Sociology 3395: Criminal Justice and Corrections

Lecture 21: Victims and Criminal Justice 3: Restorative Justice:

The final major response of the justice system to victims' concerns is restorative justice. Widely practised in small, agrarian, rural societies, restorative justice has a long and rich history in the aboriginal communities in Australia, Canada's First Nations, and the Inuit communities of the North. The quasi universal disenchantment with the traditional punitive/retributive justice system encouraged those calling for justice reform to seek alternatives to the current system of punishment - particularly in this area of community-based sentencing alternatives.*(Chart, p.2)*

In 1977 Nils Christie published Conflicts as Property, in which he explained that the root problem of the system is that conflicts were stolen from their legitimate owners, the victims, and became the property of professionals rather than people. This work provided a strong impetus to those calling for the replacement of the current, ineffective system with the constructive practices of dispute settlement, conflict resolution, mediation, reconciliation and reparation. Advocates of restorative justice point out that in addition to its devastating effects on offenders, their families, and the larger society, the current system of punishment serves to intensify the conflict rather than solve it.

Spearheaded by the Mennonite Church, and consistent with 1975 recommendations of the Law Reform Commission, victim-offender reconciliation programs were initially set up in Canada and the U.S. in the mid 1970's to serve as an *alternative* to jail. These programs then spread to many other countries - rapidly growing in popularity. The early programs, largely run by volunteers, have now been in existence for over 20 years, and the movement is expanding at a rapid pace.

Dittenhoffer and Ericson, writing in 1983, conducted a study of one of these early Canadian victim-offender reconciliation programs. This was supposed to involve offenders agreeing to meet with their victim(s) *post-conviction,* negotiate over the amount of harm done, and decide on mutually acceptable terms of compensation. Voluntary participation in the program by both the victim and the offender was required. Dittenhoffer and Ericson interviewed judges, probation officers, and prosecutors, as well as examined the operation of this program during which time 51 offenders entered the program (which involved 47 crimes). 159 victims were counted in these cases. 85% of the offenders had no relationship to their victims prior to the offence. All referrals to the program were made through a probation order. There was victim-offender contact in 18 cases, and refusal to meet in 12 (6 victim; 5 Offender; 1 Both). The rest did not meet for administrative reasons.

Dittenhoffer and Ericson's study found some serious problems in terms of meeting the initial goals of this victim-offender reconciliation program. Originally, it was to provide a new sentencing alternative which would allow the offender to pay for the crime by a method more constructive than imprisonment. The victim would also gain, becoming more involved in the

criminal justice process and further obtaining compensation for losses. The main goal was to be reconciliation: resolving the conflict between the victim and the offender and restoring balance to their relationship.

However, the manner in which the program actually operates departed substantially from this picture. The majority favoured the program because of what it could do for the victim (e.g. often insurance companies recouping losses from clients), showed lack of interest in reconciliation, and had a negative attitude toward the program as an alternative to prison. Punishment and financial recompense received particular emphasis, perhaps in reference to a crime-control model, and this directly interfered with the reconciliation objective. Moreover, administrative interests influenced decision-making, with judges and prosecutors being very selective in choosing 'shallow end' cases, and program officials preferring them. This makes it doubtful offenders who would have gone to jail would be included. All of this suggests, like earlier correctional reforms, that victim-offender reconciliation was not answering the need for alternatives to incarceration, and that it too was destined to become part of the widening net of social control. Instead of avoiding problems created by the use of the prison system, another sentencing option has been implemented which pulls a different set of offenders deeper into the system of social control, and inevitably increases cost.

Half a decade after Dittenhoffer and Ericsson's study, Mark Umbreight (1989) added to this debate by doing an exploratory study on whether victim-offender reconciliation should be applied to violent crime. Using a very small sample (6 interviews, review of informal conversations with victims, and drawing on his experience as a mediator in 1 case), he argued that this process was quite helpful to victims in certain cases, in that it enabled them to get answers to questions about the offence and to gain a greater sense of emotional closure. While obvious methodological questions arise as to the representativeness of his sample, self-selection of his respondents, how they may differ from those not so willing, and the potential for "exampling," he does make it clear that some "selected" victims of violent crime would welcome such a process. While not defining what he means by this, he does, however, urge caution about pushing victims into such programs, or even approaching them about it too quickly, as this may result in revictimization by the program. As well, he emphasizes that there need to be available more extensive casework services and resources than are found in the usual victim-offender mediation case.

