



# Center for Restorative Justice & Peacemaking

An International Resource Center in Support of Restorative Justice Dialogue, Research and Training

## Opportunities and Pitfalls Facing the Restorative Justice Movement

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April 21, 2005

### PITFALLS AND UNINTENDED NEGATIVE CONSEQUENCES

The restorative justice movement is grounded in values that promote both accountability and healing for all affected by crime. It emphasizes positive human development, mutuality, empathy, responsibility, respect, and fairness. Yet the principles and practices of the restorative justice movement are not inherently benign, incapable of doing harm. In fact, as in so many other movements and interventions grounded in lofty values and good intentions, reports of unintentionally harmful consequences or outcomes surface periodically.

In large part, the pitfalls derive from the inherent difficulty of attempting to balance so many valid needs: needs of victims, needs of offenders, needs of their community, and ultimately the needs of the state that has come to represent them. Small programs that are accountable to a finite and immediate constituency may be less prone to such errors than large institutions and governments, but even so, examples of unintended harm abound.

Sometimes the problem arises from inattention to some of the basic principles and guidelines that have by now become well established and widely known. For example, well intentioned judges in two different states took the opportunity during the civil portion of trials involving negligent homicide from drunk driving to refer the offender and the family survivor of the victim to a mediation process – on the surface, a positive restorative option for both. However in each instance there was no separate preparation of the involved parties, and the persons responsible for facilitation the meetings had no specific training in victim-offender dialogue.

In one of these cases, the judge adjourned the civil portion of the trial to allow the defendant and the wife of the husband who was killed to go into the jury room in order to empower the victim to determine, with the defendant, what type of settlement would be the most helpful to her. This victim had no preparation and even her victim advocate with her did not object to this process. Her experience was one of intense fear and re-victimization in spite of the good intentions of the judge. In the other case a judge referred a defendant in a negligent homicide drunk driving case to a very experienced local mediation program that focuses on civil court disputes and involves attorneys quite extensively in the process. This organization had not even done a victim offender mediation in a petty vandalism, yet they were now faced with facilitating a mediation/dialogue in a homicide case, with no training or experience in this area.

It is not just well-intentioned individuals who make such errors. A nationally recognized exemplary offender re-entry project that receives large federal grants to support restorative group conferencing invites victims at the last moment with no preparation, no support, and little involvement. The net result is a feeling of re-victimization by those crime victims who participated.

In many jurisdictions there are well intended juvenile justice officials and judges who mandate young offenders to meet with their victims if the victim is willing to do so, even if the defendant does not own up to the offense or would prefer not to do this type of intervention. Two documented cases occurred in a mid-western state in both a victim offender mediation program and a family group conferencing program. In both cases the victims and their support people felt re-victimized by the process because of the attitude projected by the offender who was mandated to attend against his will.

The victims themselves reported feeling coerced into the mediation or conference, despite the good intent of the highly committed restorative justice advocates who were responsible for their participation in the process.

Some of the reported problems are a result of insufficient attention to training volunteers and monitoring their performance. One participant in a peacemaking circle process reported being required to attend, receiving no preparation, and finding that the facilitator not only monopolized the process but in fact identified with and openly supported the other party in the disagreement. And observers in another program reported on a community accountability board that consisted of three elderly retired men who functioned more as arbitrators in their questioning and comments toward the young offender who appeared before them. In addition, this entire encounter took place without any victim presence or any mention of victim concerns and needs.

Some of these examples also derive from attempts by the formal criminal justice system to take over the movement and fashion it to meet the traditional needs of the system and its bureaucracy. As Zehr and Towes (2004) point out, such endeavors can threaten the soul of the restorative justice movement and neutralize its impact. A frequent shortcoming of this type is excessive focus on offender rehabilitation, to the exclusion of the needs of the victims and the community. Within the US, at least one state has adopted legislation to support restorative justice principles because of the restorative justice impact on reducing recidivism and prison overcrowding. A national legal reform organization deeply committed to restorative justice similarly articulates its rationale for such support based on the impact of restorative justice on rehabilitating offenders. And there is national legislation in one European country adopted in the name of restorative justice but which focuses entirely on offender orientated treatment and rehabilitation.

