**Community Justice:
The Potentials and Pitfalls of Restorative Justice
In the Youth Community Justice Committee Setting**

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of the requirements for the degree of:

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Abstract

This thesis discusses the theories and practices associated with reintegrative shaming in a community restorative justice context. It involves a study in which ten individuals were interviewed in pursuit of answers to the following questions. First, "What does the community believe to be its role in justice administration?" Second, "Is there a tendency in legislation to paint an overly positive conceptualization of the community, which results in community members feeling as if they have not only a responsibility but a right to be involved in justice matters?" Finally, "Is reintegrative shaming being practiced in community justice groups as the theory advocates?" My work exposed a gap between the transfer of theoretical tenets of reintegrative shaming to the processes used in Youth Justice Committees. It ultimately recommends closer involvement between policy makers and program managers to ensure the practice of reintegrative shaming focuses on the act and not the actor. Furthermore, it suggests program evaluations be carried out on a regular basis to determine the consistency and adherence to restorative justice theories.

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It being the end of this long road, I would like to take the opportunity to thank several individuals without whose support I could not have done as well as I did. I'd like to thank my mother and stepfather for supporting this endeavor, which will no doubt prove an invaluable asset in the years to come. I would also like to acknowledge the sacrifices that my husband has made in the last few years which made it possible for me to complete this work. Also, if it were not for my children I would never have thought to continue my education, so for the opportunity and time off from the "real world" they have given me, I thank them as well. I would also like to acknowledge the immense time and effort that Dr. Cheryl Picard has put into the creation of this work. Without her contributions, suggestions, and ongoing support and reassurances I could never have begun, nor completed this work.

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CHAPTER ONE: INTRODUCTION

This thesis examines restorative justice and restorative approaches to youth justice issues. It looks at the way in which communities are mobilized to get involved, and the practices used to process cases. The issue is important because Canadian legislators are showing substantial interest in pursuing a restorative approach to criminal justice matters. In so doing, they have encouraged the development of a communitarian approach to the processes of criminal justice, particularly in the case of youth offenders.¹

Community justice has come to represent a holistic and pure form of justice for many people. This opinion is backed up by the views of those interviewed for this thesis. For others, community justice has come to be synonymous with a sort of “soft justice.” Most of those interviewed have disagreed; it was often argued that restorative justice is in fact harder for the offender because it actively involves him or her in the process. The community justice movement is one that attracts the support and volunteer participation of individuals, with various credentials from the community. Volunteer positions are available in both executive and front-line positions of community-run justice committees. The alluded to positive conceptualizations of moral and civic duty, have resulted in the requirements for superficially conceived communities for the purposes of carrying out expressions of discontent.² Furthermore, because both the federal and provincial governments have made efforts to include restorative principles in recent legislation, there has been significant pressure put on community groups to come together for the

¹ As will be shown in subsequent chapters, there is considerable emphasis on restorative principles, though there is no specific use of the term restorative justice. The Youth Criminal Justice Act, and the changes to the Criminal Code s. 718(e) are two examples that will be cited at a later point in this thesis. This issue is of great importance in my view, because the community has become the point of contact at which most youth cases are seen and heard under both the informal diversion strategies of the Young Offenders Act, and the formal extrajudicial measures cited in the 2003 Youth Criminal Justice Act.

² See generally, Anthony Alfieri, “Community Prosecutors,” *California Law Review*, 2002. [hereinafter Alfieri 2002.]

purposes of creating volunteer-based committees for the purposes of the expedient processing of minor criminal cases.³

The recent revival of restorative justice philosophy and the burgeoning restorative justice movement is one that should be celebrated. It carries with it the potential to move our society, hitherto dependent upon the traditional aims of the criminal justice system, most notably pain-inducing forms of punishment, towards a view to a healing, conciliatory and future-oriented form of social justice.⁴ It has the potential to draw us away from the tendency in our society to default to punishment.

It is the above that serves to strengthen the community justice movement and ultimately serves to give it credibility. The language of restorative justice, the most powerful and creative aspects of the theoretical paradigm, is being grafted onto the discourse characteristic of the traditional adversarial system. In other words, this “new” conceptualization of justice is being infused into the old schematic. There has also been a lack of attention to the theories of both restorative justice and the process of reintegrative shaming in the training of community justice committees. The worst-case scenario sees the system of community based restorative justice blamed for failing to make any difference in either the social or the fiscal costs as compared to the traditional justice system. For this reason, it is at risk of being abandoned.

³ This is evidenced in a combination of lines of argument. Restorative justice is often touted as a valuable alternative for cost-savings and burden sharing between the traditional system, and alternative dispute resolution. See generally, Ontario, Ministry of the Attorney General Civil Justice Review: Supplemental and Final Report (Ontario Court of Justice Nov. 1996).

⁴ See generally, H. Zehr, Changing Lenses: A New Focus for Criminal Justice. (Scottsdale: Herald Press, 1990). [hereinafter Zehr 1990.]

Discussed at length in this thesis is Braithwaite's Reintegrative Shaming theory, which forms the theoretical backbone of community justice groups whose practices are predicated upon the Family Group Conferencing model from New Zealand.⁵

My interest in pursuing this study was to explore the role and expectations placed upon the community in restorative justice programs that use reintegrative shaming processes. To this end, this thesis sought to answer the question, "what is it that members of community justice committees believe are the expectations place upon them?" Similarly, whether or not community justice groups were adequately prepared to meet those expectations? Is there a tendency by legislators to paint an overly positive conceptualization of *community*, thus creating the belief that the responsibility of justice administration *should* be placed in the hands of community members despite the relative health or disease that may be present in the community? Reintegrative shaming is a focus of this thesis because the practice has the ability to be both positive and negative in allowing the community to *do* justice.

From the outset of this endeavor it occurred to me that there are two major problems with the issue of reintegrative shaming as it occurs in the context of restorative justice conferencing with youth. The first problem is with the concept of shaming itself. In particular, the problem is with the emotional experience of shame. More to the point, problematic is the process instituted to mobilize and capitalize on unearthing of true remorse on the part of the offender. The second is the forum in which *shaming* actually takes place, the community conference and incumbent values that are connected to it.

⁵ See generally John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge: Cambridge University Press, 1989). [hereinafter Braithwaite 1989.]

The concept of reintegrative shaming, although theoretically appropriate in terms of restorative justice theory, has the potential to be an often used but poorly understood process. Despite this, reintegrative shaming remains an accepted and heavily depended upon concept within restorative justice conferencing programs.⁶ As such, it is a concept that should be exposed and understood for what it really is, and for its actual potential.

Another problem is the use of the term *community* as if it were a homogeneous entity. We know this is not true, and yet it is a fundamental concept in the theoretical work and practical application of restorative justice and reintegrative shaming. Will the recent shift to community involvement at all levels of training, recruiting, and preparation result in reduced levels of readiness to administer shaming in practice? In other words, might reintegrative shaming be used to shame the offender and not the act, as the theory advocates?

Another concern comes from the critique of restorative justice, namely that restorative justice processes might result in, or mimic, state-sanctioned vigilantism. This critique raises the question, who is responsible for shaming in community committees? Moreover, is there a way to gauge whether or not communities are healthy communities, thus transmitting positive and healthy messages? How can consumers of justice be assured that people volunteering to do this work are qualified to do so?

It is entirely appropriate at this point to expose my numerous biases. At the heart of this thesis is the belief that restorative justice is a powerful way of doing justice. Ultimately, I would like to see restorative justice occupying a permanent place in the criminal justice system. It is hoped that there is no proliferation of inadequate restorative

⁶ As evidenced in the training and organizational materials used in program descriptions for programs in and around the Ottawa region.

justice programs for fear that in the long run they will have been proved a failure of the system. This is my story: I am a volunteer for the Ottawa Youth Justice Committee, and I have been involved in youth conferencing as a co-facilitator in Ottawa for two years. I am also a student involved with researching restorative justice and incumbent practices. As such, I am in the position of both the student of theory and practitioner of an interpretation of that theory. This position has allowed me to question the lack of continuity that exists between theory and practice. It is this expertise down this path of research. Finding out whether there are other people working in the field that share my concerns is of importance to me.

Reintegrative shaming is a common practice in youth justice committees that model their approach after the New Zealand model of family group conferencing in Ontario (see Chapter Two). This includes the RCMP Community Justice Forum model and the Real Justice model. Are shaming rituals being done with proper attention to make it a positive experience for the youth, as the theory purports? Has shaming become focused on the actor and not the act? Is the fact that volunteer-run youth justice committees have been charged processing of most non-violent crime involving youths under the 2003 Youth Criminal Justice Act a good thing?⁷ Is there now considerable urgency placed on the training and preparation of community groups, resulting in less attention being given to restorative justice, and reintegrative shaming theory? The Youth Services Bureau of Ottawa has created guidelines for interested communities to assemble restorative justice based community justice groups. These guidelines state very clearly that there must be proper training for facilitators and that preparation can be time-

⁷ Section 19 of the Youth Criminal Justice Act has formalized extrajudicial measures, thereby legislating an increase of cases that will be diverted to Youth Justice Committees for resolution. I am suggesting that there will be a likely increase in the number of cases

consuming.⁸ It is common practice to implement train-the-trainer sessions so that members of community groups can take on the training of new recruits.⁹ Will this prove problematic because of a lack of consistency in program administration and in the proper attention to the models used in restorative justice programs? For restorative justice programs to be deemed restorative in nature they must be devoted to the underlying theories. Thus, I set out to examine the way in which those responsible for administering restorative justice programs at the community level, the trainers, the policy people, and the facilitators, understand how reintegrative shaming fits into the paradigm of restorative justice. I wanted to know what reintegrative shaming practically means, how it functions in the community, and to what end.

Thus, this study is focused on community volunteers and those responsible for program development. It explores what the process and model of reintegrative shaming represents for individuals, including community volunteers and professionals. This study was not meant to test a particular thesis. It is exploratory in nature, and aimed at learning more about reintegrative shaming as it is practiced in community justice programs in Ontario at this point in time.

The study interview guide was designed to elicit individual opinions about whether reintegrative shaming was being done as Braithwaite's theory suggests. The questions were designed to stimulate a non-structured discussion about restorative justice and reintegrative shaming between the interviewees and myself. As such, the questions

diverted because the legislation is devoted to reducing reliance on the traditional system, and to reducing incarceration rates for youth-making community justice committees the likely strategy for effective case management.

⁸ The Toolkit is available in PDF format on the Ottawa Youth Bureau Website. www.ysb.on.ca

⁹ This has been done in the case of the Laurencrest Cornwall Youth Residence program, Operation Springboard, and Associated Youth Services of Peel. Each of these programs use the Ministry of the Attorney General (MAG) training manual, but have also implemented mentoring as part of their training. Most provide ongoing training, devoted to troubleshooting. The OPP has done similar training in conjunction with the RCMP, in preparation for helping to train interested community member-this information was garnered from one of the personal interviews carried out during the writing of this thesis (interview #5 February 13th, 2004).

were open-ended and designed to create a safe atmosphere in which to discuss the subject with some measure of freedom. Furthermore, they were designed so as to encourage a natural progression to the subject of shame, given an awareness on my part that shaming was a topic that was going to have to be approached with creativity. I drew upon personal experience to assume that the participants might be uncomfortable with the topic, or at the very least that participants would be reluctant to talk openly about shaming, reintegrative or otherwise in restorative justice conferences. It was my intention to create an interview guide, which for all intents and purposes would not be found offensive by the participants. I believed that I knew the types of questions that would immediately have the effect of ending the interviews. For this reason I developed the questions I did. Hindsight suggests that the questions could have been more effective had I been less cautious with their design and implementation but when I created the guide, they seemed in the most appropriate, most cautious format.

The first three questions were designed to collect demographic information, and information on the experience of each participant in the field of restorative justice. Questions four to eight were designed to assess the participants' breadth of knowledge in the theoretical foundations of restorative justice. This seemed important given the extent of each participant's involvement in restorative justice and because talking about a familiar subject would help to create a safe environment for the interview.

Questions nine to eighteen focused specifically on reintegrative shaming. They were constructed so as to invite both practical and theoretical reflection on the concept of reintegrative shaming, as well as elicit personal opinion on whether or not reintegrative shaming was being practiced as Braithwaite's theory advocates.

The questions were constructed based on a number of assumptions. First, it was assumed that restorative justice was theoretically and personally important to the interviewee, and that they believed alternative dispute resolution to be worthwhile. Secondly, it was assumed that reintegrative shaming was a subject that the interviewee would be familiar with, and would have a strong opinion either positive or negative. A component of the questionnaire was designed to ascertain the interviewee's personal and professional experience with restorative justice. Questions were for the most part open-ended. Examples of questions related to the theoretical paradigm of restorative justice and the processes associated with reintegrative shaming include:

- 1) How do you understand the term community in a restorative context?
- 2) How important is the community to restorative justice processes in your view?
- 3) What does the term reintegrative shaming mean to you?
- 4) What purpose does shaming serve from your point of view?
- 5) In your opinion, should reintegrative shaming within the context of restorative justice be considered a positive reaction to criminal behaviour?
- 6) Why do you think people volunteer in community justice groups?

Interviews were conducted with professionals whose careers were in some way connected to restorative or community justice, either in terms of committee training, policy development, or as members of court-sanctioned alternative programs. This group was labeled as the "Policy Group." A second group included facilitators from the Lanark Real Justice Program and from the South-Eastern Network of Restorative Justice. These individuals were trained in both the RCMP and Real Justice models of forum conferencing and are responsible for facilitating youth conferences in Lanark County and the surrounding region. The Lanark Real Justice program by nature of its association with both the RCMP and Real Justice models of conferencing, utilizes the process of reintegrative shaming as an integral part of the restorative process. This program is under

the direction of the federal Department of the Solicitor General. It receives funding from the Solicitor General, and has recently been the recipient of a grant from the Trillium Foundation. This group was labeled the “Practice Group.”

Individuals in these groups were not a random sample, and are not necessarily representative of the population. Instead, each individual was chosen because of their role and relationship to the practice of restorative justice programs in Ontario. Some were people that I had personally come into contact with through my volunteer work, and some were referred because of their unparalleled experience in the field.

My work draws heavily on the works of John Braithwaite and Dan Kahan. It also relies on government documents and procedural guidelines published by both the RCMP and the Ontario Ministry of the Attorney General regarding effective training and proper functioning of Community Justice Forums. It was my hypothesis that reintegrative shaming, as conceived by Braithwaite, is not practiced today. Connected to this was a concern that community members are under considerable pressure to become active in the creation of community ties through the formation of justice committees by becoming active in the administration of criminal justice without proper and effective training. Furthermore, that there is little proper organizational and governmental support for volunteers in such a role. The current pressure to form community justice committees may result in a lack of attention to the theoretical principles of restorative justice and reintegrative shaming. This in turn has the potential to reduce reintegrative shaming to disintegrative shaming in which justice committees express superficial value-laden messages of communal discontent with both the *actor* and the *act*.¹⁰

Therefore, this thesis seeks to answer the following questions:

- 1) What do community members involved with community justice committees understand to be their role in the administration of justice for youth?
- 2) Is there a tendency in legislation to paint an overly positive conceptualization of the community, which then leads community members to feel they have a right and responsibility in justice matters?
- 3) Is reintegrative shaming being practiced as the theory advocates?

Chapter Two of this thesis examines the nature and principles of restorative justice philosophy. It looks at the social and historical development of this alternative paradigm of justice in the context of its most recent revival and its roots in Aboriginal traditional forms of conflict resolution. Moreover, considerable attention is given to restorative justice-based practices, with specific attention given to the practice of conferencing as it is formally conceptualized in the Youth Criminal Justice Act, and to the way in which it is implemented in various programs. It is through the examination of conferencing and through some elucidation of commonly cited critiques of restorative justice that lead into the theory and practice of reintegrative shaming and shaming theory. Conferencing, as it is discussed in this thesis, is one of many possible manifestations of restorative justice programming. Other models of restorative justice include, but are not limited to, victim-offender mediation, post-sentence reconciliation, post-charge diversion, circle sentencing and healing circles. Reintegrative shaming as it is discussed in this thesis involves the practice of conferencing, which was adapted from the New Zealand model of Family Group Conferencing. Many of the criticisms of restorative justice in this thesis are applicable to conferences; it should not be assumed that they carry over to other restorative justice programs. Conferencing, like other restorative justice programs, uses a participatory model of interaction between victims and offenders. What is distinct about conferencing is that it involves input from other participants, including family members

¹⁰ Braithwaite, *Supra* note 5 at 3

and community representatives, which form the foundation upon which Braithwaites' theory of reintegrative shaming is based.

Chapter Three covers the theory and practice of reintegrative shaming. See Appendix II for an example of conferencing done in the RCMP model of Community Justice Conferencing. Australian sociologist John Braithwaite, most notably in his book *Crime, Shame and Reintegration* produced the theory of reintegrative shaming.¹¹ His work is based on the examination of the New Zealand Maori traditional approaches to conflict resolution. This theory, and the practice that has been adopted and subsequently adapted in Canada bears scrutiny because it has become *the* process used in community justice to morally educate offenders and wayward youth. Theoretically, reintegrative shaming is supposed to respectfully educate offenders in the behaviours considered acceptable within the community, but it seems easily confused with being a venting session or community forum created for issuing disrespectful denunciatory and value-laden messages to offenders. Community justice committees provide community members with a strong sense of moral and civic duty the opportunity to have a say in what will and will not be tolerated in their community. It is this practice that invites scrutiny because of its potential to do more harm than good.

Shaming will be discussed from the perspectives of both John Braithwaite and Dan Kahan. Braithwaite argues that reintegrative shaming, when done right, represents a positive experience of justice for all involved and ultimately results in positive reintegration of the offender into the community. Professor Dan Kahan argues that shaming serves an expressive function through which individuals and communities come together to express outrage, educate and otherwise express value-laden messages of

denunciation and prescribe punishment. The viewpoints expressed by both Braithwaite and Kahan are consistent with Durkheimian notions of social solidarity.

The Fourth and final Chapter discusses the exploratory and qualitative study of ten individuals directly involved with restorative justice programming in Ontario, and offers some suggestions for change and further study.

¹¹Braithwaite, Supra note 5 at 3

CHAPTER TWO: RESTORATIVE JUSTICE

Restorative Justice Theory Explored

I) The Nature and Principles of Restorative Justice

Restorative Justice is best understood as an umbrella term that can be used to describe an approach, a philosophy, or an ideology that embraces a conceptualization of social relationships as being of central importance in a real experience of justice.

Restorative justice is participatory justice, which involves a deeply transformative objective. It seeks to effect profound changes in relationships considered negative. It seeks to turn bitterness and hurt into reconciliation and healing. In practice, however, it is a fractured theory. Parts of it are often interpreted and implemented in various community programs, official policies, and grassroots philosophies, while others are left untouched.

Restorative justice is a concept that can be effectively and coherently described as being the representation of an approach to justice that is not mainstream or traditional, and draws its validity through a myriad of arguments that heavily contrast it with the retributive or 'just deserts' model of justice. In recent times, however, scholarship in restorative justice has made significant contributions to such endeavors as victimology, penology, and corrections, so much so in fact that it has taken a less peripheral place in justice administration.

Embodied in critical restorative justice theory, despite its multi-faceted nature and many interpretations, is an attitude towards justice that has as its central focus, the reparations of harm for victims, offenders and the community, caused by crime. Implicit

in restorative justice philosophy is the conceptualization of rationality, accountability, and responsibility. Furthermore, it explicitly advances the notion that human actions require a human reaction. Restorative justice theory states unequivocally that wrongdoers must be held accountable for actions that cause harm to others.

The restorative response to crime, in holding relationships central to its core, provides all those involved including the victim, the offender, and the community, with the opportunity to simultaneously identify and address their needs and obligations in the aftermath of crime. It seeks to provide the stakeholders with the opportunity to act together in an effort to collectively seek a positive resolution with an aim to heal, repair relations and reintegrate the offender.

While it is difficult to accurately define restorative justice, it is nevertheless necessary. Thus for the purposes of this thesis, the definition that seems to best encompass the relevant themes for the Canadian experience is that provided by the Law Commission of Canada in a recent publication, *Transforming Relationships Through Participatory Justice*;

Restorative justice is a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem-solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control.¹²

To further clarify the parameters of the above definition, the Law Commission of Canada has outlined the key objectives and core processes of restorative justice, all of which will be explored to some extent throughout this chapter. In the spirit of clarity, the objectives and core processes are as follows. The objectives of restorative justice include:¹³

¹² Canada, Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003). 16. [hereinafter L.C.C. 2003].

