ACCOUNTABILITY IN THE COMMUNITY: TAKING RESPONSIBILITY FOR OFFENDING

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Overview

Today's theme is *Justice in the Community*. It is my view that criminal justice has been divorced from the community for far too long. Justice has come to be seen as a contest between the State and the defendant. Largely ignored is the forgotten party, the victim, and the community to which they both belong. Justice should be something which we claim for ourselves and strive to enhance, but at present the ordinary person feels little sense of ownership of justice. It is seen as a legalistic system of rules governing this *State v Defendant* contest. As a result there is little incentive for anyone to take responsibility for the offending itself or for putting right the wrong. By contrast restorative justice is essentially a community-based model that encourages the acceptance of responsibility by all concerned and draws on the strengths of the community to restore peace. In this paper I propose a small but fundamental change to the criminal law that would help this process.

My argument will be developed under four headings:

Restorative justice as a framework for the criminal law
Accountability through court processes, old and new
The State, the individual and the community
Taking responsibility for offending

I RESTORATIVE JUSTICE AS A FRAMEWORK FOR THE CRIMINAL LAW

My own journey along this path started when I became a Youth Court Judge in 1990. It has had four stages, each leading on to the next (with a logic that has become more apparent in hindsight) and each reported elsewhere:

1 A recognition of the New Zealand Youth Court as a new model of justice.[1]
2 An analysis of our Youth Justice as a largely restorative system of justice.[2]

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1 Published in *The Youth Court in New Zealand: a New Model of Justice* ed. BJ Brown and FWM McElrea, Legal Research Foundation (1993).

3 The development of a Community Group Conference concept applicable to adults.[3]
4 A consideration of right relationships as lying at the centre of justice.[4]

I will not repeat what I have written elsewhere about this journey, but it is worth re-stating here the distinctive - indeed revolutionary - elements of the Youth Court model as I see them: (i) The transfer of power from the State, principally the Courts' power, to the community. (ii) The Family Group Conference ("FGC") as a mechanism for producing a negotiated, community response. (iii) The involvement of victims as key participants, making possible a healing process for both offender and victim. A recent High Court decision sees this as

> "a restorative justice system rather than a retributive or deterrent system. The object of the new provisions was to enable victims and the community , as well as young persons, to participate in a process which would help them and heal the damage caused by their offences. An essential part of this process is a negotiated community response at a family group conference. It is a system which operates in a vastly different way to that which Courts are required to use in dealing with adult offenders."[5]

I wish next to stress that restorative justice is not simply the old argument for "rehabilitation rather than punishment", dressed up in new language. That approach has had its day and has failed. To treat offenders as simply being sick people requiring treatment rather than punishment is not a credible approach. Amongst other faults it ignores the desire of others to see justice done and it can interfere with important rights of offenders, eg to an outcome that is not disproportionate to the offence and which terminates within a limited period. Just as significantly, this approach has failed because it left intact - indeed, reinforced - the central role of the State, and it ignored the plight of victims. Consequently the liberalism of much of the last three decades has not altered the basic model of justice entrenched in New Zealand with its heavy emphasis upon prisons. I suggest that there will never be meaningful alternatives to prisons until there is an alternative model of justice.

Different contenders are coming forward to offer that alternative. Besides restorative justice we hear of *transformative justice* and *relational justice* as well as *healing justice*. Do not be confused. They are sufficiently similar not to distract me from the central theme of this paper.[6] All are seeking a more responsive system of justice founded in a better deal for victims and a better sense of community relationships.

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[2] *The Intent of the Children, Young Persons and their Families Act 1989 - Restorative Justice?* a paper presented at Auckland to the Youth Justice Conference of the New Zealand Youth Court Association (Auckland) Inc on 25 February 1994 and published in *Youth Law Review* July/August/September 1994 p 4.

[3] *Restorative Justice - The New Zealand Youth Court: a model for development in other Courts?* a paper presented at Rotorua to the National Conference of District Court Judges, 6-9 April 1994 and later published in *Journal of Judicial Administration* Vol 4 No. 1 (August 1994) p 33.

[4] Published as chapter 7 ("Justice in the Community") in *Relational Justice Repairing the Breach* ed. J Burnside and N Baker, Waterside Press (1994).

[5] *RE v Police* (unreported, Christchurch Registry, AP 328/94, 2 March 1995, Williamson J) at p 1.

[6] The Canadian justice campaigner Dr Ruth Morris says that "good as it is, restorative justice is not enough" as it assumes there is a harmonious situation to be restored, thereby ignoring the structural injustices deeply rooted in society. (See her report on the Saskatoon Restorative Justice Conference, March 1995, pp 6-7.) Her alternative is "transformative justice", which seeks to address also the distributive injustice in the world. Recently she has spoken of "healing justice", a term which encompasses both of the other two. For relational justice see *Relational Justice Repairing the Breach* cited in footnote 4 above.

The key person in the community chemistry is probably the victim. Under a restorative justice model the victim is not just a faceless, nameless entity. His/her anger and hurt is witnessed in a face-to-face encounter. The de-personalising defence mechanisms of offenders - "They can afford it", "It's only a car" and so on - tend to break down when the victim is experienced as a living, hurting, human being. The valuable work done by Julie Leibrich[7] on the function of shame (of the Braithwaite "re-integrative" type) in changing criminal behaviour must support the claims of a restorative model, even though that work was not carried out in a restorative system. Shame can lead to apology and an expression of remorse, which in turn can lead to acceptance of the apology and possibly forgiveness. Leaving religious aspects aside, forgiveness should not be expected, in the sense of being an obligation laid upon victims, although it will often be a natural response and one that benefits both parties. In the experience of forgiveness both sides can let go of the hurt of the past and start building for the future.[8]

By contrast the victim does extremely poorly under our traditional western system even judged by measures that are in theory victim-focussed, such as reparation. As Bernard Jervis has recently written[9]

> "The distinct impression gained is that judges, probation officers, and departmental managers are attempting to put into practice a process that cannot be fully successful. The probable reason for this is legislation that is trying to reconcile two diametrically opposed criminal justice systems. The present [reparation] situation appears to be an 'add on' that cannot succeed."

For myself however I should make clear that I do not see restorative justice as doing away with either punishment or prisons. Within most FGC plans presented to the Youth Court there is an element of punishment, commonly in the form of community service. The Community Group Conference referred to in the closing chapter of Jim Consedine's new book *Restorative Justice: healing the effects of crime*[10] recommended periodic detention or community service as part of an extensive package, and this was accepted by the Court. Even Jim Consedine says that there should be, "where applicable, sanction"[11] - which I presume means punishment. The notion of punishment is deeply rooted in us and it would be naive, counter-productive and simply wrong to suggest that it has no place in criminal justice. Restorative justice can allow punishment a proper place in the process of "making things right" without it dominating the criminal justice agenda the way it does at present.

