

# **Picturing The Transformation Process**

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# Picturing The Transformation Process

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## I. Introduction

My friends and colleagues, Ruth Morris of Canada and Jim Consedine of New Zealand, have written that the need to reform our legal system goes far beyond establishing a system of Restorative Justice to creating what they both refer to as *Transformative Justice*.<sup>2</sup> Their point, as I understand it, is that a fair and non-punitive system for conflict resolution would still not correct the injustices that arise from our economic and political systems, which favor those with substantial financial resources over those who have little. They are especially concerned with racism and with economic class elitism.

I share their concerns, and I agree that our long-range struggle must seek to reform more than the legal system, but I quarrel with Ruth Morris' contention that penal abolitionists should reject Restorative Justice and seek instead Transformative Justice.<sup>3</sup> My view is that abolitionists must continue to pursue our primary goal -- *Penal Abolition*, and that Restorative Justice is a proper vehicle to achieve that goal. A different analysis and different strategies are needed in order to pursue the additional goals implied in Dr. Morris' concept of Transformative Justice.

The Transformative Justice analyses that I have seen so far seem to lack: (1) a clear commitment to abolishing the penal laws, (2) a clear vision of what new

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<sup>2</sup> See, J. Consedine, *Developing Restorative and Transformative Justice: A Church Response to Crime*, and R. Morris, *Restored to What?*

<sup>3</sup> My reasons are: First, Restorative Justice and Transformative Justice are not mutually exclusive. Restorative Justice is likely to be used to resolve conflicts, even when the Transformative Justice goals are achieved. Second, it would be a strategic mistake to abandon Restorative Justice, because it has considerable acceptance. This is too good an opportunity to waste. While the dangers of co-optation should not be minimized, the proponents of punishment have not yet twisted the concept to their ends. It would be unwise for abolitionists to concede the field to them. Third, the ideal of Transformative Justice is not yet clearly defined, and the path required to reach this goal has no map. A vague ideal will not attract the practical reformers needed by the abolitionist movement.

goals are sought, and (3) a clear strategy for bringing about the desired transformation. In this article, I will attempt to suggest a direction for this transformation process.

## II. Penal Abolitionism

When I came to Toronto in 1983 for the first **ICOPA**, I believed that the goal was to abolish prisons.<sup>4</sup> The conference name was clear: **International Conference on PRISON ABOLITION**. In Amsterdam, in 1985, a consensus developed to abolish the criminal law system. It was no surprise, then, when the 1987 **ICOPA** in Montréal changed the wording to **International Conference on Penal Abolition**, which was even more clear in French: **Conférence Internationale Sur L'Abolition du Système Pénal**.

The goal of **ICOPA** is to eliminate the entire criminal law and corrections systems, and its achievement should be the main focus of every **ICOPA**.<sup>5</sup> Abolishing the criminal law might not eliminate every injustice, but it surely would remove a major source of government oppression -- oppression usually administered more often and more severely to racial minorities and the poor. More importantly, though, stripped of the authority claimed through the criminal laws, the ruling class would lose its justification to subject ordinary citizens to severe restrictions of their activities, deprivations of their liberties, destruction of their economic potential, degradation of their psyches, and relegation to the status of slaves and disenfranchised aliens.<sup>6</sup>

The articles of Jim Consedine and Ruth Morris (FN 2, supra) reflect a reluctance to fully embrace penal abolition. Arguing that there are injustices in law enforcement, they seem to propose enforcing the penal laws in a *different* manner. For example, Consedine states:

Corporate crime is endemic the world over. It hits us in so many ways from the added on costs in our supermarkets to the pollutants in the air we breathe, from the hidden cost of our banking and financial systems to the costs of medicines we take for our illnesses. The tentacles of corporate crime touch all these areas and many more. For example,

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<sup>4</sup> Several years earlier (in 1979) at a conference in Kansas City, the most we could get was a resolution for a moratorium on prison construction. Abolition of the prisons went too far for many participants.

<sup>5</sup> See, Dunbaugh, *Where Should the Movement Move?*, published in "We Who Would Take no Prisoners", edited by McLean and Pepinsky, Collective Press (Vancouver, 1993).

<sup>6</sup> We often forget that the U.S. Constitution's 13th Amendment authorizes slavery as a punishment for crime.

through false and misleading advertising, just one tobacco company arguably kills and injures more people than all the street thugs put together. The New York Times claimed in a recent editorial (9/23/99) "that 400,000 Americans die annually from tobacco". We can assume that Third World tobacco deaths would double that figure. This could be as many as one million deaths per year. Is this not huge global crime? Are not many of these deaths preventable homicides? Will anyone go to prison for them? Not likely.

Does he really propose that penal laws be enforced in these circumstances? Dr. Morris asserts that "restorative justice fails to include structural injustice in its analysis", and she gives three examples of "structural injustice" all of which consist of discrimination (racial and economic) in the structure, enforcement and implementation of the criminal and "correctional" laws. None of the cited "structural injustice" examples would exist if all penal laws were abolished.<sup>7</sup> So replacing the penal laws with a non-punitive system of justice would, in fact, address Dr. Morris' concerns. Does she believe that penal abolitionists who support restorative justice would abandon their abolition agenda?

Eliminating the criminal law entirely and dismantling the "corrections" system as well is not as drastic as it sounds.<sup>8</sup> The need for the criminal law is grossly over-stated. Everyone familiar with it knows that the criminal law system and its punitive agencies could not survive any reasonable cost-benefit analysis related to any appropriate public policy objectives, except to punish. That is, to inflict harm, usually with violence, on someone for no purpose other than retribution. This should not be a policy objective of civilized people.

