

HEALING A FRACTURED COMMUNITY: THE USE OF COMMUNITY SENTENCING CIRCLES IN RESPONSE TO HATE CRIMES

*Brian Sapir*¹

I. INTRODUCTION

As with any social construct, the American criminal justice system is a constantly adapting and evolving mechanism that is influenced by politics, current events, and societal “hot-button” topics. Over the last century legal professionals, academics, and crime victims have voiced their dissatisfaction with certain aspects of traditional criminal justice systems. The failure of severe punishments to deter crime, the increasing occurrence of repeat offenders, and the growing costs of incarceration were all issues some saw as weaknesses in the criminal justice system.² Moreover, at the heart of many people’s dissatisfaction with the system was the seemingly complete exclusion of the victim from the legal process³ and the general focus on the offender instead of the victim.⁴ These shortcomings of the current system provided the impetus for the modern Restorative Justice movement.

¹ Senior Articles Editor, *Cardozo Journal of Conflict Resolution*, B.A. Psychology, New York University, 2003; Benjamin N. Cardozo School of Law, J.D. Candidate 2008.

² Mark Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, 1 W. CRIMINOLOGY REV. 1 (1998), available at <http://wcr.sonoma.edu/v1n1/umbreit.html>.

³ *Id.*

Crime victims frequently feel twice victimized – first, by the offender and second, by the criminal justice system their tax dollars are paying for. For many crime victims their encounter with the justice systems lead to increasing frustration and anger as they are largely ignored, and are not often even provided with information about the process, court date changes, and the final disposition of the case.

Id.

⁴ Caroline G. Nicholl, U.S. Department of Justice Office of Community Oriented Policing Services, *Community Policing, Community Justice, and Restorative Justice: Exploring the Links for the Delivery of a Balanced Approach to Public Safety* 115 (1999), available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=290> (noting that

“[v]ictims routinely experience a situation in which they are given no information, are deprived of compensation, and face courts that are not victim friendly. Meanwhile, offenders are placed in a passive role while the professionals conduct the adversarial system concerned with due process, procedural fairness, adhering to rules of evidence. . .”).

Id.

Restorative Justice attempts to change the objective of criminal justice from punishing the offender to healing the victim. Rather than spending time and money to impose harsher penalties, Restorative Justice directs the energy of all those involved towards repairing the harm done to the victim, as well as offering the offender an opportunity to look inward and discover what drove him or her to commit the crime in the first place, in the hope of never repeating the act.⁵ In the last few decades, various Restorative Justice programs have been created in conjunction with the appropriate correctional system in almost every state in America.⁶

Within the Restorative Justice community of the United States, circle sentencing (also known as community circles, peace-making circles, or healing circles⁷) has evolved since the early 1990's⁸ as an effective way of healing the harm that the offender's crime has done to the community, as well as getting to the root of the problems which may have contributed to the offender's actions in the first place.⁹ These circles attempt to reintegrate the offender back into the community while also giving the victims a forum to voice their pain and fears in order to overcome them.¹⁰

In the United States, while the use of circle sentencing has not been very widespread and comprehensive studies have not been completed yet, it has received positive preliminary responses.¹¹

⁵ Mark Umbreit, Betty Vos, Robert Coatesm & Elizabeth Lightfoot, *Restorative Justice in Action: Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 *MARQ. L. REV.* 251, 258 (2005).

⁶ Jean Greenwood & Mark Umbreit, U.S. Department of Justice Office of Justice Programs, *National Survey of Victim-Offender Mediation Programs in the United States 3* (2000), available at http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/96520-national_survey/welcome.html.

⁷ See Nicholl, *supra* note 4, at 162.

Healing circles are held for either the victim . . . or for the offender. . . . When the circle is for the victim, the focus is on his or her pain and loss and on understanding what would help the victim reach closure and healing. . . [w]hen the offender is the focus, healing circles help to explore the underlying problems associated with the criminal behavior and to support the offender to make changes.

Id.

⁸ Jim Adams, *Several Minnesota Communities are Reviving an Indian Custom to Help Break the Cycle of Crime. Volunteers Help Sentence Offenders and Then Help Them Lead Better Lives*, *MINNEAPOLIS STAR TRIB.*, Aug 18, 1998, at A1.

⁹ See Nicholl, *supra* note 4, at 161 (noting that it is important to “[i]dentify the issues that underlie the crime, alcohol problem[s], broken family relationship[s], exclusion from school, gang membership.”).

¹⁰ Pauline Rosenbaum & Kathy Walker, *Gacaca: Traditional Rwandan Healing Circles* (on file with author).