As for prisons, I think that for the foreseeable future they will be needed as a means of protection from the very dangerous offender, and often as part of a sentence for very serious

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[7] "The role of shame in going straight: a study of former offenders", her chapter for *Restorative Justice Theory, Practice and Research* ed Burt Galaway and Joe Hudson, soon to be published by Criminal Justice Press, USA.

[8] As Jim Consedine has put it:

> "Forgiveness is not something that the victim does for the benefit of the offender. It is the process of the victim letting go of the rage and the pain of the injustice so that he or she can resume living freed from the power of the criminal violation."

- *Restorative Justice Healing the Effects of Crime* Ploughshares Publications (1995), p 163

[9] At p 11 of the manuscript of "Developing reparation plans through victim offender mediation by New Zealand probation officers", a chapter written by Bernard Jervis, Manager Community Corrections, Wellington, New Zealand for *Restorative Justice Theory, Practice and Research* cited in footnote 7 above.

[10] Cited in footnote 8 above.

[11] ibid p 172.

offending. The outcome of a Community Group Conference (or other restorative justice mechanism) might well be a package of measures which includes a term of imprisonment, but I would expect it to be shorter than it would otherwise have been, by virtue of the restorative elements that assist in particular the victim. My own expectation therefore is that if restorative justice was implemented there would be a large reduction in the prison population, partly through some people avoiding prison who would otherwise have gone there, and partly through a shortening of sentences for very serious offences. It will also focus our attention on the ways in which an offender can suffer a loss of liberty in the community. But the real justification for restorative justice is what it does for victims, offenders and the community in healing the damage done by crime.

The last point I wish to make about a restorative justice framework is that it can allow culturally sensitive responses to crime within the one overall system of justice. Where victim and offender belong to the one culture those cultural values can be expressed and affirmed in the process. Where they belong to different cultures it is an opportunity for cultures to meet and learn something from each other. But whatever the cultural mix, it is possible to maintain a single system of law, if that is what is wanted. In our Youth Court model, for example, one of the functions of the Court is to filter out patently unsuitable outcomes and to guard against oppressive custom, so that the law of the land is applied, not some form of local justice.

II ACCOUNTABILITY THROUGH COURT PROCESSES, OLD AND NEW

The most relevant and helpful statement on accountability that I have come across recently is what Howard Zehr says on a video cassette about restorative justice[12]:-

> "From a structural justice standpoint, one of the more fundamental needs is to hold offenders accountable in a meaningful way. I have conversations with judges sometimes and they say, 'Well, but I need to hold the offender accountable' - and I agree absolutely, but the difference is as to how we understand accountability. What they're understanding by it, and the usual understanding is 'you take your punishment'. Well, that's a very abstract thing. You do your time in prison and you're paying your debt to society, but it doesn't *feel* like you're paying a debt to anybody - basically, you're living off people while you are doing that. You ***never*** in that process come to understand what you did, and what I'm saying 'accountability' means is understanding what you did and, then taking responsibility for it; and taking responsibility for it means doing something to make it right, but also helping to be part of that process."

I want to support Howard Zehr in that statement. The western model of criminal justice does not in my view hold offenders accountable in a meaningful way. There is nothing in our legislation for adults equivalent to s 4(f) of the Children, Young Persons and their Families Act which propounds the principle that young people committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour". It further provides that they should be "dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in

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[12] *Restorative Justice: Making things Right* (Mennonite Central Committee US) 1994.

responsible, beneficial and socially acceptable ways". As I have argued elsewhere these provisions emphasise accountability and membership of a wider community. They are not "soft" or woolly concepts. Young people, even though they are often themselves "victims", are encouraged to take responsibility for the consequences of their actions, and not to blame others or "the system". This way they can start to take control of their own lives. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too de-personalised, and too much like a game to succeed in many cases. The problem lies in the very model of justice which we use.

At the heart of the usual Western concept of criminal justice is the idea of a contest between the State and the accused, conducted according to well defined rules of fair play and leading to a verdict, guilty or not guilty. One of the most important of these rules is the presumption of innocence - the accused is to be found "not guilty" unless the State can prove otherwise. Those found guilty are punished by the State, and of course the more punitive the sentencing regime the greater is the incentive for a guilty person to rely on the presumption of innocence and put the State to the proof, ie not to plead guilty.[13]

The concept of a fair trial has been described as the apotheosis of the adversary system - its highest ideal. It has come to be seen in procedural terms, formulated by complex rules of evidence (eg excluding hearsay evidence), the Judges' rules for the conduct of police interviews, and other settled principles of "due process". Important though these are in themselves, they have pre-occupied our thinking in criminal justice for too long. The over-riding issue is whether fair *procedures* are followed - not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong. We are stuck in a mould, formed mostly in the nineteenth century, which measures justice by its own procedures. Instead of justice being the measuring rod of law, law has become the definition of justice.

It is important that we understand this "positivist" basis of our thinking about criminal justice or we will be ruled by it unawares. "This contemporary version of justice as fair trial is the culmination of a long development within the English legal system", wrote FE Dowrick in 1961[14], referring back to medieval jurists. Dowrick also quotes John Austin, the first Professor of Jurisprudence in England, who around 1830 was expounding the positivist view of justice as conformity to the established laws of the land. Austin proclaimed that "in truth, law [the positive law of the land] is itself the standard of justice."[15] This thinking was part of the colonial heritage of New Zealand and of England's other colonies. It is not a matter of mere legal philosophy. Rather it is an intensely practical matter that underlies much of our thinking and practice about criminal justice. Two examples will suffice.

(i) Nearly all of the teaching of criminal lawyers is directed to a knowledge of the rules and principles of a fair trial - the concepts of legal liability, the definitions of different crimes, and the rules of criminal procedure, including evidence and "due process" (Bill of Rights). By contrast very little of their time (less than 5%?) is devoted to the outcome of the criminal process for an offender, namely sentencing, and even less to the outcome for other parties

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13 This part of my argument I have previously stated in *Relational Justice* cited in footnote 4 above.

14 *Justice according to the English Common Lawyers* Butterworths (1961) pp 32-33.

15 Quoted by Dowrick at p 177.

such as victims. The bias towards the legal *process* rather than *outcomes* is therefore part of the training of criminal lawyers.

(ii) All court lawyers are confronted at times with the question, "How can you defend someone who admits he is guilty?" It is something that genuinely puzzles many lay people. The standard answer is to say that everyone is presumed innocent until proven guilty beyond reasonable doubt, and every defendant is therefore entitled to put the prosecution to the test and see whether it can prove guilt to this standard. This is a positivist response - justice is done if the rules are followed, regardless of the outcome.[16] For positivists any concept of justice other than "following the rules" is almost by definition excluded. Moral guilt may be relevant to others but to the law it is irrelevant. It does not really matter if the guilty go free so long as the law has found them Not Guilty. I now no longer believe this is a satisfactory response, as will soon become clear, and I do not believe it has ever satisfied most lay people.[17]

It is time to challenge the Austinian attitude. It has led to the portrayal of criminal justice as a game, with the lawyers playing the system (the rules) while the court acts as umpire, and justice too often being the loser. It has, I believe, come to serve society and the law (and lawyers) poorly.

