

THE LAW AND RESTORATIVE JUSTICE: FRIEND OR FOE? A SYSTEMIC LOOK AT THE LEGAL ISSUES IN RESTORATIVE JUSTICE

*Mary Ellen Reimund**

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* Assistant Professor and Director of Law and Justice, Central Washington University-Des Moines; B.S., Bowling Green State University, 1978; J.D. and M.A., Drake University, 1987; LL.M., University of Missouri-Columbia, 2000. The Author wishes to thank Anne Joiner and Doug Rosenoff for their editing assistance.

I. INTRODUCTION

“[I]n one case everybody is holding hands and saying ‘Kumbaya,’ and on the next one we are tied at the wrist and pounding on each other.”¹ Thus, lawyers can be conflicted over their roles in the changing environment of the criminal justice system with a restorative emphasis versus an adversarial one.

As an adversarial process, our legal system is composed of professionals, which includes defense attorneys standing in for the offender, the state representing the community, and a judge acting as referee.² The outcomes are imposed by the legal authority of judges and juries “who stand outside the essential conflict.”³ The role of the victim is to assist the state as a witness by providing evidence so the prosecution can be successful. “Victims, community members, even offenders, rarely participate in this process in any substantial way.”⁴ The traditional criminal justice system focuses on the following questions: “What laws have been broken? Who did it? What do they deserve?”⁵

Restorative justice is another philosophy that resolves criminal conflict using a different set of principles. Restorative justice takes a victim-centered approach to crime.⁶ It recognizes the needs of victims and focuses on holding offenders accountable to victims and the community.⁷ Restorative justice asks the following: “Who has been hurt? What do they need? Whose obligations and responsibilities are these? Who has a stake in this situation? What is the process that can involve the stakeholders in finding a solution?”⁸

Victim-offender mediation, family group conferencing, sentencing circles, and reparative boards are restorative processes practiced throughout the United States.⁹ Programs that support restorative practices

1. Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 78 (internal quotation marks omitted).

2. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 25 (2002).

3. *Id.*

4. *Id.*

5. *Id.* at 63.

6. MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, at xxvii (2001).

7. *Id.*

8. ZEHR, *supra* note 2, at 63.

9. For a discussion and comparison of these models, see Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST.

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can be operated through or given referrals from the courts, prosecutors' offices, probation offices, community mediation centers, and private providers.¹⁰ Most "Western justice system[s] incorporate[] restorative justice programs and values for some young offenders, typically for less serious offenses, but there is no reason why they need [to] be limited to young offenders or minor crimes."¹¹

Along with the upsurge in restorative programs¹² in the United States comes the question about the role of the law and lawyers. There is a continuing tension between whether restorative justice is a philosophy around which a new system of justice should be developed or whether restorative justice can be achieved within the confines of our current justice system. The legal issues and the role of lawyers in restorative justice can vary depending on the degree of restorativeness that permeates the criminal justice system. "The more restorative justice evolves into a kind of mainstream response, however, the more urgent it is to reflect on how to insert it into an adequate legal frame. . . . Legal formalism must not intrude on the restorative process, but the process must take place in a legalized context."¹³

This Article examines the legal issues and role of lawyers as they relate to restorative justice in the adult criminal justice system. The legal issues cannot be viewed in a vacuum without an understanding of the principles and values of restorative justice. With that foundation, restorative processes and outcomes with practical examples will lend insight into how restorative justice is manifested within the world of criminal justice. In addition to the role of attorneys, this Article will discuss some of the legal issues that have surfaced with restorative justice, both in the context of a total shift in philosophy and as a continuum of restorative practices, such as due process and the privilege against self-incrimination. The law and lawyers can work in a way that support

BULL. (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Wash., D.C.), Feb. 2001, at 1, available at <http://www.ncjrs.org/pdffiles1/ojjdp/184738.pdf>, and Leena Kurki, *Restorative and Community Justice in the United States*, in 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 235, 268-84 (Michael Tonry ed., 2000).

10. Bazemore & Umbreit, *supra* note 9, at 2.

11. Lode Walgrave, *Restoration in Youth Justice*, in 31 CRIME AND JUSTICE: A REVIEW OF RESEARCH 543, 543 (Michael Tonry & Anthony N. Doob eds., 2004).

12. See Mara Schiff, *Models, Challenges and the Promise of Restorative Conferencing Strategies*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 315, 317 (Andrew von Hirsch et al. eds., 2003) ("Current estimates suggest that there are about 750 such [restorative justice programs] operating in the United States alone.").

13. Walgrave, *supra* note 11, at 580.

restorative values. Law can, and should, be a friend and not a foe of restorative justice.

II. PRINCIPLES AND DEFINITION OF RESTORATIVE JUSTICE

When a crime has been committed, there is a need to right the wrong.¹⁴ Restorative justice looks at “[c]rime [as] a violation of people and of interpersonal relationships.”¹⁵ With the violation, there is an obligation to right the wrong and repair the damaged relationship.¹⁶ Before William the Conqueror, crimes were viewed as wrongs against individual victims.¹⁷ That changed in the twelfth century, when the focus shifted from crime as a conflict between victim and offender, to crime becoming a violation of the king’s peace.¹⁸ The state stole conflicts away from the parties;¹⁹ restorative justice moves toward giving them back.

“Restorative justice requires, at minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.”²⁰ While those principles are being examined at an academic level, they are “also being practiced by countless individuals who have given little thought to its definition, but simply find that a particular process ‘works.’”²¹ Moving beyond the principles of restorative justice to a generally accepted definition is a difficult task.²² Although some suggest that “[i]t is critically important to develop definitions of restorative justice philosophy, practice

14. See ZEHR, *supra* note 2, at 19 (identifying the need “to put right the wrongs” caused by crime as “[t]he central obligation” of restorative justice programs).

15. *Id.*

16. *Id.* at 20.

17. DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 10-11 (2d ed. 2002).

18. *Id.* at 10.

19. See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 7-10 (1977) (debating whether the conflict that arises as a result of the commission of a crime belongs to the government or to the victim).

20. ZEHR, *supra* note 2, at 25.

21. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL’Y 235, 240 (2004).

22. See Walgrave, *supra* note 11, at 551-52 (noting the diverse components of restorative justice theories, including “transformative justice, relational justice, community justice, and the like”). Defining restorative justice is a difficult task. This was the assessment made after a two-day symposium that brought together academics, lawyers, and restorative justice visionaries and practitioners to discuss restorative justice, mediation, and the law. Coben & Harley, *supra* note 21, at 237-39.

