



# Restorative Justice for Juveniles

Conferencing, Mediation & Circles

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edited by Allison Morris and Gabrielle Maxwell

# Restorative Justice for Juveniles

## *Conferencing, Mediation and Circles*

Edited by  
ALLISON MORRIS  
and  
GABRIELLE MAXWELL  
Institute of Criminology  
Victoria University of Wellington  
New Zealand



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## *Foreword*

All over the world, restorative justice processes and practices are now occurring. They operate in very many different shapes, under many different procedures and are supported by very many different systems. Nothing stays still about the way in which these processes enable families and young people to be involved in decisions about themselves and involve victims in contributing to decisions about how best to deal with the offending which has affected them. All confer and negotiate to achieve outcomes which aim to resolve the tensions arising from the offending.

I am a practitioner and not an academic. Everyday, I sit in a Court which now uses restorative justice processes and family group conferences to try and put right the wrong by healing breaches in relationships and making reparation rather than concentrating on punishment. Everyday, I am humbled by the generosity and kindness shown by many victims and by the spirit of generosity and sacrifice which is displayed when young people and their families meet with victims and their supporters and are properly supported by communities to act as human beings in contact with each other rather than as people apart.

Nothing ever stands still in this dynamic area. Constantly, we are treated to new insights, new enhancements, and new surprises. Those of us who find this exciting and stimulating need to be constantly open to new changes and new challenges. The authors of this superb collection of papers have captured the pioneering spirit of inquiry and of progress to push forward even further frontiers of a new and even more exciting and satisfying way of working across many boundaries. They are to be commended for this and for their energy and diligence in making sure that new discoveries are made available to a wide public.

DJ Carruthers  
*Principal Youth Court Judge*  
*Wellington, New Zealand*  
2001

## *List of Contributors*

**Harry Blagg** has been a Research Fellow at the Crime Research Centre, University of Western Australia since 1990. Before then, he taught at Lancaster University in England. He has been involved in research projects on aspects of the involvement of indigenous people in the criminal justice system, policing and restorative justice and recently completed projects on crisis intervention in family violence amongst indigenous people; preventing domestic and family violence by young people; and young people's attitudes to violence. He is currently working on issues related to community based treatment for indigenous men involved in family violence.

**Robert B Coates** is a sociologist and Senior Research Associate at the University of Minnesota's Center for Restorative Justice and Peacemaking. He has been widely published in the justice field.

**Kathleen Daly** is an Associate Professor in the School of Criminology and Criminal Justice, Griffith University. She has published in the areas of gender, race, crime and justice. Her book, *Gender, Crime, and Punishment* (1994) received the Michael Hindelang award from the American Society of Criminology. She has also published an edited collection (with Lisa Maher), *Criminology at the Crossroads: Feminist Readings in Crime and Justice* (1998). During 1998–99, she directed a major research project on restorative justice in South Australia.

**Jim Dignan** is a Reader at the Centre for Criminological and Legal Research, University of Sheffield. He has written on a variety of theoretical, practical and policy-related issues raised by the development of restorative justice and was a member of the team commissioned by the Home Office to evaluate the pilot Youth Offending Teams and the youth justice reform programme introduced by the Crime and Disorder Act 1998.

**Cheryl Frank** worked for four years at the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), specialising in diversion work. She later joined the Institute of Criminology at the University of Cape Town, as Senior Researcher in Juvenile Justice and worked on a range of projects relating to both juvenile justice and crime prevention. Cheryl currently works at the Open Society Foundation of South Africa, managing the Criminal Justice Initiative.

## x *List of Contributors*

**Heino Lilles** is the Chief Judge of the Territorial Court in the Yukon, Canada. For 15 years he was an Associate Professor at Queen's University, Kingston, Ontario with teaching and research responsibility in the areas of family law and children's law. He has written extensively on these topics.

**Paul McCold** is the Research Director for the International Institute for Restorative Practices in Bethlehem, Pennsylvania USA. Paul was a Research Scientist with the New York State Division For Youth for ten years. He has taught criminal justice at Old Dominion and Temple Universities, and was the principal investigator on the Bethlehem Restorative Policing Experiment. Paul has been actively involved with the UN Alliance of NGOs on Crime Prevention and Criminal Justice (NY) since 1995 and published the Restorative Justice Handbook and Restorative Justice: An Annotated Bibliography for the Alliance. He is also the author of numerous articles on restorative justice and family group conferencing, and is actively engaged in a variety of on-going research projects on restorative justice.

**Peter Marsh** is Professor of Child and Family Welfare in the Department of Sociological Studies at the University of Sheffield. He is co-ordinator of the Children and Families Research Group. His most recent research has been on young people leaving care, the development, use and outcome of family group conferences, and the evaluation of the pilot Youth Offending Teams.