### III. The Nature of Crime

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<sup>7</sup> She cites these examples: (1) "Laws are made to stress the offences of the powerless, and downplay or eliminate the harmful behaviors of the powerful." (2) "Police augment this further: their training, their deployment, their job descriptions and their biases all point them toward arresting low income street offenders from minority backgrounds, and ignoring the much larger legal offences of corporate criminals and white collar offenders." (3) "Courts and prisons each carry the bias a step further."

<sup>8</sup> A quarter century ago, attorney Gilbert M. Cantor wrote that our retributive justice system had failed, and he proposed a paradigm change. Cantor suggested that we rely mainly on the civil law system to restore victims with money damages, including punitive damages in egregious cases, and on the mental health system to rehabilitate those who engage in outrageous behavior. He also proposed, *inter alia*, settlements between the parties, financial and employment assistance, and injunctive relief. See, Cantor, *An End to Crime and Punishment*, The Shingle [Journal of the Philadelphia Bar Association] (May 1976), p. 99.

Much of the writing on restorative and transformative justice is confused by the authors' misconception about the nature of crime. Dennis Cooley (and other writers) tells us that restorative justice differs from retributive justice in that it regards crime as an offense against the victim, rather than an offense against the state.<sup>9</sup> He says, "Crime is a violation of a relationship among victims, offenders and the community." This is wrong. In Anglo-American law, an offense against a victim is not a crime; it is a tort for which civil damages can be sought.

Anyone interested in abolishing the criminal law, and thereby eliminating the whole concept of crime, must first understand the very limited nature of crime. Abolitionists must not be distracted by the general perception among lay people that crime is an "evil" act, a "harmful" act, a "predatory" act, or a "malicious" act. When we seek to do away with crime, we are not condoning bad or harmful behavior nor proposing that there be no consequences for it. We are only proposing that the government relinquish its monopoly over the process and that the consequences should not be punitive. Restorative justice calls for consequences that are beneficial to the victim, rather than simply harmful to the offender.

**Crime is only a legal concept defined by law.** The key to adopting an abolitionist perspective is to understand what Margaret Wilson wrote nearly 70 years ago: "We must remember that crime, as distinguished from wrongdoing, is a fact manufactured entirely by law."<sup>10</sup> So when Jim Considine laments that no one will be prosecuted for the wrongdoing he calls "corporate crimes", he is quite right. However, it is not because there is corruption in law enforcement; it is because technically the wrongful acts he describes are not crimes. In the law, a crime is only an act prohibited by the government. It is not a crime to kill someone; it is only a crime to murder someone. Murder and other crimes have very precise definitions in the law. All bad behavior is not criminal. Bad behavior is a crime only if the government prohibits it and prescribes criminal penalties.<sup>11</sup>

**Crime is an offense against the government only.** For a penal abolitionist it is important to recognize that all crimes are offenses against the government, not

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<sup>9</sup> Dennis Cooley's extensive paper for the Canadian Law Commission, *From Restorative to Transformative Justice*, regards transformative justice only as an extension of restorative justice principles from crime disputes to civil disputes.

<sup>10</sup> Margaret Wilson, *The Crime of Punishment*, Harcourt Brace & Co. (New York, 1931), p. 39.

<sup>11</sup> John Wilmerding defines crime as: An action (or inaction) which is proscribed; forbidden by public \*written\* law on the basis (or presumption) that it is harmful. Guilt also is a legalism. A murderer is only a person convicted of murder. O. J. Simpson, having been acquitted, is not a murderer.

offenses against the victim. For convenience crimes often are categorized as offenses against property, offenses against persons, offenses against dwellings, offenses against morality, etc. But all criminal cases are styled *The State v. The Accused*. This is not just a convenience. The prosecutor represents the government and advocates for the interests of the government. Usually, this interest is described as seeking to ensure public safety. But the government view of what is in the best interests of the public, reflects the political perspective and interests of the prosecutor.

**Crime victims are only bystanders in criminal cases.** In all criminal cases, the victim is only a witness with no real standing before the court.<sup>12</sup> The victim can not settle the criminal prosecution with the offender, or even refuse to testify against the offender.<sup>13</sup> Once the state lodges a criminal charge,<sup>14</sup> the prosecutor has complete control over the matter, and the victim is powerless to alter the course of events, except with whatever political influence can be mustered.<sup>15</sup>

Restorative justice seeks to empower the victims to have greater control over the process of resolving the conflict between the offender and the victim, but few writers ever mention em-powering the victim to divert the case from the criminal law process. Diversion would seem to be essential, in order to free offenders to accept responsibility voluntarily, which is a necessary element of the restorative process. The criminal law is an impediment to restorative justice, because the threat of severe punishment is too great to be ignored by an accused offender, who can only ward off this threat by denying responsibility.

Many writers believe that restorative justice can simply be added on to the

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<sup>12</sup> The victim is not permitted to: (1) frame the formal charges against the offender, (2) approve or reject a plea bargain, (3) present evidence against the offender (other than what the prosecutor presents through the victim as a witness), (4) make any argument against the offender's defense or in favor of the offender's conviction, (5) govern the state's recommendation of a sentence -- the victim's rights movement has gotten only victim impact statements at sentencing, (6) appeal a judge's rulings, or (7) challenge the prosecutor's decisions.

<sup>13</sup> A client once told me that a grand jury was about to indict him for embezzlement which he admitted. I called his employer's attorney and offered to settle any civil suit by having my client pay back what had been taken. Based on this, the prosecutor later threatened to charge me with interfering with the prosecution.

<sup>14</sup> In Maryland and in many jurisdictions this occurs with the filing of a police report.