¹³ L.C.C. 2003:44.

- 1) The provision of a clear, unequivocal denunciation of unacceptable behaviour
- 2) Support for victims of crime
- 3) Reformation of offenders through the demand of active responsibility taking
- 4) Restoring balance to the community
- 5) And identifying restorative consequences and future oriented outcomes.

The core value processes identified by the Law Commission of Canada of restorative justice include:¹⁴

- 1) Volunteerism on the part of the community, and participation on the part of the victim, the offender, their supporters and community members
- 2) Respect for *all* parties involved
- 3) The active engagement and empowerment of the community in the decision-making process
- 4) A focus on conciliatory outcomes
- 5) Flexibility of process and perspectives

II) The "New" Movement

The modern resurgence of restorative justice theory was born in the decade following 1970 in the context of restitution, and out of a widespread disenchantment with the traditional system.¹⁵ Since then, restorative justice has more or less blossomed into an authentic social movement, one that has ostensibly turned the heads of the global community. New Zealand, for example has replaced its traditional juvenile justice system with one that favours a restorative approach that includes reintegrative shaming theory: this is the first known official system of its kind.¹⁶ In its wake, the traditional retributive model of criminal justice policy, prevalent in Western countries, has received considerable theoretical scrutiny in the world of sociological criminology.¹⁷ It is precisely

¹⁴ L.C.C. 2003:44.

¹⁵ See generally D. Van Ness. "Restorative Justice." Criminal Justice, Restitution and Reconciliation, Eds. B. Galaway & J. Hudson (Monsey: Willow Tree Press, 1990). Van Ness focuses on a socio-historical discussion of restorative justice as it was borne out of the work of Albert Eglash and his notion of creative restitution. Creative restitution is argued by Eglash to be the "second mile of criminal justice," that which effectively goes beyond simply restoring conditions as they were before-instead, making them better (10). [hereinafter Van Ness 1990]

¹⁶ See generally Canada. Department of the Solicitor General. Robert B. Cormier. Restorative Justice: Directions and Principles-Developments in Canada (Ottawa, Public Works and Government Services, 2002). Cormier discusses at length Canada's role in the development of the United Nations Basic Principles of Restorative Justice. The basic principles were to provide a framework to guide the development of and implementation of restorative justice programs in member states. [hereinafter Cormier 2002].

¹⁷ As evinced in the work of Nils Christie, Howard Zehr, Heino Lilles, Mark Umbreit, Martin Wright, etc.

this scholarship combined with the forward thinking of those individuals who would see the inclusion of restorative justice theory as a positive alternative to the mainstream that has undeniably enriched the development of different perspectives regarding justice and corrections in Canada, the United States, New Zealand, Australia, and Britain, to name a few. Carol LaPrairie argues that much of the interest in restorative justice and restorative approaches to criminal actions stems from the many reported inadequacies in the criminal justice system as it presently operates:

[the criminal justice system] ignores the social context in which crime and disorder occur and, in doing so, de-contextualizes the offence and marginalizes various players¹⁸

Howard Zehr, the so-called father of restorative justice, deserves much of the credit for the recent promulgation of, and increased focus directed at restorative justice theory. His contribution, *Changing Lenses: A New Focus for Criminal Justice* maintains that retributive justice, the *stuff* of the traditional system, creates a scenario of justice that is entirely abstract and wholly removed from the human experience.¹⁹ He maintains that the retributive system, which transforms the state into the victim of crime has the effect of entirely leaving out the real victim, the individual, essentially denying him or her of the right to his or her own experience. Furthermore he argues that such a system is designed for the simple purpose of ascertaining guilt of offenders, which has the effect of placing the offender at the center of the justice process, without however, requiring any more than passive participation on their part. Thus, the suggested paradigm of restorative justice defines crime as a conflict that exists between persons. Furthermore, it places

¹⁸C. LaPrairie, "Altering Course: New Directions in Criminal Justice-Sentencing Circles and Family Group Conferences." *The Australian and New Zealand Journal of Criminology* 28 (1995):78. [hereinafter LaPrairie 1995.]

¹⁹ Zehr, *supra* note 4 at 2.

restoration of relationships at the center, and not the periphery.²⁰ Restorative justice, he maintains, requires the active participation of all those involved.

The restorative justice paradigm proffered by Zehr begins with the premise that crime is essentially a violation of people and of relationships, rather than merely a violation of law. It follows then, that the most appropriate response to criminal behaviour, is reparation of the harm caused by the criminal act. Restorative justice, therefore, represents a philosophy, a way of looking at and understanding crime and the response to crime. It could effectively be described as a three dimensional collaborative process, one which takes state control out of the picture and returns the incident to those most directly affected by the action, including the victim, the community and the offender.²¹

Bazemore has argued that there is great value in regarding the primary stakeholders in the resolution of conflict, meaning the victim, the offender and the community, as *clients* of the justice system.²² He has often described these stakeholders as customers that are looking for some measure of satisfaction from the product (justice) and from services rendered (litigation, dispute resolution), thereby completely altering the expectation of satisfaction from the system of justice.²³

Restorative justice has often been heralded as a replacement for the existing Canadian criminal justice system. Arguably, this stems in part from a well-documented deep-seated dissatisfaction with the current system, a lack of and a call for widespread positive change to the way justice is currently carried out in Canada and North

²⁰ Refer to Zehr 1990.

²¹ See generally G. Bazemore, "Restorative Justice and earned Redemption: Communities, Victims and Offender Reintegration." The American Behavioral Scientist, 41.6 (1999). [hereinafter Bazemore 1999].

²² See generally, G. Bazemore, and M. Umbreit, "Rethinking the Sentencing Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime." Crime and Delinquency, 41. [hereinafter Bazemore and Umbreit 1995].

²³ Ibid.

America.²⁴ It is a call for a more social, humane response to crime that involves those most affected by it in an active or proactive fashion. It is a call for valid engagement on the part of the community, and the individual members that comprise it. The momentum of restorative justice within traditional spheres of justice can be said to have roots in the victim advocacy movement, resulting from important work with victims and the pursuant scholarship that has, time and again, suggested that victims, once given the opportunity, want something altogether different than punishment of their victimizer.²⁵ The restorative justice movement is representative of a philosophy of justice which views crime as an injury to personal relationships, and furthermore, that seeks to replace the automatic *default to punishment* of the offender as the basis for justice, with attempts to heal the wounds of all those involved, and to restore a sense of balance to the victim, the offender, and the community.²⁶

III) Justice, Respect, for Victims and Offenders

The two decades following 1980 are historically the most significant with respect to the examination, promotion, and legislating the rights of victims in Canada. Take, for example, Manitoba's enactment of legislation specifically directed at the protection of victims' rights in 1986, and the pursuant Ontario's Victims Bill of Rights, which enshrined measures that were primarily intended to enhance the role played by victims in the criminal justice process. Furthermore, both provinces have since established an Office for the Victims of Crime, which in effect provides support services to victims. All Canadian provinces have followed suit and created support services for victims.²⁷ This

²⁴ See generally LaPrairie 1995; Zehr 1990; Bazemore 1998; and Bazemore and Umbreit 1995.

²⁵ P. McCold, "Restorative Justice and the Role of Community," *Restorative Justice: International Perspectives*, (Eds.), B. Galaway & J. Hudson, (Monsey: Criminal Justice Press, 1996). [hereinafter McCold 1996]

²⁶ McCold 1996:87.

²⁷ L.C.C. 2003:24.

revolutionary research and the ensuing legislation have changed the direction, objective and focus of justice in the Canadian system of criminal justice. Specifically, interest in victims' rights and desires has spurred a real culture of change in corrections and policing.²⁸ This work with victims, and the pursuant scholarship has strongly suggested that a restorative approach, in contrast to the retributive model, has infinitely more to offer the victim of crime. As Howard Zehr has pointed out, the retributive system is predicated on an approach to justice that positions the state as the victim, thereby omitting the actual victim, the individual that suffered in the aftermath of the actual experience, from the process of justice. Scholarship gave way to the promotion of concern over the lack of respect and priority of the role accorded the victim of crime. This period was followed by one characterized by victims themselves "...agitating about their own role, or rather its absence, in the criminal justice system."²⁹

The swell of activism around the plight of victims became, by the late 1970's, a fully fledged social movement with lobbies working towards the alleviation of the negative consequences for victims of both crime and the criminal justice process, and toward legislative reform focused on victim's rights.³⁰

In tandem then, the groundswell of progressive work on the topic of restorative justice and the rise of interest regarding the status of the individual in processes of justice during this period acknowledged both the importance of emotion, and the importance of allowing victims to own their experience as such. As a consequence of this recognition, there has been a great increase in interest in the victim, and victim supporters within the

²⁸ G. Bazemore, "Crime Victims, Restorative Justice and the Juvenile Court: Exploring Victim Needs and Involvement in the Response to Youth Crime." *International Review of Victimology*, 6:4. (1999): 295. Bazemore explains that these years represented a watershed for the promulgation of victims' rights, the involvement of victims in the criminal justice process, and their demand for inclusion in the process. [hereinafter Bazemore 1999]

²⁹ H. Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration." *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* Eds. A. Morris & G. Maxwell. (Oxford: Hart Publishing, 2001) 183. [hereinafter Strang 2000].

³⁰ Strang 2001:184

retributive system, and with the development of alternative justice processes that occur both internally and external to the traditional system.³¹

There is a growing body of literature that strongly suggests that crime victims have the perception that emotional restoration may in fact be more important than material or financial restitution. Reports of personal experience and professional opinion have shown that public education regarding justice options and the range of possible outcomes is of great significance in the decision made by victims to pursue other courses.³² Furthermore, there is an expanding body of research that suggests that victims are often interested in restitution as much as it represents a gesture of responsibility for the harm caused by the act in question, that victims are in fact searching for answers to particular questions about the incident, and not retribution.³³ This set of presuppositions points to the potential for restorative justice. Clearly, there is growing recognition on the part of the public and political body that sees the need, or at the very least, the potential for this objective in justice.

There is recent work that reports the fact that victims often express a need to forgive their victimizer as core substantiation for seeking justice of any kind. Victims have often been cited as expressing their desire to understand why and how they became the target of criminal activity, and to make their victimizer understand how they are feeling in the aftermath, and how they felt during the event. Mica Estrada-Hollenbeck has strongly suggested that victims would in fact turn to alternative systems of justice if fully

³¹ Increased interest has come with the reliance on victim-impact statements, mandatory mediation, and alternative dispute resolution programs in sentencing offenders. Many of these programs have been designed with the victim in mind, to encourage their active participation and engagement with the processes of justice.

³² My own experience has shown that victims don't often know about their options, and automatically default to punishment or reliance on the court system to take care of the problem. Once informed, however, many victims do tend to choose the alternative route. This has become clear in the interviews as well; practitioners and policy individuals have all had the practical experience of trying to include the victim in the restorative justice process. Many have had the experience that given the informed choice, many victims do choose to try the restorative approach.

³³ Strang 2001:185.

apprised of their options.³⁴ She explains that both victims and offenders experience very different versions of a particular incident, which play themselves out in what she calls micro-narratives, which “...reflects each person’s organization of reality, rather than valid, objective phenomena.”³⁵ Furthermore, she argues from an alternative dispute resolution perspective, that the current adversarial system does not allow for proper communication to occur between perpetrators and victims, resulting in the perpetuation of feelings of hate, frustration, or hurt for the victim, and feelings of ambivalence or outright apathy on the part of the offender.³⁶ She makes the claim that an experience of justice that allows for fluidity in communication between victims and perpetrators, one that specifically allows for the perpetrator to communicate guilt and make amends, would contribute to transforming negative feelings into more positive ones, and would undoubtedly facilitate the process of forgiveness.

Heather Strang takes this line of argument further in her work that considers the relationship between victim and offender as being central to the understanding of justice having been served. She argues that there are many cultures in which “...the judicial system supports the forgiveness process by setting up mechanisms for reconciliation and restoration of justice.”³⁷ She defines forgiveness in this sense as “...a victims’ cognitive notation that he has changed from a negative to a neutral or positive feeling,” and explains that this process can occur “...in absence or in spite of the perpetrator.”³⁸ She states that “...apology and forgiveness are so much a part of everyday interaction, for

³⁴ See generally M. Estrada-Hollenbeck, “Forgiving in the Face of Injustice: Victim’s and Perpetrator’s Perspectives.” Restorative Justice: International Perspectives. Eds. B. Galaway and J. Hudson. (Monsey: Criminal Justice Press, 1996). [hereinafter Hollenbeck 1996]

³⁵ Ibid.

³⁶ Ibid.

³⁷ Strang 2001:186.

³⁸ Ibid.

offences trivial and serious, that it is worth looking more closely at the transaction.”³⁹

Like Hollenbeck, Strang reports that the contention that victims are looking for both an apology, and to be given the opportunity to forgive, is worth serious consideration. She suggests that “...what victims really want even more than an apology is the opportunity to forgive and so to be relieved of the burden of anger and bitterness which may result from the sense that their emotional hurt is unacknowledged.”⁴⁰

Restorative justice, theoretically speaking, makes considerable room for the individual claim to personal experience for the victim, but it seeks to be even more inclusive than that. In the theoretical objective of transforming relationships, restorative justice opens the floor to a multi-victim and a multi-party perspective.⁴¹ Implicit in the theory underpinning restorative justice is the acknowledgement that crime and victimization can constitute a serious social impact, which arguably can be inclusive of a considerable range of victims, resulting in a multitude of individuals, groups, communities, or society as a whole being affected by the incident.

Consequential to the inclusive nature of restorative justice theory and practice is the emphasis on the role of the offender in the justice process, and arguably the new role for the offender in the process. As a point of contrast, the role of the offender in the retributive system is assuredly one-dimensional; the traditional justice processes in the just-deserts model do not actively engage the offender any more than it engages the victim of crime;

³⁹ Strang 2001:186.

⁴⁰ *Ibid.*

⁴¹ R. Young. “Integrating a Multi-Victim Perspective into Criminal Justice Through Restorative Justice Conferences.” *Integrating A Victim Perspective within Criminal Justice: International Debates*. Eds. A. Crawford and J. Goodey. (Vernont; Ashgate, 2000) 229. Richard Young argues that even thirty years ago, the victim would have been given no voice in the process of justice. He argues that the “offence against society model” of justice (retributive) has come under serious attack in the recent past because there has been recognition that the retributive model is historically contingent, that victims do in fact have a role in the experience of justice, and that there is an emergent belief in the philosophy that says that crime does hurt individuals. [hereinafter Young 2000.]

...they rarely participate directly; they are generally expected to communicate with the court through their lawyer; and they are discouraged from any direct dialogue with the victim. They thus can feel alienated from the process and frequently have only a vague idea of what has happened to them. Overall, they remain fundamentally untouched by both processes and outcomes.⁴²

Where the offender traditionally has been situated at the center as the focus of discussion and punishment, restorative justice-based model processes are victim oriented, and victim driven. Restorative justice processes accord primary focus to repairing the harm caused by the crime, as experienced by the victim. It furthermore allows the offender to participate in the process in a manner that helps the victim remain central to the process. It also provides the offender with the opportunity to apologize, to repent and to subsequently reintegrate into the community following proper, agreed-upon sanctioning.⁴³ The theory, however, recognizes without reservation that offenders have needs as well, and that these needs must be met within the process. Implicit is the recognition that offenders need to be given the opportunity to experience change in behavior and perspective, to right the wrongs they have committed, and to be given the opportunity to seek out forgiveness from their victims, and reacceptance into the larger community.⁴⁴ As active co-participants in the process, restorative justice philosophy requires that offenders accept responsibility for their actions, be held accountable for the consequences of those actions, and contribute to making amends and restoring balance to the lives of their victims.⁴⁵ Engaging the offender in the process has the purpose of

⁴² A. Morris W. Young, "Reforming Criminal Justice: The Potential of Restorative Justice." Restorative Justice: Philosophy to Practice. Eds. H. Strang & J. Braithwaite. (England: Dartmouth, 2000) 17. This particular article generally refers to the trend of Western countries to employ both contrasting formulations of justice. Generally, it functions as a compare/contrast of the different systems from the perspectives of all involved in the judicial process. [hereinafter Morris and Young 2000.]

⁴³ See generally G. Bazemore and M. Umbreit, "A Balanced Approach Mission in a Restorative Framework." Balanced and Restorative Justice for Juveniles. Eds. G. Bazemore and M. Umbreit (Minnesota: University of Minnesota, 1997). [hereinafter Bazemore and Umbreit 1997.]

⁴⁴ Van Ness 1996:13.

⁴⁵ Morris and Young 2000:18.

calling to task or “challenging” whatever justifications or rationales the offender may have for committing the offence.⁴⁶

IV) Restoring Balance in the Community

Fundamental to the philosophy of restorative justice is the conception of community inclusiveness, engagement, and empowerment. No discussion of restorative justice would be complete without the acknowledgement of the importance of the concept of community, despite the fact that it is such a difficult concept to accurately define. At its simplest, restorative justice requires active participation of community members. It requires that people, interested and concerned community members, get involved and become engaged in the processes of crime prevention, conflict resolution, and offender reintegration:

They are encouraged to engage in constructive efforts to show their disapproval of the actions of offenders...members are also encouraged to support offenders' efforts to take responsibility for their actions and to support victims as they come to terms with the harm caused by the action.⁴⁷

It is through the agency of community, and through the involvement of concerned community members that the fundamental values of restorative justice are realized in practice. By playing an active role in the conflict resolution process, the community finds itself in a position of being able to “...reestablish bounds of appropriate behaviour within the community.”⁴⁸ That is to say that the community has an incredibly important and powerful role to play in determining what it deems to be appropriate versus inappropriate or unacceptable behaviour from its constituents:

Restorative justice offers the possibility of harnessing the power of individual to create the social capital that is required to build strong communities. [Social capital] helps create Inter-connectedness among community members encourages trust, discourages

⁴⁶ Morris and Young 2000:18.

⁴⁷ Canada. The Law Commission of Canada. (2003). Dennis Cooley. *Restorative Justice in Canada: Lessons Learned*. Paper presented at Vancouver, March 8-9th, 2002. 22. [hereinafter Cooley 2003.]

⁴⁸ Cooley 2003:2.

political and economic opportunism, and facilitates collaboration towards a common goal.”⁴⁹

The community, furthermore, is viewed in this context as a having a wealth of resources at its disposal, and it is for this reason that the search for root causes through the processes of restorative justice is even possible. This is a particularly salient point, because without an honest acceptance or acknowledgement of responsibility on the part of the offender, there can be no tangible resolution for him or her. With the acknowledgement of wrongdoing comes the potential for deep self-examination on the part of the perpetrator, which could ostensibly allow for the recognition of problems that with some help could be effectively curbed earlier, rather than later, in the life of the offender. If restorative processes are applied effectively, that is to say, using the available resources from within the community, root causes for behaviour are sure to become evident, and community resources should be of some assistance in the rehabilitative process, and in the prevention of future criminal behaviour.

Restorative Justice Practice Explored

I) Practices Associated with the Restorative Approach

Restorative justice has been generally associated with various alternative dispute resolution practices, including restitution, community service, victim-offender mediation, family group conferencing, and circle sentencing. The practice of conferencing as discussed in this thesis is only one process that might fall under the umbrella-term restorative justice practices. Restorative justice represents a concept that, depending on the group, agency, or program in question, has been referred to as community justice or

⁴⁹ Cooley 2003:12. Social capital herein refers to “the elements of social organizations such as networks, norms and social trust that foster coordination and cooperation for mutual benefit.”

restorative community justice, and may therefore refer to a huge array of different types of justice practices and processes.⁵⁰

As discussed previously, modern restorative justice theory has been described as having its origins in the decade following 1970, in the context of victims' and human rights movements. Another view is that the philosophical and spiritual roots lie more accurately in the aboriginal cultures that span the globe. The adaptations currently used in New Zealand, Canada, and the United States are based loosely on traditions commonly associated with the aboriginal groups native to New Zealand (Maori), and North America (the First Nations Groups).⁵¹

Thus, a more complete history of restorative justice theory includes a discussion of the experience of aboriginal communities, as well as the experience of faith communities, and non-governmental organizations. Whatever its history, it represents a profound example of the power of communities to effect change. Restorative justice has essentially emerged from "...church basements, boardroom meetings of not for profit agencies, in prisons and community centers," wherever it appears that people were dissatisfied with the adversarial approach.⁵² The Church Council on Justice and Corrections (CCJC) has, for example, played an enormous role in furthering the development of restorative justice in Canada, in addition to the community justice movement in general, which includes neighborhood justice centers and community policing efforts.⁵³ The philosophy has found expression through several types of

⁵⁰ See generally P. McCold, "Primary Restorative Justice Practices" *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, A. Morris and G. Maxwell (Oxford, Hart Publishing, 2001) 48. This article generally describes circles, mediation and conferencing in a restorative context. See the article for a general overview of primary restorative justice practices. [hereinafter McCold 2001].

