

# Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System

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## I. INTRODUCTION

Restorative justice is a phrase that is known only in small, concentrated pockets of the United States and other parts of the world. It is well known in alternative dispute resolution circles and in juvenile courts.<sup>1</sup> For a growing number of legal scholars, it is a source of study and debate.<sup>2</sup> To the general American public and a large part of the legal world, however, it is still an enigma.

Restorative justice is not easily defined,<sup>3</sup> which is why efforts to educate the public about it and its benefits require strategic planning.<sup>4</sup> Howard Zehr, one of the premier scholars of restorative justice, has offered one definition: “Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in

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1. See *infra* Part II.B.

2. See *infra* note 14 and accompanying text.

3. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 36 (2002). Zehr states: “Even though there is general agreement on the basic outlines of restorative justice, those in the field have been unable to come to a consensus on its specific meaning.” *Id.*

4. The Missouri Coalition for Restorative Justice is geared toward increasing public awareness of restorative justice in eastern Missouri. Center for Women in Transition, Programs & Services, [http://www.cwitstl.org/programs\\_services/restorative\\_justice.html](http://www.cwitstl.org/programs_services/restorative_justice.html) (last visited June 11, 2007). Organizations like this exist in other states as well. See, e.g., Restorative Justice Online, <http://www.restorativejustice.org> (last visited Mar. 27, 2007) (follow “RJ Around the World” hyperlink); U.S. Dep’t of Justice, Online Restorative Justice Notebook, <http://www.ojp.usdoj.gov/nij/rest-just/> (last visited Mar. 27, 2007).

order to heal and put things as right as possible.”<sup>5</sup> In order for that definition to provide any illumination on the subject it is necessary to understand the underlying principles of restorative justice. The many implications and nuances of restorative justice are complex,<sup>6</sup> but Zehr’s attempted explanation is a first step toward framing the values that govern restorative justice.

Restorative justice has a place in all forms of human interaction in which people feel as though they have been wronged, but this Note is concerned with criminal justice. Restorative justice is needed in the United States today because restorative justice is not the normal course of action in America.<sup>7</sup> While it is most certainly not a panacea for all that ails the current criminal justice system,<sup>8</sup> there is

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5. ZEHR, *supra* note 3, at 37. Erik Luna presents four different definitions that have been proffered by scholars:

Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.

Restorative justice is concerned with the broader relationships between offenders, victims, and communities. All parties are involved in the process of settling the offense and reconciliation. . . . [T]he key focus [of the crime] is on the damage and injury done to victims and communities and each is seen as having a role to play in responding to the criminal act. . . .

Restorative justice is a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each others’ backgrounds, and to collectively reach agreement on a “penalty” or “restorative justice sanction.” Restorative justice returns the criminal conflict back to the victims and offenders. It empowers them to address sanctioning concerns together.

Crime is a violation of people and relationships. It creates obligations to make things right. [Restorative] justice involves the victim, the offender, and the community in search for solutions which promote repair, reconciliation, and reassurance.

Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 228 (third alteration in original).

6. See ZEHR, *supra* note 3, at 36. Zehr discusses the concerns restorative justice advocates have with penning one specific definition: “Some of us question the wisdom or usefulness of such a definition. While we recognize the need for principles and benchmarks, we worry about the arrogance and finality of establishing a rigid meaning.” *Id.*

7. In everyday human interaction, the common response when one person has wronged another is for the one who committed the wrong to acknowledge his or her wrongdoing, apologize, and seek to make it right with the person who was wronged. However, when criminal, and even civil, liability becomes a part of the equation, such acknowledgment could have serious legal repercussions. See discussion *infra* note 44.

8. ZEHR, *supra* note 3, at 12 (“Restorative justice is by no means an answer to all

essentially something for everyone along the path of restorative justice.<sup>9</sup>

Victims have the chance to see their offenders, to tell them what effect the offense has had on the victim's well-being, to receive an apology for what has happened, and to exact some kind of reparation for the harm that they have suffered.<sup>10</sup> In addition to victims,

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situations. Nor is it clear that it should replace the legal system, even in an ideal world.”). Zehr describes the limits of the concept of restorative justice. *Id.* at 8–13. He explains that “[r]estorative justice is not primarily about forgiveness or reconciliation[,] . . . mediation[,] . . . designed to reduce recidivism or repeating offenses[,] . . . a particular program or a blueprint[,] . . . intended for comparatively minor offenses or for first-time offenders[,] . . . a new or North American development[,] . . . necessarily an alternative to prison[,] . . . [or] necessarily the opposite of retribution.” *Id.* at 8–13. Given such restrictions on the concept of restorative justice, it is easy to see why there is no one definition for it. Instead, talking about restorative justice means explaining its principles along with clarifying what it is not.

9. Restorative justice is most commonly touted as a victims' rights philosophy. See Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 720 (2000) (“[R]estorative justice is the most hopeful, least cynical, and least co-opted aspect of the victims' right [sic] movement.”). While the traditional justice system rarely takes into account the impact on or the needs of the victim, restorative justice gives the victim an essential role in the resolution of the problem. See Daniel W. Van Ness, *Restorative Justice and International Human Rights*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 17, 24 (Burt Galaway & Joe Hudson eds., 1996); Nancy Lucas, Note, *Restitution, Rehabilitation, Prevention, and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders*, 29 HOFSTRA L. REV. 1365, 1382–83 (2001) (“There has been an increasing realization that, in handing over their disputes to the state, victims have been left out of the process. . . . Ultimately, victim-offender mediation gives victims a greater sense of control over circumstances that ordinarily would leave them feeling powerless and vulnerable.”); see also ZEHR, *supra* note 3, at 14–15 (identifying the four classes of victims' needs that the criminal justice system neglects: “information,” “truth-telling,” “empowerment,” and “restitution or vindication”).

10. ZEHR, *supra* note 3, at 14–15. Zehr details the importance for victims of telling one's story:

An important element in healing or transcending the experience of crime is an opportunity to tell the story of what happened. Indeed, it is often important for a victim to be able to retell this many times. . . . [I]t is important for victims to tell their stories to the ones who caused the harm and to have them understand the impact of their actions.

*Id.* For victims, as Zehr asserts, apologies supply a basic need: “Apology may . . . contribute to [the] need to have one's harm recognized.” *Id.* at 15. The gains for victims from receiving some kind of reparation can be two-fold:

Restitution by offenders is often important to victims, sometimes because of the actual losses, but just as importantly, because of the symbolic recognition restitution implies. When an offender makes an effort to make right the harm, even if only partially, it is a way of saying “I am taking responsibility, and you are not to blame.”