<sup>15</sup> In Maryland, each county has an elected prosecutor: the States' Attorney. In the U.S. federal system, each judicial district has a United States Attorney, appointed by the President and confirmed by the U.S. Senate. Nominations often are based on recommendations of the leading state political figures in the president's political party.

criminal process, as our present legal system adds on the civil tort law. However, an offender's capacity to pay restorative damages is usually depleted by the time the victim gets the civil case to court. Precedence is always given to the state's interest in prosecuting. This important conflict between the interests of the state and the interests of the victims has been largely ignored.

Crime is a political device to protect the interests of those in power. Jim Consedine's concern that the criminal laws are not being used to protect the "little" people from the actions of "big" business is not new. Nearly 100 years ago, in a speech to the prisoners of the Cook Co. jail in Chicago, the great criminal defense attorney Clarence Darrow noted:

Those men who own the earth make the laws to protect what they have. They fix up a sort of fence or pen around what they have, and they fix the law so the fellow on the outside cannot get in. The laws are really organized for the protection of the men who rule the world. They never were organized or enforced to do justice. We have no system for doing justice, not the slightest in the world.<sup>16</sup>

#### **IV. Restorative Justice: A Developing Process**

What is restorative justice? As envisioned by most serious reformers, it is a process for resolving conflicts quite different from the current criminal law system, or even the civil law system. The differences are many, but in my judgment four very important distinctions characterize the fundamental change advocated by the proponents of restorative justice:<sup>17</sup>

- 1. Remedial Goal.** Restorative justice seeks to be remedial rather than punitive.
- 2. Future Oriented.** Restorative justice approaches conflicts with a view toward the **future** rather than the past. The main objective is to resolve the problem

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<sup>16</sup> *Attorney for the Damned* (edited by Arthur Weinberg) Simon and Schuster, New York, 1957, pp. 11-12. Any collection of abolitionist papers should include this 1902 speech. Darrow not only espouses the abolition of jails and the criminal law, but he articulates beautifully the concerns of those who advocate for Transformative Justice.

<sup>17</sup> These are mine. Harry Mika and Howard Zehr list "Ten Commandments of Restorative Justice" which are that when you do justice restoratively, you (1) focus on the harms of crime rather than the rules that have been broken, (2) are concerned equally with victims and offenders, (3) work toward restoring, empowering and responding to victims, (4) support offenders and encourage them to accept responsibility, (5) recognize that the difficult obligations of offenders are not intended as pain, (6) provide opportunities for communication between victims and offenders, (7) involve the community, (8) encourage collaboration and reintegration rather than coercion and isolation, (9) be alert to the unintended consequences of your actions and programs, and (10) show respect for all parties.

underlying the conflict so that everyone affected can move forward into the future without a festering dispute. Looking back to the past is necessary only because understanding the historical aggravations is essential to the healing process and because reparations are often included in the remedy.

3. **Broad Scope of Inquiry.** The restorative justice process takes a **very broad view** of what information is relevant, and does not restrict the submission of facts to a precise single event, i.e., the "crime". Further, it does not limit participation in the process to the state and the alleged offender (as in criminal cases), or even to the "parties" directly involved the dispute, as would be true in a tort case for damages in civil court.
4. **Not Adversarial.** The restorative justice process tends to be **informal and consensual**. No pleadings structure the issues; no judge controls the process; the facilitator simply maintains order and ensures that everyone is given an adequate opportunity to offer information and proposed remedies; and the outcome must be one that is accepted by all -- not a ruling in favor of one over another.<sup>18</sup>

The first two of these differences are very important. The retributive justice system looks backward to fix blame (criminal responsibility) on a defendant for acts that have already occurred and then proceeds to punish him or her in a measured way, presumably commensurate with the seriousness of the offense and the criminal history of the offender. Never is any real effort made to determine what is likely to happen in the future. Lip service is paid to changing the future behavior of the offender and to deterring others from committing offenses in the future. But there is little evidence that these goals are ever met.<sup>19</sup>

The restorative goal of seeking remedial measures designed to improve the situation in the future is much more like civil equity cases than either the criminal law (which blames and punishes) or the civil tort law (which blames and awards money). In enforcing the federal laws prohibiting racial and other discrimination

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<sup>18</sup> Because of its informal nature and its use to resolve community disputes, restorative justice is often viewed as a means of empowering the community to resolve its own disputes without interference from the government. Often programs of this nature are referred to as "community conferencing" or "community dispute resolution". Whether and to what extent the government surrenders its monopoly on dispute resolution varies with each program. See, Kay Pranis, *Rethinking Community Corrections: Restorative Values and An Expanded Role for the Community*.

<sup>19</sup> The job performance of state employees (police, judges, prosecutors, etc.) involved in criminal law and "corrections" is never measured in terms of whether they rehabilitated an offender or prevented future crimes. Further, the need for and utility of sentencing determinations are not litigated nor subject to appellate review.



in voting, education, employment, housing and public accommodations, the U. S. Department of Justice declined to prosecute the discriminators in criminal court.<sup>20</sup> Instead, the government sought future oriented injunctive relief under the equity powers of the federal courts.<sup>21</sup> This litigation also produced an element of allowing the offenders to help shape the outcome. The courts often ordered the wrongdoers to propose a detailed remedial plan to which the government offered modifications. The input from the wrongdoers gave them an investment in the plan that tended to motivate compliance.

Observing these techniques as a model insofar as the goals of restorative justice are concerned, it might be said that restorative justice is not so much an alternative to the criminal law as it is an alternative to the civil tort law. As such, it is important to the penal abolition movement, because it can become the most effective and user friendly vehicle for satisfying one of the two perceived justifications for the penal laws -- repairing the harm done to victims.