⁵¹ Laprairie *supra* note 24 at 16

⁵² Cooley 2003:24.

⁵³ See generally the Church Council on Justice and Corrections website at www.ccjc.ca

processes that share only the core principle, the importance of acknowledging the relational aspect of true justice.

Restorative justice processes include the victim and the offender in a face-to-face meeting, although in absentia, many programs allow a community representative in place of the actual victim. There are three very commonly accepted forms of restorative justice processes, all of which meet these simple requirements, but also experience wide variation even within their own right. Despite these variations, there is one unwavering requirement for the offender that has agreed to participate, and that is that he or she must admit responsibility for the act prior to being offered the opportunity to participate in the process. These processes are known superficially as circles, victim-offender mediation (VOM) and family group conferencing (FGC).

Circles include most notably the sentencing-type, and healing-type circles. Circles tend to be scripted, and are done in conjunction with either the actors within the traditional justice system (judges, lawyers, the Crown, defence attorneys), or as part of the traditional process.⁵⁴ Circles are recognizable from their structural processes. That is, the participants are required to sit together in a circle, to communicate in turn, and there is typically a spiritual component that complies with the particular first nations group in question.⁵⁵ Sentencing circles are relied upon primarily for sentencing aboriginal offenders, and they work by empowering community members in an effort to restore people's sense of collective responsibility.⁵⁶

⁵⁴ McCold 2001.

⁵⁵ See generally B. Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System," *International Journal of Comparative and Applied Criminal Justice*, 20:2, (1996), for a comprehensive and concise explanation of the exact functioning of sentencing circles.

⁵⁶ Laprairie *supra* note 24 at 16

Healing circles are generally convened to dispense with a particular issue of concern to all parties involved. These circles rarely involve justice issues, as the purpose is specifically to “help someone with their healing journey.”⁵⁷ Examples of this sort of circle have been carried out in the recent residential schools issues, where groups of affected native survivors have come together to find closure to the incident, which has so gravely affected their families, and their communities.⁵⁸ Sentencing circles, on the other hand, are convened in partnership with the criminal justice system, and function as part of a “co-judging paradigm.”⁵⁹ The purpose of sentencing circles is to develop an appropriate sentencing plan, in cooperation with justice officials, the offender, the victim and their respective supporters. The circle is convened as a “respectful place” where all involved with a particular incident may have the opportunity to speak freely “...in a shared search or understanding of the event, and identify steps necessary to assist in healing all affected parties, and prevent future occurrences.”⁶⁰ This process tends to be utilized in more serious cases at the present time, because the process is considered highly intrusive, lengthy, and requires a significant commitment from all parties involved. Furthermore, in Canada, it is a process reserved more frequently for aboriginal offenders, although it has been used successfully in non-aboriginal cases.⁶¹

Mediation, commonly known as victim-offender reconciliation programs (VORP), or victim-offender mediation (VOM), are other restorative justice driven programs. Also included under this heading are community mediation, and restitution

⁵⁷ McCold 2001. To explain, Paul McCold cites the peacemaking circles of the Navajo people. He describes these circles as being not necessarily confrontational, but involve family members of both victims and offenders to arrive at an acceptable solution to the problem (49).

⁵⁸ Ibid.

⁵⁹ McCold 2001:49.

⁶⁰ McCold:2001:51.

⁶¹ See generally, LaPrairie 1995. Also, see generally, H. Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum.” *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Eds. A. Morris and G. Maxwell (Oxford: Hart Publishing, 2001).

programs. All such programs tend to follow similar processes, although they can differ vastly in terms of their practical implementation. Community mediation, for example, is typically described as being settlement-driven; that is, the objective is to create restitution agreements that are agreed upon through a conciliatory process, with communication between victim and offender facilitated by a community-trained facilitator.⁶² Victim-Offender reconciliation programs are typically run by a facilitator whose primary objectives include aiding in communication strategies between parties in an effort to help them restore balance to their lives, or to “right relationships.”⁶³ There are typically five entry points into such processes, and they include, pre-charge, post-charge, pre-sentence, post-sentence, and following release.

Victim-offender mediation is often described as having a dual objective. It emphasizes communication and relationship building, but also often includes the creation of restitution agreements. Primarily, it functions as a “dialogue-driven style of mediation which many have termed a humanistic model of mediation.”⁶⁴

Conferencing is a process that brings together those involved or affected by a crime to discuss its impact and consequence. This meeting or process is the focus of my study. The process requires the active involvement and participation of community members, parents, and other supporters of the victim and the offender, as well as the victims and offenders themselves.⁶⁵ Conferencing is designed to allow for freedom of communication with very little intervention from the facilitator. It is a process that brings both the victim and the offender together to discuss the aftermath of a particular incident. While structurally similar to victim-offender mediation, conferencing differs in that it

⁶² McCold 2001:43.

⁶³ McCold 2001:44.

⁶⁴ *Ibid.*

tends to include a larger number of participants and relies heavily on the participation of community members “to evoke a sense of shame in the wrongdoer.”⁶⁶ Conferencing emerged in New Zealand as a way to deal more effectively with youth and young offenders.⁶⁷ What separates conferencing from other restorative processes is that following the story-telling that occurs between the participants, the family of the youth is left alone to consider the facts, views and feelings of those in attendance deliberate on potential consequences of the youth’s actions along with possible sanctions to enable the young person to make amends. Their recommendations are presented to the whole group for consideration and ultimately they form all or part of the collaborative agreement.⁶⁸ The youth is typically given a time frame in which to complete the sanctions arrived at in the agreement, usually around the three-month mark. Upon completion of the sanctions, the case is referred back to the original source and is effectively disposed of.⁶⁹

The earliest manifestation of the New Zealand model of conferencing had been heavily influenced by the Maori traditions of conflict resolution. These traditions have been adapted into a youth-centered process and the model is used in all minor and many serious offences.⁷⁰ LaPrairie points out that the most familiar system of conferencing is based on the combined Maori concepts of conflict resolution, and the recent theoretical work regarding the role of shame in social control, and the acknowledgement that offenders should be reintegrated, not ostracized. Furthermore, and this adds to its appeal, it is a process which functions as a barrier to formal court processing, and as a

⁶⁵ McCold 2001:44.

⁶⁶ Cooley 2003:15.

⁶⁷ LaPrairie 1995:79.

⁶⁸ *Ibid.*

⁶⁹ Cooley, *supra* note 66 at 30.

⁷⁰ A. Morris and G. Maxwell, “The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potentials, and Pitfalls of Restorative Justice,” *Integrating a Victim Perspective Within Criminal Justice: International Debates*, Eds. A. Crawford & J. Goodey (Vermont: Ashgate, 2000) 208. [hereinafter Morris and Maxwell 2000.]

mechanism for making recommendations to judges in pre-sentence situations. Much of the rationale behind conferencing lies in the supposed inherent accountability in the family unit:

As families are both the primary socializers and the primary mechanism of social control for their children, it makes sense to give them responsibility, in partnership with the state, for dealing with their children's offending.⁷¹

It was New Zealand's 1989 Children, Young Persons and their Families Act that "revolutionized" how youth justice was carried out in New Zealand.⁷² It was this legislation that prompted the introduction of family group conferencing (FGC) as the alternative to court processes. The main objective of the conference, in contrast to VORP, VOM, or circle sentencing, is the formulation of a plan to most appropriately deal with offending behaviour before the situation gets too difficult to control.⁷³

The 2003 Canadian Youth Criminal Justice Act (YCJA), which will be discussed at length in the following section, formalizes many of the responses that were considered informal under the Young Offenders Act (YOA). Conferencing is one of those "informal responses." It has since become a formalized yet flexible process now enshrined in youth criminal justice legislation. Section 5 of the YCJA deals specifically with conferencing, and defines it as "a group of persons who are convened to give advice concerning a specific young person having difficulty with the law."⁷⁴ This definition is purposefully broad so that it may be inclusive of the various methods through which conferences can be practically realized. This is to say that conferences have taken on very different

⁷¹ Morris and Maxwell 2000:213.

⁷² McCold 2001:45.

⁷³ *Ibid.* Paul McCold takes a opportunity here to break down the various models of conferencing practiced in Australia, including the Wagga Wagga model, and community conferencing. His is a good description of the various models. For a general overview, see the article.

⁷⁴ ⁷⁴ N. Bala, "Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offender." *Alberta Law Review*, 40:4, 1012. [hereinafter Bala 2003.]

appearances, and for all intents and purposes can be called for by practically any actor in the criminal justice system, including a police officer, a judge, or a social worker, which also expands the entry points into the justice system.⁷⁵ For the most part, conferences in Canada have become synonymous with a sharing of perspectives regarding a particular youth:

[conferences] may involve meetings between offenders, victims, and community members, which would typically have a restorative justice focus. While offenders should be held accountable for what they have done through the conference process this does not necessarily mean that a punishment needs to be imposed. Sometimes a youth will be held accountable by attending a conference, apologizing, undertaking not to reoffend, and perhaps providing some form of compensation to the victim.⁷⁶

The exact purpose of the conference is to show to the offender, in a way that he or she can understand, a communal expression of disapproval of the *act* but not the *actor*. It is designed to influence the perpetrator, and impress upon him or her, a sense of community solidarity, and to provide an avenue for the offender to be welcomed back into the folds of the community.

Conferencing is but one adaptation of restorative justice programming. Its process is, in New Zealand as in Canada, bound up with the official legal processes in that it functions as part of the process to deal long-term with Young Offenders.⁷⁷ It is a process that is designed as an early intervention step that introduces the concepts of personal accountability and responsibility to the youth before his or her behaviour spirals out of control, and rewards the offender with no criminal record upon completion. Thus, conferencing is used within the legal system as an alternative to formal processing, and is

⁷⁵ Bala 2003:1013. Section 19 of the Youth Criminal Justice Act deals with the exact functioning of a conference, while S. 18 specifically encourages extrajudicial measures and community involvement in conferencing, and in authorizing the formation of committees and conferences for youths.

⁷⁶ Ibid.

⁷⁷ Ibid.

built into the Youth Criminal Justice Act as such.⁷⁸ Furthermore, it is a process dependent on an emotional exchange between all parties predicated on a reaction to shame, which is mobilized to effect long-term behavioural transition in the youth. In this way, the process of conferencing is quite separate from the other restorative justice processes identified earlier in this Chapter, and immediately identifiable as being a different interpretation of restorative justice theory.

Laprairie argues that though circles, mediation and conferencing have emerged from essentially the same principles of justice, the development of a concrete set of objectives and principles is hardly consistent. Even within the confines of a particular model there are vast differences with respect to implementation, and adherence to principles and practices. Harking back to the beginning of this chapter, we are reminded that there is no over-arching definition of restorative justice, and because it represents a more or less peripheral system of justice in which programs are implemented and administered by community groups, there is little in the way of formalized rules of engagement.

II) Restorative Justice in Ontario

The Canadian experience with restorative justice has indeed come a long way from the Kitchener Experiment in 1974.⁷⁹ This particular setting is cited as the first modern application of restorative justice in Canada. Since that time, restorative justice programs have been created and implemented by numerous faith-based, non-governmental organizations.⁸⁰ Among the core group of initiatives in Canada are victim-offender mediation, circle sentencing, community peacemaking circles, community

⁷⁸ Bala 2003:1017.

⁷⁹ See generally Cormier 2002.

⁸⁰ Cormier 2002:3.

holistic healing programs and family group conferences. It is arguable that it is for this reason that some tend to characterize restorative justice as “nomadic,” or as “operating on the margins of the criminal justice system”.⁸¹ The most extraordinary feature of community justice in Canada is the amount of involvement of Canada’s aboriginal communities in the development and implementation of community based justice programs and services that are designed to specifically address the needs of community residents, victims and offenders.

Not only is restorative justice a theoretical paradigm, it is now influencing criminal justice policy as a matter of course. On the federal level, Canada has seen the recent implementation of the YCJA, which represents the latest piece of legislation to be dependent on the philosophy of restorative justice, although there is no explicit reference to it.⁸² As previously noted, the implementation of the YCJA has formalized many of the informal strategies previously employed to deal with youth under the YOA. This includes the formalization of such policing practices as formal cautioning, written warnings and immediate referrals to community justice programs, in lieu of charging the perpetrators, thereby avoiding burdening the already exhausted court system.⁸³ The formal objectives outlined in the new Act are intended to “reinforce respect for community and individual values, and for interests that are affected by criminal behaviour.”⁸⁴ In short, the Act is intended to reduce the over-reliance on the incarceration of youths, and to dramatically increase informal responses to youth crime through the use of extrajudicial measures and sanctions, to have cases dealt with *more easily* within the community, on the periphery of

⁸¹ A. Woolford, and R.S. Ratner, (2000) Nomadic Justice? Restorative Justice on the Margins of Law. Paper presented at the joint meeting of the Law and Society Association and the Canadian Law and Society Association, Sheraton Wall Center, Vancouver, B.C., June 1, 2002.

⁸² Bala 2003:4.

⁸³ L.C.C. 2003:32.

⁸⁴ Ibid.

the criminal justice system.⁸⁵ Section 5 of the Act is specific in its use of restorative justice theory in that it states, “responses...should encourage youths to take responsibility for their acts, engage with their families and communities, and repair harm done to victims.”⁸⁶

Canada has followed in the footsteps of New Zealand with the inception of the YCJA in that it effectively reinforces a dependence upon community responses to youth crime. The Act explicitly relies upon, and encourages communities to rally together in the formation of committees designed as extrajudicial measures to administer extrajudicial sanctions, run primarily by volunteers.⁸⁷

Other notable and readily available examples of the inclusion of restorative justice philosophy, include the amendment to the Criminal Code of Canada following the Supreme Court of Canada’s *Gladue* decision, which stated that all other alternatives to incarceration be considered before handing down a custodial sentence to aboriginal Canadians. More specifically, it “made a clear statement that section 718(e) of the Criminal Code is supportive of restorative justice programming for aboriginal Canadians.”⁸⁸ Ostensibly it seems that the Canadian federal government is embracing restorative justice philosophy, and has even gone so far as to make an international commitment to pursue the lead in implementation of restorative justice principles in criminal justice matters. To this end, they have spearheaded a move to have the UN accept basic principles on the use of restorative justice.⁸⁹

⁸⁵ Bala 2003:992-994.

⁸⁶ Bala 2003:1003.

⁸⁷ Bala 2003:1012.

⁸⁸ Cooley 2002:22.

⁸⁹ Ibid.

There are numerous programs and many different participatory restorative justice based models across the country, but it has been more or less agreed to that there are two "standard" models. One is the RCMP model of community justice, otherwise known as Community Justice Forums, which are based on the New Zealand Family Group Conferencing model.

In 1997, the Royal Canadian Mounted Police invited the Australians to Canada to conduct training sessions. Fifty-seven participants, both police and community members from across Canada were trained in Regina, Saskatchewan in January, 1997. The name Family Group Conferencing was modified to reflect a Canadian experience by calling it Community Justice Forum (CJF).⁹⁰

Real Justice is the second model used in Ontario. This is a restorative justice based model created by Ted Watchell of the United States. Watchell found the work of Australian police officer Terry O'Connell, responsible for the development of a "restorative justice" system, under which serious adult offenders are brought face to face with their victims, inspirational. In 1994, Watchell established the Real Justice organization to bring the scripted version of family group conferencing to North America.⁹¹ Both programs mandate the participation of both victim and offender, and in the Ontario experience, the two models are virtually indistinguishable from one another.⁹²

In Ontario, restorative justice theory has recently experienced a wave of enthusiasm. It has been shown that provincial police departments across Canada have been actively involved in the establishment of their own programs for the administration of extrajudicial sanctions, making notable use of the conferencing model.⁹³ The Ontario Provincial Police have been actively involved with both Transformative and Restorative

⁹⁰ Canada. Royal Canadian Mounted Police. (1998). Community Justice Forum: Canadian Resource Guide. Ottawa: Public Works and Government Services Canada. [hereinafter RCMP 1998.]

⁹¹ See webpage at http://www.restorativejustice.org/rj3/Leading_Edge/TedWachtel.htm

⁹² Personal interview, (#5).

⁹³ Bala 2003:1014.

justice processes, and have to date reported fifty-two officers that have received facilitator training in the Community Justice Forum model, and there exists an agreement between the RCMP and the OPP for both further training, and follow-up training in that model.⁹⁴ Furthermore, many OPP detachments have completed train-the-trainer seminars in order to speed up the process of having their officers trained and prepared to facilitate.⁹⁵ It should be clarified that the OPP has no plans to establish, nor implement a restorative justice conferencing program of their own. The purpose of the training is strictly educative: the fifty-two police officers trained have done so in order to create a bridge for community groups wishing to become active in the formation of community justice committees. That is, the police officers are basically armed with the training so that when and if community groups are establishing themselves, there is a link to the criminal justice system, and training can be more easily developed with access so widespread. The underlying motive in training police officers as facilitators is not to pursue conferencing as a matter of police business, but rather to form effective and symbiotic partnerships with interested community members, which should come as a relief to those who do not think police should be judge and jury of their own cases.

The Ontario Ministry of the Attorney General has also established Youth Justice Committees in conjunction with the RCMP in a number of locations in the province that function as alternatives to the court-based system.⁹⁶ This particular program was developed as a diversion strategy under the YOA, and continues under the YCJA. In this program, youth justice committees are comprised of community volunteers who work in

⁹⁴ Irena Lawrenson (Ontario Police Education Services), Personal Interview with Annabel Twilley-Richardson, Oct. 6th, 2003. [hereinafter Lawrenson 2003]

⁹⁵ *Ibid.*

⁹⁶ Ontario, Ministry of the Attorney General, Youth Justice Committees (Ottawa, 1998). This manual was obtained at the training session dated spring 2003 for the Ottawa Youth Justice Committee, held by the Ministry of the Attorney General, in conjunction with an RCMP volunteer trainer. [hereinafter MAG 1998]

partnership with the police, Crown Attorneys, victim services, probation, Legal Aid, and defence counsel. Volunteers are trained in the scripted Community Justice Forum, or RCMP model. Its success is "...based on a definite theory. The key premise of the process is that shame has the potential to change behaviour."⁹⁷ Furthermore, according to the RCMP resource guide,

In a CJF, individuals do experience shame, but it is a controlled environment of care and respect. Rather than leaving permanent scars of stigmatization, the CJF can provide an opportunity to take responsibility for actions and to repair harm. The community acknowledges the worth of the offender as a human being by condemning the offending behaviour and giving the offender the opportunity to repair the harm. Reintegrative shaming is followed by efforts to restore the offender as part of the community through gestures of forgiveness and acceptance of his/her apologies. Shaming is an first important step, but it must be followed by efforts to reintegrate.⁹⁸

Committees in this program develop and implement programs that function as alternatives to formal court proceedings. They receive cases either on referral from the local police in a pre-charge situation, or the Crown in a post-charge situation, to negotiate measures for offenders, and reparations for victims and the community. The program was originally designed for first time offenders, but since the inception of the YCJA, which has formalized the committee measure, the program has been modified to potentially accept offenders who have been through the program before.

The Youth Justice Committee Program is headed by a Steering committee, made up of criminal justice system professionals which, in turn helps to develop local committees through efforts that include recruiting, training volunteer members "who reflect various components of the community."⁹⁹ These community members are, once trained, expected to abide by a memorandum of understanding. This memorandum serves to outline the various roles and responsibilities accorded these volunteers. Once recruited

⁹⁷ RCMP 1998:11.