*Id.*

communities also benefit from restorative justice. It increases safety and helps members of the community (including family members of both the offender and the victim, friends, neighbors, and merely interested people within the community where the offense took place) feel as if they have control over their surroundings.<sup>11</sup> Finally, the benefits are available to offenders as well. Restorative justice recognizes that offenders also have needs that are not adequately served by the criminal justice system.<sup>12</sup> These are just a few of the benefits of restorative justice.<sup>13</sup>

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11. Members of the community serve a binary role. As indirect victims of crime, community members are even more left out of the criminal justice process than direct victims. ZEHR, *supra* note 3, at 17. Zehr writes that “[c]ommunities . . . should be considered stakeholders as secondary victims.” *Id.*; see Luna, *supra* note 5, at 230 (when an offender commits a crime, “[t]he offender has also violated the relationship he has with the community at large, undermining the sense of security held by community members when leading their daily lives.”). As protectors of peace, the community can help facilitate healing for both the victim and the offender by assessing and attending to the needs of both parties. See ZEHR, *supra* note 3, at 18 (“Communities need from justice: . . . [e]ncouragement to take on their obligations for the welfare of their members, including victims and offenders, and to foster the conditions that promote healthy communities.”).

12. *Id.* at 16–17. Zehr lists four categories of needs that restorative justice addresses:

Offenders need from justice:

1. Accountability that
  - addresses the resulting harms,
  - encourages empathy and responsibility,
  - and transforms shame.
2. Encouragement to experience personal transformation, including
  - healing for the harms that contributed to their offending behavior,
  - opportunities for treatment for addictions and/or other problems,
  - [and] enhancement of personal competencies.
3. Encouragement and support for integration into the community.
4. For some, at least temporary restraint.

*Id.* at 17 (footnotes omitted).

Accountability is lacking in the criminal justice system, where “[o]ffenders are discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways.” *Id.* at 16. The criminal justice paradigm of punishment ignores real accountability and the benefits that come from it. *Id.* Zehr explains how restorative justice picks up where retributive justice stops: “Restorative justice has brought an awareness of the limits and negative byproducts of punishment. Beyond that, however, it has argued that punishment is not real accountability. Real accountability involves facing up to what one has done.” *Id.*; see Lucas, *supra* note 9, at 1371 (“[R]estorative justice inherently builds on an

If everything about restorative justice was beneficial, legal scholars and criminal justice practitioners would probably be spending less time writing about it and more time implementing it. However, restorative justice has its critics, and among their criticisms is the fear that restorative justice will run roughshod over offenders' constitutional rights.<sup>14</sup>

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offender's positive qualities and abilities, rather than only on his offense, and enhances offender accountability and an understanding of the consequences of criminal behavior.”).

Aside from accountability, restorative justice provides for other needs of offenders. Criminal justice rarely takes into account what might be driving an offender to commit the actions he does, and even when it is taken into account it merely serves as a defense against accountability of the offender. Examples include the extreme emotional disturbance and insanity defenses. Restorative justice recognizes the need to help the offender heal from any harms that might have “contributed to their offending behavior.” ZEHR, *supra* note 3, at 17. The understanding and healing of personal harms is one piece of the greater need of personal transformation. *Id.* Other elements of that need include “opportunities for treatment for addictions and/or other problems” and “enhancement of personal competencies.” *Id.*

13. The benefits of restorative justice are numerous. One benefit in particular that scholars have observed about restorative justice is its ability to reduce recidivism. *See* Lucas, *supra* note 9, at 1375 (“Assessments of [victim-offender mediation] programs reveal that juvenile offenders who go through the mediation process tend to commit fewer and less serious crimes than offenders who are dealt with through standard procedures.”); *see also* Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 LAW & CONTEMP. PROBS., Autumn 2004, at 59, 83 (discussing the Georgia Justice Project and its role in reducing recidivism over a period of four years); William R. Nugent et al., *Participation in Victim-Offender Mediation Reduces Recidivism*, VOMA CONNECTIONS, Summer 1999, at 1, 1, available at <http://www.voma.org/docs/connect3.pdf> (summarizing findings from the evaluation of four studies that show a reduction in recidivism rates for juvenile offenders who participate in victim-offender mediation); DONALD J. SCHMID, RESTORATIVE JUSTICE IN NEW ZEALAND: A MODEL FOR U.S. CRIMINAL JUSTICE 34 (2001), available at <http://www.fulbright.org.nz/voices/axford/docs/schmidd.pdf> (“Research over the past several years indicate [sic] significant potential for restorative justice programs to reduce recidivism.”). The reduction of recidivism benefits everyone involved in, or affected by, the commission of crime. Victims benefit by having the peace of knowing the offender will not come after them again. By the same token, communities can also have peace in knowing that another criminal on the street has become a contributing member of the community. Perhaps the party who benefits the most from reduced recidivism is the offender himself. Knowing that he can control his actions and exercising that control has the potential to give him more power than offending ever did: “[Restorative justice] involves offenders directly in deciding how to make amends for their crimes, rather than relegating them to being ‘the passive objects of punishment,’ thereby more effectively internalizing the costs and effects of their actions.” Lucas, *supra* note 9, at 1371–72.

14. Other criticisms leveled by “liberal, feminist, and critical race critics” are:

[T]hat the informality of typical restorative justice programs can . . . reinforce pre-existing subordinating relationships, insidiously enlarge the reach of the state, dangerously reduce the protection of the state, reproduce inequality of results, and obscure systematic contexts and causes for the offense. Rather than healing the victim

Part I of this Note explores the history and underlying principles of restorative justice. Part II will detail the various due process criticisms that have been leveled at restorative justice. Part III discusses New Zealand's due process system and how it has been able to successfully implement restorative justice in conjunction with due process. Part IV analyzes due process concerns in the United States, and how restorative justice can coexist with the Constitution. Part V contends that the benefits of restorative justice justify the minimal effort required to implement it.

## II. THE HISTORY AND PRINCIPLES OF RESTORATIVE JUSTICE

### *A. Restorative Beginnings*

The beginnings of restorative justice in the 1970s were humble. A small number of programs existed in the United States and Canada.<sup>15</sup> The first noted use of restorative justice in modern society occurred in Ontario in 1974.<sup>16</sup> However, the history of restorative justice extends further back than its modern inception in the 1970s. The underlying principles of what is called restorative justice were present in early civilizations all over the globe.<sup>17</sup>

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as promised, restorative justice processes can pressure victims to forgive their attackers too easily, causing further victimization, including violence.

Howarth, *supra* note 9, at 724 (footnotes omitted).

15. ZEHR, *supra* note 3, at 42. Zehr notes that at its advent in the United States and Canada, "the concept . . . of restorative justice emerged during the 1970s and '80s . . . with a practice that was then called the Victim Offender Reconciliation Program (VORP)." *Id.*; see also Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1257-58 (1994) (detailing the beginning of restorative justice programs in the United States, such as the Minneapolis Restitution Center).

16. Brown, *supra* note 15, at 1257-58. The perceived birth of victim-offender mediation is detailed in a case that occurred in Kitchener, Ontario:

[T]wo young men . . . vandalized the property of twenty-two people . . . They pled guilty to twenty-two charges. The offenders did not pay restitution to the court clerk's office, however. Instead, in an experiment jointly administered by the probation department's volunteer program and the Mennonite Central Committee, the two young offenders met with each victim. . . . Within six months, the young men had fulfilled their restitution obligations in full.

*Id.* (footnote omitted).

17. The Maori of New Zealand and the ancient Celtic traditions of Ireland are among some of the sources of early restorative justice theory. See Lucas, *supra* note 9, at 1370 n.30

(discussing the history of restorative justice in Maori and Celtic traditions).