The other justification for our retributive justice system -- preventing violent and harmful predatory acts -- can not be achieved by any law enforcement strategy. Many of these acts fall into two categories: (a) those committed out of a perceived economic necessity and (b) those committed while out of control. To prevent the first, we need a strategy to find room in the legitimate economy for everyone to have a realistic opportunity to become economically independent. Otherwise, necessity will cause them to turn to the alternative economic system -- crime. To prevent the second, we need a strategy to provide mental health care to all who need it. This must include addiction treatment, domestic abuse counseling, anger management, etc.<sup>22</sup>

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<sup>20</sup> Clearly authorized by 18 U.S.C. §242. For example, every school superintendent in the Southern states could have been indicted and prosecuted for criminal behavior. The schools were desegregated without any such indictments. The 1964 Civil Rights Act provided for civil suits, for technical assistance in desegregating and for a cut-off of federal funds from those who did not desegregate.

<sup>21</sup> Prior to the 1957 Civil Rights Act, the Attorney General only had authority to prosecute civil rights violations criminally. At the time, the federal courts operated with all white, male juries in the South. Authority to seek injunctive relief in civil court was granted by the 1957 Act (voting rights), the 1964 Act (public accommodations, public facilities and school desegregation, and in 1965 employment discrimination), and the 1968 Act (housing).

<sup>22</sup> Since many crimes are committed by people whose anti-social behavior stems from their recognition that they were not wanted by their parents and were rejected by their parents, family planning should be a high priority in any crime prevention strategy.

## V. Transformative Justice: A Goal or a Process?

Let us examine more closely the concept of transformative justice.<sup>23</sup> Much of what has been written about transformative justice is not very clear about either the goals or the process. Perhaps the clearest description of how transformative justice can help to bring about serious reforms is in Jim Consedine's October 1999 article.<sup>24</sup>

Like many other writers, Consedine opines that transformative justice processes "include much of what is recommended in restorative conferencing, but take into account wider back-ground issues" which might include such matters as "inter-generational abuse, violence, addiction and poverty."<sup>25</sup> He notes that the "transformative process can be a vehicle for community growth and development in ways that will bring out the best qualities of many in the community. The offending can be a trigger to convene such a gathering." For example, the participants "may look at the resources available or otherwise in the community to help people, the opportunities for employment and constructive living, the need for the wider community to take some responsibility for its health and well being." He suggests that a town with three bars and no recreation facilities is likely to have more alcohol related crime, and in response to such crimes might be moved to add recreation facilities and, perhaps, some addictions programs.<sup>26</sup>

Australians John McDonald and David Moore say that the community conferencing techniques they teach "transform conflicts into cooperation" thereby opening the door to resolving conflicts.<sup>27</sup> This also is the view of Dr. Lauren Abramson of Johns Hopkins Univ., who teaches and shepherds community

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<sup>23</sup> A variety of definitions can be found at

<sup>24</sup> Consedine, *Developing Restorative and Transformative Justice: A Church Response to Crime* (1999) published at

<sup>25</sup> He also suggests that these "wider issues" might include "corporate and governmental crime", but he does not suggest how they might be addressed within the context of conferencing.

<sup>26</sup> At a recent community conference in East Baltimore concerning juveniles in the streets, part of the resolution was to get the recreation facilities to stay open later.

<sup>27</sup> This description given to me by John McDonald in February 2000 is much clearer than what is in their Statement of Philosophy on the Home Page of "Transformative Justice Australia" at [www.tja.com.au/](http://www.tja.com.au/) which says that transformative justice is "a practical philosophy" that (1) "views the conflict resulting from crime as an opportunity to achieve transformative healing for all those affected"; (2) "sees problems beginning not only with the crime but also with the causes of crime"; and (3) treats the incident as "a transformative relational and educational opportunity".

conferencing programs in Maryland. But it is not "transformative justice" in the sense implied by the writings of Morris and Consedine.

John Wilmerding says that transformative justice processes "permit, encourage, and assist (or enable) individuals and groups to transform their patterns of personal energy, intentions and/or behavior from negative/destructive to positive/affirmative, in order that they might be able to fully, mutually, affirmatively, and pro-actively participate in the co-creation or restoration of equity and/or harmony in their community."<sup>28</sup> Dennis Cooley, thinks that transformative justice only takes "restorative justice beyond the criminal justice system" to "environmental law, corporate law, labor-management relations, consumer bankruptcy and debt and family law."<sup>29</sup>

In arguing that we should reject restorative justice in favor of transformative justice, Ruth Morris asserts that "[b]y focusing primarily on the current victim, restorative justice ignores the underlying structural injustices which contribute to most prosecuted crime." "Transformative justice, in contrast," she states, "accepts the significance of the present act, validating the current victim's wrong fully in its processes, but it goes on to examine and respond to the structural injustices in the life of the offender which contributed to the offence and need healing also if change is to occur." This sounds wonderful, but what does it mean in practical terms?<sup>30</sup>

If the transformative justice process does not focus on the current victim, how can it be said that the current victim's wrong is "fully validated" by the transformative justice process? Recognizing the impediments placed on the offender is entirely appropriate. But how will such recognition influence the outcome of the process? If one excuses the offender, the victim's wrong is not validated, unless the offender's liability to make amends is somehow transferred to those responsible for the offender's condition, or is transferred to the community -- the taxpayers.

Transformative justice goes far beyond the "structural injustice" examples in Dr. Morris' article. Racial and economic class discrimination in educational, employment, housing, financial and entrepreneurial opportunities permeates our society and contributes greatly to the creation and expansion of the alternative

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<sup>28</sup> See, Definitions on the Home Page of the "Campaign for Equity-Restorative Justice" at [www.cerj.org](http://www.cerj.org) .

<sup>29</sup> Law Commission of Canada, a Discussion Paper: *From Restorative Justice to Transformative Justice* prepared by Dennis Cooley.