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and programs that are consistent,”²³ others embrace the flexibility.²⁴

III. RESTORATIVE JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

Is restorative justice a complement to the existing court system or a candidate to replace it? “Redeem or divert out?”²⁵ These questions reflect two views regarding the role of restorative justice within the criminal justice system. One view shows a paradigm shift where restorative philosophy is the predominant way of handling criminal cases—a transformation for criminal jurisprudence.²⁶ “Restorative justice advocates dream of a day when justice is fully restorative, but whether this is realistic is debatable, at least in the immediate future.”²⁷

The second approach to restorative justice in the criminal justice system offers it as another tool in the toolbox of options—a complement to the existing system. “[F]ocus[ing] on repairing harm and not on what should be done to the offender is the key to understanding restorative justice and is what distinguishes it from punitive and rehabilitative justice approaches.”²⁸ “Crime is defined by the harm it causes and not by its transgression of a legal order.”²⁹

23. Harry Mika et al., *Listening to Victims—A Critique of Restorative Justice Policy and Practice in the United States*, FED. PROBATION, June 2004, at 32, 36.

24. For example, Texas Prosecutor Ronnie Earle believes the “unstructured lack of standardization is the genius of the movement,” but realized the “great temptation to create a national template for community justice programs.” Leena Kurki, *Incorporating Restorative and Community Justice into American Sentencing and Corrections*, SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY (Nat’l Inst. of Justice, U.S. Dep’t of Justice, Washington, D.C.), Sept. 1999, at 1, 3, available at <http://www.ncjrs.org/txtfiles1/nij/175723.txt>. See also Howard Zehr & Barb Toews, *Principles and Concepts of Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 1, 1 (Howard Zehr & Barb Toews eds., 2004) (“The definitions we use are based on . . . our personal life experiences, our culture and worldviews, the audience to whom we are speaking, our experiences as practitioners or academics, our understandings of victimization and offending, [and] our experiences with a particular application . . . ”).

25. Coben & Harley, *supra* note 21, at 326.

26. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 2 (Michael Tonry ed., 1999) (“If we take restorative justice seriously, it involves a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation, and crime prevention. It also means transformed foundations of criminal jurisprudence and of notions of freedom, democracy, and community.”).

27. ZEHR, *supra* note 2, at 59.

28. Walgrave, *supra* note 11, at 552.

29. *Id.* at 553.

In his widely cited book, *Changing Lenses*, Howard Zehr contrasts the retributive approach in the traditional criminal justice system with a restorative view of the justice system.³⁰ However, in his new book, *The Little Book of Restorative Justice*, Zehr expressed concern about the polarization that results from framing the issues as either restorative or retributive because it may mislead by “hid[ing] important similarities and areas of collaboration.”³¹ His current analysis is likely more representative of present perceptions regarding restorative justice in the criminal justice system today. Not a single jurisdiction in the United States has “fully embraced restorative/community values and practices.”³² There are, however, numerous programs operating as complements to the criminal justice system.³³

Positioning restorative justice as a complement to the traditional criminal justice system is a starting point for gaining greater systemic acceptance. No one has a magic wand to wave that will instantly transform the criminal justice system into a restorative one.³⁴ Showing individual program successes within the system helps lay the groundwork for the infiltration of restorative attitudes and approaches within the criminal justice system.³⁵

IV. TYPES OF RESTORATIVE JUSTICE PROCESSES AND OUTCOMES

Restorative justice programs can be divided into two categories: “those providing restorative processes, and those providing restorative outcomes.”³⁶ Victim-offender mediation, family group conferencing, sentencing circles, and reparative boards fit within the processes category.³⁷ Understanding the basic models of restorative justice and seeing system applications in adult restorative justice programs aids in our later discussion of legal issues. Although these models help in understanding

30. See HOWARD ZEHR, CHANGING LENSES 63-82 (1990) (discussing retributive justice); *id.* at 177-214 (proposing a restorative justice approach).

31. ZEHR, *supra* note 2, at 58.

32. Daniel W. Van Ness, *Creating Restorative Systems*, in RESTORATIVE JUSTICE AND THE LAW 130, 131 (Lode Walgrave ed., 2002).

33. See *id.* at 144-47 (discussing the ways in which restorative justice programs could be combined with or replace existing conventional criminal justice systems).

34. Telephone Interview with David Lerman, Restorative Justice Coordinator, District Attorney’s Office, Milwaukee County, Wisconsin (Jan. 18, 2005).

35. *Id.*

36. Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 54 (1998).

37. *Id.*

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what happens in these restorative processes, there are variations and hybrids of these models in practice.³⁸ “It is important to view restorative justice processes along a continuum, from fully restorative to not restorative, with several points or categories in between.”³⁹

A. Models of Restorative Justice Processes

1. Victim-Offender Mediation

Of all the restorative justice processes, victim-offender mediation (VOM) has been in operation the longest—over twenty years.⁴⁰ It is the most utilized model in the United States, accounting for almost 400 programs.⁴¹ There are variations in terminology for VOM programs; examples include victim-offender reconciliation, victim-offender conferencing, victim-offender dialogue, victim-offender meeting, or community conferencing.⁴² Despite the variation in names, most follow a similar process by “provid[ing] a safe place for dialogue among the involved parties,” usually facilitated by a trained community member.⁴³ The steps in a VOM meeting are as follows:

1. Introductory opening statement by mediator[:]
2. Storytelling by victim and offender[:]

38. See ZEHR, *supra* note 2, at 44-57 (discussing three models of restorative justice and how combinations of these models have been used in practice).

39. *Id.* at 55. Six key questions explore the effectiveness and extent of restorative justice models: (1) “Does the model address harms, needs, and causes?”; (2) “Is it adequately victim-oriented?”; (3) “Are offenders encouraged to take responsibility?”; (4) “Are all relevant stakeholders involved?”; (5) “Is there an opportunity for dialogue and participatory decision-making?”; and (6) “Is the model respectful to all parties?” *Id.*

40. Schiff, *supra* note 12, at 317-18.

41. GORDON BAZEMORE & MARA SCHIFF, JUVENILE JUSTICE REFORM AND RESTORATIVE JUSTICE: BUILDING THEORY AND POLICY FROM PRACTICE 105 (2005). Over half of the restorative justice programs in the country, 51.1%, use this model. *Id.*

42. Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401, 405. The article elaborates on why objections to the term “reconciliation” were raised when the American Bar Association was considering endorsement of victim-offender programs and the recent assertions by Howard Zehr as to why the term “mediation” is a misnomer as it relates to the facilitated encounter between victims and offenders. *Id.*

43. Mark S. Umbreit, *Victim Offender Mediation in Juvenile or Criminal Courts*, in ADR HANDBOOK FOR JUDGES 225, 230 (Donna Stienstra & Susan M. Yates eds., 2004). Victim-offender mediation follows four steps: (1) referral or intake; (2) preparation for mediation; (3) mediation; and (4) follow-up. *Id.*

3. Clarification of facts and sharing of feelings[;]
4. Reviewing victim losses and options for compensation[;]
5. Developing a written restitution agreement[; and]
6. Closing statement by mediator[.]⁴⁴