Before Navajo courts took on a form similar to the American state and federal systems, disputes in the Navajo community followed a more restorative approach. See generally Tom Tso, *The Process of Decision Making in Tribal Courts: A Navajo Jurist's Perspective*, in *NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE* 29 (Marianne O. Nielsen & James W. Zion eds., 2005). Tso ascribes the utility of restorative practices to the way that the Navajos lived: "When people live in groups or communities, they develop rules or guidelines by which the affairs of the group may proceed in an orderly fashion and the peace and harmony of the group may be maintained." *Id.* at 30. Oral history demonstrates that a system of leadership existed with one of the functions of the leaders being dispute resolution which followed from their roles as givers of advice: "The people chose the headmen from among those who possessed the necessary qualities. The headmen needed to be eloquent and persuasive, since they exerted power by persuasion rather than coercion. Teaching ethics and encouraging the people to live in peace and harmony were emphasized." *Id.* The customary way to resolve conflicts arising from criminal acts was to go to the "headmen," who would resolve matters in a way that would be considered family group conferencing today:

[T]he headman would meet with the wrongdoer, his or her family, the victim, and the victim's family to discuss how to handle the matter. The discussion usually involved two issues: how to compensate the victim or the victim's family for the wrong and how to deal with the wrongdoer. The discussion continued until everyone was in agreement as to what should be done.

*Id.*

The Navajo method of resolving conflict persisted until 1868, when the United States federal government began dictating the structure of the court system. *Id.* at 31. Although the Navajos "were able to build upon concepts that were already present in [their] culture" in implementing these changes, Tso regrets that the value of the Navajo method of solving disputes was overlooked until only recently:

Anglo judicial systems now pay a great deal of attention to alternative forms of dispute resolution. Before 1868 the Navajos settled disputes by mediation. Today our peacemaker courts are studied by many people and governments. Anglo justice systems are now interested in compensating victims of crime and searching for ways other than imprisonment to deal with criminal offenders. Before 1868 the Navajos did this. . . . We could have taught the Anglos these things 150 years ago.

*Id.* (footnote omitted).

The notion of *ubuntu* characterizes the historical relevance of restorative justice to South Africa. Ann Skelton & Cheryl Frank, *Conferencing in South Africa: Returning to Our Future*, in *RESTORATIVE JUSTICE FOR JUVENILES* 103, 104 (Allison Morris & Gabrielle Maxwell eds., 2001). The African worldview "embodies ideas about the interconnectedness of people to each other, the importance of the family group over the individual, and the value of benevolence towards [sic] all others in the community." *Id.* Under *ubuntu*, community problems are resolved with a focus on "reconciliation, restoration and harmony." *Id.* The African custom, still practiced in South African rural communities, proceeded by having elders "preside over the resolution of problems experienced by members of the community." *Id.* Resolution was achieved by focusing on "problems rather than offences," and the elders made decisions after hearing both sides of the issue. *Id.* Those decisions usually included an order of reparation to the victim. *Id.* It was the focus on resolving the problem and compensating victims that made these practices restorative in nature. *Id.* at 104–05.

### *B. Principles and Models of Restorative Justice*

The various forms taken by restorative justice provide insight into its specific principles. Zehr identifies three basic principles that guide restorative justice: “Crime is a violation of people and of interpersonal relationships. Violations create obligations. The central obligation is to put right the wrongs.”<sup>18</sup> These very broad principles inform state governments and agencies, as well as private programs, in formulating restorative processes. They are usually encountered in a setting that includes the offender, the victim, and the community affected by the crime.<sup>19</sup>

The oldest and most common practice<sup>20</sup> of restorative justice is the victim-offender conference, often called victim-offender mediation.<sup>21</sup> This process involves bringing the victim and the offender together to resolve their individual issues in reference to the crime committed.<sup>22</sup> The process is ideally a healing one<sup>23</sup> in which

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18. ZEHR, *supra* note 3, at 19. Zehr expounds upon these principles by acknowledging that all people are “interconnected” and that crime “represents a wound in the community.” *Id.* at 19–20. These principles are juxtaposed with assumed principles of criminal justice, which are “[c]rime is a violation of the law and the state. Violations create guilt. Justice requires the state to determine blame . . . and impose pain . . . .” *Id.* at 21.

19. *Id.* at 27. Zehr explains:

The key stakeholders, of course, are the immediate victims and offenders. Members of the community may be directly affected and thus should also be considered immediate stakeholders. . . . Restorative justice has tended to focus on the micro-communities of place or relationships which are directly affected by an offense but are often neglected by “state justice.”

*Id.* at 27–28.

20. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 673 (2005) (“Of all the restorative justice processes, victim-offender mediation (VOM) has been in operation the longest—over twenty years. It is the most utilized model in the United States, accounting for almost 400 programs.” (footnotes omitted)).

21. Other names this process can take on include “victim-offender reconciliation, victim-offender conferencing, victim-offender dialogue, victim-offender meeting, or community conferencing.” *Id.* The differences in titles can be accounted for by ideological differences as well as differences in how programs approach the process. *Id.* For instance, Zehr has taken issue with calling it “mediation,” while “reconciliation” has posed a problem for victims’ advocates because of the latent expectation that the victim must reconcile with the offender; whereas calling it “conferencing” has posed a problem in trying to get it to be covered by confidentiality statutes governing mediation. Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401, 405.

22. Zehr discusses this process further: “Upon referral, victims and offenders are worked



the victims have the “opportunity to meet offenders, discuss how the crime has impacted their lives, discuss the physical, emotional, and financial impact of the crime, and receive answers to lingering questions about the crime and the offender.”<sup>24</sup> The offender’s part in the process is one of being able to “explain what happened, take responsibility for his behavior, and make amends to both the victim and the community.”<sup>25</sup> It is important that both parties agree to participate in the process, for it cannot proceed successfully without consent from the key people involved.<sup>26</sup>

Another often used restorative practice is family group conferencing. This practice “enlarge[s] the circle of primary participants to include family members or other individuals significant to the parties directly involved.”<sup>27</sup> According to Mary Ellen Reimund, family group conferencing is mainly used in cases of juvenile offenses.<sup>28</sup> There are two basic forms: a scripted approach that utilizes specially trained facilitators like police officers, and an approach that is directed by a paid social service coordinator.<sup>29</sup> In family group conferences it is important to expand the community involved to include family members because of the influential role that family members play.<sup>30</sup> As in victim-offender mediation, the facilitator plays a neutral role in helping all the parties involved come up with a solution<sup>31</sup>; however, family group conferences go further than victim-offender mediation in that they move beyond the offense

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with individually. Then, upon their agreement to proceed, they are brought together in a meeting or conference. The meeting is put together and led by a trained facilitator who guides the process in a balanced manner.” ZEHR, *supra* note 3, at 47.

23. Zehr has identified three distinct goals of restorative process: alternative or diversionary, healing or therapeutic, and transitional. *Id.* at 52–54.

24. Reimund, *supra* note 20, at 674 (quotations omitted).

25. *Id.*

26. ZEHR, *supra* note 3, at 46.

27. *Id.* at 47–48.