**Gabrielle Maxwell** is a psychologist and criminologist. Currently, she is Senior Research Fellow at the Institute of Criminology at Victoria University of Wellington, Wellington, New Zealand. Previous posts have been with the Office of the Commissioner for Children, the Department for Justice and the University of Otago. Currently, much of her research has focussed on restorative justice and the New Zealand youth justice system in particular. Other recent work has focussed on family violence, crime prevention and children's rights.

**Allison Morris** is Professor in Criminology and was the Director of the Institute of Criminology, at Victoria University of Wellington, Wellington, New Zealand from 1993 to 2001. For 20 years before that, she was a lecturer in criminology at the Institute of Criminology, University of Cambridge. She has carried out research on women's prisons, youth justice systems, violence against women and restorative justice and her main teaching and research areas are youth justice, women and crime and victims.

**Ann Skelton** was employed by Lawyers for Human Rights for 11 years, where she specialised in the rights of children in the criminal justice system. Ann has been at the forefront of efforts to bring about changes to the system for children

charged with crimes in South Africa for many years, and in this role has promoted restorative justice solutions. She was appointed by the South African Minister of Justice in 1997 to lead a project of the South African Law Commission to develop a comprehensive new statute regarding children accused of crimes. She is currently the national co-ordinator of the Child Justice Project, a UN technical assistance project based in the Department of Justice in Pretoria.

**Heather Strang** is Director of the Centre for Restorative Justice, Research School of Social Sciences, Australian National University. She has directed the Reintegrative Shaming Experiments which examined the effectiveness of a restorative justice alternative to court, and has a special research interest in victims of crime.

**Mark S Umbreit** is the Founding Director of the University of Minnesota's Center for Restorative Justice and Peacemaking and the National Restorative Justice Training Institute. He is a professor in the School of Social Work at the University of Minnesota. He has carried out a number of research projects on victim offender mediation and has written extensively in this area.

**Dan Van Ness** is vice president of Prison Fellowship International, an NGO in consultative status with the UN made up of 88 national Prison Fellowship affiliates. He has been involved in criminal justice issues for over 20 years, as a lawyer, restorative justice advocate, and teacher. He has practiced poverty law in Chicago, organised national justice reform efforts in the United States, lived in Malta where he assisted government officials in correctional reform efforts, and taught at both undergraduate and graduate levels. Dan's work at Prison Fellowship International includes helping affiliates promote and implement restorative justice programmes, including the Sycamore Tree Project—a victim offender panel programme in prisons—and APAC—a prison-based community.

**Betty Vos** is a Senior Research Associate at the University of Minnesota's Center for Restorative Justice and Peacemaking. Her background is in social work research and practice.

**Lode Walgrave** is Professor of Criminology at the Catholic University of Leuven (Belgium), where he is also Director of the Research Group on Juvenile Criminology. The research of this group covers the whole field, from youthful misbehaviour and crime through prevention and intervention. Recent projects deal with social exclusion and youth crime, prevention, and restorative justice for juveniles. Lode is coordinator of the International Network for Research on Restorative Justice for Juveniles, and has authored several books and articles on that subject.

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**Elmar GM Weitekamp** teaches at the Institute of Criminology of the University of Tuebingen, Germany, the University of Leuven, Belgium and the Central China Normal University, People's Republic of China. His research areas are: restorative justice, victimology, family violence, longitudinal research, criminal careers and career criminals, comparative criminology, criminal justice policies, right-wing violence and hate crime and problem oriented policing. He serves on numerous boards of international journals and organisations.

**Richard Young** is Assistant Director of the Centre for Criminological Research and Lecturer in Criminal Justice at the University of Oxford. He was previously Senior Lecturer in Law at the University of Birmingham and has been a Visiting Professor at the University of South Carolina and the University of Missouri. He has published widely on topics of civil and criminal justice.



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**Part 1**

**Setting the Scene**



# *Introducing Restorative Justice*

DANIEL VAN NESS, ALLISON MORRIS and  
GABRIELLE MAXWELL

RESTORATIVE JUSTICE: A NEW WAY OF THINKING

RESTORATIVE JUSTICE IS the name given to a movement within and outside of the criminal justice system. Some of its practitioners and proponents refer to it as a new paradigm or as a new pattern of thinking. It poses new questions for societies to ask and answer in responding to crime. These discussions about restorative justice often begin by comparing it to the current criminal justice system. Perhaps the classic example of this is Howard Zehr's (1990) contrast of retributive justice versus restorative justice. Retributive justice, he argues, begins with a particular understanding of crime: it "is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules" (1990: 181). He continues:

"Restorative justice sees things differently. . . . Crime is a violation of people and relationships. . . . It creates obligations to make things right. Justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation, and reassurance" (1990: 181).