VOM gives victims an opportunity to meet offenders, discuss how the crime has impacted their lives, discuss the physical, emotional, and financial impact of the crime, and “receive answers to lingering questions about the crime and the offender.”⁴⁵ The offender is able to explain what happened, take responsibility for his behavior, and make amends to both the victim and the community.⁴⁶ Although the majority of victim-offender meetings reach a restitution agreement,⁴⁷ this is “seen as secondary to emotional healing and growth.”⁴⁸

The Milwaukee County District Attorney’s Office operates a Community Conferencing Program similar to this model. Milwaukee is unique because it is one of two counties in Wisconsin where the state legislature has funded an assistant district attorney position in the prosecutor’s office to serve as a restorative justice coordinator.⁴⁹ According to Assistant District Attorney David Lerman, who coordinates the community conferencing program in Milwaukee County, referrals to the program come from prosecutors, defense attorneys, victim-witness advocates, judges, law enforcement, probation officers, or victims who wish to speak directly with an offender.⁵⁰ The program works with adult offenders in nonviolent cases where the offender admits wrongdoing.⁵¹

44. MARK S. UMBREIT, MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE 143 (1995).

45. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, RESTORATIVE JUSTICE FACT SHEET 11 (1997), available at http://jabg.nttac.org/curriculum/docs/community_restorative_boards.pdf [hereinafter RESTORATIVE JUSTICE FACT SHEET].

46. *Id.*

47. Bazemore & Umbreit, *supra* note 9, at 3. Four study sites showed that ninety-five percent of mediation sessions resulted in a successfully negotiated restitution agreement. *Id.*

48. Kurki, *supra* note 9, at 270.

49. LEGISLATIVE AUDIT BUREAU, AN EVALUATION: RESTORATIVE JUSTICE PROGRAMS 9-10 (June 2004), available at http://oja.state.wi.us/docs_list.asp?doccatid=63.

50. Community Conferencing Program, Milwaukee County District Attorney’s Office Materials (on file with author) [hereinafter Community Conferencing Program Materials].

51. *Id.* From May 2000 through September 2004, 187 conferences were held.

According to a legislative audit, only 8.8 percent of offenders who participated in a Milwaukee County Community Conferencing program in 2002 were rearrested for a crime within one year, as compared to 27.6 percent of nonparticipating offenders in a control group.⁵²

Victim-offender reconciliation has saturated the adult criminal justice system in Polk County, Des Moines, Iowa.⁵³ According to Assistant Polk County Attorney Fred Gay, sending cases to victim-offender reconciliation is a consideration for Polk County prosecutors in the following situations: when reviewing cases during initial intake, during pre-plea at the defense attorney's request, and during felony presentence investigations.⁵⁴ "It is just part of the way we do business," Gay explains.⁵⁵ All types of cases are eligible to go through victim-offender reconciliation except domestic violence cases.⁵⁶ Liaisons in the Polk County Attorney's Office coordinate the conferences between victims and offenders and community members conduct the meetings.⁵⁷ Victim satisfaction with victim-offender reconciliation is what has gained the political support for funding.⁵⁸

Id.

52. LEGISLATIVE AUDIT BUREAU, *supra* note 49, at 21. Internal studies within the program reveal similar results. Community Conferencing Program Materials, *supra* note 50.

53. Telephone Interview with Fred Gay, Assistant Polk County Attorney, Des Moines, Iowa (Jan. 21, 2005).

54. *Id.* Missouri law provides that the presentence investigation includes available alternatives, including restorative justice. See ROBERT H. DIERKER, 28 MISSOURI CRIMINAL PRACTICE HANDBOOK § 35.3(2)(b), at 487 (West 2005) (citing MO. ANN. STAT. §§ 217.777, 558.019.8, 559.021 (West 2004)).

55. Telephone Interview with Fred Gay, *supra* note 53.

56. *Id.* For more information on Polk County's Victim-Offender Reconciliation Program (VORP), see MARK S. UMBREIT & JEAN GREENWOOD, U.S. DEPT' OF JUSTICE, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 46-48 (April 2000), available at http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf.

57. Telephone Interview with Fred Gay, *supra* note 53.

58. *Id.* According to Gay, a satisfaction study of the VORP Program in Polk County showed that more than eighty percent of the victims were satisfied with VOM, and although the satisfaction levels for offenders was lower, it constituted a majority of the participants. *Id.* This is consistent with other satisfaction studies of VOM programs. See Bazemore & Umbreit, *supra* note 9, at 3 (listing as successes of VOM programs the creation of negotiated restitution agreements in ninety-five of all cases examined in a two-year study, an increased likelihood that victims would be more satisfied with the criminal justice system having participated in a program, an increased likelihood that offenders would complete restitution obligations having participated in a program, and lower recidivist rates among offenders who participated in a program);

While the Milwaukee and Des Moines programs handle adult offenders, the majority of cases across the country referred to VOM involve misdemeanors, property crimes, and minor assaults⁵⁹—all committed by youthful offenders.⁶⁰ As programs have matured and greater trust is gained from the referring justice system agencies, there has developed a push to work with victims and offenders involved in serious crimes,⁶¹ such as sexual assault,⁶² attempted homicide, and murder.⁶³ As programs handle more cases involving serious crimes, concerns about the legal implications of restorative processes will be greater due to heightened concerns about offenders' rights.⁶⁴

2. Family Group Conferencing

Family group conferencing (FGC) is similar to VOM, but FGC involves a broader group of people—such as family, friends, coworkers, and teachers—to resolve the criminal incident.⁶⁵ The origin of family group conferencing comes from the Maori in New Zealand “where it is used . . . for most juvenile offenses.”⁶⁶ In 1989, New Zealand became the first country to adopt a fully restorative juvenile justice system using FGC.⁶⁷ With the New Zealand model, “all but the most serious and violent

Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, FED. PROBATION, Dec. 2001, at 29, 30 (noting that “[t]he vast majority of studies reviewed reported in some way on satisfaction of victims and offenders with victim-offender mediation and its outcomes . . . across program sites, types of offenders, types of victims, and cultures”).

59. BAZEMORE & SCHIFF, *supra* note 41, at 112; UMBREIT, *supra* note 6, at 318.

60. Schiff, *supra* note 12, at 318.

61. See BAZEMORE & SCHIFF, *supra* note 41, at 112 (“Anecdotal evidence suggests that there appears to be a trend toward taking increasingly serious cases . . . ”).

62. E.g., RESTORE, JUSTICE THAT HEALS, <http://restoreprogram.publichealth.arizona.edu/Default.htm> (last visited April 9, 2005) (employing a restorative justice model for sexual assault cases).

63. MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH 255 (2001). In Texas, for example, there are currently 150 victims of severe violence on a waiting list who have requested meetings with their offenders. *Id.* at 256; see also Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2004) (discussing VOM in more serious cases).