28. Reimund, *supra* note 20, at 677 (“The vast majority of [family group conferencing] programs are limited to juvenile offenders.”).

29. ZEHR, *supra* note 3, at 48–49. The older model is the one more commonly utilized in New Zealand. *Id.*

30. *Id.*

31. *Id.* at 49 (“Like the mediator in a [victim-offender mediation], the coordinator of a [family group conference] must seek to be impartial, balancing the concerns and interests of both sides.”).

itself.<sup>32</sup> The plan that results from the family group conferences requires input from everyone in the conference, and “[t]he victim, the offender, or the police can each block an outcome if one of them is unsatisfied.”<sup>33</sup> Family group conferences expand upon the principles of restorative justice by including the family as representatives of the community affected by the crime.

A third manifestation of restorative justice is the circle approach.<sup>34</sup> Circles expand the list of involved participants even further than family group conferencing. In this program, in addition to the victim, offender, and families of the victims, other community members take part in the restorative process.<sup>35</sup> There is still a facilitator involved, but “discussions within the circle are often more wide-ranging than in other restorative justice models.”<sup>36</sup> Circle sentencing is in place in many communities, and Reimund argues that it is the “most restorative process available because it encompasses more of the restorative justice values than other processes.”<sup>37</sup>

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32. ZEHR, *supra* note 3, at 50. As Zehr explains, the family group conference is an integrated process:

Family group conferences . . . are not designed simply to allow for the expression of facts and feelings and to develop restitution agreements. Because they normally take the place of a court, they are charged with developing the entire plan for the offender that, in addition to reparations, includes elements of prevention and sometimes punishment.

*Id.*

33. *Id.*

34. *Id.* “Sentencing circles” are one kind of circle. *Id.* Other types of circles include “healing” circles, “workplace conflict” circles, and “community dialogue” circles. *Id.* Zehr describes the circle process as follows: “participants arrange themselves in a circle. They pass a ‘talking piece’ around the circle to assure that each person speaks, one at a time, in the order in which each is seated in the circle.” *Id.* at 51.

35. *Id.*

36. *Id.* The author goes on: “Participants may address situations in the community that are giving rise to the offense, the support needs of victims and offenders, the obligations that the community might have, community norms, or other related community issues.” *Id.*

37. Reimund, *supra* note 20, at 679. In support of her assertion that circles are the most restorative of all the restorative justice methods, Reimund discusses the “direct involvement” community members have “in determining which cases come to the circle.” *Id.*

### III. POSSIBLE DUE PROCESS VIOLATIONS IN RESTORATIVE JUSTICE

In several ways the Constitution seeks to make sure that citizens' due process rights are not violated when they are accused of a crime. The Fifth Amendment<sup>38</sup> provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."<sup>39</sup> In addition to this prohibition, which was extended to the states by the Fourteenth Amendment,<sup>40</sup> persons accused of crimes are afforded (by the Sixth Amendment<sup>41</sup>) the right to representation by counsel, and the right to a trial by jury.<sup>42</sup> In the current criminal justice system these rights are protected at every phase.<sup>43</sup> However, in a system that has not been refined, like restorative justice, this protection is less distinct.

#### *A. Self-Incrimination*

Restorative justice critics take issue with the way that restorative justice handles, or fails to handle, due process safeguards.<sup>44</sup> Because

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38. U.S. CONST. amend. V.

39. *Id.*

40. U.S. CONST. amend. XIV. The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.* § 1.

41. U.S. CONST. amend. VI.

42. *Id.* The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Id.*

43. "In a coercive procedure, all legal guarantees must be observed. In a traditional criminal justice procedure, safeguards like legality, due process, and proportionality are evident." Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 560 (2004).

44. See Brown, *supra* note 15, at 1288 (discussing the due process shortcomings of

restorative justice emphasizes acknowledgment of personal responsibility in the crime committed, it is inevitable that an admission of guilt will take place.<sup>45</sup> What is problematic about the acknowledgment of responsibility is its propensity to violate the due process right against self-incrimination.<sup>46</sup> In a post-adjudicatory stage this is not as problematic because the offender has already been found guilty. However, in the steps that occur prior to adjudication the need to address self-incrimination safeguards is greater.

Because there is always a chance that the restorative process may break down and that the offender will have to take a chance with the criminal justice system, what is said in the restorative justice process has the potential to be used against the offender in a later criminal proceeding. Self-incrimination is also problematic when offenders discuss unrelated crimes they have committed.<sup>47</sup> Even if the offense at issue is resolved in the restorative process, there is still the problem that statements made in the proceedings could be used against the offender in prosecutions for other crimes.

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restorative justice); *see also* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760 (2000) (“[B]ecause VOM pressures offenders to accept informal resolution of the charges against them and to waive representation by a lawyer, trial by jury, and the right to appeal, it would seem to stand on constitutionally questionable ground.”).

45. Brown, *supra* note 15, at 1290; *see* Reimund, *supra* note 20, at 685 (“The constitutional rights of a person accused of a crime and directed into a restorative process could be violated if she was not given any warning about rights against self-incrimination and then revealed information which later could be used against her in court.”).

46. Self-incrimination is just one of several problematic issues associated with admitting guilt. *See* Blackwell & Cunningham, *supra* note 13, at 69. The authors identify the source of self-incrimination problems:

[Literature in the restorative justice field that identifies a “victim” and “offender”] thus has excluded from the potential scope of restorative justice at least three categories of criminal defendants: (1) clearly innocent defendants who still need healing from the harm caused by accusation, arrest, incarceration and pretrial court procedures; (2) defendants whose legal guilt may be uncertain or unprovable [sic] and who may nonetheless recognize that their own bad decisions contributed to the situation leading to arrest; and (3) defendants who are prosecuted not in response to a complaint by an individual victim but rather by a regulatory state . . . .

*Id.* (footnotes omitted).

47. Reimund, *supra* note 20, at 686 (“[T]here have been instances where the offender has admitted committing crimes outside of the offense at issue during the restorative process. As a consequence, such information could potentially be used against the person in a subsequent prosecution.” (footnotes omitted)).

### *B. Right to Counsel*

Restorative justice, be it pre-adjudication or post-adjudication, also poses a problem for the right to counsel. Critics have acknowledged that restorative justice often leaves lawyers out and diminishes their role in the process.<sup>48</sup> Defense attorneys often see their role in advocating for clients as one of avoiding, or at least limiting, punishment.<sup>49</sup> The primary advice they give to clients is to deny guilt if possible.<sup>50</sup> However, this is difficult to achieve in restorative justice systems when the objective is for the offender to acknowledge responsibility.

The traditional role defense attorneys take can be an impediment to the restorative justice process.<sup>51</sup> They seem to discourage the very focus of restorative justice. Restorative programs exist that allow attorneys to be present, but their presence is usually not mandatory.<sup>52</sup> There are also programs in which attorneys are not present at all.<sup>53</sup> Essentially, an offender involved in restorative justice may be unable to receive the same kind of assistance of counsel that he would have received in the traditional criminal justice system.