⁹⁸ RCMP 1998:12.

and interviewed, volunteer community members receive approval from the Ontario Ministry of the Attorney General.

The program generally operates as follows. In a pre-charge situation, an individual police officer has the option of referring a particular case to a justice committee in lieu of laying a charge, provided, of course, that there are reasonable and probable grounds for actually laying a charge, and that the youth accepts his or her responsibility for the act. In a post-charge situation, Crown attorneys have the option of referring a case once the charge has been laid provided there is sufficient evidence to proceed with prosecution, and again, that the youth has taken responsibility for the act in question. In both cases the option is presented to the youth but he or she must volunteer to participate. The youth in question and his or her family or guardian must meet with some members of the justice committee. The victim or victims are subsequently invited to attend, or if they are not comfortable with that idea, to provide input via a statement relating the emotional/physical/somehow traumatic impact the act had on his or her life. The participants at the youth justice committee include the youth, his supporters, the victim and his supporters, the facilitator and co-facilitator. This group of individuals comes together to formulate an agreement on measures or sanctions required on the behalf of the offender, and reparations for the victim. The committee will include in an agreement the responsibility for supervision of measures completion, and the measures, which may include but are not limited to, community service, restitution, curfews, behaviour modification programs, non-association agreements, extra school time, or voluntary surrender of driving privileges. Furthermore, it is required that the youth provide a written apology to the victim in every case in addition to possible other

⁹⁹ MAG 1998:2.

measures. All present must sign the agreement. If the young person does not complete the agreement, the case may be referred back to the original referral source. It is at that point up to the individual officer or system actor to proceed with the file.

The many programs that have been developed under the direction of the Ontario Ministry of the Attorney General are just a few of the many initiatives that have been undertaken to effect a positive change in the criminal justice system, and indeed in the way that justice is done for youths. These committees take a restorative approach and as such “aim to create a means of dealing with offenders within their own communities [...] promoting a more effective approach to offender reintegration and a greater understanding of victim and community needs.”¹⁰⁰

III) Acquiescing to the Critiques of Restorative Justice

Restorative justice cannot be considered devoid of pitfalls. It is a process of justice that, while not necessarily new, it is new to Canadian society. It is not a perfect theory, and it is not without some contradictions. For example, it would be misleading to suggest that restorative justice does not have elements that could be considered retributive in nature, after all, there are sanctions associated with restorative justice, and not all of them are associated strictly with straight restitution. The fact is that in a pre-charge situation, a youth might still end up having to fulfill a restitution order, in addition to community service hours, where it is conceivable that in a courtroom setting, the case might have been dismissed. There are numerous critiques that hinder the overall potential of restorative justice that must be addressed in order to present a comprehensive picture of the issue.

¹⁰⁰ MAG 1998:3.

Allison Morris and Warren Young have suggested that the major critiques of restorative justice are premised on the following: a lack of consistency in program implementation, documented failure of such programs to effectively deter or to reduce recidivism rates, that victims may actually be used to benefit offenders by making the programs offender-centered, that restorative justice conferences may in fact perpetuate power imbalances, and that restorative justice may actually encourage a sanctioned brand of vigilantism.¹⁰¹

Furthermore, critics of restorative justice tend to find support among arguments that suggest that root causes do not get adequately addressed, which is one of the championing arguments for restorative justice. Other criticisms flow from the argument that the so-called volunteerism associated with offender participation borders on coercion. Arguably, these are valid concerns, and find resonance with people who have been involved with committees that have in the past, moved quickly through a conference in order to get it over with, thereby giving into expediency rather than to efficiency and attention to the theories that inform restorative justice processes.

Another valuable criticism, though couched in somewhat positive language, is that with growing recognition of the advantages of restorative justice, and the lack of formal guidelines, “a myriad of sanctioning associations have sprung up across the country. This has led to considerable variation in prerequisites, educational requirements and practicum expectations.”¹⁰² Furthermore, expanding on the concern of vigilantism, critics often have questioned why there exists the assumption that the community is more

¹⁰¹ Morris and Young 2001:21-23.

¹⁰² L.C.C., 2003:123.

able to direct the positive experience of a justice process better than a judge in a similar situation?

It is on the foundation of this critique that I wish to build at least part of my argument. Conceptually, *community* is fundamental to restorative justice theory. *Community* is fundamental to conferencing and to the models of community justice committees. *Community* is also conceptually at the heart of the YCJA. With so much reliance, or maybe over-reliance, on the concept of community, one might expect a definition to follow but there is no suitable or general enough definition for these purposes. For this the reason, the nature of *community* is such a nebulous concept in the context of conferencing. In some literature it is defined as the *community of care*, and otherwise, it has been used to define a geographic region. Between the language used throughout the YCJA and the rhetoric of restorative justice, there is no continuity to its meaning.

Reintegrative shaming, the theoretical concept that will be discussed in great detail in the following chapter, is a process fundamental to conferencing. It is both a technique and a communication style utilized in such a way to place significant emotional strain on the offender during the meeting with the victim and his family. Theoretically, this is a process designed to dramatically increase the offender's level of empathy for the victim, and to play upon any remorse that he or she may be feeling. Reintegrative shaming is often utilized as a vehicle to send a value-laden message regarding behaviour that is considered acceptable within the confines of the community in question. It is often touted as an effective means of reducing recidivism and increasing the levels of respect that perpetrators have toward their communities and their victims. The great potential in

this theory comes with the emphasis on the positive reinforcement of the perpetrator's essentially good nature, followed by a message of re-acceptance by the community following the denunciatory message. From a theoretical perspective, reintegrative shaming done correctly can be completely restorative.

The process of reintegrative shaming can be used quite successfully in groups to send an individual a particular message, the use of reintegrative shaming in the context of youth justice in my estimation can be quite a frightening pursuit, and potentially disastrous, namely because of problems earlier alluded to as associated with the nature of community. Arguably, geographic communities probably do not really exist in a meaningful way for many youths in Canadian society, as even their associations are quite often not even known to his or her parents. In addition, it is my opinion that the secular nature of Canadian society has resulted in less clear messages regarding that which is considered acceptable behaviour. Furthermore, it seems that families are less likely at this point in time to set down roots in a given community, or are unwilling or not interested in communicating with their neighbours. It is my perception that youths are not likely to respond positively to messages conveyed by the *community*. The connections suggested are reminiscent of a time when *community* actually meant something, *when it took a village to raise a child*, to make use of a popular cliché. All of the above makes a positive conception of community difficult to imagine. Furthermore, I suggested earlier that there seems to be a push for communities to create readily identifiable, if superficial points of reference, as evidenced in the community justice movement. This leads me to ask: what are the messages being transmitted, and who is transmitting them? What community

members are sitting on the community justice committees and what is their point of reference?

Community justice committees and their programs are mandated and their funding controlled by various governmental bodies, these bodies cannot, however, control the evolution of shaming practices within these groups because there is insufficient attention being paid the theory. This is evidenced in both the Ottawa Youth Justice Committee and the Lanark Real Justice Committee, neither of which has had any formal training since Spring of 2003, nor has training been scheduled in the foreseeable future.¹⁰³ Therefore the conceptualization of *community*, the *community committee*, and the messages and values that these groups express in their denunciation of particular acts, bears scrutiny.

The community justice committee phenomenon is arguably part of a broader community justice movement, which "...represent(s) a desire to return to a period when meanings were fixed, identities were secure, and public life was safe and predictable. The values evoked by community, specifically, reciprocity, mutuality and sharing, are seen to counter the powerful push toward individualism generated by capitalism, urbanization and secularization."¹⁰⁴ In the context of community justice as it bears upon youth justice issues, there is a need to explore the phenomenon of conferencing and the unabashed issuing of shame within community justice committees.

The following chapter explores the theoretical concepts of reintegrative shaming and conceptualization of shame and shame sanctions as tools to communicate value-laden messages of discontent. It will also shed light on the issues that are bound up in these

¹⁰³ This information was obtained through a personal interview with the administrative head of the Lanark Real Justice Committee. As for the information regarding the Ottawa Youth Justice Committee, since I belong to the committee, I have access to such information personally.

concepts, in particular, shaming in a restorative manner. In Chapter three, attention is drawn to disconnections between the theory of restorative justice and the practice of reintegrative shaming. It also links together the concepts of community, conferencing, and shaming.

¹⁰⁴ Cooley 2003:14.

CHAPTER THREE: SHAMING THEORY

Shaming Theory Explored

1) Shame, Shaming, and the Shamed

The concept of shaming is difficult to explore and even more difficult to understand as something that people *do to one another* in the pursuit of justice. Understandably, the word shame and the act of shaming necessarily conjure up, negative associations that include branding, the scarlet letter, public mutilation, and the pillory for the purposes of public humiliation. It is a topic worth visiting for the simple reason that, as evinced in Chapter One, there is a movement in criminal justice matters, particularly for youth, toward the use of shame as a tool in the community justice movement. It was the two decades between 1980 and 2000 that saw a resurrection of public shaming disguised as alternative means of dispensing justice. This revitalization, while both criticized and applauded for its ingenuity, gained some momentum because people began asking whether or not shaming could in fact reduce crime and recidivism rates.¹⁰⁵ That question is better dealt with during a separate research study, although an interesting prediction made by Massaro is that shaming will have little impact on recidivism rates, because "...those who are most likely to respond [to shaming] are those who have been most properly socialized, and thus are most likely non-offending members of the audience, and "not potential offenders."¹⁰⁶ While the issues of deterrence and crime prevention generally speaking are central to shaming theory, the question this thesis is ultimately concerned with is whether shaming makes sense in the criminal justice system

¹⁰⁵ We don't have figures to answer these questions! In many cases community justice agencies take on pre-charge referrals, which results in no charge, no record, and therefore no way of tracking perpetrators through the system. In Ontario, the OPP have opted out of the call to create a tracking system for cautions and warnings, and for referrals as well. This has resulted in an inability to track recidivism at all. Although, it should be noted that in the United States, where many judges have opted to dispense shame sanctions, they have noticed a decrease in repeat offenders.

¹⁰⁶ T. Massaro, "Shame, Culture and American Criminal Law," *Michigan Law Review*, 89 (1991). [hereinafter Massaro 1991.]

characteristic of our society within the context of restorative justice. In Canada, there has been a clearly articulated move from a centralized approach to criminal justice to a community-based approach with youth in particular. The processes associated with this community-based justice movement are grounded in restorative justice, and are very much predicated on the family group conferencing style of victim-offender mediation discussed in Chapter One. Implicit in this, and in adapted models, is the use of shaming as a method to draw out of the youth a sense of remorse, to encourage empathy, as well as the desire to make amends. James Whitman suggests that there is inherent danger in turning the offender over to the public because, he argues, that “there is no way to predict or control the way in which the public will deal with him, no rhyme or limit to the terms the public may impose.”¹⁰⁷ He makes a valuable point. That is, the concept of *audience* is unavoidable in the discussion of shaming.¹⁰⁸ Hence, the value of community is compromised in my opinion. Given these issues, and the problems identified with the concept of community in Chapter One, this thesis explores whether the practice of shaming the offender is best done in the context of community justice groups.

Public shaming is a relied-upon sanction here in Canada, and even more so in the United States. It is often cited as an alternative to incarceration, and is borne out of the complaint that ‘...nothing works.’ It has taken on several forms in recent times, finding fruition in the court system as well as in community justice programs alike. Many, it seems, would prefer to use something other than the term shaming or shame, and yet, as will be shown in this chapter, many believe the term to be incredibly useful, and enjoy the response it provokes from the public. Unfortunately, reintegrative shaming, a

¹⁰⁷ See generally, J. Q. Whitman, “What is Wrong with Inflicting Shame Sanctions?” *The Yale Law Journal*, 107 (1998). [hereinafter Whitman 1998].

¹⁰⁸ *Ibid.*

purportedly positive form of shaming, has come under speculation because of the mass interest in public humiliation and shame sanctions.¹⁰⁹

II) Against the Backdrop of Social Norms

The concept of shaming can only really be understood in terms of how it is valued against the backdrop of the social norms of a particular society on a macro-level, or of a particular community grouping on a micro-level. It is the social norms of a particular group who value particular goods that define which behaviour is acceptable, and that which is deemed unacceptable; social meaning is attached to behaviour that gives it value.¹¹⁰ Social norms, furthermore, represent the accepted moral principles of a given society. The social meaning of certain behaviours, arguably of all behaviours are taken into account in the formulation of proper responses to unacceptable behaviour. That is, individuals take social meaning into account when deciding what action is warranted in the face of unacceptable behaviour, as do communities when deciding what laws to enact.¹¹¹ Against the backdrop of social norms, it is impossible to identify criminal behaviour and punishment independent of the social meanings that they convey.

Thus, for shaming to be adequately understood as an effective tool in curbing unacceptable behaviour, it cannot be considered independent of the value that society has placed on behaviour. Furthermore, and very interestingly, it has been demonstrated that public shaming, if it is to be effective, must be a purely public phenomenon. As such it is inextricable from that forum. An audience, as pointed out by James Whitman earlier in

¹⁰⁹ S. Levrant, F.T. Cullen, B. Fulton, and J.F. Wolzniak, "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" *Crime and Delinquency* 45, (1999). Levrant, S.Cullen, Francis T.; Fulton, Betsy; Wozniak, John F. (1999). [hereinafter Levrant 1999.] Levrant makes the very interesting point in this article that restorative justice may actually increase punishment if reforms fail to develop policies and programs that are able to successfully reintegrate offenders into society; with this in mind, we should consider that the use of shaming and shaming penalties, which are gaining in popularity fulfill the retributive desires of the public.

¹¹⁰ See generally D. Kahan, "The Secret Ambition of Deterrence," *Harvard Law Review* 113:2 (1999). [herein after Kahan 1999.] Also, for a more indepth explanation of this theoretical viewpoint, see generally, D. Kahan, "Social Meaning and the Economic Analysis of Crime", *Journal of Legal Studies*, vol. XXVII (1998).

this chapter, is an unavoidable part of the shaming act. It is the public that shames, but as in reintegrative shaming theory, discussed below, at least some of those present in the audience must in some way form part of the immediate community of which the offender belongs, because:

...the anxiety that shaming exploits is a fear of abandonment or isolation, usually from a social group or other community that is necessary or valuable to the individual...To be effective, the public rebuke therefore must threaten a significant relationship.¹¹²

Shaming is therefore a social act. It requires that a social encounter take place between the offending individual and a social group that has the ability and the desire to expose his or her weaknesses or deficiencies. The exact purpose of shaming is to exploit a primal fear of being either shunned by ones peers, or banished from ones community. The most important components in shaming theory are therefore the concepts of social norms or values, community cohesiveness, audience, exploitation, and fear of withdrawal of support.

Anthropological and psychological theories regarding the emotion and the experience of shame abound. Anthropologists link shame to the concept of social honour or dishonour. Public shaming as a social practice, it is argued, is inextricably bound up with conceptions of the public persona in a tightly knit or dyadic community.¹¹³ To further elucidate, the anthropological conceptualization of shame is very closely tied to notions of personal honour, often described in terms of possessing the value of a currency. The power that shame enjoys from this perspective is drawn from a powerful conception of community interdependency, or from the conceptualization of a collective

¹¹¹ Kahan 1999.

¹¹² Massaro 1991.

¹¹³ H. Blagg, "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia," *British Journal of Criminology*, 37:4 (1997):488. [hereinafter Blagg 1997]

worldview.¹¹⁴ Therefore, notions of shame are most powerful in societies that display an intense interdependency.¹¹⁵

From a psychological perspective, the experience of shame is described as being a highly individualized experience that is felt at the very core of the human experience. The experience of feeling dishonoured or shamed in a group setting has been likened to the feeling of an adrenaline rush.¹¹⁶ It is suggested that this particular reaction is triggered by the "...tension between an individual's ego ideal and her conscious or unconscious awareness of the ego's actual potential."¹¹⁷ It has also been described as an emotion that "...forces a downward redefinition of oneself," which causes the "...shamed person to feel transformed into something less than her prior, idealized image."¹¹⁸

The sociological perspective is particularly useful for the purposes of this thesis, although arguably, each perspective sheds valuable insight regarding the process of public shaming. Shaming has found support among several sociologists who have argued that shame and shaming exist as "cultural universals."¹¹⁹ The popular argument is that the process of shaming has the same intended effect on the person being shamed regardless of culture or personal background. John Braithwaite, the theorist responsible for the theory of reintegrative shaming states unequivocally that while shame is admittedly "experienced and enacted in very different ways by different people," he has yet to come

¹¹⁴ Blagg, 1997.

¹¹⁵ Massaro 1991:1926. Massaro has argued that Western society, most notably Canada and the United States, lacks the level of interdependency necessary to make shaming work effectively (1922). Furthermore, she argues that in the West, the family unit, which has been ultimately responsible for proper socialization is often "missing, culturally isolated, or dysfunctional," (1922). Finally she states, that the West, and in particular the United States, is culturally complex, culturally pluralistic, in relatively small geographical regions, which gives rise to differing conceptions of shame, and "which may confound official efforts to deter crime through shaming." (1922). Braithwaite agrees, and cites Japanese culture as a successful example of a culture that uses shaming effectively. However, he has argued against the individualistic claim in favour of a focus on norm enforcement through "alternative, intermediate communities of interest-such as the workplace, schools or other association contexts."

¹¹⁶ Massaro 1991.

¹¹⁷ Massaro 1991:1901.

¹¹⁸ *Ibid.*

¹¹⁹ Blagg 1997: 488.

across a culture where the experience shame and of public shaming are tools rendered impotent for the purposes of social control.¹²⁰

Dan Kahan, whose work will be further considered later in this chapter, has suggested that incarceration as a dominant form of punishment became an attractive alternative once it became out of fashion to shame offenders publicly. He describes shaming penalties as belonging to one of four groups: stigmatizing publicity, literal stigmatization, self-debasement, and contrition. Stigmatizing publicity is described as an "...attempt to magnify the humiliation inherent in conviction by communicating the offender's status to a wider audience."¹²¹ This, for example, has been occurring in Durham County, Ontario, where the police force has initiated a program of publishing names and pictures of individuals *charged*, not convicted, with drunk driving.¹²² Literal stigmatization is described as the marking of an offender with a symbol that clearly indicates their crime. He states, "...one judge ordered a woman to wear a sign declaring 'I am a convicted child molester.'"¹²³ Self-debasement penalties involve ceremonies or rituals during which the offender is publicly disgraced, such as having him or her stand in a public place donning a sign describing their offence.¹²⁴ Contrition penalties combine elements of stigmatizing publicity with self-debasement; offenders are required to publicize their offences, describing them in detail, and apologizing for them.¹²⁵ In more general terms, shaming sanctions can be defined as the following:

Shaming sanctions are punishments that are directed primarily at publicizing an offender's illegal conduct in a way intended to reinforce the prevailing social

¹²⁰ J. Braithwaite, "Conferencing and Plurality: Reply to Blagg," *British Journal of Criminology*, 37:4 (1997):504. [hereinafter Braithwaite 1997.]

¹²¹ D. Kahan, What Do Alternative Sanctions Mean? *University of Chicago Law Review*, 63 (632). [hereinafter Kahan 1996.]

¹²² See the Durham County Police website, <http://www.police.durham.on.ca>. Durham Regional Police are publishing the names of those charged with Impaired Driving during the 2003 Festive R.I.D.E. program. Each week, the Service will publish a media release listing the number of vehicles stopped by R.I.D.E., the number of breath tests given and the names of those charged with Exceed .08.

¹²³ Kahan 1996:632.

¹²⁴ Kahan 1996:634.

¹²⁵ *Ibid.*

norms that disapprove of such behaviour and thus to induce an unpleasant emotional experience in the offender.¹²⁶

Furthermore, it is important to note that, in theory, shaming and shame sanctions can, and have been, used in cases that vary in their severity. Most often, however, they are reserved for first-time offenders and for minor offences, such as vandalism, shoplifting, and other property related offences.