64. Wellikoff, *supra* note 63, at 3.

65. Kurki, *supra* note 24, at 4-5.

66. RESTORATIVE JUSTICE FACT SHEET, *supra* note 45, at 13.

67. Schiff, *supra* note 12, at 319.

youthful offenders are diverted from the court [system].”⁶⁸

A second model of FGC is used in Australia, but it is based on ideas borrowed from the New Zealand model.⁶⁹ This approach utilizes a “standardized, scripted model of facilitation,”⁷⁰ and is used by police and school officials to “facilitate meetings between the parties and their families.”⁷¹ Estimates in 2001 showed ninety-four active FGC programs in the United States.⁷² The vast majority of FGC programs are limited to juvenile offenders⁷³ and thus fall outside the parameters of this Article.

3. Circles

Circles—referred to as sentencing circles, peacemaking circles, and community circles—are derived from First Nation’s community practices in Canada.⁷⁴ They were first used in the Canadian criminal justice system “as an alternative way of sentencing that involves all stakeholders.”⁷⁵ The use of circles in the United States began in 1995 with a pilot project in Minnesota.⁷⁶ They are now used in both juvenile and adult cases to determine sentences and decide offenders’ terms of accountability.⁷⁷ Circles also “help families and communities take responsibility for mending broken relations and creating new lives, [and] give criminal justice professionals a chance to work with victims and offenders in new ways.”⁷⁸

“In a circle process, participants arrange themselves in a circle.”⁷⁹ A “talking piece” is passed around the circle to allow each person to speak, one at a time, in the order they are seated in the circle.⁸⁰ This process

68. *Id.*

69. *Id.*

70. ZEHR, *supra* note 2, at 48 (internal quotation marks omitted).

71. Schiff, *supra* note 12, at 319.

72. *Id.* Family Group Conferencing is also being practiced in Minnesota, Pennsylvania, Montana, Vermont, Colorado, and other states. *Id.*

73. ZEHR, *supra* note 2, at 48.

74. Schiff, *supra* note 12, at 321-22; ZEHR, *supra* note 2, at 50.

75. KAY PRANIS ET AL., PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY 21 (2003).

76. Schiff, *supra* note 12, at 322.

77. PRANIS ET AL., *supra* note 75, at 21.

78. *Id.* Circles are used to facilitate juveniles’ reentry into their families, schools, and communities. *Id.* at 22. They are used within juvenile correctional facilities, with chronic female offenders on probation, and with support groups for sex offenders at risk for offending again. *Id.* at 22-23.

79. ZEHR, *supra* note 2, at 51.

80. *Id.*

emphasizes respect, valuing what each participant has to say, and “the importance of speaking from the heart.”⁸¹ Participants in the sentencing circles may include the victim, supporters of the victim, the offender, supporters of the offender, judges, court personnel, prosecutors, defense counsel, police, and interested community members.⁸² Sentencing circles typically have four stages: (1) determination of suitability; (2) preparation; (3) the peacemaking circle meeting; and (4) follow-up and maintenance of accountability.⁸³ When cases are referred from the court for sentencing, the agreement reached in a circle can be the sentencing recommendation that is presented to the court.⁸⁴ “Using circles to respond to crime . . . [is] an ongoing process with stages that can extend over weeks, months, or years, depending on the case and the needs involved.”⁸⁵

Several communities in Minnesota use circles for sentencing recommendations.⁸⁶ Minnesota is unique because there is legislative authority for restorative justice programs, including circles, to “assign an appropriate sanction to [an] offender.”⁸⁷ Minnesota’s restorative justice statute withstood a challenge before the Minnesota Supreme Court in *State v. Pearson*.⁸⁸ The Washington County circle handles misdemeanor case

81. *Id.*

82. RESTORATIVE JUSTICE FACT SHEET, *supra* note 45, at 3. See also Janelle Smith, *Peacemaking Circles: The “Original” Dispute Resolution of Aboriginal People Emerges as the “New” Alternative Dispute Resolution Process*, 24 HAMLINE J. PUB. L. & POL’Y 329, 334-35 (2003) (discussing the values of sentencing circles, many of which spawn from participation by a broad number of affected individuals).

83. PRANIS ET AL., *supra* note 75, at 152-53. The stages of the circle process have flexibility because there is “no formula for how a specific Circle process for a victim or offender ‘should’ unfold—no automatic, assembly-line method that guarantees a predictable, uniform result.” *Id.* at 149.

84. Kurki, *supra* note 24, at 5.

85. PRANIS ET AL., *supra* note 75, at 149.

86. Smith, *supra* note 82, at 332. Some Minnesota counties utilizing peacemaking circles include Mille Lacs, Ramsey, Dakota, Kandiyohi, and Washington counties. *Id.* at 332 n.10.

87. MINN. STAT. ANN. § 611A.775 (West 2003).

88. *State v. Pearson*, 637 N.W.2d 845, 848-49 (Minn. 2002). The court found that restorative justice programs have the authority to assign a sanction for a criminal offense, but ruled that the sentencing authority remains with the judiciary. *Id.* at 847-48. The state’s lack of participation in (or notice of) a sentencing circle meeting did not negate the sentencing circle’s recommendation as to disposition, absent a clear statutory requirement that the prosecutor participate in the process. *Id.* at 848 n.2. The prosecutor had notice of the meeting and could have participated in the circle if he wanted a particular result. *Id.*

referrals from city attorneys.⁸⁹ Prior to *Pearson*, the Washington County prosecutor sent felony cases to sentencing circles, but after that decision, the county attorney discontinued participation.⁹⁰

One of the older operating circles in the United States is the South Saint Paul Restorative Justice Council.⁹¹ This group utilizes circles for a variety of purposes, including sentencing.⁹² A study of that program exposed disagreement between the community, prosecutors, judges, and corrections as to what cases would be appropriate for a circle.⁹³ Despite disagreement as to appropriate referrals,

Judge Barry Stuart, the pioneer of circle sentencing in the Yukon . . . [who has] work[ed] primarily with quite serious cases involving multiple recidivists, suggest[ed] that the extensive time and resources required for peacemaking circles are primarily warranted in [recidivist] cases . . . rather than the very minor cases involving first time offenders that are diverted from the justice system.⁹⁴

A circle is the most restorative process available because it encompasses more of the restorative justice values than other processes.⁹⁵ Community members have direct involvement in determining which cases come to the circle.⁹⁶ Circles address the needs of both victims and

89. Telephone Interview with Gary R. Schurrer, Chief Judge, 10th Judicial District, Washington County, Minnesota (Jan. 24, 2005); *see also infra* Part V.B (discussing the role of attorneys in restorative justice programs).

90. Telephone Interview with Gary R. Schurrer, *supra* note 89.

91. ROBERT B. COATES ET AL., RESTORATIVE JUSTICE CIRCLES IN SOUTH SAINT PAUL, MINNESOTA, at i (Sept. 1, 2000), available at <http://2ssw.che.umn.edu/rjp/Resources/Documents/Circles.sum.sept.pdf>.