### *C. Right to Trial*

Another detriment to due process rights that has been identified by critics regarding restorative justice is that it seems to circumvent the

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48. See, e.g., Blackwell & Cunningham, *supra* note 13, at 69 (“The apparent requirement that a defendant be found an ‘offender,’ either through confession or adjudication, also tends to exclude (or at least alienate) a key player in the criminal justice system, the defense attorney.”).

49. *Id.*

50. See *id.* (“[T]he defense lawyer is understandably reluctant for his or [her] client to enter into an encounter that requires admission of guilt without knowing in advance the likely sentencing consequences . . .”).

51. See Brown, *supra* note 15, at 1289 (“Indeed, some programs actively discourage counsel from attending because their focus on ‘rights’ is thought to obstruct the mediation process.”).

52. Telephone Interview with Shar Brinkley, Coordinator, Madison County Cmty. Justice, in Madison County, Ind. (July 28, 2005) (discussing the fact that the Madison City Community Justice Center gives offenders the “opportunity” to have a lawyer present).

53. Telephone Interview with Davi Mozie, Program Coordinator, Del. Ctr. for Justice, Adult Offender Servs., in Wilmington, Del. (July 28, 2005) (discussing fact that attorneys are not present at victim-offender mediations).

right to trial.<sup>54</sup> This becomes more of an issue either when the offender is not prepared to plead guilty, or when the offender is compelled to participate in a restorative justice program.<sup>55</sup> The procedural safeguards afforded by a formal court process, such as the rules of evidence, are rarely a part of restorative justice mediations and conferences.<sup>56</sup> A mandatory process, such as the reparative boards employed in Vermont,<sup>57</sup> provokes critics of restorative justice to regard it as a grave threat to due process<sup>58</sup> because the defendant

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54. See *infra* notes 55–61.

55. See Reimund, *supra* note 20, at 683–84. The author notes that, when “guilt is in dispute,” the “full array of procedural protections afforded by formal court processes are desired . . .” *Id.* She also discusses the importance of voluntary participation to the American Bar Association concerning VOM, because “[i]f an offender is compelled to participate in restorative processes, the concerns about due process are greater.” *Id.* at 684. When the coercion occurs pre-adjudication, due process problems are at their highest. If the defendant pleads guilty, “the question becomes whether due process was infringed upon in any greater degree in a restorative process than through plea bargaining.” *Id.*

56. See Brown, *supra* note 15, at 1288. Brown asserts:

Public processes can protect offenders through various safeguards: the right to counsel, judicial review to ensure offenders are informed and act voluntarily, rules of evidence that exclude irrelevant information from proceedings to determine guilt and punishment, and uniform sentencing schemes to make sure that punishment is reasonably related to the crime committed rather than being based upon the individual who committed it. Because victim-offender mediation stresses substantive outcomes rather than procedural regularity, it cannot protect offenders from unfairly subjective assessments of their culpability or from well-intentioned but unrestrained exercise of discretion by program administrators.

*Id.*

57. See VT. STAT. ANN. tit. 28, § 910 (Supp. 2006). The Vermont statute establishes, as a condition of probation, a restorative justice program that utilizes community reparative boards. The boards consist of members of the community that have been recommended by “nonprofit organizations or municipal entities.” *Id.* § 910(a). In addition to being responsible for the implementation of restorative justice programs, which determine how offenders will make reparation for their offenses, reparative boards are directed to “[e]ducate the public about, and promote community support for, the restorative justice program.” *Id.* § 910a(d)(2). For the history and underlying principles behind these enabling statutes, see Jan Peter Dembinski, *Restorative Justice: Vermont State Policy*, 29 VT. B.J. & L. DIG. 39 (2004), available at [http://www.vtbar.org/ezstatic/data/vtbar/journal/dec\\_2003/RestorativeJustice.pdf](http://www.vtbar.org/ezstatic/data/vtbar/journal/dec_2003/RestorativeJustice.pdf).

Vermont’s Community Justice Centers, which oversee such restorative justice programs as the reparative panels, are funded by the Department of Corrections. Jan Peter Dembinski, *Restorative Justice in Vermont: Part Two*, 30 VT. B.J. & L. DIG. 49, 50 (2004). Group conferencing can be used in cases involving “burglaries, simple assaults, neighbor disputes, and incidents of vandalism.” *Id.* at 52. For a more in-depth explanation of Vermont’s restorative justice system, see Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 67.

58. Telephone Interview with David C. Sleight, Partner, Sleight & Williams, in St.

may not receive adequate notice or be given the chance to make an informed decision.<sup>59</sup>

Even though the due process issues are lessened in a voluntary restorative justice process (when the offender willingly pleads guilty of his own accord), some critics have questioned just how voluntary such a process really is.<sup>60</sup> The underlying theory is that offering restorative justice as an alternative to incarceration is a gentler form of compulsion when the defendant feels as if his fate will be worse if he does not opt for the restorative route and it violates due process by its very nature of only appearing voluntary.<sup>61</sup>

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Johnsbury, Vt. (June 8, 2005). Sleight identifies as the problem with the mandatory reparative boards the lack of appealability and limits of the boards' rulings, which give them a broader power than a judge. *Id.* However, Vermont has recently implemented a pretrial diversion restorative justice program that affords offenders the opportunity to make a choice between going to court and participating in a restorative justice program. *Id.* Sleight finds this system unproblematic because participation does not appear on the offender's criminal record and offenders retain the ability to "bargain" for their sentence. *Id.*

59. *Id.*

60. See Brown, *supra* note 15, at 1264. Brown details the coercive nature of restorative justice programs:

Programs that conduct mediation early in the criminal process, when the offender still lacks information about the likely outcome of the case, can more effectively exploit the offender's fear of state punishment in order to secure the offender's cooperation. A VOM program appears to lack some of the state's coercive power, because the offender can refuse to mediate. But the offender's freedom to reject mediation can be constrained if the offender fears indirect punishment for the refusal to mediate (this could occur if the offender's failure to cooperate in mediation is taken into account at the time of sentencing). Even if the VOM program does not actively exercise coercive power, it can exploit the offender's fear of state coercion by scheduling mediation at a time when the offender's uncertainty is greatest.

*Id.* (footnotes omitted); see also Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 78 (1998) ("An innocent person, or a person with legal defenses, may admit responsibility and accept diversion in order to avoid the uncertainty of a trial. While this is not overt coercion, it raises due process concerns because it circumvents a legal procedure that might have resulted in acquittal."); Kate Warner, *Family Group Conferences and the Rights of the Offender*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 141, 142 (Christine Alder & Joy Wundersitz eds., 1994), available at <http://www.restorativejustice.org/articlesdb/articles/20> ("When admission of an offence is a prerequisite to participation in a diversionary program, there is inevitably an inducement to admit responsibility to avoid the uncertainty of a court outcome and to dispose of the matter as quickly as possible.").

61. Even advocates for restorative justice recognize the coercive possibilities of restorative justice:

[I]n reality there will be a certain level of coercion in most restorative processes, because the looming alternative (and predecessor) will usually be the traditional

### *D. Double Jeopardy*

Restorative justice is also problematic for critics because it potentially violates offenders' rights against double jeopardy.<sup>62</sup> The potential for this violation has been identified when there is a chance that the restorative justice proceedings are not successful, and therefore the case proceeds to trial.<sup>63</sup> One could argue that offenders who end up having to participate in both processes receive double the punishment for one offense.