Julie Leibrich conducted a study on the effect of shame in offenders' decisions to "...go straight."¹²⁷ The results of her study demonstrated that from her sample the most common dissuading factor in the decision to commit criminal acts cited by offenders was in fact *shame*, described as a fear of public humiliation, or a fear of having to endure personal disgrace in the eyes of their family or loved ones.¹²⁸ The experience of shame and disgrace was also identified as the greatest cost of offending. Implicit in this research is the suggestion that most criminals actually conduct cost-benefit analyses prior to offending. Leibrich's study echoes the threads of John Braithwaite's theoretical work. As will be shown, he has argued that the right kind of shaming leads both potential offenders and prior offenders to desist from the act of committing crime, therefore functioning as both a preventative and a corrective or educative measure.

III) Reintegrative Shaming, and Shaming Theory

John Braithwaite's theory of reintegrative shaming begins with the premise that societies that present low crime rates are those in which shaming possesses the greatest social impact. To illustrate, he cites Japanese culture.¹²⁹ Braithwaite argues that societies that display such interdependence rely formally on this particular brand of social control,

¹²⁶ Unknown-Research Note, "Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law," *Harvard Law Review*, 116 (2003):2186.

¹²⁷ See generally J. Leibrich, "The Role of Shame in Going Straight," *Criminal Justice, Restitution and Reconciliation*, Eds. B. Galaway and J. Hudson (New York: Criminal Justice Press, 1990). [hereinafter Leibrich 1990.]

which works "...hard at reforming the deviant through reconstructing his or her social ties."¹³⁰ He argues that for shaming to be effective, it must be reintegrative and must avoid stigmatization. Stigmatization, he argues is the sort of shaming that creates an outcast of the offender and contributes to the development of the master status trait of delinquent or criminal. This action serves to diminish any positive reinforcement regarding other aspects of the offender's identity, ultimately creating a situation in which the bonds of respect for the offender as a *whole person* are not sustained. Reintegrative shaming, on the other hand, is a process depicted by Braithwaite during which disapproval is expressed with respect for the offender, within the confines and the safety of an ongoing relationship. This disapproval, moreover, is focused on the offending *act*, and not the *actor*. Braithwaite has argued that the process of reintegrative shaming involves a redefinition of the offender's act as an unfortunate incident, reinforces the positive aspects of the offender's personality, and involves forgiveness, apology and repentance.

For Braithwaite, reintegrative shaming represents an effective tool for social control because he argues shame is an emotion that is exploited early on in the process of socialization, in the family.¹³¹ He argues that more "...families in the twentieth-century exhibit loving socialization practices based on the socially integrative of pride in doing right and shame at doing wrong."¹³² Harking back to Massaro's argument, identified earlier in this chapter, that the combined individualistic nature of North America and the proliferation of cultural plurality make the use of shame archaic and anachronistic,

¹²⁸ Leibrich 1990:284.

¹²⁹ Braithwaite *supra* note 4 at 2.

¹³⁰ J. Braithwaite and S. Mugford. "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders." *British Journal of Criminology*, 34:2 (1994) 140. [hereinafter Braithwaite & Mugford 1994.]

¹³¹ J. Braithwaite "Shame and Modernity," *Regulation, Crime and Freedom*. J. Braithwaite (Dartmouth, Ashgate, 2000) 11. [hereinafter Braithwaite 2000.]

Braithwaite defends his position, using that argument to further his position regarding the effectiveness of shame in social control. He states that there has in fact been an increase of interdependency among people in the twentieth century, due to the substantial proliferation of roles attributed to individual persons:

The contemporary city dweller may have a set of colleagues at work, in her trade union, among member of his golf club, among drinking associates, the parents and citizens' committee for her daughter's school, not to mention a geographically extended family, where many of these significant others can mobilize potent disapproval.¹³³

According to this theoretical position, shame in fact plays a powerful role in contemporary society because people ultimately care very deeply about how their actions are perceived by others, in each of their numerous roles.¹³⁴ For Braithwaite, the fact that reintegrative shaming originates at least in part in the kernel of the family unit indicates that it has potential to work effectively in society at large.

Braithwaite takes the "...something works" approach in the application of his theory of reintegrative shaming as regards to both prevention and deterrence. Reintegrative shaming, he argues, has a great deal in common with the restorative justice movement, and with the concepts of making amends, restitution, and reconciliation.¹³⁵ Braithwaite's theory of reintegrative shaming seeks to understand the link that exists between social control and criminal activity. He argues adamantly for the active shaming of offender's criminal activities, but necessitates the subsequent reintegration of the offender after appropriate amends have been offered to the victims of crime.¹³⁶ This theory stands in opposition to the types of social control effected by the use of

¹³² Braithwaite 2000:275.

¹³³ Braithwaite 2000:277.

¹³⁴ Braithwaite 2000:279.

¹³⁵ See generally, Braithwaite & Mugford 1994.

¹³⁶ Ibid.

stigmatizing punishment, including incarceration, dominant in the traditional criminal justice systems characteristic of North American, and other Western countries. These traditionally-used criminal justice systems, Braithwaite argues, do very little to effect any change in the cycle of re-offending. Toward a general theory of shaming, Braithwaite has argued that de-privatization of public law and the common use of public shaming would improve the effectiveness of criminal law enforcement for the simple reason that it might aid in the creation of a shared, moral conception of order. He has subsequently argued that linking shame and punishment would result in a more sound and effective legal order.¹³⁷

For Braithwaite, the reintegration component of the reintegrative shaming process comes most identifiably in the form of a ceremony that falls after the intervention during which the shaming has taken place. To illustrate, the shaming process is fairly ritualized. It takes place during the storytelling phase of the ceremony, during which each participant present has the opportunity to express how the act affected them personally. This is followed by expressions of community disapproval, during which the community has the opportunity to educate the offender regarding acceptable versus unacceptable behaviour. Once remorse has been gauged, and amends have been made, the process is followed by gestures of reacceptance into the community.¹³⁸ In this ceremony, it is the concept of identity that becomes of great importance:

The vision that an offender holds of himself as a 'tough guy' or that victims have of him as a 'mindless hooligan' are challenged, altered, and recreated.¹³⁹

Because Braithwaite's theory hinges on the supposition that identities are multi-faceted composites. He is opposed to the idea that identity is fixed and is evident all the time,

¹³⁷ Massaro 1991:1921.

which he argues is a fault of much labelling theorist work.¹⁴⁰ He suggests that by employing a conception of multiple identities, one is able to disassociate from the one identity (as say, an offender) and align, or re-align, with another identity that is compatible with the rest of the community.¹⁴¹

Reintegration ceremonies, according to Braithwaite, focus on a sequence of what he has described as "...disapproval-non-degradation-inclusion."¹⁴² To reiterate, these ceremonies focus first on the communication of disapproval of the incident, and are followed by reacceptance into the community. All of the preceding is done within a continuum of respect for the offender, and under the assumption that the actor is an essentially good person.¹⁴³ What makes this strategy reintegrative, rather than disintegrative or stigmatizing, is the fact that it is theoretically aimed at identifying those qualities that remain positive in the offender's personality, and is therefore not focused on identifying the offender as a deviant.¹⁴⁴

This line between disintegrative and reintegrative shaming can be blurry. To combat this, Braithwaite has suggested a method by which one might be able to discern reintegration from disintegration ceremonies. He argues that it is possible to identify stigmatic versus reintegrative messages during the shaming ceremony. For example, he admits that very few individuals are completely faithful to the theory of reintegrative shaming, and that very often the messages of disapproval communicated during the

¹³⁸ Braithwaite 1989:55.

¹³⁹ Braithwaite & Mugford 1994:141.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Braithwaite & Mugford 1994:142.

¹⁴⁴ Ibid.

ceremony are mixed. He states "...the subtleties in the ways shaming and reintegration are mixed by practical human communicators are myriad."¹⁴⁵

Braithwaite also admits that it is extremely difficult to avoid stigmatic messages from both victims and other concerned participants, including the offender's supporters. The ratio of stigmatizing communication to reintegrative communication can be mitigated, however, through the proper instruction and preparation on the part of the coordinator or facilitators, which includes including storytelling-based training methods, which focus attention on victim empowerment, respect and support for the offender, condemnation of the criminal *act*, and an active engagement of all participants. He posits that by presenting a process that is identifiably victim-centered, incident-focused, and community oriented as opposed to "...offender and pathology-centered," the process becomes more suited to reintegration than disintegration or stigmatization.¹⁴⁶

Reintegrative shaming forms the basis of the theoretical work of Dan Kahan, a shaming proponent from the United States. Much of his interest in shaming theory stems from his interest in punishment, and draws on Braithwaite's argument that the act of linking shaming with punishment would have the effect of creating a more stable social order. Kahan's theoretical work is very much dependent on expressive theory and expressive rationality. This conceptualization of shaming represents, from my perspective, a much less positive outcome for the offender. Kahan's conceptualization of shame, as will be demonstrated, is one that gives ultimate power over the offender to the community. In contrast to Braithwaite, Kahan's conceptualization of shaming places the needs and desires of the community at the center of the process, ignores the needs of both

¹⁴⁵ Braithwaite & Mugford 1994:166.

¹⁴⁶ Braithwaite & Mugford 1994:167.

the victim and the offender, replaces consequence with punishment, and denies the very tenets of restorative, and participatory justice.

Kahan argues that an expressive theory of punishment acts upon the foundation of social norms, and the implicit belief that actions necessitate meaningful consequences against the backdrop of clearly articulated goals. Kahan argues "...under this view, we can give a satisfactory account of crime and punishment only if we pay close attention to their social meaning."¹⁴⁷ To clarify, Kahan believes that criminal law can have a moralizing effect on those it governs. For example, he argues that the expressive character of the law can shape or alter preference adaptation, which means essentially that criminal law can be perceived as an expression of society's moral condemnation of criminal conduct."¹⁴⁸ Furthermore, Kahan argues that criminal law can have a moralizing effect in the sense that individual community members are more apt to obey a law that is enforced, but if there is widespread belief that others do not obey it, or that it will not be enforced, it is unlikely to be obeyed. He states, "...when the law effectively expresses condemnation of wrongdoers...it reassures citizens that society does indeed stand behind the values that the law embodies."¹⁴⁹

Individuals are more disposed to obey particular laws, whether or not those laws accord with their moral beliefs, when they perceive the criminal law as a whole to be basically just. They are more likely to have this perception when criminal punishment confirms, rather than disappoints, shared expectations about what behaviour is worthy of moral condemnation.¹⁵⁰

Kahan addresses the concept of public shaming with the same emphasis as expressed above. He states that from the expressive point of view, social meaning is derived from what people and communities value, and furthermore that criminal laws

¹⁴⁷ Kahan 1996:592.

¹⁴⁸ Kahan 1996 603.

allow for the coherent expression of disapproval.¹⁵¹ Building on Leibrich's study, outlined earlier in this chapter, Kahan argues that individuals refrain from committing crimes, at least in part, because of what they fear others will think of them, or because of what criminal behaviour would signal in their particular community.¹⁵² For Kahan, criminal law is the embodiment of social meanings. He argues that the way in which a particular act is punished, or not punished as the case may be, can really tell us what and whom the community values. From the economic position, Kahan states that members of the public expect punishment to protect them from crime, in addition to providing them with an avenue for expressing their moral condemnation to the act in question.¹⁵³ Thus, he argues that while imprisonment speaks volumes about a community's objection to an offending act, other alternative sanctions, such as fines or community service tend to be far less powerful in expressing condemnation:

The conventional alternatives, in contrast, send a much more ambiguous signal. To the ears of the public, fines seem to say that offenders may buy the privilege of breaking the law; and we can't very well condemn someone for purchasing what we are willing to sell.¹⁵⁴

That being said, Kahan believes that shaming punishments that function as alternative sanctions fare better as expressive messages, serve the dual purpose of deterrence, and cost very little. He argues that, "...social norms permit the construction of a rich array of shaming practices, all of which unambiguously convey moral condemnation."¹⁵⁵ They allow the community to have a voice in the expression of

¹⁴⁹ Kahan 1996:604.

¹⁵⁰ *Ibid.*

¹⁵¹ See generally, Kahan 1998.

¹⁵² *Ibid.*

¹⁵³ Kahan 1998:616.

¹⁵⁴ *Ibid.*

¹⁵⁵ Kahan 1996:631.

disapproval, in the sanctioning process, and ultimately to receive instant gratification in terms of the relative visibility of offenders making amends:

Shaming punishments—from bumper stickers for drunk drivers, to publicity for toxic waste dumpers, to signs or distinctive clothing for sex offenders—unambiguously expresses moral disapprobation.¹⁵⁶

Furthermore, Kahan states that substituting shame for incarceration is unlikely to perturb the public in the way that other sanctions have in the past, and he argues, that the “political acceptability of shaming penalties is close to an established fact.”¹⁵⁷ The reason for this, he argues, is that shaming penalties cost very little relative to incarceration, and they fulfill the public desire for retribution.

To clarify, Kahan has argued that public satisfaction with the concept of incarceration increases as scholarly dissatisfaction with it deepens. He believes that this is due at least in part to the failure of such invisible alternative sanctions as fines and community service, which in his view do very little to express the sentiments of the community.¹⁵⁸ Shaming and shame sanctions, from this perspective, are forms of punishment that both makes offenders suffer the consequences of their actions, and functions as a “...special social convention that signifies moral condemnation.”¹⁵⁹ Kahan’s position regarding shaming and shame sanctions is clearly one that gives precedence to the community, and not the victim, nor the offender. In this view the community not only has the right and the obligation to shame, but to make examples of offenders who cross the line. There is nothing in Kahan’s theory that is suggestive of the importance of reintegration. The emphasis in his theory rests in the stigmatization of the offender, and the enforcement responsibility of the community. A lack of attention to

¹⁵⁶ Kahan 1998:616.

¹⁵⁷ Kahan, 1998:617

¹⁵⁸ Kahan 1996:593.

reintegrative shaming theory, in my view, can run dangerously close to this type of power abuse.

IV) Shaming Restoratively?

The issue of punishment has beckoned some attention because shaming in this context can be understood as part of a ceremonial act, or as a punishment. Thus, it is necessary to touch upon the issue of punishment for at least a moment. Howard Zehr asks the following: is there a place for punishment in restorative justice?¹⁶⁰ He states that while punishment should in no way be the focus nor the objective of a restorative approach to justice, there is room for considerable debate regarding whether or not certain sanctions, such as restitution, could or should be considered punishment.

If there is room for punishment in a restorative approach, its place would not be central. It would need to be applied under conditions which controlled and reduced the level of pain and in a context of where restoration and healing are the goals.¹⁶¹

Presumably, Braithwaite's notion of punishment falls within these parameters. As has been discussed, reintegrative shaming and shaming punishment are meant to educate the offender. Furthermore, they allow the offender the opportunity to make amends, and to transform negative relationships with his or her community members into positive relations. To summarize Kahan's argument, shaming penalties are meant to be retributive. They are also meant to educate, or at least to help shape preferences, and to influence future decision-making. Punishment should be, in this view, considered to be a message directed at the offender, from the general community as a general social expression of disapproval. By the same token, this message is meant to educate the

¹⁵⁹ Kahan 1996:653.

¹⁶⁰ H. Zehr, "A Restorative Lens," *The Canadian Criminal Justice System*. (Toronto: Canadian Scholars Press, 1995):542. [hereinafter Zehr 1995]

¹⁶¹ *Ibid.*

offender regarding the way in which society operates. From this theoretical perspective the conceptualization of shaming penalties is one that would technically be acceptable under Zehr's conception of acceptable punishment.

It is useful to link restorative justice with shaming theory. An important part of restorative justice philosophy, as outlined in Chapter One, is the perception that offenders do not benefit from the process if the needs of both the victim and community are not properly tended to. Gordon Bazemore has suggested that these needs are best met when the offender truly experiences remorse, and subsequently conveys to his victim and the wider community, a message of shame, in an effort to make amends. Bazemore describes the restorative justice theory of reintegration as having three important points. Firstly, he states that the process must actively engage the victim and the community in a more integrated fashion that sees the needs of both the victim and community adequately addressed. Secondly, he argues that any efforts to sanction crime, manage risks, and reintegrate offenders must be seen as interdependent, so that they "may be viewed as means toward the ends of repairing harm to victims, offenders, and communities, it is hoped, facilitating transformative changes in each."¹⁶² He argues that it is not the treatment nor the punishment of offenders that renders the community a safer place, and that in fact, penalties or sanctions that isolate or degrade, such as imprisonment, can actually serve to weaken the bonds that foster reintegration, ultimately heightening the risks to the larger community. His third point is that the needs of the co-participants are best met through the administration of a more informal, or naturalistic response to crime.

¹⁶² Bazemore (1997):789.

He argues that a social response is one that both involves and emphasizes the important roles of citizens, community groups and socializing institutions.¹⁶³

It is important to introduce once again the concept of community. Both restorative justice and shaming theory draw heavily on the concept. It would be in the language of restorative justice to suggest that the root of all criminal activity can be located in the conflicts and disharmony prevalent in the community. As such, the argument claims that crime is best resolved, and the offending individual is best dealt with, inside the community.¹⁶⁴ LaPrairie argues that the restorative approach is designed to "...provide the context for ensuring that social rather than legal goals are met."¹⁶⁵ The focus, it is argued, should be on empowerment of victims, of offenders and of community members, and the return of the conflict to the rightful owners. The theme of community is continued in both restorative and shaming theory, in the line of argument that demonstrates the importance of offender reintegration. From this perspective, the healthy response is the welcoming of the willing offender to be reintegrated back into the community.

The conceptualization of the community has often been criticized as lacking any concrete definable qualities.¹⁶⁶ It does, however, represent a significant foundational concept in both restorative justice and shaming theory. In the context of reintegrative shaming it is often pared down, and described as a "community of care," or as a community of "intimates," referring to those within the immediate circle of the co-participants.

¹⁶³ Bazemore 1997:789.

¹⁶⁴ G. Bazemore and M. Umbreit, "Rethinking the Sentencing Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime," *Crime and Delinquency* 41 (1995): 305. [hereinafter Bazemore & Umbreit 1995.]

¹⁶⁵ LaPrairie 1995:78.

¹⁶⁶ See generally, Massaro 1991.

Shaming, within the context of restorative justice, is aimed at offender reintegration, with the primary objective being the strengthening of individual bonds to conventional groups. It is predicated on both the development and enhancement of relationships between people within a specific community.¹⁶⁷ Shaming, in this context represents a process of justice that aims to educate, moralize, and properly re-socialize offenders, and to bring them back into the fold.¹⁶⁸ Sanctioning objectives, from this perspective, include behavioural, material, emotional and cognitive outcomes for victims, offenders and their communities of concern because, “restorative justice gauges success in sanctioning not by how much punishment was inflicted or treatment provided but by how much reparation, resolution, and reintegration was achieved.”¹⁶⁹

This movement is posited against the current trends in sanctioning in Canada and the United States, which are still dominated by an over-reliance on incarceration. This trend has traditionally been to maximize harm done to the offender, however, reintegrative and restorative shaming practices widens “the continuum of possible sanctions,” which range from “...those intended primarily to threaten or harm offenders (and would-be-offenders), which generally emphasize incarceration, to other approaches that may build community solidarity and commitment and ultimately strengthen the bonds between offenders and community members.”¹⁷⁰

With a view to further put a positive spin on the concept of shaming, Bazemore suggests that the process of justice capitalize on the feelings of shame or remorse that the offender may naturally be feeling, and that, in the spirit of Kahan, punishments ought

¹⁶⁷ G. Bazemore, “Restorative Justice and Earned Redemption: Communities, Victims and Offender Reintegration,” *The American Behavioral Scientist* 41:6 (1998). [hereinafter Bazemore 1998]

¹⁶⁸ S. Miller, and J. Blackler, “Restorative Justice: Retribution, Confession and Shame,” *Restorative Justice: Philosophy to Practice*, (Eds.), H. Strang and J. Braithwaite, (

¹⁶⁹ Bazemore & Umbreit 1995:305.

best to be expressive of values held most highly in a given community. He argues that penalties aimed at threatening or harming the offender, do very little to aid in a community-wide or community sanctioned expression of value-laden messages. Thus, "...expressive sanctioning aimed at communicating value-based messages to offenders and the community and affirming obligations and accountability should be more effective in regulating conduct and much more likely to promote community solidarity and peaceful dispute resolution."¹⁷¹

In further support of this position, Bazemore suggests that from a perspective informed by what he has termed "earned redemption," sanctioning should encapsulate the objectives of concrete reparations to victims and communities, and should furthermore make the provision for the community an outlet for "symbolic, collective denunciation of crime, as well as on the affirmation of tolerance limits."¹⁷² Bazemore states that rehabilitation becomes increasingly attainable when reparative sanctions are viewed from the offender's perspective as being fair, and when they truly represent the culmination of a victim-focussed justice process. He goes on to say that once victim-offender meetings are combined with reparative, restitutive, or community service orders, that sanctions are high on the educative scale; "...according to one study, completing restitution and community service was found to be associated with enhanced feelings of citizenship and community commitment."¹⁷³

From a purely theoretical perspective reintegrative shaming and the distribution of shaming penalties are consistent with restorative justice philosophy, despite the potential of each to be disagreeable at best and downright retributive to the core at worst. Shaming,

¹⁷⁰ Bazemore 1998:791.