<sup>30</sup> Morris, *Restore to What?* published at

economic system we know as "crime" or "criminal enterprises". These forms of structural injustice and many others must be addressed by any serious reformer. But so far, it is not clear that the proponents of transformative justice have a plan for doing so that is any more concrete than the vague promises of the restorative justice folks.

Suppose that an offender robbed a store to feed his or her family and the offender's need was attributable to racial discrimination in his education. Will the transformative justice process assess damages against the school board?<sup>31</sup> Assuming the school board can be reached, what are the damages? Is it simply the loss suffered by the store owner? The anguish suffered by the store clerk? The offender's diminished capacity to earn?<sup>32</sup> Can the offender be awarded a new educational opportunity? With support for the offender's family during the education period? Can the transformative justice process order the school board to stop discriminating? Would this require a comprehensive plan? Limited to future students, or would past students be entitled to compensatory education? Who would monitor and enforce compliance with the plan? Who would pay for implementing it, or for monitoring it? Can the transformative justice process include the power to mandate reforms and to tax to achieve them?

These questions are raised, not to discredit the idea of transforming our public institutions. They are raised to point out that the process for doing so is highly complex and it transcends our legal systems for crime and dispute resolution (civil torts), reaching deep into our political system, our system of taxation and the regulation of business enterprise.

In short, I tend to agree with abolitionist writers Morris and Consedine that the reforms we seek are far reaching, and I have no trouble calling those reforms "transformative justice". With this view, I see "transformative justice" as a concept of goals, not as a process. This puts me at odds with most of the other writers, who describe "transformative justice" as a process that varies little from the "restorative justice" process, as I understand it. (See, pages 4-5, *supra*.)

## **VI. The Quest for Justice -- Setting Our Goals**

Once we accept that we need something beyond a sensible and effective alternative conflict resolution process, then we become open to examining and evaluating the fundamental political and economic structures that govern every day

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<sup>31</sup> What if the offender grew up and attended school in Mississippi and has lived in Baltimore for 15 years?

<sup>32</sup> Imagine that the offender's need to rob arose from unjust wage disparity between executives and workers.

life in the western world and beyond. Transforming the impact of these forces so as to produce "Justice" is a tough task indeed. It ought not to be fettered by any notion that crime or conflict resolution could play a major role.

First, we must attempt to define "Justice" (with a capital "J"); second, we must set goals for achieving some measure of justice; and third, we must devise a strategy for achieving the goals. Because the quest for "Justice" is a philosophical endeavor that has consumed and eluded great minds for several millennia, we should be careful not to get bogged down at step one. The best lay term for justice is "fairness". Let us look for goals that will make life as fair as possible for as many people as possible. What does this mean? I propose that the goals of those who seek "Justice" should be something along the lines of achieving the following:

1. Universal Political Self-Determination. Australians John McDonald and David Moore make a keen observation in their Statement of Philosophy. To achieve the transformation from conflict to resolution, participants in community conferences must feel justice and this sense of justice can only be achieved "if all the conditions of a defensible democratic process are met." These conditions include: "political equity, deliberation, participation and non-tyranny."<sup>33</sup> Fairness, they tell us, is a concept that children learn early in life, and it is readily understood that there must be fair rules, fair play and a fair outcome. It is a basic principle that the authority to promulgate, to interpret or to monitor compliance with the rules be derived democratically.

2. Real Opportunities for Economic Independence. Maryland Congressman Elijah Cummings says that ALL children are capable of success with proper support. This consists of (a) believing that every child can succeed, (b) having high expectations for each child, and (c) creating opportunities for every child to develop. He notes that "Our children are the living messages that we send to a future we will never see."<sup>34</sup> Few people actually enjoy the luxury of deciding how to use their time and what vocation to follow. Most people work constantly finding or earning the fundamental necessities of life -- nutritious food, a safe shelter to rest in, a sanitary environment and basic health care. Only economic independence brings the freedom to choose. The hope and opportunity of economic success must be kept open to all on a fair basis.

3. Full and Free Access to Public Information. The capacity to obtain and to communicate information is power. No one should have an unfair advantage in

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<sup>33</sup> Transformative Justice Australia web site: [www.tja.com.au/](http://www.tja.com.au/).

<sup>34</sup> Based on his remarks at a rally for the Maryland Children's Action Network in Annapolis, MD, January 31, 2000.

accessing or communicating information and ideas, especially information that is essentially public. The Internet is becoming the primary public library, so access to it should be free and easy. Keeping information secret (or distorted) must be carefully scrutinized and rejected absent a compelling public interest.

4. Incentives to Serve Common Interests. The rights of individuals to own private property and to profit from their investment of effort and capital are beneficial incentives that effectively promote economic opportunities. But we also must devise incentives that effectively promote the interests of the community, including such matters as education, sanitation, health care, consumer protection and the preservation of natural resources and the environment. Surely, we can strike a balance between pure capitalism and pure communism that is better than either one. We are all the children of Eve (a.k.a. Lucy), and the future of our family is dependent on our love for and loyalty to one another -- cousins all.

## **VII. The Quest for Justice -- Understanding the Problems**

As we contemplate how to reach each of these goals of the "justice" movement, it has to be clear that the "justice" we seek has little to do with the criminal or civil courts or with the police or even with conflict resolution of manageable proportions. There are definitely conflicts involved -- huge cultural differences that play out at an emotional (not a rational) level. But the conflicts are of such a magnitude that it is quite difficult to imagine who has to come to the table to resolve these conflicts, even if there were some predisposition to do so.