### *E. Confidentiality*

Adding to the due process problems posed by restorative justice programs is the uncertainty of confidentiality. Restorative justice scholars acknowledge that an assurance of confidentiality in proceedings would do more to guard against self-incrimination and

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criminal justice system. It is coercion of the offender by the police that lands her in the criminal justice system, and thus in a restorative justice process such as victim-offender mediation, and it is a much higher level of coercion that probably awaits her as a default if she does not successfully complete such a program. A lesser level of coercion to successfully complete the program exists for the victim if he wishes to play a leading role in the outcome of the process.

Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 599 (2004). The trouble with coercion is also questioned: "Is any level of coercion problematic for a restorative justice rights model to be based on integrative power? Not necessarily, because outside pressures can sometimes work towards [sic] positive internal goals." *Id.*

62. See generally Ernest H. Schopler, Annotation, *Supreme Court's Views of Fifth Amendment's Double Jeopardy Clause Pertinent to or Applied in Federal Criminal Cases*, 50 L. Ed. 2d 830 (1978) (explaining the ramifications of the due process clause). Schopler writes:

While the Supreme Court has recognized that the double jeopardy clause is written in terms of potential or risk of trial and conviction and not in terms of peril of second punishment, the court has also declared that the purpose of the clause is to prohibit multiple punishment or repeated prosecutions for the same offense. The rationale underlying the clause, expressed by the court in varying language, is that the state with all its resources should not be allowed to subject a defendant to embarrassment, expense, and ordeal by repeated attempts to convict him for an alleged offense.

*Id.* at 836 (footnotes omitted).

63. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 103 (1999) (discussing critics' concerns about restorative justice constituting double jeopardy "when consensus cannot be reached at a conference and the matter therefore goes to court").



double jeopardy.<sup>64</sup> However, that assurance cannot always be given or guaranteed.<sup>65</sup> Therefore, scholars decry the lack of statutory guarantees of confidentiality in restorative justice programs.<sup>66</sup>

Mediation itself suffers from a lack of uniform mediation confidentiality statutes;<sup>67</sup> even when a statute exists, there is no consensus as to whether restorative justice can be classified as mediation.<sup>68</sup> In conventional mediation, the mediator requests that all parties agree to keep the content of their discussion confidential, sometimes even securing written confidentiality agreements.<sup>69</sup> However, such a confidentiality agreement within the victim-offender mediation setting could not block a subpoena when a statute does not afford protection. Without statutory guarantees the statements made in a restorative justice program could be used against the offender in court.<sup>70</sup>

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64. See Reimund, *supra* note 21, at 406 (discussing the lack of constitutional guarantees in victim-offender mediation).

65. See *id.* at 406. (“Of even greater concern in mediating criminal cases, is the risk an offender takes if confidentiality cannot be guaranteed and whether the defense bar will buy into restorative processes with that issue unsettled.”).

66. See Brown, *supra* note 15, at 1288 (“The confidentiality of mediation generally is a controversial issue, and absent a clear statutory privilege protecting the mediation, considerable information about it may become available to people and institutions outside the mediation.”). See generally Reimund, *supra* note 21, at 401 (discussing confidentiality in mediation).

67. See generally Philip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, 22 N. ILL. U. L. REV. 251 (2002) (discussing the variety of state statutes governing confidentiality in mediation and Congress’s efforts to encourage uniformity in the wording and governance of these statutes).

68. See Reimund, *supra* note 21, at 406 (“Since most confidentiality statutes do not specifically include VOM, a determination of whether they would receive protection under [mediation confidentiality statutes] could turn on the terminology used to describe the program.”).

69. Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest*, 1995 J. DISP. RESOL. 1, 10.

70. See Reimund, *supra* note 21, at 401. Reimund questions whether promises of confidentiality at the beginning of a victim-offender mediation could prove to be “false promises” when “the mediator receives a subpoena from the county prosecutor requiring her testimony in a criminal trial where the offender from her mediation has been charged” with other crimes. *Id.* at 401–02. Reimund is also concerned that an offender’s due process rights are in danger by the lack of confidentiality when faced with an offender’s prior crimes:

Because a victim offender meeting process encourages offenders to openly discuss their version [sic] of the criminal offense being mediated, admissions of prior wrongdoing beyond the current crime may be revealed as part of the story telling or as a result of the offender’s desire to “come clean.” Once the offender discloses that

#### IV. INTEGRATION OF RESTORATIVE PRINCIPLES AND DUE PROCESS PRINCIPLES IN NEW ZEALAND

##### *A. Restorative Justice Processes in New Zealand*

The implementation of restorative justice in New Zealand is so extensive that its practices often serve as a model for implementation in other countries.<sup>71</sup> Its success rate is known by restorative justice proponents throughout the world.<sup>72</sup> Because New Zealand's approach has been geared mostly toward juvenile offenders, the guidelines for a fair and efficient process are governed by the Children, Young Persons, and Their Families Act of 1989 ("1989 Act").<sup>73</sup>

The restorative justice practice of choice in New Zealand is the family group conference.<sup>74</sup> The 1989 Act ensures good faith participation by all parties in the family group conferences by "requir[ing] that written records of the decisions, recommendations and plans of family group conferences be prepared and collected."<sup>75</sup> The actual process of the family group conference is pretty

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information, what is the obligation of the mediator to report it? . . . There are two potential conflicts presented in the prior crimes debate. One deals with the obligation of the mediator to proactively disclose the information in the instant case, and the other has to do with the mediation communications being sought for subsequent prosecution . . .

*Id.* at 407 (footnotes omitted). In the area of future crimes, Reimund asserts that confidentiality can cause conflict with any duty to warn that may exist in the event of a serious threat of death or injury, and then calls for a distinction as to whether all crimes should be considered the same: "Should warnings and non-confidential status attach to imminent threats of serious crime or death only with less serious property crimes still being protected?" *Id.* at 408.

71. "New Zealand is . . . often represented as the 'beacon' country with the most far-reaching restorative justice system for juveniles." Walgrave, *supra* note 43, at 566; *see* Reimund, *supra* note 20, at 676-77 ("In 1989, New Zealand became the first country to adopt a fully restorative juvenile justice system using [family group conferencing] . . . A second model of [family group conferencing] is used in Australia, but it is based on ideas borrowed from the New Zealand model." (footnotes omitted)).

72. SCHMID, *supra* note 13, at 3. Schmid notes that New Zealand's processes have received "international acclaim" that established New Zealand as a "pioneering model of restorative justice." *Id.*

73. Children, Young Persons, and Their Families Act 1989, 1989 S.N.Z. No. 24. The origin of this act, interestingly enough, stems from "a growing concern that removal of children from their families was destabilizing and otherwise harmful." SCHMID, *supra* note 13, at 11.