¹⁷¹ Bazemore 1998:792.

¹⁷² Ibid.

as demonstrated in the work of both John Braithwaite, done right and done effectively, seems to mesh perfectly well with restorative justice theory. Kahan's position is on the other hand, representative of disintegrative, or stigmatizing. His conceptualization of shaming, puts the community in charge of morally educating, and degrading the offender for his actions. This theory suggests that the community is responsible for making the offender an example to be wary of. It succeeds in sending a message. On one hand, reintegrative shaming says what you've done is unacceptable, but you've made amends, now let's move forward. Expressive shaming, on the other hand sends the message that what you've done is unacceptable, now how can we make you pay for it? The community should not possess such power, nor is this truly neither transformative, nor participatory justice. From this perspective, the community becomes judge and jury, and the offender becomes the center of attention and demands the focus of the community at large. Reintegrative shaming, on the other hand, combines the concepts of relational and transformative justice. After all it brings together the victim, offender and the community, emphasizing the positive aspects of each, in addition to creatively emphasizing the aspects of accountability, respect, and forgiveness.

V) Support from the Solidarity Thesis

There is a reading of Durkheim that suggests that he may have conceptualized law as a sort of symbolic language; the reason being is that he characterized punishment in terms of representational of the sentiments of the collective.¹⁷⁴ Durkheimian theory is consumed with notions of social solidarity, and social integration. He concerned himself with the social facts that serve to bind individuals together in a society. His was an anti-

¹⁷³ Bazemore 1998:792.

¹⁷⁴ Kahan 1996:594.

individualist approach arguing that man is only so because he lives in society.¹⁷⁵ For Durkheim, law was regarded as the most important of all social facts because by its nature it was reflective of social solidarity. It was the evolution from mechanical to organic forms of social life and society that preoccupied Durkheim's thinking. Specifically, it was the different degrees of solidarity, or the core bonds characteristic of each type that underpinned most of his theoretical contributions. His book *The Division of Labor in Society* set out to advance his theory that societies develop along a continuum, evolving from mechanical to organic.¹⁷⁶

From the Durkheimian perspective, solidarity is described as that which "directly links the individual with society."¹⁷⁷ He developed the theory that rules emerge automatically from the social conditions as societies become more complex.¹⁷⁸ In mechanical societies the division of labor is limited, the level of uniformity high, and individualism is not tolerated. Organic solidarity, on the other hand, exists in highly differentiated society, where mutual dependency is the glue that connects people to one another. In organic solidarity, the collectivism characteristic of mechanical society is replaced with a high degree of individualism.

From his thinking on the nature of society flowed his development of a theory of punishment. He has identified two main forms of sanctions, and they are either repressive or restitutive. Repressive laws are characterized by a system, which dispenses harsh punishment, capitalizes on the suffering of the offending individual. In other words, repressive law is symptomatic of a highly retributive arrangement. Reactions of this

¹⁷⁵ D. Milanovik, *A Primer in the Sociology of Law*. (New York: Harrow & Heston Publishers, 1988) 24. [hereinafter Milanovik (1988).]

¹⁷⁶ Milanovik 1988:25.

¹⁷⁷ E. Durkheim, *The Division of Labour in Society*. (New York: Free Press of Glenco, 1964) 106. [hereinafter Durkheim 1964]

¹⁷⁸ R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh, Edinburgh University Press, 1999) 104. [hereinafter Cotterrell (1999).]

nature are characteristic in highly collectivist societies, where crime is viewed and understood as being an attack on the social fabric of the society in question.¹⁷⁹ Restitutive law, on the other hand, could very well be described as restorative; it is characterized as justice which demands a return to the way things were before, and is therefore less concerned with punishment, and more concerned with getting on with life.¹⁸⁰ Restitutive laws are not rooted in the conscience collective, and are therefore not marked by strong punitive reactions, but rather they tend to focus on the reparation of harms that have occurred.

From this perspective, law, as a social fact, represents an impassioned expression, communication, as powerfully symbolic yet accessible language of a given society that serves as an indicator of social solidarity, or group cohesion. As such, it serves as a means of communicating behaviour deemed acceptable, and that deemed unacceptable. It functions as a vehicle of conveyance, and serves to inform and is informed by collectively agreed upon moral principles.

Reintegrative shaming is best understood through Durkheim's conception of the relationship between law and morality. Law, as Durkheim conceived it, was inextricably bound to morality and religion, but the authority that it commands can and must be understood as part of a broader understanding of the essence of moral phenomena. Religion, by his view, was understood as filling a social function, and represented a source of meaning, values, and worldviews.¹⁸¹ The link between law and religion is the following; both institutions exist as social phenomena, both impose obligations, and both

¹⁷⁹ Milanovik 1988:26.

¹⁸⁰ *Ibid.*

¹⁸¹ Cotterrell 1999:50.

are the foci of duty and commitment.¹⁸² Law, like religion, must be "...a focus of willing allegiance, something to be believed in and involved with."¹⁸³ Furthermore, law, like religion, is also a source of identity, "...of moral meaning as well as discipline in individual lives."¹⁸⁴ Durkheim has been interpreted as having connected religion, law and morality in the following way: in primitive society, morality is imbued with religion and expressed in religious principles, and in modern society, morality is expressed through law. Law and morality are the "pre-eminent expressions of this collective life-of society itself."¹⁸⁵

Modern society is understood as being complex and in lacking religion, but for Durkheim society still required a moral foundation, but whatever the moral foundation, law functions to "...express, protect and guarantee that foundation."¹⁸⁶ While in his later work he did not go so far as to say that law should replace religion in society, he did say that some shared focus of belief and attachment is necessary in every society. Furthermore, he argues that a secular morality "must somehow acquire some of the vitality, the quality of being enthusiastically lived out with a sense of personal commitment."¹⁸⁷

Through the eyes of Durkheim, it can be argued that law is an infinitely social issue. Law represents a system by which groups of people can come together. It represents a language that all members of a particular society are privy to, and it is something which they can believe in when all else fails. It is *this* social nature of law that this research is ultimately concerned with. It is the law as it is played out in the

¹⁸² Cotterrell 1999:50.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ Cotterrell 1999:52.

¹⁸⁶ Cotterrell 1999:51.

¹⁸⁷ Cotterrell 1999:54.

community, and the way in which it involves the participation of the people and the larger community. From this perspective, law acts as a symbolic language, used in the expression of morality through expressions of malcontent. In other words, law ultimately serves the social purpose of education, and has the effect of formalizing conciliatory moral principles.

Shaming Practice Explored

1) What Matters More? The Community, or the Process?

Restorative justice in criminal cases is, as was discussed throughout the preceding chapters, carried out for the most part by community groups and committees in Ontario. The majority of these groups function under, and receive their funding from, the Ministry of the Attorney General. It is important to point out that there are many programs that function without government support. The following programs are almost entirely supported by unpaid community volunteers: Operation Springboard, York Region, has thirty-three active volunteers.¹⁸⁸ The Laurencrest Cornwall Youth Residence-run program, which has been in operation since the early 1990's as one of the first citizen boards, has eighteen active volunteers.¹⁸⁹ The Associated Youth Services of Peel program, in operation since September of 2003, has twenty active volunteers.¹⁹⁰ The Ottawa Salvation Army program has 24 active volunteers.¹⁹¹ Each of the mentioned groups is run by a steering committee, each member of which volunteers his or her time,

¹⁸⁸ This information was gathered from direct correspondence I had with the director of the program Operation Springboard, York Region. "Active" volunteers, refers to their status as active facilitators.

¹⁸⁹ Information obtained directly from the director of the youth residence (March 4th, 2004).

¹⁹⁰ This information was obtained directly from the director of the program (March 4th, 2004).

¹⁹¹ I am a volunteer for this group, and came by these numbers from experience.

but has strong connections either to each particular program or to the Crown Attorney's Office.¹⁹²

The concept of community is seen as problematic in this thesis. The above program descriptions are used to illustrate this. Restorative justice is often described as community justice. Using the terms synonymously has the effect of fostering in those individuals who already possess an interest in, or a sense of duty to, their community, a need to involve themselves with the administration of justice. The informal reliance under the Young Offenders Act, and the now formalized reliance on youth justice committees to take on the lion's share of youth cases under the YCJA has been a calculated move to re-establish, and to involve the community in active responsibility taking. This has taken the form of community movements created to have the ultimate role in justice administration in their communities. This is signaled in other community-based movements:

Engrafted from the community policing and community-movements over the last decade, and invigorated by interdisciplinary research highlighting the influence of community norms on civic character and society, the ethic [...] of community in criminal prosecution] emphasizes the values of citizen participation, institutional decentralization, and local accountability in the prosecution function.¹⁹³

The emphasis on community cohesiveness has increased the urgency in the minds of community members to get actively involved, and there is pressure articulated in the YCJA for community activism in the administration of so-called community justice. Moreover, volunteerism, and the act of getting involved, has become more important than adherence to the theoretical underpinnings of restorative justice.

¹⁹² The Steering committees are comprised necessarily of a Crown, and of potentially a police officer, a representative from victim's services, and a representative from probation. This list is not exclusive nor entirely inclusive.

¹⁹³ Alfieri 2002. 1465.

At this point it is useful to re-introduce the concept of shaming. Shaming, both in terms of process and punishment, has been identified in the preceding section of this thesis as a delicate process and a tool difficult to master. Braithwaite himself has argued that there must be clear adherence to the theory or else the process runs the risk of becoming disintegrative.¹⁹⁴ In Ontario, the models of restorative justice used in community justice programs are based on the New Zealand concept of Family Group Conferencing, described earlier. This process uses formal reintegrative shaming techniques in order to make the youth understand the consequences of his or her actions. This type of communication requires solid training with an emphasis on the theoretical basis for the process, otherwise the process runs the risk of being nothing more than a government sanctioned, audience ritual of disintegrative shaming, reducing the process to an offender-focused, audience-run. Two risks are immediately identifiable. The reintegrative shaming process will be reduced to stigmatization and neither the victim nor the offender will benefit from the potential from restorative justice. The problem is not whether reintegrative shaming theory fits with restorative justice ideals, for it has been shown that it does. The problem exists at the nexus where theory and practice meet. The problem is the implementation of restorative justice programs reliant on the theory of reintegrative shaming in community-run committee settings.

Reliance on community groups is a consequence of the encouraged use of extrajudicial measures in the YCJA. The Act has outlined clear provisions authorizing the establishment of volunteer-run youth justice committees, the responsibility of which falls to provincial governments.¹⁹⁵ Such committees function under the new Act as they did

¹⁹⁴ Braithwaite *supra* note 141 at 54

¹⁹⁵ Bala 2003:1011.

under the Young Offenders Act. That is, youth justice committees are established by, and made up of "...membership drawn from those in the community with an interest in assisting young persons in trouble with the law."¹⁹⁶ As decreed by the new Act, any member of the community, including authority figures such as police or other justice professionals, may be involved as volunteers or with the administration of restorative justice practices. S.19 of the Act reads that a volunteer community group "...may accept a referral from the police or a prosecutor to arrange a meeting involving an offender and a victim, and then make a recommendation for an appropriate extrajudicial measure."¹⁹⁷ Community groups and individual community members have become the most important site for creating, overseeing, and facilitating victim and offender meetings.

Arguably, it is the values being trumpeted through official encouragement regarding both the creation of community justice initiatives, which tend to foster "...citizen state collaboration and grassroots equality initiatives within the criminal justice system."¹⁹⁸ What results from the exploitation of communitarian values in legislation is an unabated and sometimes boisterous commitment on the part of community members to sentiments of civic responsibility to morally educate wayward community members.¹⁹⁹ Making provisions for a dominant role for *community* in the criminal justice system results in a change in case management. The burden of processing minor cases, and in some instances, major cases, shifts to the community committee with relatively little intervention from the governing body. This movement has resulted in the "...refashioning the relationship between law, communities and government," because

¹⁹⁶ Bala 2003:1011.

¹⁹⁷ Bala 2003:1012.

¹⁹⁸ Alfieri 2002:1465.

¹⁹⁹ Alfieri 2002:1491.

“...increasingly, governments are turning to communities for the solutions to many social issues.”²⁰⁰

In local and practical terms, the aim of community justice programs is to implement a citizen-participatory approach to moral and civic education, offender reintegration, victim empowerment, general deterrence, and a renewal of commitment to communities. This approach, argued by Alfieri, “...endorses citizen-state collaboration, regulatory decentralization of the state juridical function, and local accountability of governmental agencies to nongovernmental organizations and citizen groups.”

Furthermore, he states:

Building coalitions from the bottom up, this participatory approach renders the state more receptive to the community specific demands of grassroots justice campaigns in dealing with crime from arrest and indictment to conviction and sentencing.²⁰¹

It is not illogical to return justice administration to communities. Restorative justice-based programs allow for the formation of new partnerships, most notably between justice officials and “real” people, making the criminal justice process less abstract and more accessible to victims, offenders and communities, arguably the consumers of justice. Moreover, these new arrangements might be conducive to crime prevention initiatives. Cooley sees the advantage of these new partnerships, stating, “...communities have become the site not only in which policy and programs are implemented, more and more, communities are being called upon to develop and administer policy.”²⁰²

Based on the connections just made, it is useful to restate some of the tensions underlying this thesis. The need for the community to become active in the administration

²⁰⁰ Cooley 2003:20-21.

²⁰¹ Alfieri 2002:1492.

²⁰² Cooley supra note 195 at 72

of justice is clear in the YCJA. The Act encourages both community responsibility for the outcome of crime, *and* for making things right again. How has this rhetoric influenced citizens' sense of responsibility and has it resulted in an increase in individual interest in the process of criminal justice? Has it compelled people to be involved in the criminal justice process? Has this resulted in community justice groups in Ontario forming too quickly and with very little theoretical training? Without proper attention to the theories of restorative justice, most notably to reintegrative shaming, restorative justice-based community justice programs are likely to do little more than exact punishments that shame and stigmatize the offender. At worst, the processes might be reduced to an exercise in public humiliation, potentially reducing the community to an audience brought together to both witness, and partake in the act of lynching of one of its own. Restorative justice programs based on reintegrative shaming run the risk of becoming state-sanctioned vigilantism programs that will ultimately do very little for the future of restorative justice.

In the next chapter the study findings will be discussed. As will be seen, there is in fact a disconnection between the way in which reintegrative shaming is theoretically conceived and the way in which it is implemented.

CHAPTER FOUR: DISCUSSION AND CONCLUSION

Discussion of Findings

This thesis focused on the use of reintegrative shaming in community justice groups. To reiterate, my study set out to answer the following main questions:

1. What do community members involved with community justice committees understand to be their role in the administration of justice for youth?
2. Is there a tendency in legislation to paint an overly positive conceptualization of the community, which then leads community members to feel they have a right and responsibility in justice matters?
3. Is reintegrative shaming being practiced as the theory advocates?

The interview guide, (see Appendix I for a complete list of questions), was designed to allow for an open dialogue regarding the theory and practice of reintegrative shaming, restorative justice, and ideas regarding effective training and preparation of youth community justice groups based on restorative models. The questions were open-ended and therefore designed to facilitate conversations regarding the above topics, rather than direct them. My objective in speaking with people was exploratory in nature, and the study was not designed to “prove” a particular thesis. Input came from two distinct groupings that I have labeled the “Policy” group and the “Practice” group. In total, ten people were interviewed for this study.

1) The Policy Group

This group consisted of seven respondents, which included RCMP personnel from the Aboriginal and Community Policing sector. These respondents were labeled one, two and three. It included a representative from the Church Council on Justice and Corrections, labeled respondent four; an OPP Officer responsible for YCJA implementation and police education, respondent five; a representative from Ottawa’s Collaborative Justice Project, respondent six; and a representative from the Eastern

Ontario Restorative Justice Network, respondent seven. Each individual was chosen to participate because of the nature and breadth of their experience in restorative justice programming in Ontario. Each person presented strengths in certain areas, including for example, restorative justice work with youths, or experience in training police officers to effectively use restorative justice in their daily interactions. I thought the various perspectives and levels of experience with restorative justice programs would be helpful in the pursuit of a multi-pronged perspective regarding the issue of training in reintegrative shaming from the policy sector.

Respondents in this group ranged in age from the mid-forties to late fifties. Three participants were male, and four were female. All seven respondents are presently employed within the field of restorative justice, but accumulated interest in the subject while employed in other justice and socially oriented careers. All seven respondents have been working in restorative justice within the last ten years, having fallen into the field later in their careers. Each of the seven respondents was hitherto employed in the social work milieu, as a police officer, correctional worker or mental health worker.²⁰³

The seven participants in this group typically responded with great emotion when asked why restorative justice was important to them. In summary, to the question "Why is restorative justice important to you?" a typical response was that the theory had both a spiritual and an intuitive resonance with them and that restorative justice simply "spoke to them."²⁰⁴ Furthermore, the seven respondents were generally in agreement that restorative justice represented a natural, more humane response to dealing with offending

²⁰³ The policy group was comprised of seven individuals in some way involved with restorative justice. The group included three members of the RCMP, a representative from the Ottawa Collaborative Justice Project, a member of the Church Council on Justice and Corrections, and one member of the OPP involved in the training of police officers in the ways of the Youth Criminal Justice Act, and a rep. From the Eastern Ontario Restorative Justice Network.

²⁰⁴ More than one participant admitted to this connection.

behaviour. Respondent one replied, "It is a form of justice that makes more sense. We don't need punishment, victims and offenders need to be given a chance to heal."

Each of the seven respondents expressed serious disenchantment with the aims and objectives represented by the traditional criminal justice system. When asked, "Does restorative justice meet the aims of the traditional justice system?" all seven responded in a similar fashion. Respondent seven said, "It does not, but it's not supposed to. It's a different kind of justice altogether." All agreed that the traditional system could never be dispensed with, as respondent one said, "...because there are always serious cases that cannot and should not be handled in this informal way."

Six of seven of the respondents in this group strongly felt that the community has a rightful place in the role and responsibility of justice administration. Five agreed that the notion of community is nonetheless difficult to accurately define. When posed, "How important is the community to restorative justice processes?" seven respondents agreed that it was very important, but one respondent qualified her answer with the following note of caution. Respondent six suggested that the community should also be acknowledged as a place where lynching and humiliation can easily occur. She said:

Just because a program is called community justice it should not be necessarily considered better than the alternative. Without guidelines, the processes and punishment resulting from the meeting of some community programs may actually result in harsher sanctions and generally less due process accorded to the offender.²⁰⁵

Furthermore, she suggested,

There is no way to be sure that the community responsible for the conference, and that which the youth is being reintroduced is a healthy community. All the safeguards in the world cannot guarantee this in a volunteer run program. The only way to ensure consistency is to pay employees to do this kind of work.

While the other respondents agreed that community was important to restorative justice processes, there seemed to be some caution in the answers given. This is evidenced in the agreement by all respondents that the community is actually a very complex phenomenon, and difficult to define as a geographic designation or otherwise.

When the respondents were asked to respond to the question, "Why do you think people volunteer to do this work?" seven of the respondents answered that they didn't know. Four did however suggest that in their minds, there was a strong possibility that volunteers' had themselves been victims at another time in their lives, and that maybe this was a motivating factor. Respondent one said, "...personal motivation to do this work as volunteers is a subject that ought be more deeply studied."