Clearly the techniques of community conferencing would be more likely to resolve these conflicts than the present "winner take all" political process. But is there any way to get these matters into such a forum? If not, can there be a strategy to resolve them within the current political structure? To answer either of these questions, we need to look more closely at the goals and to develop a clearer picture of precisely what problems need to be overcome.

a. The goal of self-determination. The right of self-determination, as expressed in the Universal Declaration of Human Rights, includes the rights to vote, to have a secret ballot, to participate in the government, to receive public services, and to equal suffrage.<sup>35</sup> Control over one's own destiny is so fundamental

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<sup>35</sup> United Nations General Assembly Resolution 217 A (111) of 10 December 1948, Article 21, states: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) Everyone has the right to equal access to public service in his country; (3) The will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be by

that the right of self-determination is at the heart of every people's movement and is displayed prominently in every post-revolution constitution.

While we in the United States are proud of our heritage of free elections, having pioneered in the field of democracy, it is clear that our voters often are not given much of a choice. Frequently, the ballot offers only a candidate from one or both of the two "major" political parties -- Republicans and Democrats.<sup>36</sup> Our laws favor a two party system, but not a multiparty system.<sup>37</sup> In a two party system, both parties usually try to appeal to the middle of the political spectrum, because it takes a plurality to win and a large losing minority gets nothing. This produces two candidates with similar views,<sup>38</sup> and the voters often are deprived of the opportunity to choose a significant change in policy. The ballot access laws make it difficult for a third party or an independent candidate to get on the ballot.<sup>39</sup> Supporters of these alternative candidates have to expend virtually all of their time and resources securing a place on the ballot with little left for publicizing the alternative vision of these candidates. Further, the alternative candidates are most often excluded from the public debates with the widest audiences.<sup>40</sup>

But even if everyone who wished to seek office could get on the ballot and could participate in the debates, only the candidates with huge financial backing can get significant exposure. It can be argued that the ability to attract financial support measures whether a candidate has enough voter support to be taken seriously. But it is the number of dollars, not the number of donors, that governs

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universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

<sup>36</sup> In many local areas of the country we have a one party system, where the only choice voters can express is in the primary election of the ruling party. For example, in Maryland's 1998 general election, 36.7% of the seats in the state legislature were not contested (18 of 47 Senate seats and 51 of 141 seats in the House of Delegates).

<sup>37</sup> The U.S. Supreme Court has been a little schizophrenic about this. In discussing the right of voters to express their preferences, the Justices tend to say that they should be allowed more choices. *Anderson v. Celebrezze*, 460 U.S. 780 at 793-94 (1983). But when dealing with the right of candidates to ballot access the Justices seem to say that the state is entitled to limit ballots so as to produce a clear majority.

<sup>38</sup> In his struggle to overcome the national consensus in favor of desegregation, former Alabama Gov. George C. Wallace often said, "There's not a dime's worth of difference between the Republicans and Democrats."

<sup>39</sup> A monthly newsletter, *Ballot Access News*, published by Richard Winger ( [ban@igc.apc.org](mailto:ban@igc.apc.org) ), reports on all litigation and legislation relating to ballot access. It documents the wide variety of hardships. See, Winger's article: *What Are Ballots For?* published on his web site: [www.ballot-access.org](http://www.ballot-access.org) .

<sup>40</sup> Ross Perot debating with Bush and Clinton in 1992 was an exception. Perot was excluded in 1996.

whether a candidate will be heard. In addition, the United States Supreme Court has ruled that the right to spend money on a political campaign is unlimited, because it is protected by the First Amendment's guarantee of Freedom of Speech.<sup>41</sup>

And, if we could provide a level playing field for all those who seek to be elected to office, our winner-take-all elections do not provide representation for a substantial minority. In many parliamentary systems, where party affiliation requires adherence to the party platform, every party with a significant minority vote gets to place a number of its candidates in parliament so that its representation in the legislature is roughly equal to the party's voting percentage.

In the United States, adherence to party principles has gone down the drain. In the "bad old days" party candidates were selected in "a smoke filled room" by the party "bosses".<sup>42</sup> This system produced candidates that could be counted on to vote the party line, which gave them some predictability from the standpoint of the voters. It also produced candidates (like Harry S. Truman) who were intimately familiar with voter's concerns -- a process that started as a ward healer who sat every Saturday morning in the local firehouse listening to people's complaints, noting them and passing them along to elected local officials and municipal department heads.

Unfortunately, the "reformers" -- to wrest power from the party "bosses" -- ended this system with help from television. In an effort to democratize the process, we changed from nominations by party conventions<sup>43</sup> to nominations by primary elections. With the simultaneous advent of television, this allowed persons to seek high elective office without the apprenticeship of serving in more local offices. These new candidates are now able to appeal directly to the voters, bypassing the party regulars. A charismatic person can get the nomination of a political party and be elected to high office with no prior relationship with voters, with no previous governing experience, and with no allegiance to the party platform (or to any political point of view). The modern candidate needs only to come up with enough money to pay for slick television ads, for smart fashion consultants, and for professional fundraisers, image-makers, polltakers and

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<sup>41</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First Nat'l Bank v. Bellotti*, 435 U.S. 385 (1972).

<sup>42</sup> A person with political ambition was required to pay his "dues" (very few "hers" in those days). One usually would serve as a ward healer before seeking a local office, in a local office before seeking a state office, and in a state office before seeking an elective, or even an appointive, federal post.

<sup>43</sup> At local, state and national conventions party regulars could confront and bargain with one another face-to-face.



political strategists.

The elected office holders who rise to power under this system are free of any debt to their political party and its "bosses". Their success has destroyed the ward healer system. No one sits in the firehouse today listening to citizen complaints. Since the political parties can no longer control who runs on their ticket, voters can not tell a candidate's point of view from the party affiliation. But the most important change is that now all candidates are beholden, not to the party "bosses", but to those who contribute money.<sup>44</sup> The new system is dependent on our having an economic system that provides some people (including corporations – see *Bellotti* decision cited in FN 41, *supra*) with a great deal of excess money available for political contributions.