¹¹ Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, *JUV. JUST. BULL.*, Feb. 2001, at 7.

Since circle sentencing has enjoyed such successes in the limited jurisdictions where it is practiced and with the limited number of crimes to which it has been applied, its use should be broadened to crimes of a more serious nature. Specifically, the damaging effects of one specific category of crime in the United States could be greatly reduced or avoided through the use of community Sentencing Circles.

Hate crimes are an ugly reality in today's world and messages of tolerance are slow to catch up with the progress of ethnic/religious/sexual diversity occurring in the country. These crimes leave the victim feeling helpless and unable to take control of the situation.¹² The danger in this type of crime lies not only in the harm done to the victim, but also in the fear and anger it spreads to the entire community.¹³

This Note will discuss the increasing occurrence of religious, ethnic and race based hate crimes in the United States and how circle sentencing is well suited to heal the community's emotional wounds left in the aftermath of these crimes. The first part of this Note will give an in-depth description of the evolution of Restorative Justice ideas and programs, the ills it seeks to cure in today's modern criminal justice system, and the main goals behind its methods. The Note will then focus on and describe one specific type of Restorative Justice program – community Sentencing Circles. The second part of this Note will examine current statistics relating to hate crimes in the United States and will focus on the effect of the September 11th attacks on the cultural equilibrium. The third part of this Note will evaluate previous Restorative Justice methods used in hate crime situations and how community Sentencing Circles would be better at addressing the fear, hate, and anger instilled in communities plagued by these crimes.

Since Restorative Justice programs have enjoyed great successes in other areas of the criminal justice system, they should also

Very little research has been conducted to date on the effectiveness of circle sentencing . . . [t]hose who have been involved with circles report that circles empower participants to resolve conflict in a manner that promotes sharing of responsibility for outcomes, generates constructive relationships, enhances respect and understanding among all involved, and fosters enduring, innovative solutions.

Id.

¹² Department of Justice, Office of Victims of Crime, <http://www.ovc.gov/publications/in-fores/responding/files/SessionA.txt> (noting that “[i]t is most unsettling to the victims because there is nothing they can do to alter the situation, nor is there anything they should be expected to change. . . [v]ictims of bias crime often suffer serious and long-lasting traumatic stress. . .”).

¹³ *Id.* (noting that “[n]ot only is the individual who is personally touched by these offenses victimized, but the entire class of individuals residing in the community is affected as well.”).

be utilized when dealing with hate crime. Moreover, the current Restorative Justice methods being used in hate crime cases, which focus only on the offender and the victim, should give way to community Sentencing Circles which involve the entire community in the healing process. While this Note proposes that community circle sentencing should be utilized in hate crime cases, it is not to be taken that the Note advocates Restorative Justice as a substitute for the model penal system. Instead, Restorative Justice practices should be used in conjunction with the criminal justice system to not only punish the offender, but also to focus on repairing the emotional harm done.

II. RESTORATIVE JUSTICE

Criminal activity in the United States causes more injury, death, and property damage than all natural disasters combined.¹⁴ For victims, the crime is not an isolated event, but an invasive disturbance of their personal world, which can cause prolonged negative effects.¹⁵ Common reactions to victimization include: Shock, physical and psychological harm, anger, a sense of loss of control, insecurity, depression, shame, anxiety, and self-blame; however, the way each particular victim copes with these feelings varies.¹⁶ Likewise, the offender is injected into a dispassionate penal system where little if any time is spent addressing the underlying reasons for the initial crime and how to avoid further offenses.¹⁷

Throughout history, politicians and sociologists have debated the causes of crime and pondered how and why our society breeds criminals.¹⁸ Cynically, the complexities of the factors involved

¹⁴ United States: Uniform Crime Report: State Statistics from 1960 – 2005, <http://www.disastercenter.com/crime/>.

¹⁵ See Nicholl, *supra* note 4, at 70.

¹⁶ *Id.*

¹⁷ Erika Bai Siebels, *Restorative Justice, Real Justice*, PRISM, Mar. - Apr. 2005, at 8, available at <http://www.restorativejustice.org/resources/docs/siebels> (noting that “[t]hey go to jail, are locked up and visited by district attorneys to get into negotiations with the State about their future. By the time they get to prison, they feel hammered down by the system and they forget about the victims.”).

¹⁸ See Nicholl, *supra* note 4, at 40.