92. *Id.*

93. *Id.* at v. Due to concerns about avoiding significant risk to the public, the police and prosecutors did not think assault or sexual assault cases, or cases involving violent offenses, were appropriate. *Id.* Council members “would eliminate few if any offense categories from possible circle work.” *Id.* The judge involved in the study did “not see circles handling sex offender or murder cases,” but corrections staff “suggested that circles would be particularly useful with sex offenders returning to the community.” *Id.*

94. *Id.* at vi.

95. See VAN NESS & STRONG, *supra* note 17, at 63-65 (describing the flexible principles and processes of sentencing circles).

96. See PRANIS ET AL., *supra* note 75, at 152 (noting that the decision of “whether the Circles process or some other restorative justice practice might be appropriate” in a particular case typically rests with a community justice committee).

offenders.⁹⁷ Members of the circle have a role in making sentencing recommendations.⁹⁸

4. *Reparative Boards*

Reparative boards are usually composed of citizens in the community who conduct face-to-face meetings with offenders who have been ordered by a court to participate.⁹⁹ Board members and the offender discuss the nature and impact of the offense and draw up a contract.¹⁰⁰ These boards have been implemented statewide through the Department of Corrections in Vermont, where persons sentenced to probation go through this process to work out the conditions of probation.¹⁰¹ By legislative mandate, restorative justice became the law and official policy in Vermont, and the reparative boards are used in cases where offenders commit nonviolent crimes and do not require significant intervention.¹⁰²

B. *Outcomes*

The outcomes of these processes "include restitution, community service, victim support services, victim compensation programs, and rehabilitation programs for offenders."¹⁰³ Similar outcomes emerge from the traditional criminal justice system, so there are some restorative outcomes that do not flow from restorative processes. An example would be community service, which is considered "an alternative form of punishment, not restorative justice."¹⁰⁴ Restitution, however, has the potential for being restorative if it is "seen as repayment to or a contribution to the community, mutually agreed upon by all parties."¹⁰⁵ Although these judicially imposed obligations can have an explicit restorative meaning, their restorative impact will be reduced. Between the fully restorative processes and the partially restorative reactions, degrees of

97. ZEHR, *supra* note 2, at 51.

98. PRANIS ET AL., *supra* note 75, at 21.

99. RESTORATIVE JUSTICE FACT SHEET, *supra* note 45, at 1.

100. *Id.*

101. Kurki, *supra* note 24, at 6.

102. Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, VT. B.J., Winter 2003-2004, at 39, 40. For more detail on a working reparative board program, see Olson & Dzur, *supra* note 1, at 65-68.

103. Van Ness & Nolan, *supra* note 36, at 54.

104. ZEHR, *supra* note 2, at 57.

105. *Id.*

restorativeness exist.¹⁰⁶ “A fully restorative system would be characterized by both restorative processes and outcomes.”¹⁰⁷

Howard Zehr raises several issues that point out the dangers in defining categories for what is and is not restorative justice. For example, he has asked: “[I]s it primarily a process? . . . [Y]ou can do the process and you can come up with some pretty awful things. . . . Can you come to a good restorative healing outcome in a bad way?”¹⁰⁸ Familiarity with the restorative processes and outcomes as well as understanding that there are degrees of restorativeness helps when assessing the legal protections, processes, and role of attorneys in restorative justice.

V. LAW AND RESTORATIVE JUSTICE

The foundations of law may be impeding the wider adoption of restorative justice within the criminal justice system. According to Judge Gary Schurrer, “[t]he legal system has never been a system that is designed to encourage change rapidly.”¹⁰⁹ Because the law is driven by precedent, looking toward the future rather than at the past is foreign to those trained in the law.¹¹⁰ This legal mindset does not encourage new and different theories for the criminal justice system, such as restorative justice.¹¹¹

Not only do legal systems adopt change slowly, other legal ramifications also hinder systemic adoption of restorative justice and raise the question of whether restorative justice can operate within the legal parameters currently existing within the criminal justice system. Critics of restorative justice have noted concerns about due process protection and procedural safeguards that exist in more formal processes.¹¹² “[R]ights can

106. See Walgrave, *supra* note 11, at 555-58 (describing an array of restorative and partially-restorative programs).

107. Van Ness & Nolan, *supra* note 36, at 54.

108. Coben & Harley, *supra* note 21, at 271 (quoting Professor Howard Zehr, Symposium Remarks at the Dispute Resolution Institute at the Hamline University School of Law (Nov. 2003)).

109. Telephone Interview with Gary R. Schurrer, *supra* note 89.

110. *Id.*

111. *Id.*

112. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1251 (1994) (proposing “a decoupling of mediation from the criminal justice system,” which is a move that would “protect the integrity of the system and the integrity of mediation as a fundamentally voluntary process”) (footnote omitted); Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community and Justice*, 52 STAN. L. REV. 751, 760 (2000) (arguing that “because VOM pressures offenders to accept informal resolution of the charges against them

be trampled because of the inferior articulation of procedural safeguards in restorative justice processes compared to [the] courts.”¹¹³ When “the values are similar between restorative [justice] and conventional processes, such as offender rehabilitation and accountability,” tension is low.¹¹⁴ However, when the rights of offenders are involved, “a value less compatible with restorative justice theory” emerges, and the divide becomes greater.¹¹⁵

If restorative justice is fully embraced through a paradigm shift, then a different way of looking at legal issues should be considered. “Due process, legality, equality, right of defen[s]e, presumption of innocence and proportionality may be irrelevant or may need to be experienced in a different form. Maybe other legal principles need to be constructed in a manner more appropriate for the restorative perspective.”¹¹⁶ One author has even explored what a restorative constitution might look like.¹¹⁷

Since that shift has not taken place, restorative justice is practiced today within existing constitutional parameters and procedures in the criminal justice system. A closer examination of the pertinent legal concerns as they relate to restorative justice reveals that the issues may be of greater magnitude in theoretical discussions than in practice. Most restorative theorists and practitioners recognize that the rights of offenders cannot be ignored and responsibility for their protection falls on the professionals.¹¹⁸

A. *Constitutional Implications*

Our Constitution guarantees the criminally accused certain rights, including due process and the right to avoid self-incrimination.¹¹⁹ The

and to waive representation by a lawyer, trial by jury, and the right to appeal, it would seem to stand on constitutionally questionable ground”).

113. Braithwaite, *supra* note 26, at 104.

114. Olson & Dzur, *supra* note 1, at 79.

115. *Id.*

116. Lode Walgrave, *Introduction to RESTORATIVE JUSTICE AND THE LAW*, at xv, xvii (Lode Walgrave ed., 2002).

117. See Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 744-54 (2000).

118. E.g., Walgrave, *supra* note 11, at 580 (asserting that “restorative practices can afford some *flou artistique* with regard to legal safeguards, because they are limited in scope and are carried out by reformers whose personal moral authority suggests that serious violations of participants’ legal rights are unlikely”).