The purpose of this extended discussion of the electoral process is to demonstrate that the self-determination goals of the transformative justice movement can be reached only with legislative action and Constitutional amendments to radically alter the way we do politics. Especially needed are reforms in ballot access, representation of minority views, financing election campaigns, pricing televising campaign messages<sup>45</sup> and the manner in which news agencies cover election campaigns. Of course, the problems are entirely different in each country, so that an electoral reform strategy appropriate to the United States, or even to a single state, may not be transferable to any other jurisdiction.

b. The goal of economic opportunity. This is the most ambitious of our goals. Economic opportunities are derived from a variety of sources. Our first reaction is to think of employment opportunities, but much of the nation's income comes from other sources and our wealth is a product of income, expenses, taxes, benefits<sup>46</sup> and the changing value of our assets. Many people find it easy to say that the economy should be left alone to be governed by the natural forces of the free market. We should understand clearly, however, that our economy in the United States (and I suspect everywhere) is not left alone, and it is not governed by the free market. The government influences almost everything, so we should examine those influences and try to construct coherent policies that will influence

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<sup>44</sup> The influence of money is so great in campaigns that campaign finance reform and lobbying reform must both be considered essential elements of any plan to bring about true self-determination.

<sup>45</sup> The broadcast bands are public, licensed by our government to private industry. Free air time should be given to election debates. It may be possible that easy and inexpensive access to the Internet will change these dynamics.

<sup>46</sup> Benefits are valuable services given to people that are not counted as taxable income, such as use of company car.

the economy in different ways.

Income may be the hardest part of the equation. In classic economics, income is derived from labor, land or capital. Actually, we create income in many ways, such as: (1) by working for others, (2) by selling a service, (3) by buying a product and reselling it, (4) by buying materials, manufacturing a product and selling it, (5) by buying equipment and renting it, (6) by buying land or a building and renting it, (7) by buying land (with or without buildings) and reselling it, (8) by loaning money for interest, (9) by investing in someone else's business for a share in the profits, (10) by buying and selling shares in a business.

The equations have changed just during my lifetime. I remember when an investor was satisfied with earning 4% to 5% of invested capital annually. Stockbrokers today bust their butts to reach much higher and regard it a failure if they get less than a 10% annual return. Years ago, the interest rates on loans were 6% or less,<sup>47</sup> because it was a crime to charge more.<sup>48</sup> Now, the lowest rates are over 7%, except for municipal bonds with their tax advantage. Banks used to be local. All loans were based on first hand knowledge of the local housing and business markets. During the Reagan presidency banks were allowed to become interstate.<sup>49</sup> Now, with mergers combining the industry into a few national banks, computers in the South programmed by kids in the West, evaluate loan applications from everywhere based on criteria that ignore local economic conditions. The emphasis is on recent bill paying history.

We have increased the relative value of capital and decreased the relative value of labor. In the first half of the 20th century a working class man with a steady job could support a household with a wife (most women stayed at home then), 3 or 4 children (contraception was not practiced regularly as it is now), a grandparent or two, a maiden aunt and a drunken uncle. He had to work 10 hours a day, six days a week to produce enough income, however. And one or more of the kids had a paper route or some other job. Now, in modern times, two professional people each working at least 40 hours a week can hardly afford to support themselves and a child or two. More hours of work and fewer people supported. What is the problem here?

*Digression into the Nature of Families.* The modern family has a much

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<sup>47</sup> The Maryland Constitution, Art. III., §57, provides: "The Legal Rate of Interest shall be Six per cent. Per annum;" [but before you run to get a new mortgage, read the rest] "unless otherwise provided by the General Assembly."

<sup>48</sup> Maryland increased the interest rates when the banks threatened to move and take the jobs to Delaware.

<sup>49</sup> Who knows how much this phenomenon has influenced the trafficking in illegal drugs?

higher standard of living than the typical family of the 1920's or '30's. Our expectations were raised by television,<sup>50</sup> and many of us have been quite successful in meeting these expectations. In addition, the modern family has a much better chance of enjoying a substantial period of relatively well financed retirement. Through social security and health care programs and the abundance of unskilled jobs, we are now able to free our parents (and our drunken uncle) from their dependence on us. [Non-working "maiden" aunts are rare these days.] But like the loss of "old time politics", the loss of the extended family living in a single household may not be such a good thing.

During the past five years or so, western civilizations have become obsessed with the misadventures of children. Juvenile offenses, which were decriminalized about 100 years ago, are again becoming criminalized. In a frenzy of fear, the juvenile system is being made more punitive and more children are being sent into the adult system of retribution. Only in the past few years have policy makers begun to realize that children need more attention and more positive role models. Accordingly, we are now seeing a flood of money for after-school programs featuring mentors.<sup>51</sup>

In all of this furor, little is said about the extended stay-at-home family, which used to provide after-school supervision, activities and mentoring.<sup>52</sup> Some of the marginally employed relatives might prefer to be paid a sub-minimum wage to shepherd the children at home rather than to flip burgers in the mall. How can we make this possible? Should there be tax benefits for those that keep barely employable adults in their households? Must they be relatives?

Should we provide for volunteer extended families? That is, groups of persons (not always related) who agree (by contract) to become a family and to take on obligations with respect to one another.<sup>53</sup> Is this a device that could be put to many other important social uses? [Since this article was written, we have heard

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<sup>50</sup> The families excluded from the legitimate economic system watch the same "television families" with the typical household amenities as the rest of us watch and thus have the same acquisitive hopes.

<sup>51</sup> Believing that poverty is a cause of crime, the programs often are limited to poor children. But middle class kids with two working parents need after-school supervision. The shooters in Columbine might have been ineligible.