He describes how these different understandings result in dissimilar emphases. Retributive justice focuses on the violation of law, whereas restorative justice focuses on the violation of people and relationships. Retributive justice seeks to vindicate law by determining blame and administering punishment, whereas restorative justice seeks to vindicate victims by acknowledging their injury and by creating obligations for those responsible to make things right. Retributive justice involves the state and the offender in a formal process of adjudication, whereas restorative justice involves victims, offenders and community members in a search for solutions (1990: 181).

Zehr's dichotomy demonstrates how looking at old problems in new ways makes it possible to arrive at new understandings and responses. We can respond to behaviour that breaks the law by focusing exclusively on the rule that was broken or by looking first at the harm it causes to people and relationships. How we look at crime will lead us to a response that seems logical and right. The restorative response is to focus on repairing harm.

Some commentators (for example, Daly 1999) have challenged such dichotomies as too simplistic because they imply that restorative justice is good and retributive justice is evil. Furthermore, many young people subjected to restorative justice processes and results view them as punishment (1999: 10). Those are good points. Dichotomies may be more useful for didactic purposes than as descriptions of the attitudes of persons involved in restorative processes. But they do serve to illustrate in broad strokes the ways in which restorative justice processes encourage new priorities, shifts in emphasis and the inclusion of new parties as decision-makers. Lode Walgrave teases out these problematic distinctions between punishment and restorative sanctions in his chapter.

#### THE HISTORY OF RESTORATIVE JUSTICE

In explaining what restorative justice is, it is important to remember that this is a theory of justice that has grown out of experience. It has been informed by indigenous and customary responses to crime, both those of the past and those used today. Its modern development probably began in response to the first victim offender mediation programmes developed in the mid-1970s in Canada. These programmes started as an alternative to probation for young offenders and expanded into pre-sentence programmes that allowed the victim and offender to construct a sentencing proposal for the judge's consideration. It was assumed that offenders would benefit from this exposure to the needs of the victim, and that this would reduce recidivism and increase the likelihood of restitution being completed. What was not expected was that crime victims would also benefit from this approach, reporting higher satisfaction levels than with traditional court processes (see Zehr 1990: 158–174).

As practitioners and observers reflected on why this might be, they concluded that it was because victims were essentially non-participants in traditional criminal justice processes. They might testify if called as witnesses, but in criminal proceedings they were not decision-makers or active participants. On the other hand, victims involved in victim–offender mediation liked being able to shape the outcome if they wanted to. For that matter, offenders were also non-participants in court proceedings. Although the criminal justice system revolves around them, or perhaps in some countries because it focuses on them, their role is essentially passive. In North America, Europe and other developed countries it is the defendants' lawyers who are active in legal proceedings.

In the past 20 years, restorative justice has become an influential movement in Australia, Canada, England and Wales, New Zealand and other countries. Even the United States, a country more often associated with the introduction of repressive penal measures, has not escaped its influence. Michael Tonry (1999) begins a survey of American sentencing policy by observing that there are now four competing conceptions of sentencing: indeterminate, structured sentencing (e.g., guidelines), risk-based sentencing and restorative/community justice. His

reason for including restorative justice in this group of four is relevant to our discussion:

"A fully elaborated system exists nowhere, but there is considerable activity in many States, and programmes based on community/restorative principles are beginning to deal with more serious crimes and criminals and to operate at every stage of the justice system, including within prisons. [It is] spreading rapidly and into applications that a decade ago would have seemed visionary. These include various forms of community involvement and emphasise offender accountability, victim participation, reconciliation, restoration and healing as goals (though which goals are emphasised and with what respective weights vary widely)" (1999: 3–4).

In other words, restorative justice is having a significant influence because of its demonstrated ability to function within all phases of the justice process and to address serious offences and offenders. Restorative justice programmes and policies are proliferating at a remarkable speed around the world, as we will see shortly. The starting point for change in most countries has been their youth justice systems and it is for this reason that this book focuses on young offenders. The lessons learned there, however, are relevant for the transformation of all parts of criminal justice systems. But first, let us consider how we might define restorative justice.

#### A DEFINITION OF RESTORATIVE JUSTICE

British criminologist Tony Marshall (1996: 37) has proposed a definition of restorative justice that is increasingly used internationally:

"Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."

This procedural definition is helpful. However, it raises a number of questions: Who are the "parties with a stake in the offence"? How do they come to a collective resolution? What does it mean to "deal with the aftermath of an offence"? What "implications for the future" should be considered? While answers to those questions must be worked out in specific contexts, Susan Sharpe (1998), a Canadian, has proposed five key principles of restorative justice that help round out Marshall's definition. The following is adapted from her work (1998: 7–12).