To return then to Zehr's challenge about accountability, the plain fact is that our nineteenth century model does not promote accountability. To start with, much of the language used is from a bygone era. Following the taking of "depositions" the accused is "arraigned" upon an "indictment". The accused stands in "the dock", almost like an exhibit on display. "You are charged that on or about ... you did ... How do you plead?" The whole trial is conducted very publicly, with accompanying rituals that serve to dramatise and hence de-personalise the experience. Any shaming is of the ostracising type which John Braithwaite argues does not promote a change in attitudes. Julie Leibrich refers to this as the "public humiliation" of the courtroom where, in an adversarial system, the person is literally made to stand apart, and contrasts it with personal disgrace and private remorse She found that public humiliation was counter-productive in the process of "going straight".[18]

It is not surprising then that, increasingly, the news media treat crime as prime news, and criminal trials as free drama or live entertainment which they are keen to televise. The media thrive on conflict,[19] on public contests, on finding winners and losers. If the victim features at all in court reports it is usually as a "loser", even where the accused has also "lost", so the only "winner" is the prosecution, ie the impersonal State. Feelings of

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[16] An even more extreme form of this view was expressed by an American post-graduate student at a seminar I attended on sentencing conducted at Cambridge by the criminologist Nigel Walker in October 1993. Professor Walker asked whether capital punishment could be criticised because of the possibility of innocent people being executed. The student's response was a vigorous denial that this was a fair question - if they were found guilty by due process of the law then they *were* guilty, he said.

[17] Jurors take an oath to give their verdict according to the evidence, but are probably more interested in moral guilt than the judge's instructions will permit. The evidence before them is carefully restricted by the exclusionary rules of evidence which will often exclude considerations of moral guilt. This may account for a number of unexpected acquittals and convictions.

[18] As cited in footnote 7 above, at p 23 of her draft text.

[19] The media must examine their own responsibility for certain crimes such as violent and sexual offences by the promotion of role models who use violence as a solution or who abuse women.

antagonism, fear, anger and general negativity are fuelled, amongst the trial participants and the viewing public alike. There is scarcely ever any good news reported from the courts.

I suggest that one of the key defects in the criminal process today relates to pleading. (The very word "plead" should be abolished. It suggests the prostrate supplicant offering up a prayer for relief to a kingly presence.) The fact of the matter is that a "plea" of Not Guilty does not necessarily mean that the defendant denies guilt. It may mean only that the defendant wishes to "put the prosecution to the proof", ie to see if the prosecution can prove its case. This can operate as an incentive *not* to accept responsibility but instead to deny all responsibility that the defendant or his lawyer thinks cannot be proved. As things stand this is not only permissible but encouraged. Further, with proceedings laid indictably (ie intended for trial by jury) the defendant is not even *asked* to plead until after a preliminary hearing (taking "depositions").[20]

Of course if a key element of an offence does not exist then the defendant should indeed be found Not Guilty. But if instead the prosecution should fail to prove an ingredient of the offence through the absence (or faded memory) of an important witness, or because a witness lies, or through failure to correctly recite the breath-alcohol litany in the witness box, or by simple oversight of the prosecutor, or because relevant evidence is ruled inadmissible, is justice served by a Not Guilty finding? Where the guilty are found Not Guilty by this process an injustice is done which the positivist approach does not recognise.

I therefore increasingly see the need to change our rules about putting the prosecution to the proof. Having reached this conclusion I was heartened recently to read in a report of the Restorative Justice Conference held at Saskatoon, Canada, in March 1995 that the Deputy Minister of Justice of Saskatchewan, Brent Cotter, had expressed a similar view:

> "He said the criminal justice system encourages you to avoid responsibility and deny, and hope you might get off. In a family, such behaviour would be considered dysfunctional. In a community it is still dysfunctional."[21]

What changes might be made to avoid this dysfunction?

In essence I propose that we should do away with the concept of putting the prosecution to the proof, except where the defendant denies the charge or has no means of knowing[22] what happened at the time. Why should not defendants be told the charge against them and asked whether that charge is admitted or denied? If it is admitted then the prosecution should not have to prove it.[23] If denied it should be proved using the adversary system.[24]

This procedural change could be accompanied by an amendment to the Criminal Justice Act to incorporate as a guiding principle the proposition laid down by statute for the Youth

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[20] Even the right of a defendant to plead guilty before a preliminary hearing is of recent origin, having been introduced only in 1976 - s 15 (1) Summary Proceedings Amendment Act 1976.

[21] From part V of a report compiled and circulated by Dr Ruth Morris.

[22] eg because of memory loss.

[23] Lawyers will have an important role to perform in ensuring that accused persons understand what it is they are admitting to and what defences might be available to them.

[24] A further refinement could be a formal mechanism for admitting in part and denying in part, as commonly occurs in civil claims, and in those cases the prosecution need prove only the disputed part.

Court[25] that those committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour". There might also be an amendment to the law concerning the duties of lawyers.[26] In the New Zealand Family Court there has long been an obligation on lawyers to promote reconciliation. In various civil jurisdictions there is starting to appear an obligation to consider alternative dispute resolution procedures.[27] Why could not a new Criminal Justice Act impose a responsibility on lawyers to encourage offenders towards reconciliation with victims, and to start that process by admitting their responsibility (if any) for the harm done? This has little appeal under the present system, but as part of a new deal for victims and offenders it would be a different proposition. When the consequences of admitting guilt are rejection and isolation, and imprisonment holds out only the prospect of degradation and destruction of self respect, there is much less incentive to plead guilty.[28] But if that is changed into a positive, growing and healing experience, if the consequences are intended to promote reconciliation, there is an incentive to accept responsibility.

Additionally there would be a greater acceptance of responsibility (ie fewer false denials) where offenders attend Community Group Conferences. I say this based on the Youth Court's experience of the FGC process. I now see it as an important difference in principle that the adversary system's method of pleading is *not* followed in the Youth Court. On first appearing in court the young person may volunteer that the charge is denied - in which case it is put off for a hearing - but otherwise no plea is taken and the matter is adjourned for an FGC to be held. There the prosecution's summary of the relevant facts is discussed and the young person can admit or deny its contents. This is done in the presence of the victim so there is the opportunity to try and reach agreement on the facts. It can be a form of plea bargaining if you like, especially where Youth Advocates attend at conferences. There can be direct negotiation about what actually happened, which in turn can influence the charge that the young person faces, usually by substituting a more realistic charge than that initially laid by the police. If agreement is not reached - significantly, a rather unusual outcome - the conference adjourns for a defended court hearing. Otherwise the conference proceeds in the manner already described to try and agree upon a plan of resolution to recommend to the Court, where the charge can then be formally admitted.