74. ZEHR, *supra* note 3, at 48.

75. Van Ness & Nolan, *supra* note 60, at 64. The act mandates that these records be kept at the "district office closest to the location of the conference." *Id.* at 66.

straightforward: it involves a youth justice coordinator, the police, and, of course, the victim and offender.<sup>76</sup> One aspect of the family group conference in New Zealand that is beneficial is that valuable information is obtained about the offender and his reasons for committing the offense.<sup>77</sup>

New Zealand's juvenile offenders are not the only offenders that can take advantage of restorative justice. In the mid-1990s, pilot diversion programs for adults began operating.<sup>78</sup> As of 2000, New Zealand has been using family group conferences with adults.<sup>79</sup> For example, in Waitakere two groups joined to begin a pilot program for adults that extends the benefits of the youth program to adults.<sup>80</sup> Referrals to the program can be suggested by anyone involved in a criminal case.<sup>81</sup> Following approval by the court,<sup>82</sup> the administrator

76. The process begins when "a youth justice coordinator invites the victim of the criminal offense to meet with the offender and the offender's family." SCHMID, *supra* note 13, at 13. After a statement of the facts has been read by the police and admitted or denied by the offender, "the victim is asked to speak about the impact the offense has had on him/her." *Id.* Following the victim's statement, which could be given in person or by letter, "[t]he conference participants then discuss collectively . . . what should be done to repair the harm to the victim . . . and what the offender should do in order to be held accountable for the offense." *Id.* The offender then meets with his family "to discuss a suitable plan," and the group comes back together to negotiate the plan. *Id.* Once an agreement is reached, the justice coordinator records it in writing. *Id.* The plan will be presented to the court for approval if "criminal charges ha[ve] been presented in court." *Id.*

77. "Family group conferences in New Zealand, for example, have provided a greater understanding regarding why and how youth crime is committed." *Id.* at 37. The underlying factors that may be influencing young repeat offenders include cultural isolation or the experience of major trauma. *Id.* at 38. Institutions of the community play integral roles in this information-gathering process: "Using this information and a problem-solving or 'broken windows' approach, the youth aid police and the youth justice coordinator in Wellington worked with local schools and community groups to address several key causes and factors involved in the worst and most troublesome youth offending in Wellington." *Id.*

78. Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand*, in RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 257, 259 (Andrew von Hirsch et al. eds., 2003).

79. SCHMID, *supra* note 13, at 17.

80. *Id.* at 16. The Restorative Justice Trust, established in 1999, and the Methodist Mission Northern together established a pilot program using cases referred from the Waitakere District Court. *Id.*

81. *Id.* at 16-17.

82. There are four criteria for making a referral, and the court can approve or disapprove. *Id.* at 17. These criteria are: "there was a direct victim[,], the offense had a maximum sentence of at least two years imprisonment[,], the offender had admitted guilt[, and] there was essential agreement about the facts underlying the case." *Id.* These criteria are also satisfied in the youth family group conference programs. *Id.* at 13.

of the program appoints a facilitator whose job it is to contact the victim and offender, convene a conference between them and their supporters (including lawyers), and write a report to the court.<sup>83</sup> The report is non-binding, but the court may consider it when deciding the disposition of the case and imposing sentence.<sup>84</sup> This scheme “differ[s] from family group conferences in that restorative justice conferences are voluntary and only take place if both the victim and offender agree to participate.”<sup>85</sup> Another difference between this program and voluntary programs is that because judges have discretion in allowing the reports from the conferences to have a bearing on the sentence the adult form is “less likely to have a profound impact on the eventual sentence and [is] more centrally and specifically victim focused.”<sup>86</sup>

In addition to family group conferences, adult diversion programs employ community-oriented conferences. In Project Turnaround,<sup>87</sup> one of the pilot programs funded by the New Zealand Crime Prevention Unit, judges divert certain offenders to these programs upon their first appearance in court.<sup>88</sup> The characteristic “panel meeting” of Project Turnaround is modeled after the family group conference, but representatives of the community are also present.<sup>89</sup> Attendance by the offender at these panel meetings presents the

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83. *Id.* at 17.

84. *Id.* Three more schemes like this one are in existence in Auckland, Hamilton, and Dunedin. Morris & Maxwell, *supra* note 78, at 261.

85. *Id.*

86. *Id.*

87. For a description of Project Turnaround, see *id.* at 259–60. Te Whanau Awhina, a pilot program begun at the same time, operates in the same way as Project Turnaround in that the judge refers the case during a court hearing. *Id.* at 260. However, it is different in that the offenders referred to it are Maori, whereas the offenders in Project Turnaround are mostly of European origin. *Id.* In Te Whanau Awhina, the direct victims and the police do not attend. *Id.* Because the victims are rarely involved, the authors do not consider Te Whanau Awhina to be “fully consistent with restorative processes.” *Id.* Like Project Turnaround, there are community representatives and a discussion of the offense and its repercussions, as well as a focus on reintegrating the offender into the community and finding him employment. *Id.* However, unlike Project Turnaround, the case is “not necessarily diverted from further court appearances and sanctions.” *Id.*

88. *Id.* at 259.

89. SCHMID, *supra* note 13, at 18. The process operates in a similar way to the family group conference, featuring a discussion between the offender and the victim of the crime and why it was committed, followed by suggestions for dealing with the offense and a signed contract detailing the plan for resolving the issue. *Id.*

possibility that the offender will not have to appear in court anymore, and will have all evidence against him withdrawn.<sup>90</sup>

Another program for adult offenders employed in New Zealand is the Community Accountability Programme.<sup>91</sup> This program involves the victims and offenders in a way that is different from the previous programs. Instead of panel members, paid facilitators help victims and offenders make decisions about how to resolve their issues.<sup>92</sup> In the late 1990s, the Crime Prevention Unit funded the creation of more diversion programs utilizing community panels modeled after the first pilot programs.<sup>93</sup> “By July 2000, there were, in total, [ten] program[s] supported and administered by the Crime Prevention Unit.”<sup>94</sup>

### *B. Due Process in New Zealand*

New Zealand has no formal written constitution to mirror that of the United States Constitution, but New Zealanders have, through statutory and common law, the same rights afforded to United States citizens through the Fifth and Sixth Amendments. New Zealanders are entitled to representation by counsel,<sup>95</sup> trial by jury,<sup>96</sup> the right against self-incrimination,<sup>97</sup> and the right against double jeopardy.<sup>98</sup>

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90. Morris & Maxwell, *supra* note 78, at 259. The authors go on to state that this process is not a fully restorative one “where decisions are made by those who are most directly affected by the offending rather than by appointed representatives of the community.” *Id.* However, since “the plans decided at the meetings involve[] making amends to the victim and the community,” Project Turnaround “is consistent with a restorative justice approach.” *Id.* at 259–60.

91. *Id.* at 260–61. This program ended during its first year, but has since resumed operation. *Id.* at 261.

92. *Id.* at 260. The authors determined that, because of the greater control given to the victim and offender, this program was the most restorative of the three. *Id.*

93. *Id.* at 261.

94. *Id.*

95. Compare Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 23(1) (“Everyone who is arrested or who is detained under any enactment . . . [s]hall have the right to consult and instruct a lawyer without delay and to be informed of that right . . .”), and *id.* § 24(c) (denoting the same rights), with U.S. CONST. amend. V, and U.S. CONST. amend. VI.