119. See U.S. CONST. amend. V (stating that “no person . . . shall be compelled

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system relies on procedural rules to determine legal guilt or innocence, with lawyers and judges as the keepers of procedural expertise.¹²⁰ Although constitutional rights are a vital part of the United States criminal justice system and have to be protected in restorative processes, how that process looks may be different under a restorative justice model because restoration of violated relationships is key. Expertise in substantive law becomes less necessary because crime is not viewed as breaking a state law, but rather as violating community norms.¹²¹ With direct participation by the victim, offender, and community, fewer specialized roles are needed.¹²² Restorative justice simplifies procedure by putting parties in control of a conflict's resolution.¹²³

1. Due Process

As guardians of due process, public defenders want to make sure that restorative justice programs protect the rights of offenders.¹²⁴ Although there are concerns about the erosion of rights in restorative processes, it is a misnomer to believe that restorative justice requires abandonment of due process and procedural safeguards or that the two concepts are incompatible.¹²⁵ There are times when the full array of procedural

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law").

120. Olson & Dzur, *supra* note 1, at 61.

121. *Id.* at 63.

122. *Id.*

123. *Id.*

124. John Stuart, *Compassionate Prosecution/Compassionate Defense: The Rights of the Accused, the Interests of the State, and the Common Ground for Restorative Justice*, Address at the Restorative Justice Summit at the William Mitchell College of Law (Mar. 1, 2000). Stuart made six suggestions for drawing public defenders into restorative justice programming: People should (1) understand that due process is important to public defenders; (2) understand the skepticism of public defenders; (3) involve public defenders in restorative justice planning; (4) take on the most serious cases they can honestly reach for; (5) claim public defenders as a community resource; and (6) keep in mind that lawyers are people who live in the community, have families, and have hearts—draw on those attributes to involve public defenders into restorative justice. *Id.*

125. See Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME & DELINQUENCY 296, 308 (1995) (noting that "none ha[ve] argued that it is necessary or desirable to weaken procedural protections for offenders to ensure restoration of victims or to bring about more rapid implementation of restorative policies"). John Braithwaite & Christine Parker, *Restorative Justice Is Republican Justice*, in RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME

protections afforded by formal court processes are desired, especially if guilt is in dispute. “Conferences should never proceed in cases where the defendant sees him, or herself as innocent or blameless . . .”¹²⁶ “Courts of law are designed to be ‘truth machines’—forums for sorting out disputed facts” in those types of situations.¹²⁷ But this machinery is unnecessary and can be “counterproductive in cases where significant facts are not in dispute.”¹²⁸ Concerns regarding due process are lessened in many restorative programs when the offender participates after pleading guilty. In those cases, the question becomes whether due process was infringed upon in any greater degree in a restorative process than through plea bargaining. Plea bargaining “circumvents . . . ‘rigorous standards of due process and proof imposed during trials.’”¹²⁹

If an offender is compelled to participate in restorative processes, the concerns about due process are greater. When VOM was endorsed by the American Bar Association in 1994, the number one item on its list of program requirements was that participation by both the offender and the victim be voluntary.¹³⁰ Although coerciveness has been a criticism of restorative justice, the same could be said regarding plea bargaining, which occurs in ninety percent of felony prosecutions.¹³¹ Voluntariness can

103, 116 (Gordon Bazemore & Lode Walgrave eds., 1999) (proposing a restorative justice model “in which the justice of law and the restorative justice of the community interact and interplay”).

126. John Braithwaite, *Thinking Harder About Democratizing Social Control*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 199, 205 (Christine Adler & Joy Wundersitz eds., 1994).

127. William G. Schma, Comment, *Community Conferences: Reshaping Criminal Justice*, 67 REV. JUR. U.P.R. 661, 661 (1998).

128. *Id.*

129. Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 768 (1998) (quoting Allisa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990)).

130. AM. BAR ASS’N, VICTIM/OFFENDER MEDIATION/DIALOGUE (Aug. 1994), available at <http://www.abanet.org/crimjust/policy/index.html>.

131. See, e.g., U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C (2003), available at <http://www.ussc.gov/ANRPT/2002/SBT0C02.htm> (noting that 97.1% of federal felony cases in 2002 were plea bargained); U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL CASE PROCESSING STATISTICS, at <http://www.ojp.usdoj.gov/bjs/cases.htm> (last modified Sept. 28, 2004) (noting that “[n]inety-five percent of convictions occurring within 1 year of arrest were obtained through a guilty plea”). For more discussion about plea bargaining in criminal mediation, see Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 608-15 (2004).

remedy coercive elements of restorative practices that have a tendency to impede due process.¹³²

An example of how voluntariness can be achieved within a restorative program is the Milwaukee Community Conferencing Program. Offenders are given two options: (1) what the penalty will be with restorative conferencing; and (2) what the penalty will be without conference participation.¹³³ Coercion is lessened because the offender has the option of whether to participate, and thus an option to choose the corresponding penalty.

Another way to protect due process rights is to give an offender the opportunity to opt out of the restorative process at any time to pursue her case in the traditional criminal justice system with its full panoply of rights.¹³⁴ In contrast would be restorative programs where offenders are ordered to engage in a restorative process as part of their sentence. Not only does the system take away the ability of the offender to be a voluntary participant in restorative justice, it softens the voice of victims since the options regarding the terms of an agreement reached during a VOM would be reduced.

2. *Right Against Self-Incrimination and of Confidentiality*

There is the potential that an offender participating in a restorative justice process could trigger her Fifth Amendment privilege against self-incrimination.¹³⁵ The constitutional rights of a person accused of a crime and directed into a restorative process could be violated if she was not given any warning about rights against self-incrimination and then revealed information which later could be used against her in court.¹³⁶ Most restorative justice programs “do not legally guarantee the American Bar Association’s . . . guideline that ‘statements made by victims and offenders

132. For a more in-depth discussion of voluntariness and the due process implications of restorative justice, see Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 12-31 (2004).