Lawyers who understand the spirit of restorative justice can have an important role to play at FGCs in protecting defendants from family or other pressure to admit charges that are quite inappropriate or to agree to an outcome that is unduly severe. They can also be an important aid to others present if general advice is needed about procedures and alternatives. But in general their role should be supportive and unobtrusive.

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[25] Section 4(f), Children, Young Persons and their Families Act 1989.

[26] I first mooted this idea at a meeting of the Criminal Bar Association in Auckland in June 1994, when it seemed to be unopposed, and have since expressed it in the *Relational Justice* chapter cited in footnote 4 above.

[27] "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants ... That is what justice is all about." - Warren Burger, former Chief Justice, US Supreme Court.

[28] The courts do try to encourage guilty pleas by giving a "discount" in sentencing, often perceived as being in the 20-30% range. However the acquittal rate on defended cases is higher than that - about 45% in my experience - so the defendant is likely to risk a longer sentence in the hope of getting a complete acquittal.

What is significant in this process is that the acceptance of responsibility is done not within the ritual of plea taking in court but at the FGC in the presence of the young offender's lawyer, family, the victim, and other community representatives. The same could be true for adults.

Those who would want to retain the present concept of putting the prosecution to the proof might seek to rely on the presumption of innocence and the right not to incriminate oneself, two concepts that are closely interrelated. There is a relevant history here and it is a history of the extraction of confessions, often false confessions, by agents of the State using force or the threats of force. One of the best accounts of the background to our present rules of criminal procedure is Judge John Cadenhead's paper TENSIONS WITHIN THE CRIMINAL LAW presented to the 1984 New Zealand Law Society Conference. He reminds us of the brutality of the days of burning of women and hanging of petty thieves and observes that "in an odd sort of way, the inequalities of the trial system and the ferocity of the penal laws were to some degree counterbalanced."[29] Those days must never be allowed to return, but we must also recognise that when the presumption of innocence and the right to silence were being expounded the accused was not even *allowed* to give evidence in his or her own defence, a position that remained until 1889 in New Zealand (1898 in England).

I do not suggest any change to the rules governing the conduct of the police and other investigative and prosecuting agencies, but instead pose the question: Why should not the court be able to ask the defendant (in open court) "Did you do this as alleged?" This one question would remove a considerable element of gamesmanship from the criminal law.

At present such a procedure may be prohibited by s 25 of the New Zealand Bill of Rights Act 1990:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> .....
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> (c) The right to be presumed innocent until proved guilty according to law:
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> (d) The right not to be compelled to be a witness or to confess guilt: ...

My proposal is that s 25 should commence with the words *Everyone who is charged with an offence* ***and who denies that offence*** ... Society is entitled to ask why the prosecution should have to prove an offence which is in fact admitted. It is noteworthy that the presumption of innocence is not always expressed as widely as in our Bill of Rights. I note that the *Oxford Companion to Law* states the effect of the presumption as applying "until or *unless the contrary is admitted by him* or proved beyond reasonable doubt by competent evidence". (My emphasis).

Secondly, the general public are entitled to say that *they* are very much interested in justice, and that justice is not done if the innocent are convicted *or* the guilty acquitted. As I have observed elsewhere[30]

> In the past the law has concentrated on the dangers of convicting one innocent person and has so arranged the laws of evidence and procedure that this risk is reduced to a minimum - even if (so it was said) 100 guilty people go free. When a person could be hung for stealing, that

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[29] Page 97 of the proceedings of that conference.

[30] The April 1994 paper cited in footnote 3 above.

> sort of comment was entirely understandable, but now it is perhaps time to acknowledge *each* wrong trial result as an injustice.

Howard Zehr puts his finger on the problem with characteristic clarity:

> "Even if he is legally guilty, his attorney will likely tell him to plead "not guilty" at some stage. In legal terms "not guilty" is the way one says "I want a trial" or "I need more time". All of this tends to obscure the experiential and moral reality of guilt and innocence "[31]

In support of Zehr, we have to ask: What does it do to the person who is *in fact* guilty to be found "not guilty"? And what does it do to the victim, to victim-offender (and other) relationships, and to the respect for justice in the community? In each case the answer is, I believe, that it does untold damage - to the respect for the law and for the courts, and to the measure of justice in the community. May I illustrate with an example.

A man rapes a woman. He does not deny it to the police but nor does he admit it. He simply keeps silent. He is charged with rape. In court he is never asked whether he admits the charge and so he pleads Not Guilty in order to put the prosecution to the proof, in the hope that they will fail to prove the case. The woman gives evidence. The defence lawyer alleges that the woman had dressed "provocatively"; he puts it to her that she encouraged his client's advances and consented to the indecencies inflicted upon her. When she denies this he puts it to her that she is lying. The woman breaks down and cries. The jury is not sure where the truth lies. They have a reasonable doubt and therefore must find the man Not Guilty.

Even though the man may later admit his guilt he cannot be tried again for that rape. As he has not given evidence he has not committed perjury. He is free for ever. *Does he think justice has been done?* The woman knows that he raped her and feels that she has been branded by the verdict as a slut and a liar. *Does she think that justice has been done?* The woman's mother has given "recent complaint" evidence for the prosecution. She knows what her daughter has gone through. *Does she think that justice has been done?* The officer in charge of the case felt that his witnesses had been telling the truth. *Does he think that justice has been done?* The woman tells her friends and others in her community of her experience of the law. *Will they think that justice has been done?* Are all these people going to be satisfied with the legalistic answer that because there was a reasonable doubt and the defendant did not admit guilt he must be presumed innocent? Of course not - and to expect otherwise is to fail to understand the community's sense of justice. The problem is that he was never *asked* whether he admitted the charge.

Too often we do not appreciate the damage done to witnesses, victims and offenders by judicial processes. One such process is putting the prosecution to the proof where the charge is admitted. By removing any such "right" and by reviewing our system of pleading perhaps in favour of the Youth Justice model, I submit that judicial processes could start to encourage accountability of offenders for criminal behaviour.[32]

III THE STATE, THE INDIVIDUAL AND THE COMMUNITY

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[31] *Changing lenses: a new focus for crime and justice* Herald Press (1990) p 67.

[32] The accountability of other parties I address in the remaining parts of this paper.

