent that processes are driven by the criminal justice system, they will be in danger of being mere appendages to that system. In time, they will be in danger of becoming increasingly similar in outlook and value to that system. As such, they will become more hierarchical, more dependent on 'expertise,' more 'professionalized' and more isolated from the community. In effect, they would become cultural window-dressing for the mainstream justice system that has already failed many communities. A real opportunity exists at this time in Canada's history to partner with communities to design truly appropriate processes that have the possibility of transformational outcomes, not only for criminal justice. This opportunity must be seized, embraced and nourished.

[60] Canada, Minister of Industry, *Justice Spending in Canada, 2000/01* (Ottawa: Canadian Centre for Justice Statistics, 2002) cited in Findlay & Weir, *supra*, at 67, chapter 9.
[61] For very detailed explanation of these figures and their consequences see *ibid*.

9. Conclusion

The current system of criminal justice is not working for offenders, especially young offenders and those offenders, young and adult, who commit petty crimes.

It is clear from the research in Canada and elsewhere in the Western world that restorative justice processes are increasingly on the rise. These types of processes hold a great deal of promise for helping not only the victim but also the offender to heal and to be brought back into the community as a full participating member. Further research and investigation needs to be undertaken on these processes as to their utility, satisfaction levels of participants and the immediate and long-term outcomes for the victim, offender and community. However the initial evidence is encouraging; illustrating that we need to "think outside the box" when dealing with long-standing systems that are not fulfilling the original intentions. This is what restorative justice processes have achieved. These Restorative Justice Systems will need further refining and should be developed carefully and with the important considerations of design, gender, youth and community at the forefront. However if they are implemented well, they hold out great promise of reducing crime, healing offenders and victims and contributing to healthier communities.