## **OPPORTUNITIES FOR EXPANDING THE VISION**

In the face of these potential pitfalls, the restorative justice movement needs to remain passionately committed to its foundational vision of an entirely different way of understanding and responding to crime and conflict. This vision is grounded in values that are resonating with an increasingly broad range of individuals and communities throughout the world, presenting many opportunities for new and widened impact. A number of these opportunities are listed below; many others continue to emerge.

1. Initiating a system wide commitment to providing local citizens who are victimized by all but the most serious violent crime the opportunity to first choose a local community based restorative justice response. Both parties would retain the legal right to go before the formal criminal or juvenile justice system if either felt that they were not treated fairly or were dissatisfied with the outcome of the restorative justice intervention. Such a policy would place restorative justice in the forefront of our collective response to crime, rather than consigning it to a marginal position as an option for only a select number of individuals. This policy would also result in huge cost savings.
2. Developing an increasing number of hybrids that integrate the strengths and limitations of each individual restorative justice intervention. For example, in more serious cases the use of victim offender mediation on a small or intimate level could first be offered to the specific victim and offender. This could be later followed by a session involving a number of family members and support people and then even this could be followed at a later time with a much larger community intervention involving a peacemaking circle of perhaps twenty to thirty individuals. Case examples of such combinations go all the way back to the experience of Genesee County, NY in responding to a sniper shooting case in the early 1980s. Examples also include a more recent case in Dakota County, MN in which the response to a pipe bomb incident by students in a high school resulted in combining elements of victim offender mediation, family group conferencing and, a community peacemaking circle.
3. Increasing the use of surrogate victim offender community dialogue. Encounters with surrogates can be a partial response to the large volume of crime victims whose offenders are never caught. Such victims are equally in need of gaining a greater understanding of why people commit such crimes and letting others in the community know about the impact on their lives. Often they also find it beneficial to help hold other similar offenders accountable for their actions even though their own offender was never caught. Dialogue groups in prisons and other correctional facilities that include offenders, victims of similar crimes and community members have been shown to benefit all who are involved at a relatively low cost. Examples of this exist in the states of Minnesota, Washington, and Wisconsin.

4. Applying restorative justice principles and practices in school settings from elementary level through college. Examples of this include the use of peacemaking circles to deal with student conflicts in an entire school district in Minnesota, and other schools throughout the country that use various forms of victim offender mediation, peer mediation, family group conferencing, circles, or other types of restorative dialogue.
5. Expanding the use of restorative justice principles and practices in work place settings among co-workers.
6. Increasing the use of restorative justice principles and practices to foster healing in the wake of severe political violence and in the context of national healing.
7. Building increased coalitions among unlikely allies within communities that focus on the real human impact of crime, the need for direct and understandable accountability of law violators, and the need to foster healing within the community.
8. Offering more support for victims of severe violence. This would include greatly expanding the opportunities for victim-offender dialogue for those victims who seek to meet. It would also involve much wider use of victim intervention projects that respond to the needs of victims immediately, whether or not there ever is any direct engagement with the offender.
9. Developing strong legislative support for public resources being appropriated to support the restorative justice movement, based on evidence of its effectiveness in reducing recidivism, cutting costs, and increasing victim and citizen satisfaction with the justice process. Such initiatives would also involve building stronger alliances with the crime victim advocacy community through focusing on joint interests between restorative justice advocates and crime victim advocates.
10. Building ever increasing bridges between the dominant culture and the many ethnic groups and communities of color within our society. One approach already being utilized is that of tapping into the ancient wisdom among many indigenous people who have for centuries practiced elements of what today is called restorative justice.
11. Using the principles of restorative justice to engage in a new framework for research on the public policy and human impact of the death penalty.
12. Strengthening the very fabric of community and civic responsibility through increasing involvement of neighbors and citizens in restorative community-base justice initiatives that provide opportunities for more frequent and meaningful contact with each other in activities which benefit all of society.