96. Compare Bill of Rights Act 1990, § 24 (“Everyone who is charged with an offence . . . [s]hall have the right . . . to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months . . .”), with U.S. CONST. amend. VI.

97. Compare Bill of Rights Act 1990, § 25 (“Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: . . . [t]he right

Because these rights exist, the same due process concerns faced by United States offenders would be faced by New Zealand offenders; thus, the New Zealand model is all the more applicable to the United States.

New Zealand is able to preserve these rights and make restorative justice such an integral part of its justice system relatively easily. For instance, in the adult pilot programs, offenders first have to agree to the process.<sup>99</sup> This practice preserves the offender's right to trial because the offender is able to choose whether to go to trial or to participate in restorative justice.

Project Turnaround is exemplary in the way it presents the opportunity for the offender to have all charges against him dropped and all evidence withdrawn.<sup>100</sup> Although the offender must admit guilt in order to participate in this program,<sup>101</sup> his rights against self-incrimination are not compromised in the traditional sense. Because of the opportunity presented by successful participation in the program, admitting guilt in a restorative justice setting does not have the same legal repercussions that it has in a retributive setting. In essence, by admitting guilt and choosing to participate, the offender is not really "incriminating" himself because he comes out of the process with a clean legal slate.

In the event that the conference is unsuccessful, the Waitakere program serves as a model that preserves the right against self-incrimination. The report that results from the conference is not binding,<sup>102</sup> so while the judge may consider it, she does not have to abide by it. As such, any admission of guilt in the restorative process would not automatically be detrimental to the offender's case in court.<sup>103</sup>

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not to be compelled to be a witness or to confess guilt . . ."), with U.S. CONST. amend. V.

98. Compare Bill of Rights Act 1990, § 26(2) ("No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."), with U.S. CONST. amend. V.

99. See *supra* note 85 and accompanying text.

100. See *supra* note 90 and accompanying text.

101. See *supra* note 82.

102. See *supra* note 84 and accompanying text.

103. Even if the judge did opt to use the report from the restorative process, its only applicability would be at the sentencing phase of the adjudication. Presumably, the court would have already had to find the offender guilty before the restorative process report would even

The programs employed in New Zealand also exhibit a profound respect for the right to counsel.<sup>104</sup> Although it is not mandatory that the offender have an attorney present, the offender's choice to employ one is manifest.<sup>105</sup>

Project Turnaround is also a good model for the preservation of double jeopardy rights. Because a successful process usually results in withdrawn evidence and dropped charges,<sup>106</sup> the offender does not face the prospect of paying consequences under the retributive system as well as the restorative one. Thus, voluntary processes also help protect the offender against double jeopardy.

#### V. NEW ZEALAND AS A MODEL FOR INTEGRATION OF RESTORATIVE AND CONSTITUTIONAL PRINCIPLES IN THE UNITED STATES

If the United States were to follow New Zealand's example it would not be difficult to integrate restorative justice into the current criminal justice system while preserving offenders' due process rights. As New Zealand demonstrates, restorative justice can be implemented on a wide scale without numerous due process violations. The similarity of New Zealand's due process requirements to those of the United States makes New Zealand the ideal starting point for examining how the United States can succeed with restorative justice.<sup>107</sup>

First, participation in a restorative justice process must be voluntary. In order for the choice to be truly voluntary, the offender needs to be informed of all of the options and possible repercussions involved with each choice.<sup>108</sup> Such a decision would be an excellent opportunity for attorney participation. Although restorative justice processes typically do not purposefully exclude attorneys from the process, giving the attorney an actual role as an advisor about which

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come into play, thus eliminating any concern that an admission during the restorative conference would detrimentally affect the court's determination of guilt.

104. See SCHMID, *supra* note 13, at 17.

105. *Id.*

106. See *supra* note 90 and accompanying text.

107. See *supra* notes 95–98 and accompanying text.

108. This would resolve the issue of proper notice, as well as eliminate any subtle compulsion. If the offender is able to weigh his options with every possible bit of information on the table, he is more likely to make a decision that is in his best interest.

route would be most beneficial to the offender would solidify the attorney's usefulness to the process.<sup>109</sup> Inviting offenders to consult with their attorneys before agreeing to participate in the process would effectively preserve the right to counsel.

The attorney's role would not have to end there, however. Once the offender decides to pursue restorative justice, the attorney could also ensure that due process safeguards are assured.

Having a system in place that would effectively drop all charges in the event of a successful restorative conference would further preserve offenders' due process rights by ensuring offenders are not subjected to double jeopardy. Although critics may return to the argument that this is subtle coercion that limits the offender's access to trial,<sup>110</sup> it is important to note the emphasis on a "successful" conference. It would seem that in order for the conference to be successful, both the offender and the victim would be committed to making the desired outcome a reality. If an offender feels coerced into taking part in the conference, he is then less likely to be committed to it, and a successful conference is then an unlikely result.

In the event that the conference is unsuccessful, confidentiality safeguards are necessary.<sup>111</sup> In fact, without confidentiality safeguards, restorative justice will not stand against due process challenges. A uniform act should be drafted to address these challenges. Specifically, establishing a privilege for statements made in the course of a restorative conference not only preserves offenders' rights against self-incrimination and double jeopardy, but will allow the offender to be more open in his communications.

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109. In advising her client about the pros and cons of participating in a restorative conference versus taking his chances at trial, the attorney could still be a zealous advocate for the offender. In fact, advising in such a situation may be an even better manifestation of her duty to her client, because she would be evaluating what is best for her client, rather than just what is necessary to keep her client out of prison.

110. See *supra* Part III.C.

111. See *supra* Part III.E.



## VI. CONCLUSION

If the American justice system measures its success by the population of its prisons, then it is a successful system indeed.<sup>112</sup> However, if the success of a system should be measured by a reduction in crime and an increase in feelings of security, then the system as it stands can be improved.

Restorative justice has been shown to provide the kind of improvements that the current retributive justice system needs.<sup>113</sup> Understandably, there can be reluctance to overhaul the only familiar system in favor of one that has not yet proven itself on a wide scale in this country. Further, when the potential threat to fundamental rights of due process is added to the equation, the likelihood of implementing the new system is further decreased.

Restorative justice does not aim to reduce due process rights or overhaul well-functioning justice systems. Integrating it into the American justice system would not necessitate a revamping of the Constitution. Indeed, its implementation is already taking place on American soil.<sup>114</sup> New Zealand, which incorporates similar due process rights through statutory law, has been able to successfully implement restorative justice in such a way that the country now serves as a model for other countries seeking to make their criminal justice systems more effective.

New Zealand's example would satisfy criticism that deems restorative justice too risky of a system for widespread implementation in the United States. In addition, restorative justice need not completely replace retributive justice, and can even have some retributive aspects. It would take time and resources to make restorative justice more than an enigma to the American public, but some time spent rethinking and reforming the way crimes are handled in this country is a small price to pay for the probable increase in public feelings of security, and in the number of contributing members of society.

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112. See THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH, [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_newfigures.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_newfigures.pdf).

113. See *supra* Part IV.

114. See, e.g., *supra* note 4.