It is clear that in earlier times a more integrative and community-based system of justice prevailed in most societies, and still does in some, eg Japan. It is most instructive to ask how it came to be abandoned in favour of one in which the State took a dominant role. In my February 1994 paper[33] I answered the question this way:

> On one level it may seem obvious that the change from small scale to large scale communities, from rural to (less personal) urban environments, has worked against the retention of a more community-based system of control. However, that change has also permitted the creation of new forms of community, eg based on voluntary association rather than neighbourhood or family, and so it cannot entirely account for the change. In any event the transformation of the face of justice occurred long before modern urban society evolved.
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> Most commentators point to the rise of the nation state, and this makes sense; after all, without a powerful State justice had necessarily resided with the local community. The Jubilee Policy Group report[34] at pp 10-11 suggests that the Norman invasion of England was the beginning of the change in Britain.
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> > "William the Conqueror and his descendants had to struggle with the barons and other authorities for political power. They found the legal process a highly effective instrument in asserting their dominance over secular matters and, through their control of the courts, in increasing their political authority. To this end, William's son, Henry I, issued in 1116 the Leges Henrici, creating the idea of the 'King's Peace' and asserting royal jurisdiction over certain offences by which it was deemed to be violated. These included arson, robbery, murder, false coinage, and crimes of violence. A violation of the King's Peace was an offence against his person, and thus the King became the primary victim in such offences, taking the place of the victim before the law. The actual victim lost his position in the process, and the State and the offender were left as the sole concerned parties."[35]
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> A second consequence of the King's jurisdiction in the matter of offending was a movement away from restitution (to the victim) and towards fines (payable to the State). Fines became a source of revenue, and were consistent with the idea of paying a debt to society. This consequence reinforced the first, ie the displacement of the victim by the State as central protagonist in the dispute with the offender.[36]
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> In many areas, however, the central role of the State in modern society is being critically examined and (often) cut back. We should not assume that a restorative model is no longer possible or desirable.

Bearing in mind the historical context of the rise of the role of State we should not regard it as immutable or sacrosanct. What I find surprising is that the State's role in other fields of endeavour has been under systematic review in New Zealand for at least ten years and yet the field of justice lies largely untilled.

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[33] See footnote 2 above.

[34] The Interim Report (Dec. 1992) of the Research Project of the Jubilee Policy Group (based in Cambridge) in association with the Prison Service Chaplaincy, entitled *Relational Justice: a new approach to penal reform*.

[35] In fact, as Associate-Professor Bernard Brown has reminded me, it was the Assize of Clarendon promulgated by Henry II in 1166 that really established the King's control over criminal justice. This was a code of 22 articles setting out the principles on which the administration of justice was to be effected, with judges going on circuit and sitting with local juries to deal with serious crime.

[36] ibid p 11.

> Although there have been times of greater upheaval in our history, it is doubtful that there has been a time in which there has been so much upheaval in so many areas as the past few years. From the economy to social policy, from the electoral system to education, no area has been left untouched.[37]

Fundamental reforms, often involving a reduced role for the State, have been undertaken in education, transport, health, social welfare, housing, labour relations, the economy, parliamentary representation, public utilities such as water and electricity supplies, and in many other areas. Is it not time that the State's role in relation to justice was subjected to the same sort of critical questioning?

The concept of the State as all-powerful sovereign has come under attack from a different quarter recently in the United Kingdom. That country's membership of the European Community has raised deep questions about its own sovereignty, helpfully addressed by Professor Neil MacCormick of the University of Edinburgh in an article "Beyond the Sovereign State".[38] He too calls for jurisprudence to become the subject of popular debate. In a passage that may have relevance as well for the session today on Cultural Justice, Professor MacCormick writes:

> "To escape from the idea that all law must originate in a single power source, like a sovereign, is thus to discover the possibility of taking a broader, more diffuse, view of the law. [This] alternative approach is system-oriented in the sense that it stresses the kind of normative system law is, rather than some particular or exclusive set of power relations as fundamental to the nature of law. It is a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system."[39]

And later he continues:

> "Taking the view of the sovereign state which I suggested ... it seems obvious that no state in Western Europe any longer is a sovereign state. None is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources ... I am unwaveringly opposed to the road back. One of the main upshots of universal sovereign statehood was two disasters - world wars ... In abandoning the dogma of absolute Parliamentary sovereignty, one might well reconsider with it the possibility of further diffusing legal authority inside the UK to the constituent nations or other subdivisions where subsidiarity makes this seem sound ... The time is therefore indeed ripe for rethinking jurisprudence and legal philosophy, not just with regard to teaching courses in Edinburgh or London or anywhere else, but throughout the legal and political communities we inhabit. There is a general need for reflection on the bases of legal order."[40]

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[37] The Hon Peter Dunne MP writing in *NZ Herald* 11 January 1995.

[38] Modern Law Review (1993) Vol 56 No. 1 p 1.

[39] ibid p 8. Such a co-existence of legal authorities was described in a different context at a Legal Research Foundation lecture on Native American Tribal Sovereignty given in Auckland on 13 July 1994 by Professor Richard Collins of the University of Colorado.

[40] ibid pp 16-18.

What Professor MacCormick says is relevant here because he addresses the position of the State in the legal process and encourages us to see it both as something which is evolving towards a less dominant role and as a subject for debate amongst ordinary people.

And what of the individual's place in the scheme of things? Our society, and our legal system with it, seems to have become very much focussed on individual rights, with no developed concepts of individual obligations or of communal rights. This emphasis may have resulted in part from the great power of the State and the need to protect the individual against its excesses. Regardless of the explanation, the preoccupation with the rights of the individual is a noticeable late twentieth century phenomenon in New Zealand. Legislative examples are to be found in the Bill of Rights, the Human Rights Act and the Privacy Act. In themselves they are generally valuable pieces of law, but they present an unbalanced picture of the human condition.[41] In this environment the "me" society thrives - pornography freely available in the name of freedom of expression, young brains permanently damaged by glue-sniffing that has never been made illegal, increasingly varied and available forms of gambling by which families can be destroyed, television that promotes violence against the other guy as good entertainment. The credibility of the Privacy Act has not been enhanced by its use by officials in a manner that seems designed to protect themselves from criticism, as in a recent answer by one government Department to an Official Information Act request concerning defendants in custody awaiting trial. The Department is reported as advising that there were ten defendants who had been in prison for more than a year awaiting trial, but a possible breach of the Privacy Act was given as the reason for not advising the charges which they faced and the length of time expected before a trial would take place.[42]

We seem to have forgotten that rights are only meaningful in the context of obligations, and the rights of the individual are only meaningful in the context of a community of which s/he is part. In the context of criminal justice the "individual" concerned has so far been the defendant. The defendant's rights are the subject of much of the criminal law. Modern western legal systems have had practically no concern for the rights of the victim. Recent changes such as the Victims of Offences Act, and amendments to the procedures governing the prosecution of sexual offences, have done little more than tinker with the existing model. It is still primarily concerned with protecting the rights of the defendant. The interests of the victim are poorly served by a trial system that treats the victim as little more than a witness. And at the sentencing stage, the court acts in the name of Society (including the victim) to exact a debt said to be owed to Society through a process in which the victim is largely peripheral.[43]

The shortcomings of the law from a victim viewpoint were well documented by the Victims Task Force before its time ran out. The very title of its final report, *Towards Equality in Criminal Justice,* emphasises the lack of balance in the law. Another significant title summed up the 8th International Symposium on Victimology held at Adelaide, Australia in August 1994: *Coming in from the cold: Can victims be included in the justice system?*[44]

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[41] The Bill of Rights "has become, in the eyes of some, a rogue's charter" according to Professor David Paciocco, *The New Zealand Bill of Rights Act 1990* Legal Research Foundation (1992) p 2.