When asked to respond to the question, "What is the most important aspect of training for volunteers of community justice groups?" the respondents with the RCMP, being familiar with the model promulgated in their organization, all agreed that theory was important, but that method could not and should not be ignored due to the scripted nature of the process. Respondent four and respondent six both suggested that if reintegrative shaming is a technique used in these groups that training focused on fleshing out that theory is desirable. All seven were in agreement that there should be equal emphasis on theory and communication style. Furthermore, respondents one, respondent two, and respondent three agreed that there were insufficient resources allocated for training, which ultimately results in poorly trained facilitators. All seven respondents agreed that increased resources and more formalized systems of training and mentoring would be the preferred method of training. Respondent one said, "We are hoping to make a year of mentoring a mandatory prerequisite to facilitator preparation."

Respondent two stated, “Resources are constantly a problem. I personally have volunteered my own time to train community groups because I feel strongly about restorative justice.” Respondent three said, “There is never enough money to train staff. We rely on volunteers totally for all aspects of the community justice model.” The RCMP is not however, responsible for overseeing the community groups that go on to actively administer community programs, and as such, follow-up training is not something in which they are actively involved.²⁰⁶ Furthermore, there are many community groups that have gone on to create training programs in order to facilitate the training of new members, which none of the RCMP respondents felt overly comfortable with. Respondent one said, “Again, we feel strongly that if committees are using the RCMP model, they should be trained properly, and there should be follow-up, and mentoring programs in place.” Respondent two argued, “How can they train their own volunteers if they don’t receive proper training in the first place?” There was the recognition that the RCMP had been responsible for bringing the Community Justice Forum model to community groups. Respondent two expressed the concern that in the long run, that because of the lack of attention to the theories supporting the process and “...the script,” restorative justice in this format was doomed to failure.²⁰⁷

As regards the concept of reintegrative shaming, all seven of the respondents in this group reported having difficulty with both the concept and the terminology associated with it, but gave credence to Braithwaite’s reintegrative shaming theory. None had heard of Kahan’s expressive theory. Specifically, to the question “Please describe

²⁰⁶ This responsibility is allocated to the Ministry of the Attorney General through the Steering committees for each distinct community group.

²⁰⁷ While each participant remained emotionally and completely devoted to restorative justice, and continued to have expectations that it would continue to underpin many justice programs, there was an air of certainty and understanding that the way that it was originally conceived was not being practically realized.

what reintegrative shaming looks like in your program,” the RCMP respondents stated that Braithwaite’s reintegrative shaming formed an integral part of the restorative process, according to the Community Justice Forum model. Further, respondent one stated, “Reintegrative shaming forms some part of the punishment, or consequence for the offender.” In response to the question, “In your view, how effective is the shaming component of the reintegrative shaming ceremony?” respondent two remarked that from his perspective, “There is no need to worry about negative effects of shaming in community conferencing, because facilitators are not trained well enough to know *how* to shame.” Respondent six stated, “The best part of the process is what follows, when victim and offender can look at each other and understand one another. They don’t have to like each other, but once the process is finished, the fact that they have made this journey together makes the whole thing worthwhile.”

Each of the seven respondents in this group agreed that the word *shame* and the process of *shaming* were negative conceptually. Respondent four said, “We are trying to fit the concept of shame and shaming into an existing framework. It is not punishment, but having the offender feel shame for his actions is a necessary step towards healing.” Respondent three said, “The concept has too much baggage. Besides, it’s a communication tool, and not punishment. We need some new language, although the concept and what it is meant to do works well when done effectively.” Respondent one said, “Shame, and the act of shaming, is required to help bring about recognition in the offender that they have done something wrong, and that they had to make amends for the harm that they had caused the victim and community.”

In response to the question, "Is there a legitimate role for punishment in restorative justice," respondent one argued, "The process is part of the punishment." Respondent two, respondent six, and respondent seven were in agreement. All seven respondents argued however, in collusion with respondent five, who stated "...not punishment; but there is room for consequences." Furthermore, no respondent felt that formal sanctions should result from community justice conferencing. Generally, it was agreed that the process should be enough, especially when dealing with youth. Respondent one stated, "...despite this, agreements resulting from community forums often read like probation agreements. Community justice committees have been issuing punishments on top of the conferencing process" Furthermore, respondent six said, "Very often, when a conference goes well, restitution agreed upon during the agreement phase is often given back to the offender. The victim, after a good meeting, is often satisfied that the apology is real, and has little need for material compensation."

The seven respondents were very familiar with restorative justice theory and philosophy. There was general agreement among the seven respondents in this group that restorative justice and reintegrative shaming fit well together, despite the negative reaction to the terminology. There was general agreement that the community was representative of a place fit for the resolution of conflict, although as noted, there was some dissension with regards to this point. It was, however, agreed to by all seven respondents, when asked "What do you feel is the role for the community in shaming offenders?" that community groups actively involved with such processes should be supported with clear and concise organizational guidelines with respect to volunteers training. More importantly, it was generally agreed that shaming, though unfortunate

from a conceptual point of view, had the potential to be both a positive and a necessary part of the process, but that the reintegration element must be properly enforced and regarded as more important than the shaming element. All agreed that shaming was to focus on the *act* and not the *actor*.

II) The Practice Group

The participants in this group were all facilitators from the Lanark Real Justice Committee from Lanark County. This committee was initially brought together through combined efforts of a retired OPP Officer, and a retired civilian RCMP Officer following a major fire that resulted in the death of a young couple in Mississippi Mills in 1996. This group is not supported by any religious organization, but is instead comprised strictly of concerned community members. The Lanark Real Justice Committee has just recently been conferred status as a registered charity, has secured funding for a three-year term from the Federal Solicitor General's Office, and has just received a full-funding grant from the Trillium Foundation. Its operations will form part of a study directed from the Solicitor General's Office concerning satisfaction rates reported by victims and offenders who have experienced the process.

This group officially began operating under the Real Justice model, but has now adopted and adapted the RCMP and Real Justice approaches. Real justice was adapted by American Ted Watchel from the Australian model of Family Group Conferencing Model, created in 1994. The current members of the Lanark committee have received training offered by the RCMP and the Ontario Ministry of the Attorney General in 2003 in the CJF model, and a few of the original members have been trained in the Real justice

model.²⁰⁸ Originally, the group was trained through a mentoring system put into place by Ruth Sirmon, a founding member of the committee.²⁰⁹ Like other groups in Ontario, previously mentioned, after the initial training seminar, this group implemented a training program, which includes mentoring, and monthly committee-based training sessions. These committee-based training sessions are essentially subsequent training that focuses group efforts on communication style, help with difficult dynamics, writing agreements, and sharing experiences. The following is a summary of the interviews conducted with the members of this group.

The three respondents willing to speak with me were female, and their ages ranged from the mid thirties to early fifties. As with the policy group, all respondents in this group were somehow involved in some form of social work in their careers, and found work in restorative justice later in their careers. These participants are volunteer facilitators, all of whom have worked together on various forums conducted by the committee. The respondents in this group are labeled as respondent eight, respondent nine, and respondent ten.

With respect to restorative justice, all respondents in this group, as with the policy group, felt that it represented a system of justice that simply made sense, as compared to the traditional criminal justice system. When asked, "How important is the community in restorative justice processes?" All three respondents in this group both felt that the rightful place for conflict resolution was in the community where the infraction occurred, and all felt that they had a right and responsibility to act in such a manner.²¹⁰ Respondent

²⁰⁸ Personal Interview 10 (March 3rd, 2004).

²⁰⁹ Personal Interview 10.

²¹⁰ Personal interviews with respondents 7, 8, and 9 (on February 29th, and March 3rd) resulted in a positive acknowledgement of the responsibility of community members to be involved in justice issues, and that theirs is a community that really cares about those that comprise its ranks.

eight said, "It helps everyone get through the ordeal. The community is the best place to resolve conflict because it reinforces the idea that we all have to live here together."

Respondent nine said, "The traditional justice system works against the youth in our community. This approach recognizes that mistakes are sometimes made."

As regards the concept of reintegrative shaming, the respondents in this group seemed less interested in talking about their program, and at some points during the interview seemed uncomfortable with the topic altogether. When asked, "Could you describe what form does reintegrative shaming take in your program?" Respondent eight said, "While it is true that our program relies on both the RCMP and the Real Justice model, we don't use reintegrative shaming. We don't shame offenders." Respondent nine said, "I don't think we use shame in a bad way." When asked "What purpose does shaming serve from your point of view: expressive, educative, or moral?" respondents eight, nine and ten all answered "educative." When asked "How familiar are you with the theoretical work of John Braithwaite?" I believe that we've dealt with some of his theory, but it's not totally familiar to me." Respondent nine said, "I think we've looked at it. It formed part of the RCMP training." When asked, "How much emphasis on theory has there been in the training you have received for the position of facilitator?" respondents eight, respondent nine and respondent ten uniformly reported having received little training with respect to theory, but quite a bit as regards method and process, such as handling difficult dynamics, agreement writing and communication skills.²¹¹ When asked, "How much formal training have you received since the initial training when you began?" the answer from all respondents was, none.

²¹¹ Each participant noted this.

When asked, "How long does a typical forum run?" respondent eight said, "Usually four or five hours. I've done one as long as nine hours though. But it involved many members of a particular community, so it took a long time." Respondent two was also involved with that particular forum, but added, "I've done one as short as 45 minutes, but that one was not successful."

III) Key Findings

First and foremost, this study showed that reintegrative shaming is seen from the point of view of policymakers as a generally positive means to an end. Overwhelmingly, the respondents from the policy group agreed with the statement that shaming was only one element of a particular restorative process designed to uncover and mobilize genuine feelings of remorse on the part of the offender. It was agreed that shaming was used with a view to heal wounds caused by the action of offenders'. Furthermore, it is inferred from the reactions by those interviewed in the policy group regarding punishment, shaming sanctions and community involvement, that shaming should focus on the act, with effort being focused on reintegration and re-acceptance as it is advocated in the theory.

This study showed that there is a difference in how the practice of shaming in conferencing is transferred from the policy to the practice groups. This in itself is not surprising, as it is often difficult to put theory into practice. In this instance it is particularly problematic because of the voluntary nature of committee work, and because of the vulnerability of the youth involved. It is unpaid, relatively unsupervised *volunteers* doing the work of justice with victims and offenders. Interestingly, the participants from both study groups were very hesitant in speaking about the concept and the act of *shaming* offenders. Seven out of ten of the respondents suggested that the words *shame*

and *shaming* be replaced with something less negative sounding, for example *remorse* and *getting at remorse*. The practice group respondents all remarked that they utilized a process designed to bring about true sentiments of remorse and empathy in the offender, but the act of assigning a signifier to the *process* was avoided by all three respondents. There was some hesitation in the policy group as well. It seems that very few of the respondents from either study groups either actually used or appreciated the terms *shame* and *shaming*.²¹²

There is a notable difference between where the two groups placed emphasis on volunteer training. The policy group reported uniformly that theory could not be avoided, although there was agreement that method and communication style were of great importance as well. As for the practice group, theory seemed to be negotiable in terms of the value it possessed and consequently emphasis lay in the polishing of communication skills, and in writing sanction agreements. This might lead one to infer community justice committees might actually understand their role to be as a community *court* rather than as a program aimed to meet restorative ends.

This study indicates that reintegrative shaming is in fact not being conducted as Braithwaite's theory advocates. Responses gathered from interviews with the policy group point to theoretical training as being key in mastering techniques of effective reintegrative shaming practices. The interviews with the practice group indicate the opposite; the respondents were trained and valued training that placed sole emphasis on method and communication. Theoretical material was, by the admission of the respondents, given little consideration. Furthermore, the community in the answers given by those interviewed from the Policy group is representative of the optimal place for

²¹² This was noted in both groups. Respondent number two was the only respondent totally comfortable with the term.

conflict resolution of the conferencing nature. It is not meant to be a place where an audience congregates for the purposes of *sentencing*. On the other hand, the practice group used shame to affect the offender, but placed greater emphasis in training and in practice on the creation of agreements that highlighted the importance of shame-inducing sanctions and punishments.

Thus, while the inevitable divide between theory and practice is understandable, in a situation where community volunteers are wholly responsible for the processes of justice, there should be clear and concise guidelines in place to ensure that the process is fair for all involved. Moreover, the community justice conferencing process, insofar as it is a restorative approach to the resolution of conflict in the aftermath of crime, should not necessarily be goal oriented in terms of closure being dependent on the creation of a sanction agreement. Nor should it be understood as a forum during which community members are invited to take part in a venting session. The following section makes some recommendations to ensure consistency and structure to the conferencing process in Youth Justice Committees.

IV) Moving Forward

Braithwaite has hypothesized that reintegrative shaming, done with thorough attention to the theoretical aspects that inform its applications, is an effective way to deal with young offenders in restorative justice conferencing. This process focuses concentrated, negative attention on the *act*, while bestowing positive messages of re-acceptance on the *actor*.²¹³ Shaming, from this perspective, actively mobilizes the emotional experience of shame in the offender, and capitalizes on feelings of genuine remorse, and as such, aids the youth to better comprehend the victims' articulated

experience of the event. The process facilitates a better understanding in the offender that consequences are a natural byproduct of criminal behaviour. Furthermore, this process gives the youth the opportunity to express an apology, to take responsibility, and to make necessary amends to the victim, material or otherwise. Reintegration, a necessary component of this process follows active shaming via a gesture of re-acceptance from the same community involved in the act of shaming. This serves to reinforce the notion that those actively involved in the process forgive the offenders' transgression, and actively welcome the offender back into the community.

Shaming from Kahan's perspective, on the other hand, represents an element of a process that actively capitalizes on and mobilizes community sentiments to send a concentrated, negative message to the offender. This message is that by committing their transgression, they have breached an unspoken agreement with their community, and that they are therefore to be made an example.²¹⁴ To that end, the values expressed, and the message transmitted is done so through the committee process by community members, and is followed by the dissemination of a very public punishment meant to do nothing more than further ostracize the offender from his or her community. There is no better example of Braithwaite's conceptualization of disintegrative shaming, or stigmatization. Both theoretical perspectives, however, follow along the same continuum, and draw their strength from the same source, and that is a conceptualization of community solidarity as authoritative, but democratic. The difference between these responses to offending lies in the community's devotion to reintegration, restoration, and healing, rather than a devotion to making an example of one of their members for the purposes of deterrence.

²¹³Braithwaite *supra* note 2 at 4.

²¹⁴ See generally Kahan 1999, and 1996.

The difference lies in the practical implementation of theory. Either outcome is possible within the parameters of the community justice setting. That said, it seems intuitively more difficult to shame with a view to restore balance, than it is to shame with a view to punish.

Presently, in Ontario, as with the rest of Canada, the YCJA has formalized extrajudicial measures, and has had the effect of placing considerable emphasis on a restorative, community based response to youth offending. Ultimately this will result in the majority of cases being diverted from the traditional system of criminal justice to the informal system. This has included the implementation of a warning and cautioning system as well as the formalized option of referral of cases to restorative justice from all points of entry to conferencing in youth justice committees.²¹⁵ These efforts have been in part to reduce reliance on youth incarceration, but also to officially impart restorative notions of individual responsibility, consequences for the offender, and to place quantifiable value on conceptions of civic duty, and collective moral responsibility on law-abiding, concerned community members.²¹⁶

Braithwaite himself has warned of the ease with which one can slip from reintegrative to disintegrative shaming.²¹⁷ If that is the case, it is imperative that there be considerable attention devoted to the theory of reintegrative shaming if it is to be used as an element in restorative justice youth conferencing. Otherwise, community groups run the risk of doing considerably more harm than good. The youth represent a vulnerable population in that it is a common perception that youth are still pliable; thus considerable care should be taken to ensure that they, as the product of a poorly regimented

²¹⁵ Lawrenson 2003.

²¹⁶ See generally, Cooley 2003.

²¹⁷ Braithwaite *supra* note 141 at 54

community-based justice committee program, do not turn to subcultures of deviance for peer acceptance.²¹⁸ It has been admitted by Braithwaite himself that it is easy to slip from reintegrative to disintegrative shaming at any time, and since that is the case, there must be considerable attention devoted to the theory if it is in fact to be used.²¹⁹ It is not enough for community members to rally together in the formation of justice committees with an aim to process youth cases. The desire of individual community members to get offending youth to conform must be unequivocally matched by a program that has strong identification with, and a clearly articulated devotion to, a reintegrative shaming model of restorative justice. The best way to ensure theoretical and procedural consistency is to foster a relationship, and maintain closer contact between the policy makers, and the program managers. This would ensure, for example that a Youth Justice Committee in Chapeau would have the same training, guidelines, and mandate as a Youth Justice Committee in St. Catharines.

The existing Youth Community Justice Committees in the jurisdiction of Ontario are directly connected to the Crown Attorney in each district. However, the sponsoring agency varies by location. For example, the Salvation Army sponsors the Ottawa Youth Justice Committee. While it is a fact that the Lanark Real Justice Committee is run under the direction of, and receives its funding from the federal department of the Solicitor General, and not the Ontario Ministry of the Attorney General, programs run under both departments provide the same theoretical alternative for youth justice. Furthermore, the YCJA has been implemented at both the Provincial and Federal level, and as such, there should arguably be consistency across the province in the way in which it is being

²¹⁸ Braithwaite *supra* note 141 at 54

²¹⁹ *Ibid.*

applied. Also, it would be valuable to institute mandatory training that is consistent for each volunteer in each committee working under the auspices of restorative justice. Such training would include theoretical training in both restorative justice and reintegrative shaming. It would also include training with respect to effective communication skills, and basic facilitator training. This is imperative because the volunteers are not only working with youth, but aiding volunteers to be active in the process as well. It may even be of value to introduce a certification system under the auspices of which trained volunteers would be certified facilitators.

Admittedly, to take this approach would have the effect of formalizing the informal nature of the process. However, considering the vulnerability of this element of the population, the fact that victims are involved, and that volunteers are completely responsible for the process, consistency in training and program implementation surely cannot hurt. The training program offered co-jointly by the RCMP and the Ministry of the Attorney General has the potential to be quite effective. What is lacking is the commitment on the part of the government to offer continuous training, and the resources that would allow for follow-up consultation. As respondent five put it, “You see, kids don’t vote. There is less investment at all levels of government in populations that don’t vote.”²²⁰

As was shown in the answers from both groups, there is value in both the process and theoretical elements of the training process. The use of shadowing or mentoring for new facilitators would be acceptable as a practical, hands-on way of training members in the process of reintegrative shaming. However, this practical experience of the process should follow concise theory-based training, and should form part of a training schedule

that would also include follow-up, continuous learning, and positive coaching strategies.²²¹ Braithwaite would argue that reintegrative shaming done properly within a respectful environment promoting restorative ideals results in a well adjusted person, while disintegrative shaming results in the offender descending into a subculture of deviance, searching out others like him or herself. That said, it is arguably easier and less costly in the long run to provide effective training, fiscal resources, and commitment from government to continued devotion to the model being idealized for it to be effectively realized.

Inextricably tied with the notion of consistency in training and preparation of volunteers, is the concept of program evaluation. The Lanark Real Justice Committee is being studied by the federal Solicitor General's Office to gather statistics regarding the satisfaction of participants, both victims and offenders. This is valuable work. However, in conjunction with a solid training plan, and open dialogue between the policy makers and program managers, there should be intermittent program evaluation that looks critically at the development of skill sets for volunteers. Satisfaction rates are important, as are studies that look at recidivism rates. It is necessary however, from the standpoint of consistency, that volunteers be periodically assessed to ensure that they are effectively employing the skills necessitated by the theories. An evaluation of this sort might include participant observation. Understandably, the fact that this is a volunteer-based process makes this problematic. I would posit that there are some volunteers out there who would resist such scrutiny, likening it to being spied upon. In order to allay fears, it might be useful to create clear and consistent guidelines before volunteers are selected and

²²⁰ Personal interview 5.

²²¹ This was a viewpoint expressed by respondent 1 and two, from the policy group. .

interviewed, that state that program evaluation is a necessary part of the process and will be carried out periodically.

V) Limitations of the Study

One major flaw in this research is the notable absence of the perspectives of young offenders who have experienced the process. It was my intention to include such a perspective. Furthermore, I was granted ethics clearance from the Carleton University Ethics Office to do so. The Lanark Real Justice Committee Executive, after deliberation, reached the conclusion that it raised too many moral issues for them, and subsequently declined my request. The perspective of the offender would be invaluable in a study of this sort. It is important to understand from the offender's perspective whether or not they actually felt as if they had been shamed, if they found their sanctions to be punishments, and whether they experienced a positive sense of reintegration following the shaming ceremony. Having left out this perspective is one of the limitations of this study.