But restorative justice has remained a popular idea. I often refer to it as the "hot new thing" in criminology. Over the last decade or two, restorative justice initiatives have developed all over the commonwealth (e.g. Australia, Canada, New Zealand, South Africa and Britain). Typically, they are intended to involve offenders, their families, victims, other interested members of the community, and a facilitator. All affected by the crime are encouraged to actively participate in the resolution of matters arising from the crime. In principle, the victim is a central actor in this process. In practice, levels of participation in RJ schemes, at least in Britain, have been very low. In 2001, for example, only 7% of youth offender panels were attended by victims. Given that responses to a 1998 British crime survey suggested that 41% of victims were willing to meet with the offender, it's possible that the problem lies with inadequacies in the means by which

victims are involved (e.g. in New Zealand, victims attended about half of all family group conferences, and in Australia, rates are even higher 73% in N.S.W. and 89% for crimes of personal violence in experiments in Canberra. A recent study in the U.K.(Masters, 2002) suggests that the reason for these radical differences lie in the way that victims are encouraged to participate in RJ: basically the U.K. has had consistently "poor practice" - while only about 23% of victims didn't wish to attend, 53% were not informed about it, and many that were couldn't attend at the scheduled time (or rescheduled time). The labour intensive nature of victim involvement, high case loads, and poor interagency cooperation, moreover, suggested better staffing, training and coordination of caseworkers was necessary to bump up victim attendance.

So why are these studies relevant to us? Quite simply, it is because *restorative justice is being implemented, in varying degrees, throughout Canada as we speak.* Here in Newfoundland and Labrador, and mainly in St. John's, RJ is provided by three community groups: (1) Community Mediation Services Inc.; (2) The John Howard Society*;* and (more broadly) Aboriginal "Circles of Support."

The most developed of these is Community Mediation Services, which runs community mediations and conflict resolution training (since 1996). It provides support for victims before, during and after the CJS process. Aside from a core paid staff, much of their programming is run by trained volunteers (avg=25/year). Requests for the use of RJ come from police officers, community agencies, schools, victims, and community referrals (though their information notes that points of referral are "unrelated to the criminal justice process"). When involved, victims are generally involved in community mediations as participants in the RJ process. Much of their work deals with things like vandalism and neighborhood disputes.

The John Howard Society, a group with a long history of working with offenders, has provided, since 2000, a peer mediation program for youth. This trains peer mediators (students) to help other students resolve conflicts in a neutral setting (e.g. bullying, rumours, misunderstandings, personal property disputes, relationship issues, etc. Points of referral are unrelated to the criminal justice process.

Finally, Circles of Support offers one on one services to victims of sex offences and violent crime in Newfoundland (since 1997). Requests for the use of RJ services may come from a victim, an offender, or a community referral. Victims that become involved usually participate voluntarily, providing a caseload of 10-20 victims a year (vs. 30-60 offenders). Essentially, this is a program to help warrant expired sex offenders integrate into the community. Referrals are made following conviction, either pre or post-sentence. The program generally deals with men, sometimes mentally challenged, who have committed offences like sexual assault and sexual abuse, though other violent offences may also come into play.

As can be seen, restorative justice in Newfoundland and Labrador is available through a patchwork of community services. As I understand it, after attending a presentation during "Restorative Justice Week" in November 2004, there is some talk of expanding RJ here through either the Department of Justice or Victims' Services, though this will take time.