[42] *NZ Herald* 22 April 1995. The only sensible claim to privacy appeared to relate to the names of the prisoners.

[43] I have already referred to Bernard Jervis' study of the sentence of reparation in Section I above.

[44] *The Law Institute Journal,* November 1994, Vol 68, No. 11, p 1016.

The problem has been a lack of balance. The need to address the defendant's rights in a more flexible manner that recognises the rights of others such as victims, witnesses and court reporters was recently recognised by an excellent paper *Coddling the Crims? Judges, Human Rights and the Adversary System* published in late 1994 by the Public Issues Committee of the Auckland District Law Society.[45] This need for a better balance between the rights of participants must in New Zealand be coupled with the need for a better balance between cultural influences. Our western model of criminal justice is highly individualistic, with little or no concession to the more community-based approach of other cultures in this country. The result has been a tremendous waste of community resources, even in our Youth Justice system. Ever since 1989 when the Children, Young Persons and their Families Act was enacted many Maori and Pacific Island community groups have been waiting in the wings for approval - and more importantly funding - as Iwi Authorities and Cultural Authorities able to take custody of young people in the community. The absence (until very recently) of such approvals has meant that the very few remaining State-run residences such as Weymouth have had to struggle inappropriately (and unfairly) to contain Youth Justice referrals as well as Care and Protection cases, and young people who are there for residential supervision alongside unruly would-be absconders awaiting return to court. Much of this burden could and should have been carried in the community.

In this example Weymouth represents the State. Once again the problem arises because of the State taking a needlessly prominent role in criminal justice. Similar questions may arise in tomorrow's sessions on home detention and the privatisation of prisons. What responsibility does the community have in taking care of offenders? If we want the State to give up its monopoly in justice the question of the community's role cannot be avoided. Each community produces its own offenders and it simply cannot insist that other communities should accommodate them. But the real problem may not be the State's inability to overcome community resistance to the siting of new (State) institutions, so much as its unwillingness to properly authorise and fund community groups, such as iwi authorities, who *are* willing to take responsibility for offenders. In this regard I mention Te Whanau O Waipareira in West Auckland as a case in point.

The three distinctive features of the Youth Court system as I have defined them all point to the central role of community relationships in this model of justice - the diminished role of the State, a negotiated community response, and a healing process between victim and offender. One of the strengths of relational justice is that it stresses the value of relationships within the community, and it reminds us that

> Community is both a psychological and social concept as well as physical and geographic. Rebuilding communities involves both material and relational aspects and cannot be achieved without individuals and neighbourhoods taking on some responsibility.[46]

Where community structures have been allowed to run down they need to be rebuilt, and both financial and human resources (not necessarily from central government) are needed for that task. But notwithstanding the adverse economic and social pressures on communities it

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[45] It had been hoped that the principal author of that paper, Mr Grant Illingworth, would be a commentator at the present session of this conference.

[46] *RELATIONAL JUSTICE: A Reform Dynamic for Criminal Justice* Jubilee Policy Group, November 1994.

is surprising how strongly a sense of community still flourishes in New Zealand. I have been very conscious of this recently in a different capacity[47] while hearing objections and submissions on "community of interest" as a factor in determining electoral boundaries. It was by far the most common matter raised by objectors in connection with the new MMP boundaries, and their sense of community was often very keenly felt. Neighbourhood Support and other community policing initiatives also tap into and strengthen this valuable resource.

Nevertheless communities should not be understood just in neighbourhood terms. As Tony Marshall wrote in 1991[48]

> The concept of community can, however, be expanded to accommodate the fact that our mobile society allows meaningful association on many other bases than just the residential - work, school, voluntary associations based on leisure pursuits, political parties, churches (where the term "community" is already in use with a special connotation), ethnic groups, trade unions, extended family, etc. Any of these may be more relevant communities to the individual than what is increasingly the accident of their residential location. ... To Naisbitt and Aburdene (1990)[49]"community" is "the free association of individuals".

It follows that the involvement of the community in criminal justice should mean the involvement of these free associations as well as those based on geographic locations. The more mobile is society the more true will this be.

If we think about negotiated solutions we realise that these days it is an emerging theme, that instead of imposing a solution from the top through the power of the State, it may be better that the parties most directly affected negotiate a solution with which they are happy. There are many parallels readily found in the 1990's.[50] Ought not this to encourage us to consider the principle for criminal justice as well? Negotiated outcomes may , if we wish, still be subject to approval by a court or other state body, but there is a significant role for the parties and the community to play in reaching and implementing a solution.

But to call it an "emerging theme" is perhaps to suggest it is a recent invention. This is far from the truth - negotiated, community-based solutions have long been familiar to us in the family environment and lie at the heart of long-standing dispute resolution practices of

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[47] As Chairman of the Representation Commission responsible for reviewing all electoral boundaries under the Electoral Act 1993.

[48] "CRIMINAL JUSTICE IN THE NEW COMMUNITY: bending to the trends in politics, society, economics and ecology" a paper written for the British Criminology Conference, York, July 1991, p 13.

[49] *Megatrends 2000* London: Pan.

[50] I have made a similar point before. The recent adoption of proportional representation in the New Zealand parliament is one such parallel. "Alternative Dispute Resolution" is another - a well developed movement with many lawyers and their clients in Australia, New Zealand and elsewhere strongly committed to its principles. Disputes Tribunals have an obligation to try and achieve a settlement between the parties. Many judges are regularly raising the question of mediation of civil disputes in pre-trial conferences. Mediation has been a feature of Family Court procedures for some time. The Court of Appeal has encouraged parties to negotiate settlements of Treaty of Waitangi disputes. Major environmental issues are often resolved by a process of detailed negotiation between all interested parties. Human Rights legislation introduced a conciliation-based model for discrimination complaints in New Zealand in the mid-1970s and around the world. The high rate of agreement at FGC's (about 90%) is testimony to the ability of the parties to resolve most cases of youth offending.

indigenous peoples, including Maori.[51] Gabrielle Maxwell's experiences in Australia, South Africa, Canada and with Palestinian Arabs confirm this proposition from a wider perspective, as I expect she will have told us in the Cultural Justice session earlier today.[52] In the Yukon Territory, Canada, Judge Barry Stuart applies a traditional approach long familiar to Canadian Indians:

> "Since 1991, I have been using Community Sentencing Circles to deal with young offenders and adults. The results are startling. Even without significant State support or extensive professional justice official involvement, communities have made great strides in changing the well-being of offenders, victims and communities. Empowering the community to do its own moral work builds bonds within communities and builds the self-esteem of participants. The process heals relationships among those directly affected by the crime and others ... affected by the circumstances surrounding the crime.
>
> Resolving conflict is an essential building material of any relationship. Empowering communities to take responsibility for conflict within the community restores this essential building material of relationships within a community."[53]