The perspective of the victim would have also been a valuable addition to this study. There was reference to victim studies in the literature review for this thesis, most notably by Heather Strang and Mica Estrada-Hollenbeck, who both argued that victims are often not looking for material compensation, but rather for closure and to give forgiveness, and to get answers to questions from their victimizers such as "Why me?" While there may be some work in the field, I was not able to find literature that considered the perspective of the victim regarding feelings vis-a-vis active shaming of the offender. That said, it would have been a valuable addition to this study. In a subsequent study, it would be important to include input from victims who had experienced justice in a restorative community justice scenario.

This study proved difficult for me because I found it hard to be the objective researcher that I needed to be to do this work properly. I am a volunteer in this field, but I became involved because of my interest in researching the subject. As such, I have always looked at this concept through a student's eyes.

VI) Some Concluding Thoughts

Conferencing as described throughout this thesis is only one of many different restorative justice based program initiatives throughout Canada and the rest of the World. As outlined in Chapter One, there are numerous manifestations of restorative justice, and while many capitalize on shame, conferencing as adapted by the RCMP from New Zealand based Family Group Conferencing is limited to youth, and is predicated specifically on Braithwaite's theory of reintegrative shaming. This is not so for many of the other programs in existence, which vary not only by location but also by sponsoring agency.

My position in this thesis has been critical of disintegrative shaming. I disagree with any aspect of shaming that is disintegrative and thus designed to punish offenders through the use of shaming practices. One of the conclusions I reached from discussions with both policy and practice individuals is the apparent ease with which programs fall into a disintegrative pattern of shaming due to the lack of attention given to explaining the theoretical underpinnings that Braithwaite so adequately presents. This is a serious problem which must be made known and attended to because of the likelihood that conferencing may be doing more harm than good to young offenders.

Reintegrative shaming may provide a more positive outcome for our youth, although I still have some reservations. Under the right circumstances and done with

deliberate attention to ensuring the clear and concise use of a script that is grounded in Braithwaite's theory need not be disintegrative. This should be a clear principle of all conferencing programs.

Facilitators responsible for running the conference forum must ensure that it provides a safe and supportive environment for all parties including victims, offenders and their respective supporters. This safe environment must enable and encourage participants to join in the reparation of harm and to move toward healing rather than allowing the process to focus on punishment.

Program facilitators must also be proficient in their ability to recognize and understand both the ranges of possible emotional reactions, including anger, shame, and resentment and the point from which these emotions originate in the participants. The facilitators must take responsibility for allowing expressions of anger without permitting such reactions to impact negatively on the process. To clarify, for conferencing to continue as a valid alternative to a traditional hearing, there must be unwavering devotion on the part of the facilitator to the model, and to nurturing an ability to navigate tense situations. The facilitator must be able to identify and redirect and refocus negative accusations directed at the individual to something more positive.

There should also be an acceptance and an understanding developed in the volunteers of the use of shame and shaming in conferences. While clear training guidelines with respect to theoretical grounding in theory would be the ultimate and most important aspect, emphasis on the value of shame should be actively embraced by the community of volunteers responsible for enforcing the use of the conferencing model.

The key word in the above list of recommendations is *consistency*. There must be some measure of consistency in youth justice programming across Ontario under the Youth Criminal Justice Act. There is great potential in all restorative justice programming, but most notably in community justice conferencing for youth, communities, and for victims of crime. It has the potential to be a transformative justice in that it is a process that actively involves offenders, victims and communities in a positive resolution of a particular incident. Moreover, it might have the effect of profoundly changing the way a youth sees the world, or the way a victim sees him or herself. Theoretically, reintegrative shaming has the potential to help the youth walk away from what was really a mistake, knowing that he or she is still a respected member of a particular community. It has the negative potential, however, to do the very opposite. That being said, consistency in program administration, while it can alter the grassroots nature of community movements, would serve to ensure that the practice does not take on a life of its own. It ensures that due process would be served, and would have the effect of restraining unchecked tendencies among people to want to lynch wrongdoers in a public forum.²²²

²²² See generally Whitman, 1998.

BIBLIOGRAPHY

- Alfieri, A. V. (2002). Community Prosecutors. California Law Review, 90, 1465-1511.
- Bala, N. (2003). Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders. Alberta Law Review, 40(4), 991-1027.
- Bazemore, G. (1998). Restorative Justice and Earned Redemption: Communities, Victims and Offender Reintegration. The American Behavioral Scientist, 41(6), 768-813.
- Bazemore, G., and Umbreit M. (1995). Rethinking the Sentencing Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime. Crime and Delinquency, 41, 296-316.
- Blagg, H. (1997). A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia. British Journal of Criminology, 37(4) 481-501.
- Braithwaite, J. (1989). Crime, Shame and Reintegration. Cambridge: Cambridge University Press.
- Braithwaite, J., and Mugford, S. (1994). Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders. British Journal of Criminology, 34(2).
- Braithwaite, J. (1997). Conferencing and Plurality: Reply to Blagg. British Journal of Criminology, 37(4) 502-506.
- Braithwaite, J. (2000). Regulation, Crime, Freedom. Burlington: Ashgate.
- Braithwaite, J., & Strang, H. (2000). Connecting Philosophy and Practice. In H. Strang & J. Braithwaite (Eds.), Restorative Justice: Philosophy to Practice, (pp. 203-220). England: Ashgate.
- Canada. Law Commission of Canada. (2003). Transforming Relationships Through Participatory Justice. Ottawa: Law Commission of Canada.
- Canada. The Law Commission of Canada. (2003). Restorative Justice in Canada: Lessons Learned. Paper presented at Vancouver, March 8-9th, 2002: D. Cooley.
- Canada. Royal Canadian Mounted Police. (1998). Community Justice Forum: Canadian Resource Guide. Ottawa: Public Works and Government Services Canada.
- Crawford, A. (2000). Salient Themes Towards a Victim Perspective and the Limitations of Restorative Justice: Some Concluding Comments. In A. Crawford and J. Goodey (Eds.), Integrating a Victim Perspective within Criminal Justice: International Debates. Vermont: Ashgate Publishers.

- Cotterrell, R. (1999). Emile Durkheim: Law in a Moral Domain. Edinburgh, Edinburgh University Press.
- Durkheim, E. (1964). The Division of Labour in Society. New York. Free Press of Glenco.
- Estrada-Hollenbeck, M., (1996), Forgiving in the Face of Injustice: Victims' and Perpetrators' Perspectives. In B. Galaway & J. Hudson, (Eds.), Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.
- Galaway, B. & Hudson, J., (Eds.). (1996). Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.
- Gehm, J. (1996). Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation. In B. Galaway & J. Hudson, (Eds.), Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.
- Immarigeon, R.. (1996). Prison-Based Victim-Offender Reconciliation Programs. In B. Galaway & J. Hudson, (Eds.), Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.
- Kahan, D. (1996). What Do Alternative Sanctions Mean? University of Chicago Law Review, 63, 591-653.
- Kahan, D. (1999). The Secret Ambition of Deterrence. Harvard Law Review, 113(2), 413-500.
- Lamborn, L. (1975). Toward a Victim Orientation in Criminal Theory. In B. Galaway & J. Hudson (Eds.), Considering the Victim: Readings in Restitution and Victim Compensation. Illinois: Charles Thomas Publishers.
- LaPraire, C. (1995). Altering Course: New Directions in Criminal Justice-Sentencing Circles and Family Group Conferences. The Australian and New Zealand Journal of Criminology, 28.
- Leibrich, J. (1996). The Role of Shame in Going Straight. In B. Galaway & J. Hudson (Eds.), Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.
- Levrant, Sharon; Cullen, Francis T.; Fulton, Betsy; Wozniak, John F. (1999). Reconsidering Restorative Justice: The Corruption of Benevolence Revisited? Crime and Delinquency, 45(1) 3-27.
- Lilles, H. (2001). Circle Sentencing: Part of the Restorative Justice Continuum. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 161-182). Oxford: Hart Publishing.

Massaro, T., (1991). Shame, Culture and American Criminal Law. Michigan Law Review, 89, 1880-1944.

Maxwell, G. and Morris, A., (2001). Implementing Restorative Justice: What Works? In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 267-282). Oxford: Hart Publishing.

Maxwell, G. and Morris, A. (2001). Family Group Conferencing and Reoffending. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 243-266). Oxford: Hart Publishing.

McCold, P. (2001). Primary Restorative Justice Practices. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 43-55). Oxford: Hart Publishing.

Mesmer, H. (1990). Reducing the Conflict: An Analysis of Victim-Offender Mediation as an Interactive Process. In B. Galaway & J. Hudson (Eds.), Criminal Justice, Restitution and Reconciliation. Monsey: Willow Tree Press.

Milanovik, D. (1988). A Primer in the Sociology of Law. Harrow & Heston Publishers: New York.

Miller, S., & Blackler, J. (2000). Restorative Justice: Retribution, Confession and Shame. In H. Strang & J. Braithwaite (Eds.), Restorative Justice: Philosophy to Practice, (pp. 77-92). England: Ashgate.

Morris, A., & Maxwell G. (2000). The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potentials, and Pitfalls of Restorative Justice. In A. Crawford & J. Goodey (Eds.), Integrating a Victim Perspective Within Criminal Justice: International Debates, (pp. 207-227). Vermont: Ashgate.

Morris, A., & Maxwell, G. (Eds.). (2001). Restorative Justice for Juveniles: Conferencing, Mediation and Circles. Oxford: Hart Publishing.

Morris, A., & Young, W. (2000). Reforming Criminal Justice: The Potential of Restorative Justice. In H. Strang & J. Braithwaite (Eds.), Restorative Justice: Philosophy to Practice, (pp. 11-32). England: Dartmouth.

Netzig, L. & Trenczek, T. (1996). Restorative Justice as Participation: Theory, Law, Experience and Research. In B. Galaway & J. Hudson, (Eds.), Restorative Justice: International Perspectives. Monsey: Criminal Justice Press.

Ontario. Ministry of the Attorney General. (Nov. 1996). Civil Justice Review: Supplemental and Final Report. Ontario Court of Justice.

Ontario, Ministry of the Attorney General. (1998). Youth Justice Committees Toronto: Ministry of the Attorney General.

Pate, K. (1990). Victim-Offender Reconciliation Programs in Canada. In B. Galaway & J. Hudson (Eds.), Criminal Justice, Restitution and Reconciliation. Monsey: Willow Tree Press.

Rowley, M.S. (1990). Recidivism of Juvenile Offenders in a Diversion Restitution Program (compared to a matched group of offenders processed through court). In Galaway, Burt and Joe Hudson (Eds.), Criminal Justice, Restitution, and Reconciliation, (pp. 217-227). New York: Monsey.

Sessar, K. (1990). Tertiary Victimization: A Case of the Politically Abused Crime Victims. In B. Galaway & J. Hudson (Eds.), Criminal Justice, Restitution and Reconciliation. Monsey: Willow Tree Press.

Skelton, A. and Frank, C. (2001). Conferencing in South Africa: Returning to our Future. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 103-120). Oxford: Hart Publishing.

Strang, H., & Braithwaite, J. (Eds.). (2002). Restorative Justice and Family Violence. Cambridge: Cambridge University Press.

Strang, H., & Braithwaite, J. (Eds.), (2000), Restorative Justice: Philosophy to Practice. England: Dartmouth.

Strang, H. (2001). Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 183-194). Oxford: Hart Publishing.

Stuart, B. (1996). Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System. International Journal of Comparative and Applied Criminal Justice, 20(2) 291-309.

Umbriet, M. (2001). Introduction: Restorative Justice Through Victim Offender Mediation. The Handbook of Victim Offender Mediation. San Francisco: Jossey-Bass.

Unknown Research Note Author. (2003). Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law. Harvard Law Review 116.

Umbriet, M. S., Coates, R., B., & Vos, B. (2001). Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation Practice and Research. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 121-143). Oxford: Hart Publishing.

Van Ness, D. (1990). Restorative Justice. In B. Galaway & J. Hudson (Eds.), Criminal Justice, Restitution and Reconciliation. Monsey: Willow Tree Press.

Walgrave, L. (2000). Extending the Victim Perspective Towards a Systemic Restorative Justice Alternative. In A. Crawford & J. Goodey (Eds.), Integrating a Victim Perspective within Criminal Justice: International Debates. Vermont: Ashgate Publishing Co.

Whitman, J. Q. (1998). What is Wrong with Inflicting Shame Sanctions? The Yale Law Journal, 107.

Wright, B. (1975). What About the Victims? In B. Galaway & J. Hudson (Eds.), Considering the Victim: Readings in Restitution and Victim Compensation. Illinois: Charles Thomas Publishers.

Young, R. (2001). Just Cops Doing "Shameful" Business? Police-led Restorative Justice and the Lessons of Research. In A. Morris & G. Maxwell (Eds.), Restorative Justice for Juveniles: Conferencing, Mediation and Circles (pp. 195-226). Oxford: Hart Publishing.

Zehr, H. (1990). Changing Lenses. Waterloo: Herald Press.

Zehr, H. (1995). A Restorative Lens. In The Canadian Criminal Justice System. (pp. 521-546). Toronto: Canadian Scholars Press.

INTERNET RESOURCES

Church Council on Justice and Corrections web-site address: www.ccjc.ca.

Canada's Young Offenders Act: www.parl.gc.ca

Canada's Youth Criminal Justice Act: www.parl.gc.ca

Ottawa Youth Services Bureau web-site address: www.ysb.on.ca.

Real Justice Information:

http://www.restorativejustice.org/rj3/Leading_Edge/TedWachtel.htm

Supreme Court of Canada (Excerpt). "Application of s. 718.2(e) of the Criminal Code: R. v. Gladue." Justice as Healing Vol. 4, No. 2 (Summer 1999). On-line Journal: www.usask.ca/nativelaw/jah.html.

Appendix I
Research/Personal Interview Guide

- 1) Please describe your educational background, including any training or volunteer experience within the field of restorative justice.
- 2) Can you briefly describe the position in which you are currently employed?
- 3) How is it that you came to be involved with restorative justice? Was it something that interested you before you began working in the area, or did you come across it in your personal life first?
- 4) Why is restorative justice important to you?
- 5) In your opinion, do the traditional goals of criminal justice, that is, incapacitation, deterrence and rehabilitation, fit into restorative justice philosophy? How?
- 6) Do you personally believe that there a legitimate role for punishment in restorative justice? If so, in what circumstances and to what end?
- 7) How do you understand the term community in a restorative context; please explain.
- 8) How important is the community to restorative justice processes, in your view?
- 9) What does the term *reintegrative shaming* mean to you? Does it represent something positive, or negative?
- 10) How familiar are you with the theoretical work of John Braithwaite, or with the New Zealand experience of reintegrative shaming?
- 11) Please describe what form reintegrative shaming takes in the program with which you are involved. Give examples.
- 12) What purpose does shaming serve from your point of view? Does it serve an expressive, educative, or moral purpose?
- 13) What is your stance on issuing shame sanctions as part of restitution agreements? Is this something your program does?
- 14) In your opinion, should reintegrative shaming within the context of restorative justice, be considered a positive reaction to criminal behaviour?
- 15) In your experience, how effective is restorative justice? How effective is the shaming component? How do you personally measure effectiveness?
- 16) In your opinion, what is the role of the community in the reintegrative shaming ceremony?

- 17) Why do you think people get involved in community justice?
- 18) Have you yourself ever been a victim of crime? If so, did this event have an impact on your decision to volunteer in this capacity?

Appendix II
Example of a Conference
Ottawa Youth Justice Committee

Conferencing by the model outlined in this thesis is done according to the script developed by the RCMP for the Community Justice Forum. The following is an example of a conference that took place in Ottawa in January of 2004.

There was no victim present, but instead a community representative who in this case actually was part of the justice committee. Also in attendance were the forum facilitator, the young offender and his father.

As per the script, the facilitator introduced the participants, and as there was no advance warning that the victim would in fact not be present, the individual originally designated as the co-facilitator was asked to switch roles and take on that of the “victim,” or community representative, because she had had direct communication with the victim in the case.

The facts of the case were as follows. The youth in question had, with an acquaintance, on the evening of July 1st 2003, stopped at a gas station in south Ottawa. The youth in question got out of the vehicle and proceeded to smash the window surrounding the attendant on duty and grabbed three packages of cigarettes through the broken pane. A taxi driver, who also happened to be a relative of the owner of the gas station passed by as the incident was occurring and phoned the police. A cruiser finally caught up with the youths in question about one hour later. The youth was brought down to the Elgin Street Police station, where he was placed in a cell for eleven hours. Once released, he was informed that his case, if he were willing to accept responsibility, could be heard extra-judicially, meaning he would not have to go to court. He was informed

that his cohort case, because of his age would be seen in court. The youth agreed to the extra-judicial route and awaited a call from the Ottawa Youth Justice Committee.

The facilitator introduced the parties and their relationships to the incident, and established his role as the facilitator. He then explained that the purpose of the form was to arrive at acceptable restitution and restoration for the victim, who while he did not show up, was eligible and rightfully entitled to some form of compensation for the harm caused by the youth in question. He then asked the offender to relate his story.

The offender at first was reluctant to expand on any details and tended to answer as curtly as possible, despite the open nature of the questioning. He asked questions such as "How did you come to be involved?" and "Could you share with us what you were feeling at the time of the incident?" He also asked the offender to think about all those affected by the incident. The facilitator explained that he himself could think of fourteen.

The facilitator then turned the floor over to the victim, otherwise known as the community representative, who described how the victim had suffered emotionally, physically and financially as a result of the offenders' actions. In this case, the victim was not concerned about restitution because the total loss did not exceed Fifty dollars. The victim, in the originally intake had expressed that it was the cost to him personally in terms of time and aggravation which were his chief complaints. He also wanted to know if this was the same kid who did this every couple of months, because it happens so frequently in the same manner.

The facilitator then turned the floor to the offenders' supporter. If victim support had been present, their input would have followed the victims' story. In this case, the lone supporter was the offenders' father, who spoke for the offenders' mother, and siblings.

He related how the whole family has suffered and how they have been affected by the offenders' behaviour. He transmitted the feelings of shame that he and his whole family felt about his actions. He also spoke very highly of his other four sons' who he claimed would never have done such a thing. He cried while relating these messages to his son. He used phrases such as "What you have done," and asked questions that began with "Why would you..."

The facilitator then turned the discussion to what has happened since the incident occurred. At this point, the offender and his father talked up the actions that the youth has taken, including working as a ceramic tile layer. The youth also spoke of finishing high school with the aim to go into engineering the following year. With an aim to end the conference, the facilitator asked the offender if there were anything else he'd like to say. He apologized, and said that he had learned from his mistake, and promised never to do anything like that again. He did appear to have been affected, and to have felt feeling of shame. At one point he mentioned that he did feel ashamed for what he had done. Physically, his posture denoted defeat, and he would not look anyone around the table in the eyes.

After a long silence, the facilitator then asked the offender what he believed would be sufficient restitution. He was visibly shocked by this question, and responded that fifty hours of community service would probably suffice. The participants agreed that in addition to a written letter of apology, that fifty-dollars would be restitution enough to cover the financial losses experienced by the victim. The co-facilitator who had functioned as the community representative wrote up the agreement, which included a formal written apology that was to be hand delivered by the facilitator to the victim,

plus fifty-dollars for compensation. During this time the offender, his father, and both facilitators interacted in a friendly manner and partook in some juice and cookies. This is the reintegration part of the ceremony. Following the refreshments, both the facilitator and co-facilitator, as well as the youth and his father all signed the agreement, at which point the youth was free to go with his father.

Following the conference a debriefing occurred between the facilitators, and it was agreed that despite the fact that the victim was absent, the conference was successful. It lasted from roughly 06:30pm until just after 08:15pm, which is relative for other conferences in the Ottawa Youth Justice Committee. It was deemed successful because it ended with a signed agreement, and with a youth that appeared to have been truly remorseful, and willing to take responsibility for the harm that he had caused for his victim. Furthermore, in this case the shaming component was successful because of the facilitator's experience with communication techniques, and was able to transmit positive messages while using communication techniques that were aimed at shaming the act, and not the offender.