—First, *restorative justice invites full participation and consensus*. This means that victims and offenders are involved, but it also opens the door to others who feel that their interests have been affected (for example, neighbours who have been indirectly harmed by the crime). The invitation to participate underscores the benefits of voluntary involvement, although, of course, offenders may participate in order to avoid traditional criminal processes.

- Second, *restorative justice seeks to heal what is broken*. A central question asked in any restorative process is “What does the victim need to heal, to recover, to regain a sense of safety?” Victims may need information; they may need to express anger toward the person who has harmed them; they may need reparation. Offenders, too, may need healing; they may need release from guilt or fear; they may need resolution of underlying conflicts or problems that led to the crime; and they may need an opportunity to make things right.
- Third, *restorative justice seeks full and direct accountability*. Accountability does not simply mean that offenders must face the fact that they have broken the law; they must also face the people they have harmed and see how their actions have damaged others. They should expect to explain their behaviour so that the victim and community can make sense of it. They should also expect to take steps to repair that harm.
- Fourth, *restorative justice seeks to reunite what has been divided*. Crime causes divisions between people and within communities. That is one of the most profound harms that it causes. Restorative processes work toward reconciliation of the victim and offender, and reintegration of both into the community. A restorative perspective holds that the “victim” and “offender” roles should be temporary, not permanent. Each should be drawn toward a future in which they are free of their past, no longer defined primarily by the harm they may have caused or suffered.
- Finally, *restorative justice seeks to strengthen the community in order to prevent further harms*. Crime causes harm, but crime may also reveal pre-existing injustices. These can be as localised as a long-term dispute between the “offender” and the “victim” that erupted into criminal behaviour. It can be as systemic as racial and economic inequities that, while not excusing the offender’s behaviour, must be addressed in order to strengthen the community and make it a just and safe place to live (Morris 1994).

#### HALLMARK PROGRAMMES OF RESTORATIVE JUSTICE

The processes that Tony Marshall describes, and the principles that Susan Sharpe outlines, have been demonstrated for thousands of years in informal, customary traditions. More recently they have been implemented in a variety of ways within and alongside the criminal justice system. However, three programmes have become hallmarks of restorative justice processes: victim offender mediation, conferencing, and circles. The chapters in this book cover aspects of each of these and we only mention them briefly here.<sup>1</sup>

<sup>1</sup> Two other programmes have been acknowledged as potentially restorative outcomes: restitution and community service. This book does not include a discussion of these.



### **Victim Offender Mediation**

The first contemporary restorative process was victim offender mediation. In its prototypical form, this involves bringing together victims and their offenders along with a mediator who coordinates and facilitates the meeting. In the course of this meeting, victims describe their experiences with the crime and the effect it has had on them and offenders explain what they did and why, answering questions the victim may have. When both victim and offender have had their say, the mediator will help them consider ways to make things right. In some European countries, mediation does not necessarily involve a direct meeting between the two parties. Instead, the mediator conducts shuttle negotiation with each party until an agreement on restitution is reached. Such an approach satisfies some restorative principles, but not as many as a direct meeting. In other countries, particularly in North America, victim offender mediation increasingly involves others who have also been affected by the offence or who are present to provide support to the principal parties. Paul McCold in his chapter describes victim offender mediation in more detail (as well as other restorative justice processes) and Mark Umbreit, Robert Coates and Betty Vos review, from the victims' point of view, the research that has examined the extent to which victim offender mediation has met restorative justice goals and outcomes. They demonstrate that across a variety of sites and cultures, victims who choose to participate are satisfied with both the process and the outcomes reached. Elmar Weitekamp in his chapter offers a European perspective. Victim offender mediation (or offender victim mediation as it is in Germany) has a long history there as the preferred way of meeting victims' needs.

### **Conferencing**

Conferencing was developed in New Zealand and was, in part, a reflection of aspects of the traditional processes of the Maori people, the indigenous population of New Zealand. Conferencing has been further adapted as it has been used in other countries, and there are now several versions of conferencing found in New Zealand, Australia, Asia, Southern Africa, North America and Europe. Conferencing involves not only the primary victim and offender, but also secondary victims (such as family members or friends of the victim) as well as supporters of the offender (such as family members and friends). These people are involved because they have also been affected in some way by the offence, and because they care about one of the primary participants. They may also participate in carrying out the final agreement. The conference facilitator arranges the meeting and makes sure that everyone present is able to participate fully, but does not play a role in the substantive discussions. Some forms of conferencing are "scripted", which means that the facilitator follows a prescribed pattern in guiding discussion by the participants. Other conferences work within a general