In a similar vein Principal Youth Court Judge MJA Brown has written:

> "In the Children, Young Persons and their Families Act 1989 there is a clear statutory intention to attempt to strengthen families, church or school associations, sporting links and residential communities to exert informal social control and nullify the excesses and inflexibility of crude state intervention. All my life experience to date convinces me that there are great strengths within our community ... We need only reflect on the many aspects of New Zealand life which are dependant on voluntary labour. I suspect that about 99% of sports coaching in this country is done by unpaid enthusiasts. There has been similar involvement in the cultural, charitable, artistic, religious and political facets of society. Given this immense reservoir of concern and sense of group obligation, I am positive we can draw on that distinctly New Zealand tradition."[54]

I conclude this section by briefly mentioning the courts' relationship to the community, and in particular the extent to which the courts should relate directly to a neighbourhood or locality. While we have a High Court of New Zealand there is no "District Court of New Zealand". Instead there are some 66 different District Courts - the *Warkworth* District Court, and so on. Their identity with a local neighbourhood was no mere accident. It was recommended by the Report of the Royal Commission on the Courts (1978) - the "Beattie Report" - which led to the restructuring of the courts 15 years ago:

> "In recommending these changes [from Magistrates' Courts to District Courts] we are anxious not to destroy the essential nature of the Magistrates' Courts: we see the proposed District Courts as local courts readily accessible to the people, equipped and staffed to provide justice speedily with a minimum of formality and expense. We see

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[51] See para 5.5.2 of my February 1994 paper cited in footnote 2 above.

[52] And see her observations in *Criminology Aotearoa/New Zealand* October 1994 No.2 p 9. Associate Professor Bernard Brown says that his experience of Papua New Guinea is to a similar effect.

[53] Personal letter, 21 October 1994. An official account of such a process is to be found in *R v Moses* (1992) 71 C.C.C.(3d) 347.

[54] Forward to *The Youth Court in New Zealand: a New Model of Justice* cited in footnote 1 above. However at the Youth Justice Conference held in February 1994 Judge Brown also warned that he considered that the Youth Justice system was working only at about 40% of capacity - hence my later comments about funding.

> these courts exercising a wide jurisdiction. All sections of the community should be able to approach the court without apprehension or mistrust, and with the minimum of fuss."[55]

This must still be a model prescription for these courts today, whether operating a restorative model of justice or not.

IV TAKING RESPONSIBILITY FOR OFFENDING

By drawing on the themes already developed we can now address directly the issue of taking responsibility for offending. *It is my thesis that our criminal justice system should be structured so as to encourage rather than discourage the acceptance of responsibility by those who are in fact responsible for offending and by those who are best placed to do something constructive about preventing it.*

The monopoly which the State currently claims over justice distorts the whole question of responsibility for offending, because no-one else is encouraged to take any responsibility. Whenever there is an increase in reported crime, or in the seriousness of crime, it is "the government" and the courts (ie collectively the State) who are expected to solve the problem. That expectation is quite unreal, but it is unfortunately reinforced every time politicians seek to win votes by a "law and order" platform - there is a hidden premise (or is it a promise?) that the State will reduce crime, eg by requiring the courts to impose longer sentences of imprisonment. Not only does this place an unfair burden on the courts and the prison system, but it gets in the way of any other solution being adopted. We are all encouraged to think of crime as the government's problem and therefore to divert substantial resources (in the form of taxes and professional expertise) to State-centred solutions when they could be more effectively used elsewhere. This endemic "passing of the buck" flows directly from the *State v Individual* model of justice, which is why it is so essential that all concerned should stand back and re-assess that model.

Once we free ourselves from the all-pervasive assumption that the State and the offender are the only parties with a responsibility for crime the thesis expressed above may be able to be advanced. May I offer eight brief proposals that might enable a more integrated and responsible model to evolve.

1 *All offenders should be made accountable for the harm they have done and encouraged to accept responsibility for putting things right.*

Under this heading I have previously advocated a Community Group Conference concept for adults, and today I have argued for a less legalistic system of (and attitude to) pleading to criminal charges. More generally, a restorative model of justice would seek to promote this objective.

If people are to be encouraged to accept responsibility for what they do some interesting issues arise relating to final name-suppression orders, which preclude the community from

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[55] at para 258 p 78.

knowing who has been convicted of an offence, and to the statutory prohibition (under our accident compensation legislation) on victims suing for damages.[56]

2 *Where others have some responsibility for the behaviour of the offender, eg parents, they must be encouraged to accept that responsibility.*

One of the strengths of the Youth Court model is precisely that parents are encouraged to take responsibility for what their young people are doing. Sometimes this is evidenced in a very practical way by offers to fund reparation for the victim and be repaid later by the young person. Attention to family responsibility for offending can where applicable be part of the dynamics of an FGC.

> "The prevailing spirit I would characterise as *responsible reconciliation*. The term 'reconciliation' connotes a positive, growing process where strength is derived from the interaction of victim, offender and family in a supportive environment. It is a 'responsible' process in that those most directly affected take responsibility for what has happened, and for what is to happen. Indeed it is an environment in which co-responsibility can be fostered, recognising that fault does not usually lie entirely with the offender and encouraging others who share that responsibility to shoulder it. It can be a moving experience to hear from a grandmother who has been working closely with a wayward grandson and in the process has let her own son know how he has let the youngster down."[57]

3 *The relevant community should take responsibility for helping the offender to address the wrong, repair the damage and to affirm him in any remedial steps for the future.*

The community's responsibility would be to assist a process in which the victim and the offender are the key players. That assistance might take many forms - supporting the victim or offender or both, providing victim or offender counselling services, supervising community work, reporting breaches of curfews or non-association agreements - or even providing employment. Such a responsibility was accepted in the small Canterbury town of Darfield earlier this year. The question was whether a former school teacher and convicted child molester, who had served his term of imprisonment and undergone treatment aimed at preventing a recurrence, should be allowed to retain his job at the local council library where he had worked first as a volunteer and then as a paid employee. After proper debate the council decided that his employment would continue, but it accepted a responsibility to ensure that strict conditions were complied with, eg that he would never be alone in the library with children. Through its council that community accepted a responsibility to help see the offender restored to a productive and non-offending role in society.

It is time that we made full use of the goodwill and experience in the community, *and* commit sufficient funds to the process to avoid what happened in the field of mental health - where the process was largely de-institutionalised without ensuring sufficient community-based resources. This does not mean social workers abounding in every community but rather the proper funding of those groups who are ready and willing to help and seek only to

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[56] Indeed the very distinction between criminal and civil remedies needs examination. The removal of the right to sue may have led to distortions in other areas, such as the awarding of parts of fines to victims. Ideally the question of compensation for the victim should be able to be addressed in a single process.