However, to really get a look at a comprehensive RJ program, I should point out that Nova Scotia has currently implemented a much more wide-ranging restorative justice system, and has been doing so for the last decade, with the primary goals of reducing recidivism and increasing victim satisfaction. This is the one that many provinces - and academics - are watching. The reading I gave you about the Nova Scotia program indicates that this initiative, run by the Department of Justice, *potentially diverts offenders by police prior to being charged, by the prosecutor prior to dealing with the charges, by the judge after conviction but before sentence is passed*. It explicitly *deals with more than minor property crimes* (with restrictions on what entry point referrals can be made depending on seriousness of offence). *Considerable community involvement is expected* in implementing the restorative justice process (these can involve victim-offender conferences, family group conferences, and sentencing circles, among other things). The program is to be delivered through community agencies, and is to be phased in gradually, beginning with young Offenders in four counties, then provincewide, and finally provincewide for all offenders.

The first thing I would suggest is that *many of the problems found by others may crop up here as well* (e.g. criminal justice officials not wanting to refer serious cases, widening the net of social control, poor attendance). However, because the program is designed to be much broader, these issues may be even more pronounced here. Time will tell if this thesis is correct.

However, there are other issues to consider. For the last several years I have been working with Don Clairmont of Dalhousie University interviewing representatives of community agencies and the criminal justice system regarding their views of this program. In 15 interviews, comprising 11 community influentials and 4 parties involved in the justice system, I found the following:

When asked about *the possible risks and benefits of RJ to victims*, the term “revictimization” was common among community respondents, as were concerns about the lack of a victims’ veto, RJ being used for serious or violent offences, little power in the process, RJ being used in lieu of charges, and few supports being put in place. However, some did see a benefit to victims who did not want charges to proceed. Not surprisingly, most of these comments came from respondents representing victims’ organizations - although others also expressed some concerns about violent offences being included. Most offender oriented respondents commented little, but considered that victims’ expectations would play a large role.

The justice system respondents expressed the potential benefits of RJ as catharsis, understanding and closure, but considered that preparation, expectations and outcome were important. There were concerns about training of moderators and previously offender-based systems switching their focus to victims, but it was expressed that there were already risks and delays in the system, and the potential for empowerment, so why not give this a chance.

When asked about *the possible risks and benefits of RJ to offenders*, community respondents commented that the obvious benefit was to avoid incarceration. However, this was expressed differently depending on the perspective of the respondent. For example, those who worked - or primarily worked with - offenders expressed this in the context of a philosophy that it was better

to avoid incarceration, would help rehabilitate, and assist with community re-establishment. Other community respondents, not necessarily sharing this philosophy, thought that RJ's potential for avoiding incarceration was not such a good thing, and would enable offenders to play the system. In the middle were individuals who work with both victims and offenders, who expressed both aspects as an upside and a downside, and felt that RJ gave another option given the right attitude, instead of just being seen as "a better deal." Another theme was that RJ, if it worked, would hold offenders accountable, make them take a look at what they've done, take responsibility for their actions, and relieve guilt. It would get away from the current system where they are "cloistered" away from the events and their victims. Many of the respondents expressing these views either worked in victims' organizations, or expressed, at least in part, a sympathy for the victim.

Turning to the justice system respondents, some of the same themes emerged, such as avoiding incarceration, being held accountable, making offenders take a look at what they've done, countered with the potential that offenders may just see RJ as a "slap on the hand." However, the issue of risks took on more of a legal flavor, with one official pointing to potentially giving up constitutional rights to keep silent and not incriminate oneself, while another did not see such problems if RJ was done prior to charges being laid.

When asked about the *possible risks and benefits of RJ to communities*, the theme of cost-effectiveness emerged as significant. Some felt that this would save money on courts and the criminal justice system, but most felt that RJ masked a hidden agenda involving "downloading" costs onto the non-profit sector. Indeed, to really work as it should, they felt RJ should have sufficient resources put in place to enable agencies to do their job. The most critical in this regard were respondents somehow connected with victims' organizations. Those coming from an offenders perspective voiced some of the same concerns, but also, in line with their philosophy of reintegrating offenders, tended to also express that the community needed education to understand RJ, support it, and get involved. Other interesting comments included RJ as an artificial way to reduce crime statistics, the issue of just who would decide whether a case went to RJ, and the potential for an increased sense of control in stigmatized communities.