## **QUESTIONS FOR THE FUTURE**

Despite the wide and increasing international acceptance of restorative justice principles and practices and despite the many opportunities facing the movement in the twenty-first century, there remain numerous unresolved and often troubling issues. Many of these speak to the core integrity of the movement, while others pose questions about fair and effective implementation. We present the most salient of these in the following list:

1. Is restorative justice in fact about developing an entirely new paradigm of how our criminal justice systems operate at a systemic level, or is it a set of processes, specific principles, and practices that can operate within our conventional criminal justice systems (Robinson, 2003)?
2. How does the restorative justice movement avoid becoming a micro-level intervention serving victims, offenders, and communities that has no macro-level impact the contributing factors to crime and delinquency in our communities, which are inseparable from the social injustice that permeates our society?
3. Can restorative justice really be a victim centered approach when the overwhelming emphasis and resources in the system are so heavily focused upon identifying, apprehending, processing and punishing or even treating the offender?
4. How big is the tent under which policies and practices are considered to be part of the restorative movement? As Susan Sharpe (2004) points out, there are at least two camps: the “purist” who would

severely limit who is really in “the movement;” and the “maximalist” who would be so inclusive that it becomes hard to distinguish what makes the policy and practice uniquely restorative.

5. How can the restorative justice movement avoid the predictable co-opting of its philosophy?
6. The vast majority of crime victims never have their offenders apprehended and processed in the system. These victims are currently largely ignored by the justice system – restorative or conventional. How can restorative justice address the multitude of needs facing victims of crime whose offenders are never caught and who are never given the opportunity therefore to enter a mediation session or conference or peacemaking circle or other related interventions?
7. Will restorative justice be marginalized through being essentially required to deal with only the most minor types of criminal and delinquent offences, many of which would self-correct on their own?
8. Will restorative justice as a movement gravitate toward a “one size fits all” approach in which a specific intervention or approach will be viewed as appropriate for nearly all cases, or all cases of a given type?
9. A major pillar of the restorative justice approach is its emphasis upon the involvement of communities and respecting the needs of the community. How will the restorative justice movement deal with the reality that many communities express a wish for policies and practices that are far from being restorative in nature? Will the movement be able to integrate respect for those positions while still advocating more restorative approaches?
10. How will the restorative justice movement effectively deal with cases involving domestic violence? This is a tremendously controversial area and many different opinions exist in the field already. Some believe that domestic violence cases can be routinely referred to such programs as victim offender mediation while others are more cautious. In theory, restorative justice may have a great deal to offer to the field of domestic violence. In practice, however, it carries a tremendous capacity for doing harm, despite good intentions. How can the dangerous territory of domestic violence be reconciled with the good intent of those involved with the restorative justice movement?
11. Within the United States, the criminal justice system has a vastly disproportionate number of persons of color caught in its policies and practices. How does the restorative justice movement avoid mirroring this same reality? How many restorative justice policies and programs affect communities of color? How many of these programs and policies actively engage people of color in leadership roles and service delivery roles?
12. How can the informal nature of community-based justice that characterizes the restorative justice movement be reconciled with the protection of rights offered by our formal criminal and juvenile justice systems? How can extensive and unfair disparity in sanctions and outcomes be avoided as individual victims and communities are given a wide range of options for holding the offender accountable?

## **CONCLUSION**

The restorative justice movement is having an increasing impact upon criminal justice system policy makers and practitioners throughout the world. As a relatively young reform effort, the restorative justice movement holds a great deal of promise as we enter the twenty-first century. By drawing upon many traditional values of the past, from many different cultures, we have the opportunity to build a far more accountable, understandable, and healing system of justice and law that can lead to a greater sense of community through active victim and citizen involvement in restorative initiatives.