[57] From p 96 of my chapter ("Justice in the Community") in *Relational Justice Repairing the Breach* cited in footnote 4 above.

have their expenses covered. John da Silva and Naida Pou know the sort of people I speak of.

4 *Ultimately both victim and offender should be restored in the community.*

Thanks to Howard Zehr I am now seeing respect as perhaps a key element in the justice process. At an historic weekend seminar at Teschemakers, Oamaru last June Howard spoke to a group similar to those at this conference, though smaller in number - a mixture of social workers, prison visitors, lawyers, Maori kaumatua, youth justice personnel, probation officers, judges, nuns, law students and former prisoners. Ruth Morris was also present. I have previously reported something of what Howard said then, and it is a theme I expect he will have developed earlier today:

> "Justice is about meaning ... Crime is really about disrespect ... We would like justice to be a teacher. If we want offenders to have respect for others, how can we do that if we don't treat them with respect? ... No-one takes brokenness seriously ... Healing justice is about respecting people."[58]

Restoration of the victim is not achieved at present, as will be apparent by now. It should be a central objective. It is equally important that an offender who admits the wrong, takes active steps to repair the damage and carries out any punishment imposed on him should be restored to a place of respect in the community. In this regard, as Julie Leibrich concludes, the best incentive for the offender to change may well be a sense of social belonging and personal integrity.[59]

5 *The community must ask itself whether it has a responsibility for the wrong by allowing it to happen.*

We do not want to breed a community of "busy-bodies" but is it not time that we all acknowledged a responsibility beyond our own front gates? If we see youngsters getting into trouble and shut our eyes to it, we may "see no evil" but we may make possible its repetition. If we know that the boy down the road is regularly beaten by a mother who is just not coping on her own and we shut our ears to his cries we may "hear no evil" but do we then have some responsibility for the boy's refusal to return home, and for the criminal charges which the mother later faces?[60] When the extended family does not wish to intervene (even by offering help) in a situation that repeatedly points to trouble for one member, because they wish to "speak no evil", perhaps they should ask themselves whether they could have prevented the damage that later appears as offending.

Over 200 years ago Edmund Burke gave this warning: "All that it takes for evil to thrive is that good men stand by and do nothing." When the good people of Glen Innes had had enough of graffiti sprayed in all manner of public places they organised themselves, Maori Wardens and others, to patrol their neighbourhood every night. They soon found out who were roaming the streets unsupervised. Today Glen Innes is graffiti-free. There are of course many, both within and outside the churches, who acknowledge a responsibility within

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[58] From my report on Howard Zehr's visit to New Zealand in *Stimulus* Vol 2 Issue 3 August 1994 p 3.

[59] Page 30 of her manuscript cited in footnote 7 above.

[60] As Associate-Professor Bernard Brown has pointed out to me, this also raises issues of children's rights. For example, should young offenders be able to report neglect by their parents?

the community for preventing harm from arising. Good friends do not let their friends drive drunk, as the advertisements now tell us. That example of social responsibility has a much wider application. What is really needed is that people should care about each other and be prepared to take responsibility for each other. And the other side of that coin is that in everything we do we are all accountable to our family, friends and wider community who might be affected. No-one is an island.

6 *Where victims have contributed to crime, eg by provoking an assault, they should accept some responsibility for what happened but without this excusing the offence.*

The issue of victim responsibility for crime is a complex one, which Ruth Wilkie will address in her commentary. There are many things that we can do to make ourselves less likely to become victims, if we can afford them - installing burglar alarms, anti-theft devices for motor vehicles, or increasing the lighting around our properties. Failure to take such steps may be criticised as a lack of self-interest but it does not make us responsible for crime. Sometimes however a victim can be said to have contributed to the offence. I know a young man who stole and sold his mother's jewellery because he was left at home by his father alone for several weeks with no money on which to live. Often the courts have to pass sentence for an assault which has been provoked by the victim or a related party. (Provocation is not a defence, except to murder.) Commonly the offence is but part of a wider dispute between the parties.

The adversary model does not handle these situations well. The focus of attention is on the person facing the charge before the court. Sometimes the police charge only the principal offender, so that those with a lesser role (which may include victims) appear to escape legal responsibility. If the offender and the victim are part of a Community Group Conference where the whole incident can be discussed there is the potential for the offender to make his accusations and perhaps have them accepted, not by way of legal defence but as part of a peace-making process. Sometimes it is only by dealing with the wider issues between the parties that a repetition of the offending will be avoided.

7 *The police should be regarded as part of the community solution, not as an enemy.*

Recent trends for the New Zealand police to become more community-oriented are to be warmly welcomed. A more co-operative approach to crime prevention has seen the evolution of Neighbourhood Support and other community policing initiatives. Police Youth Aid officers are already fully involved in this type of work, and constables like Nick Tuitasi of Mt Roskill, who works with an older age group, are an inspiration to us all.[61]

A Masterton mother marched her two children to the local police station when she realised they had been shoplifting. There they spoke with a Youth Aid Officer. They had arrived home with goods they did not have the money to buy. The woman also made them return the stolen goods and apologise to the shopkeepers.[62] What else lay behind this unusual story we do not know, but this woman regarded the police as an ally in teaching her children a valuable lesson. She was commended by the police. Did she "dob them in", or did she care

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[61] Similar work of a preventative nature is being done with arsonists by the New Zealand Fire Service through its Youth Liaison Project.

[62] As reported in *NZ Herald* on 24 December 1994.

about her children enough to do something about it? Does the driver who warns other drivers about a speed camera regard the police as any ally trying to make the roads safer for all of us, or as a common enemy to be beaten?

The police take most of the responsibility for the detection and prevention of crime. They cannot succeed alone. I feel that when the police are seen to be part of the community and there to assist the community then crime prevention will increasingly be seen as a community responsibility. This will require a re-evaluation of the role of the police, perhaps more towards one of partnership with the community.

8 *The State (legislators and governments) has a responsibility to provide a legal system that promotes justice and harmony in the community.*

The final component in this analysis is the State. It is essential but it need not be so dominant. Its legal system should promote justice as a goal and not as a process. Harmony, I suggest, requires many things, including an attitude of respect for others, a desire to mend the tear in the fabric of the community caused by crime, and a belief that the law is there for the benefit of all. Law-makers therefore have a responsibility to seek to promote a just regime.

Like justice, harmony in the community is an ideal that will always be imperfectly achieved, but that is of the nature of ideals. Ultimately we will be judged by how much we cared about such ideals and what we did to promote them. The yearning for justice is very deep. It will not go away. The churches who are represented here today will recognise that restorative justice offers to the world the healing power of repentance and forgiveness, of justice with mercy, of God's love for all people. These are ideals in which all people can share. If there is to be true accountability in the community it is time that we breathed the spirit of justice.