As for the justice system respondents, the majority agreed with the philosophy of restoring peace as beneficial to the community. Indeed, several pointed out that there are already risks within the system, and in releasing offenders into the community. Others, however, pointed to the issue of properly informed decisions being made, with some particularly vocal about the problem of expecting high levels of expertise from small, poorly funded community organizations. Several pointed to the fact that the community would not like RJ - particularly "get tough" types - and that education was necessary.

When asked about *whether they felt that RJ would be effective*, only 3 community respondents said yes without extensive qualification (possibly because they have already unofficially used similar strategies, as well as the fact that they work with offenders). More critical were victims groups and those with a victim orientation. Some of these felt that it would not be effective, that it should be carefully phased-in and evaluated to avoid revictimization, and that the lack of a

victims' veto would be a hindrance. Third, some commented that its success depended on how it was managed. Indeed, these latter respondents commented on how program statistics can be fixed, and that "you can build in success or set up for failure." Finally, two respondents commented that they didn't know whether RJ would be effective. In the words of the latter "the jury's still out."

The justice system respondents were fairly positive about the potential effectiveness of RJ. One Judge felt it would probably cut recidivism, while another felt that it would be more effective for young, first time offenders. One official found "the theory quite compelling," while another felt that it would be effective "in some cases," adding that RJ was "worth a shot" as the traditional system doesn't do such a great job anyway.

When asked *whether RJ was likely to be efficient,* community respondents became quite vocal: one simply said "Bullshit!" All denied its efficiency considering that (1) it is a government program, and (2) social programs dealing with human emotions aren't geared to efficiency. It was felt that such a program would be expensive, and that the necessary resources needed to be put in place for the program to work . "If rushed, it will be flawed." There was also some suspicion about why RJ was really being implemented, and that it was not really to help resolve crimes, but to save government money.

Justice system respondents were split on efficiency, but spoke more from a systemic perspective. Several felt that initial diversion would clear up the court docket, while one Judge felt that it could slow things down if cases were put on hold to engage the offender in RJ. The issue of downloading came up among all respondents, and one succinctly commented, in line with the community respondents, that "No system tailored to individual needs is efficient." Finally, the issue arose of "efficient for who?" Increasing court efficiency by diverting cases elsewhere may simply increase the burden elsewhere. Indeed, one well-placed official brought up the issue of the survival of the RJ program after federal financial support ends.

When asked about *whether RJ was likely to be equitable,* community respondents broke down again largely on victim-offender lines. Victims' organizations, or those who took a victim perspective, felt that it would not be equitable for victims as offenders' rights were paramount, and there was no veto for victims. Offenders' organizations offered qualified hopes that RJ would be equitable. Examples inlcude: "So long as people understand what's involved"; "So long as resources are put in place for all"; "I hope so. It may be painful but beneficial for victims and offenders both"; and "I guess I can always live in hope". Two respondents also spoke of minority access issues in terms of gender, class, and particularly race.

As for the justice system respondents, all commented on the lack of veto for victims. One official commented that the victim already has no rights, so is not losing anything in RJ. One Judge agreed, adding that victims now have an option they didn't before, and that a veto would intrude on the rights of another party - the community. A government official commented how she once would have believed in a veto, but has since seen cases where it would have created an injustice (e.g. where the technical victim of an assault had a long history of abusing others, and a

person who fought back could then be forced, by the victims' veto, into criminal court for assault). A second Judge felt that the lack of a veto is not fair, but it should be possible to conduct RJ sessions in another manner if the victim does not want to be involved. All of these respondents commented that minority access was an issue that needed to be looked at. Finally, there were comments on RJ's equitable implementation, such as making sure participants know what the parameters are, and the impact on participants perspective (e.g. comments on the possibility that RJ could achieve the same outcome as court in a shorter time with a greater feeling of having an impact on the result).