133. Telephone Interview with David Lerman, *supra* note 34.

134. Van Ness & Nolan, *supra* note 36, at 78-79.

135. See U.S. CONST. amend. V (providing that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself”).

136. See Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 9-10 (noting that mediators regularly require promises from those present to keep the mediation discussion confidential and assure the participants that the proceedings are confidential even though there exists uncertainty as to the legal implications of such promises).

and documents and other material produced during the mediation/dialogue process [should be] inadmissible in criminal or civil court proceedings.”¹³⁷

Legislation is not providing the solution to this concern in most states, because it is unclear whether restorative justice programs are covered by statutory confidentiality provisions in existence for other types of mediation, and there are few states with statutes specific to restorative processes.¹³⁸ The Uniform Mediation Act, which has extensive provisions pertaining to confidentiality in mediation, has been adopted by several states and is being considered by others, but that Act does not provide the protections addressed in the American Bar Association Guidelines.¹³⁹

This issue is minimized if the person pleads guilty prior to participation in the restorative process. However, there have been instances where the offender has admitted committing crimes outside of the offense at issue during the restorative process.¹⁴⁰ As a consequence, such information could potentially be used against the person in a subsequent prosecution.¹⁴¹

Although disclosure of other crimes is not a frequent occurrence, it does occur. In the Polk County program, Assistant Polk County Attorney Fred Gay confirms there have been a few instances where the issue has arisen and the facilitator has stopped the conference in order to avoid a potential incriminatory comment.¹⁴² He also explained that facilitators are trained to avoid probing into matters outside of the current case.¹⁴³

In the Milwaukee program, the Consent to Participate form contains information that may be revealed outside of the conference in the following situations: “Someone is being physically harmed. Someone is in

137. Braithwaite, *supra* note 26, at 103-04 (alteration in original) (quoting AM. BAR ASS’N, *supra* note 130).

138. Reimund, *supra* note 42, at 419.

139. See *id.* (providing an extensive discussion on the impact of the Uniform Mediation Act on victim offender mediation).

140. A 1999 Texas Attorney General Open Records Decision addressed this issue after a prosecutor subpoenaed the tapes from a VOM where the offenders made admissions about prior crimes, finding that the admissions were not entitled to protection under the state’s Alternative Dispute Resolution Procedures Act. See Tex. Att’y Gen. Op. No. ORD 659 (Aug. 5, 1999), available at <http://www.oag.state.tx.us/opinions/or49Cornyn/ord-659.htm>. For an in-depth discussion of this case, see Reimund, *supra* note 42, at 412-13.

141. Reimund, *supra* note 42, at 419.

142. Telephone Interview with Fred Gay, *supra* note 53.

143. *Id.*

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danger of being physically harmed. Someone has committed a felony, or a sexual assault of any type. [There exists e]vidence that tends to prove an accused innocent of the charges leveled against him or her.”¹⁴⁴

Confidentiality in sentencing circles is different “because the law requires sentencing to be a public process.”¹⁴⁵ As with VOM, confidentiality should be discussed up front.¹⁴⁶ Unreported crimes could come into the circle through the offender, victim, or participants and is addressed on a case-by-case basis, depending on what is the most appropriate community response.¹⁴⁷ An obvious exception to confidentiality in circles “involves personal or public safety, such as when a victim seeks additional formal sanctions or when a child or anyone else is in danger of further harm.”¹⁴⁸ The better practice, from a legal perspective in VOM and in sentencing circles, is to be clear about what will and will not be confidential prior to participation.

If these precautions are taken, it is less likely that legal conflicts will exist. Also, the potential to infringe on participants’ rights in restorative processes would be greatly reduced.

B. *Role of Attorneys in Restorative Justice*

Most referrals to restorative justice programs come from the criminal justice system.¹⁴⁹ However, there is a wide range of participation in and acceptance of restorative justice processes by prosecutors. On one end of the spectrum is Assistant Polk County Attorney Fred Gay:

Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the “trail ‘em, nail ‘em, jail ‘em” mentality that pervades the traditional criminal justice system, to the restorative justice mind set that considers every case in light of what outcome best addresses the needs of the victim, community and offender.¹⁵⁰

144. Community Conferencing Program, Milwaukee County District Attorney’s Office, Consent to Participate (on file with author).

145. PRANIS ET AL., *supra* note 75, at 110.

146. *Id.* at 111.

147. *Id.*

148. *Id.*

149. BAZEMORE & SCHIFF, *supra* note 41, at 111. In juvenile programs, probation was the most common referral for VOM and circles, which was followed by judges, law enforcement officials, and prosecutors. *Id.*

150. Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1652 (2000).

At the other end of the continuum are prosecutors who will not refer cases to restorative processes.

The perception that restorative justice takes power away from the prosecutor is also seen as a deterrent to prosecutors' participation in restorative justice. This was illustrated when the Minnesota prosecutor in *State v. Pearson*¹⁵¹ said the following in the *Saint Paul Pioneer Press*: "I believe it will give prosecutors pause as to their participation in those programs."¹⁵² The prosecutor in *Pearson* did not agree with the recommended stay of adjudication in a case where the sentencing circle's sentencing recommendation was followed.¹⁵³

As elected officials, prosecutors are often concerned about loss of political capital.¹⁵⁴ "The perception that criminal mediation is 'soft on crime,' equates with 'political suicide' despite potential cost-cutting and restorative benefits."¹⁵⁵ According to Assistant Polk County Attorney Fred Gay, restorative justice is not soft on crime.¹⁵⁶ When discussing with offenders the process of meeting their victims, some say they would rather just spend their time in the jail cell.¹⁵⁷

As a restorative justice advocate and prosecutor for over twenty-six years in Austin, Texas, District Attorney Ronnie Earle also dispels these notions:

I'd never been a prosecutor when I first became district attorney so I wasn't really sure what the job was. I thought all you had to do was be tough on crime because what people really wanted was justice. I thought at that time that justice was vengeance or pay back. And so we started being tough on crime, like all DA's are supposed to be. But pretty quickly I came to understand that vengeance wasn't making victims feel any better. And so I started looking for different ways to do my job. . . .¹⁵⁸

151. *State v. Pearson*, 637 N.W.2d 845 (Minn. 2002).

152. Amy Becker, *High Court Upholds Sentencing Circle's Discretion*, PIONEER PRESS (Saint Paul), Jan. 18, 2002, at 2B.

153. *Id.*

154. Laflin, *supra* note 131, at 618.

155. *Id.*

156. See Gay, *supra* note 150, at 1652 (arguing that although restorative justice is less focused on punishment alone, it is more concerned with "reparation, restitution and accountability").

157. Telephone Interview with Fred Gay, *supra* note 53.

158. Coben & Harley, *supra* note 21, at 285 (alteration in original).

For defense attorneys, restorative justice processes can be “counter-cultural to the more common practices of lawyers who are argumentative, persuasive and articulate debaters, who believe fervently and vigorously that seeking justice, on behalf of a client or cause, means advocating for and ‘winning’ a legal claim.”¹⁵⁹ The adversarial persona runs so deeply in attorneys that talk of restorative justice can cause attorneys to dismiss it by making flippant “Kumbaya” remarks when being exposed to the philosophy.¹⁶⁰ According to prosecutors Gay and Lerman, when skeptical defense attorneys actually experience restorative justice in person, either through VOM or sentencing circles, they become more accepting of the processes.¹⁶¹

Whether defense attorneys serve as roadblocks or bridges to restorative justice could turn on whether they believe that redemption, forgiveness, and conciliation are more important to their clients than the ultimate resolution of the criminal charge.¹⁶² Some defender offices see “these expanded services as new and improved ways to represent clients,” but it more accurately “signals a paradigmatic shift in defense philosophy and ideology” and “marks a significant departure from the traditional defense role, which focused narrowly on the criminal case and left unaddressed the related convergent issues.”¹⁶³

Defense attorney Terese Dick, who represented clients going through the Milwaukee Conferencing Program, has stated the following: “We are being challenged to explore and change our ways of thinking about the criminal justice system and the role we play in relation to the prosecutor,

159. Carrie Menkel-Meadow, *Practicing “In the Interests of Justice” in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1763 (2002).