<sup>52</sup> On the contrary, we have new government policies labeled "welfare reform" against stay-at-home adults.

<sup>53</sup> Could families be incorporated or otherwise given legal status? Community conferencing has its roots in tribal practices and may conflict with American notions of individualism. Should we encourage a return to tribal loyalties and commitment to tribal responsibility for the misdeeds of the individual members?

a lot about civil unions for gay couples.] Could we actually save public money and improve service delivery by subsidizing extended families to enable them to provide supervision and other services for family members under drug treatment programs, probation or house arrest? Such services are more likely to succeed in an atmosphere of love than in a punitive setting.

Expense is a complicated area, because it is influenced by many hidden factors. For example, there is a controversy in U. S. politics this year about prescription drugs. The political debate, as usual, is not properly focused. It is about whether or not Medicare (health insurance for seniors) should pay for prescribed medications. In my view, the debate should be about whether the price of medications should be so high, and about whether health care, including needed medications, should be available to everyone at little or no cost.

Producing and distributing medications is relatively inexpensive. The high costs are attributable to three factors: (1) research and development, (2) marketing, and (3) profits. The patent laws were designed to benefit the inventor, like Thomas A. Edison, who worked alone in a little shop and risked everything to come up with a moneymaker. If the person who actually developed a new remedy was getting the benefit, I would agree that that person's genius and effort be rewarded. But when a corporation hires hundreds of people to work in a lab on a guaranteed salary, the corporation gets the benefit of the patent -- not for genius, but for the financial risk. In these circumstances, we should reexamine our public policies.

The manufacturers tell us that, but for the potential of huge profits, new remedies would not be found.<sup>54</sup> Since the scientists do not get the bulk of the profits (if they share at all), would they do the same work for the same pay in equivalent facilities elsewhere -- at a university, for example? Why should we believe that the motivation to discover new remedies would disappear? If we decide that the people (acting through their government's health finance system) are going to pay for the drugs, why not simply pay for the research with our tax money and not pay for the profits on the risk investment? The alternatives are: (1) to finance research directly, (2) to limit the term of a patent,<sup>55</sup> or (3) to allow the government to buy a patent by eminent domain for a reasonable amount over the

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<sup>54</sup> On the contrary, there have been television stories to the effect that needed remedies for rare diseases are not pursued by the drug companies, because there would be too little profit. "Lorenzo's Oil", for example.

<sup>55</sup> For example, in the Microsoft anti-trust suit, an alternative to breaking up the company would be to strip it of its copyright for the Windows operating system. In today's economy capitalists recover their investment and a huge profit long before their exclusive rights expire. In the software industry, new ideas become obsolete quickly.

development costs and to license others to produce the drug for a nominal license fee. The competition would keep prices down.

If the manufacturers only produced and distributed the medications, their profits would likely be limited to a reasonable return on the investments associated with those functions. Distribution and marketing are quite different matters, however. There is no excuse for advertising prescription drugs. It started with Rogaine. Now it is very common. The drug companies are spending a great deal of money to create a demand for something that no one should take at all unless a doctor determines that it is necessary to cure an existing health problem. Perhaps, the IRS should issue a directive that the expense of advertising for prescription drugs is not necessary to the business and thus is not deductible.<sup>56</sup>

*Conclusion of the Economic Discussion.* The whole area of restructuring economic policy is very complex. We often institute programs to have a particular effect, but find that it has many unintended consequences. To attempt to do a definitive job in this paper would be a mistake. It would take a book and I lack sufficient expertise. The reader would do well to read some of the books by two investigative reporters for the Philadelphia *Inquirer*. Donald L. Barlett and James L. Steele wrote three books that explore how some of our policies adversely affect many of our people. They are, *America: What Went Wrong?*; *America: Who Stole the Dream?*; and *America: Who Really Pays the Taxes?* What they reveal will shock and anger most people.

## **VIII. Conclusion**

This discussion illustrates that the goals of the "transformative justice" movement are not simply goals to reform the so-called justice system. If we were to get past the economic justice issues, we might then get into areas of behavioral science, ethics and religion. Most of what we seek could be achieved easily if everyone lived according to Jesus' "Golden Rule" that we should "Do unto others as we would have them do unto us." These eleven words were boiled down to their essence in seven letters by Aretha Franklin who asked only for "R-E-S-P-E-C-T".

When I started this paper, I had hoped to be able to describe a strategy for achieving the goals of transformative justice. I found that we need to develop and refine these goals so as to give us a much clearer picture of where we want to go. Then we can analyze our current policies to determine which ones work against our goals. As Barlett and Steele show us it is no small task to unravel such

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<sup>56</sup> This approach would avoid the First Amendment problem of the ban on liquor and cigarette advertising, because it would allow the ads to continue, but the money spent on it would be taxable as profits – a major disincentive.

government programs as the tax code and to find out its real effects. Only then can we devise a strategy to move the transformative process along.

I can only hope that those who read this paper will come to understand that we will soon have to move our focus away from "crime" if we are ever to begin the transformation process. Our nation's current political obsession with "crime" and "public safety" is an impediment to progress. I believe that the media are largely at fault.<sup>57</sup> They do little or no in depth analysis, but I suspect that any serious study would reveal that, in reality, we are a much less violent society today than we were 100 years ago. Putting in place a restorative justice system to replace the criminal laws is only a first step in a much larger transformation.

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“Inve\$t in **Children** – not in **Prisons**”

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<sup>57</sup> A few years ago, I remember a bright young reporter for the *New York Times* giving this analysis: Most Americans form their opinions based on what they see on the local TV news. Because of their work schedules, most people usually look at the late night news shows. Each news show tries to come up with new material. Between the early evening news and the late night news, the only government office open and engaging in interesting business is the police station. Thus, we are lead to perceive a crime wave.