As these interviews closed, respondents were asked to share their comments on any issues or concerns that RJ would raise for their particular organizations. Many of the above issues came up again, and will not be repeated here. New comments largely related to the mandate of the particular community organizations in question, and there was again a split between offender and victim-oriented organizations. A sampling of interesting issues raised include:

- the possibility of being co-opted through funding;
- downloading/ RJ done for wrong reasons;
- RJ not really getting away from the adversarial model;
- The potential for subtle dynamics of intimidation and control being used by offenders in sessions;
- Parachuting Aboriginal models of conflict resolution onto culturally and numerically different communities and expecting them to work;
- the potential impact of RJ diversion on police record checks;
- the potential impact of RJ diversion on criminal statistics;
- the potential impact of RJ on the pro-arrest/pro-charge policy in domestic abuse cases;
- the need for sufficient training of staff;
- parallels with problems occurring in family court mediation;
- seniors probably wouldn't want to be involved, except perhaps in family situations involving financial abuse;
- if RJ allowed to expand, we may be able to expand our halfway houses/programs;
- RJ provides more options for referral.

The criminal justice respondents commented more from a systemic perspective in this regard. A sampling of issues raised include:

- Increasing vs. decreasing delays and time demands;
- How does information come before the court? Are RJ discussions privileged, or can they be used in cross-examination;
- The relationship between RJ and conditional sentences
- Whether non-compliance is like a breach of probation;
- The possibility of RJ having unintended consequences;
- The significance of RJ depending on its implementation and use in the system and community;
- How records are to be kept and cross-referenced by community organizations;
- How well-trained are community volunteers;

- What kinds of supports are in place for community volunteers;
- How different is RJ from current alternative measures in practice - How little this has affected my duties to date;
- The need for judiciary to remove selves from trials if involved in an offender's circle sentencing or other forms of RJ.

Finally, when asked for suggestions or recommendations, community respondents broke down on victim-offender orientations. Those with a largely victim perspective wanted either to move slowly with RJ, doing more consultation, to scrap it, or to make it more equal between the parties. The need for adequate resources came up as well. Those dealing with offenders either focused on community education, or wanted to learn more about RJ.

As for the justice system respondents, the only suggestions came from the judiciary, both of whom indicated that they needed to know what community support services for offenders were available. One phrased this in terms of better communication, while another suggested doing a separate study on this in its own right.

Summing up, the 15 RJ surveys provided a great deal of interesting information on where community influentials and members of the justice system see this program in its early stages. The most consistent finding involves the relatively sharp difference in perspectives between victims organizations, and those taking a victims' perspective, on the one hand, and those working with offenders on the other. These are repeated, but to a much lesser extent, among those working within the justice system itself - who appear to have not only a more systemic perspective on this program, but appear to see different sides of issues more readily.

Finally, and in addition to the above, I should point out that the Year Two Interim Report on the N.S. restorative justice initiative found that only about 11% of victims/victim substitutes attended restorative justice sessions in the period in question. Perhaps this reflects some of the "poor practices" noted in Britain. Moreover, police, who did the bulk of the RJ referrals, tended to refer predominantly first time/less serious offences to this program. While those few victims who did attend tended to rate the RJ experience quite favorably, it may be suggested that this was largely the result of such "creaming" in the referral process such that more serious, violent offences were not represented. This represents an initial failure of the program in two ways. If it does not deal with serious cases, and even then only 11% of the victims participate, what kind of an alternative is it? On the other hand, if more serious cases are dealt with, it is quite possible that either victim satisfaction, attendance, or both, will not prove as supportive of this program as the government and academic literature suggests. More research needs to be done to clarify these questions.

In closing, restorative justice has reemerged as a popular current policy response to victims' traditional problems in the justice system. However, in studies of earlier programs, it was discovered that all was not as originally set out. Despite this, Nova Scotia has gone even further in its current restorative justice initiative. Not only may this run into some of the same problems, but the opinions of affected community organizations and justice system officials leave us much

to think about. Indeed, the initial review of this program has not adduced overwhelming victim participation in this program, and evidence of only minor cases being referred. This leaves us with many questions to consider about the future of RJ.