160. For example, while I was facilitating a training session entitled “Mediating the Criminal Case” at the University of Idaho College of Law Northwest Institute of Dispute Resolution on August 4, 2003, one of the defense attorneys inquired when we were going to sing “Kumbaya” during the restorative presentation.

161. Telephone Interview with Fred Gay, *supra* note 53; Telephone Interview with David Lerman, *supra* note 34.

162. See Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211, 225 (1999-2000) (acknowledging that “consideration of restorative justice [may be] inconsistent with the lawyer’s duty of zealous advocacy,” but “whether the client should pursue restorative justice . . . should be the client’s decision”).

163. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1068 (2004).

the judiciary, our clients, and the community in which we live.”¹⁶⁴ A handout is given to defense attorneys in that program which points out that defense attorneys are representing their clients’ best interests, but not as advocates in the classic sense and reminds the attorneys to allow their clients to speak for themselves.¹⁶⁵ Dick views conferencing as a way to serve clients differently and, ultimately, to their advantage.¹⁶⁶

Both prosecutors and defense attorneys who embrace the restorative justice philosophy understand that these processes make changes in the lives of offenders, victims, and the community at large.¹⁶⁷ Restorative processes are not quick fixes to clear the dockets by closing large numbers of cases for prosecutors, nor are they a way for defense attorneys to get their client off easily. As a judge who participates in circle processes, Gary Schurrer points out that, from a legal perspective, it is very difficult to quantify those people who make lifestyle changes and lead a law-abiding life as a result of restorative justice, which in turn creates skepticism among prosecutors and defense attorneys.¹⁶⁸ Developing an understanding about the deeper meaning of restorative justice defies easy explanation, as “written descriptions of practices and cases are not equally powerful, not enough to convince most people, and not enough to show that sentencing circles work better than traditional criminal justice approaches.”¹⁶⁹

C. The Hazards of Law in Restorative Justice

One of “the greatest threat[s] to restorative justice may be the thoughtless enthusiasm of policy makers, police, magistrates, judges, and social workers who want to integrate a few techniques into traditional

164. Terese Dick, *Milwaukee County’s Community Conferencing Program: The Role of the Defense Lawyer*, WIS. DEFENDER, Summer 2002, at 15, 17. The experience in Vancouver, Washington, “suggests that defense counsel may be more amenable to a paradigm shift and modifying their roles than other legal actors.” Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 158 (2000).

165. Milwaukee Community Conferencing Program, *The Role of Defense Attorneys* (on file with author).

166. See Dick, *supra* note 164, at 17 (concluding that clients may sometimes be better off in a nonadversarial system).

167. See VAN NESS & STRONG, *supra* note 17, at 38-43 (discussing effects of the process on victims, the community, and offenders).

168. Telephone Interview with Gary R. Schurrer, *supra* note 89.

169. Kurki, *supra* note 9, at 282.

rehabilitative or punitive justice systems.”¹⁷⁰ This is because “[a] taste of mediation, a bit of conferencing, or a pinch of community services are added to the system without questioning fundamental principles.”¹⁷¹ Practices stripped of personal commitment become “fast food” restorative practices, ornamenting a system that essentially remains unchanged.¹⁷²

There are also concerns about restorative justice becoming institutionalized within the legal system.¹⁷³ Institutionalization brings pressures to be efficient and cost-effective.¹⁷⁴ These objectives do not “square well with the emphasis on ritual, the taking of time to tell stories, and the inherent inefficiency of circle process.”¹⁷⁵ These all present “critical challenge[s] to whether the process of institutionalization can be accomplished without destroying the vitality of restorative justice.”¹⁷⁶

VI. CONCLUSION

Law and restorative justice are not foes in the search for justice within the criminal justice system. When united, they provide a powerful force by giving victims a voice, holding offenders accountable to right their wrongs and allowing communities to participate in the process. There are rays of that power radiating from restorative programs in operation today. One only has to look at the programs in Iowa,¹⁷⁷ Minnesota,¹⁷⁸ and Wisconsin¹⁷⁹ to see that restorative justice and the law can be successful complements to the criminal justice system.

Restorative justice does not advocate putting law in the closest available dumpster. To the contrary, law provides important qualities that are also espoused by restorative justice. This concept is confirmed by Howard Zehr, widely considered the grandfather of restorative justice in the United States, who has stated: “We also must not lose those qualities

170. Walgrave, *supra* note 11, at 583.

171. *Id.*

172. *See id.* at 582 (noting that as restorative practice has improved, the danger of it becoming monotonous has also increased).

173. *See, e.g.*, Coben & Harley, *supra* note 21, at 325 (“A critical challenge is whether the process of institutionalization can be accomplished without destroying the vitality of restorative justice.”).

174. *Id.* at 324-25.

175. *Id.* at 325.

176. *Id.*

177. *See discussion supra* Part IV.A.1.

178. *See discussion supra* Part IV.A.3.

179. *See discussion supra* Part IV.A.1.

which the legal system at its best represents: the rule of law, due process, a deep regard for human rights, [and] the orderly development of law.”¹⁸⁰

Constitutional concerns can be addressed by incorporating better practices in programs, such as clarifying what is and is not confidential.¹⁸¹ Attorneys can be involved as the vanguards of offender rights, with some variations in how they perform that role, as suggested in the guidelines set up in Milwaukee’s program.¹⁸² The gains achieved by restorative justice would mean little if they came at the risk of offenders’ rights. However, “there is no evidence that such risks have been realized in any form of restorative justice.”¹⁸³

Value can be added to the criminal justice system through restorative justice. Restorative justice can fill voids of injustice in the system. As Assistant Polk County Attorney Fred Gay asserts: “Our adversarial system of justice, while necessary to protect the rights of defendants, insulates both the victim and the defendant from the very real human contact that is often necessary.”¹⁸⁴ An “exclusive focus on ‘legal’ needs and interests may not bring us justice,”¹⁸⁵ but restorative justice can get us closer. A realistic goal is to go “as far as we can toward a process that is restorative.”¹⁸⁶ “In between will be many cases and situations where both systems must be utilized, and justice is only partly restorative.”¹⁸⁷

180. ZEHR, *supra* note 2, at 60.

181. See discussion *supra* Part V.A.2.

182. See discussion *supra* Part IV.A.1.

183. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 35.

184. Gay, *supra* note 150, at 1654.

185. Menkel-Meadow, *supra* note 159, at 1774.

186. ZEHR, *supra* note 2, at 60.

187. *Id.*