Arguments about crime have raged regarding the effectiveness of the police and the justice system, the decline in moral and social values, economic polarization, rapid changes in urbanization, the lack of parenting skills, the media influence, and the lack of individual responsibility. In a recent *Washington Post* article, no fewer than [twenty] variables were cited as contributing to a rise or fall in crime, including racial segregation, population turnover, home ownership, street design, shortage in after-

have led some to believe that crime is an unfortunate but possibly inevitable fact of life.¹⁹ However, regardless of the cause, a crime is inherently the “violation of one human being by another”²⁰ and “is not merely an act of breaking [the] laws of the State; [but rather] it is a tearing of the social or community fabric.”²¹

A. The Evolution of Restorative Justice

The Restorative Justice movement began in the mid 1970’s with the actions of small community groups, scholars, and members of the justice system who were all looking for a better alternative to the criminal justice system in place at the time.²² The first product of the movement was the Victim Offender Reconciliation Program, which along with other processes, gained influence and respect throughout the rest of the 70’s and 80’s.²³ The first milestone for the movement occurred in 1994 when the American Bar Association officially endorsed victim offender mediation and recommended its use in courts across the country.²⁴ Since then, Restorative Justice has grown into the mainstream in jurisdictions throughout the United States and has spread internationally to countries around the world.²⁵

Restorative Justice is an entirely new way of thinking about crime and victimization.²⁶ The core theory behind Restorative Justice is that the greatest good can be accomplished by direct engagement between the offender and the victim.²⁷ Ideally, any Restorative Justice practices would bring the offender and victim

school activities, the size of the population in the [sixteen to twenty-four] year age bracket, and unemployment rates.

Id.

¹⁹ *Id.*

²⁰ Mark S. Umbreit & Robert B. Coates, U.S. Department of Justice Office of Justice Programs, *Multicultural Implications of Restorative Justice: Potential Pitfalls and Dangers* 3 (2000), http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/.

²¹ *Id.*

²² See Umbreit, Vos, Coates & Lightfoot, *supra* note 5, at 259.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Julie Andrus, Ken Downes & Mark Umbreit, *Community Reconciliation Through Facilitated Dialogue & Restorative Justice*, Andrus Family Fund Board Exploration Triad 5 (2001), available at <http://www.restorativejustice.org/articlesdb/articles/5578>.

²⁷ Paul McCold, *Overview of Mediation, Conferencing and Circles*, <http://www.restorativejustice.org/resources/docs/mccold/view>.

together to simultaneously discuss responsibility and reparations.²⁸ The theory attempts to draw on, and utilize the individual strengths of, the offender, the victim, and their communities, rather than to linger on their weaknesses.²⁹ All three of these entities are key players in the restorative process which is geared towards healing the damage each suffers because of crime.³⁰

The goal of Restorative Justice is to implement a justice system that would mirror an ideal society where people behave with mutual respect and integrity.³¹ In such an ideal society, when wrongdoing occurs, the victim and offender would be able to meet, and through dialogue the offender would be able “to gain a clear understanding of the nature of the wrong and its consequences so he/she can accept responsibility for the behavior, apologize and make amends, including a plan to prevent a reoccurrence. The offender is then forgiven, trust is restored and the relationship is repaired.”³² The core steps behind this ideological society have become the framework for any Restorative Justice process.³³ The four steps include: (1) acknowledgement of the wrong; (2) sharing and understanding the harmful effects; (3) agreement on the terms of reparation; and (4) reaching an understanding about the future.³⁴

Through these four steps, Restorative Justice practitioners attempt to fulfill the individualized needs of the victim, the offender, and the community. The victim is given an opportunity to voice his or her fear and rage at being victimized; the victim also has a chance to hear the offender’s story and gain a better understanding of why the crime occurred; and lastly the victim walks away from the situation with reparations and a sense of having been involved in the justice process and an overall feeling of closure.³⁵ Simultaneously, offenders are allowed to accept responsibility for their actions and also achieve a greater understanding of how the harm that they inflicted affects others, thus learning self-responsibility.³⁶

²⁸ *Id.*

²⁹ See Andrus, Downes & Umbreit, *supra* note 26, at 5.

³⁰ Michelle Maiese, *Restorative Justice, Beyond Intractability* October 2003, http://www.beyondintractability.org/essay/restorative_justice.

³¹ See McCold, *supra* note 27, at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Umbreit & Coates, *supra* note 20, at 3.

³⁶ See Andrus, Downes & Umbreit *supra* note 26, at 7 (noting that “[e]ducational programs for offenders include becoming aware of how victims feel and being able to empathize with victims. Education also helps offenders see their responsibilities as members of a community.”).

Additionally, giving the offender a forum for discussion makes the offender's experience with the justice system more agreeable and opens a dialogue regarding the social, political, and economic factors which created the impetus for the crime in the first place.³⁷ By achieving peace between the offender and victim under the watchful eye of the community, both the offender and the victim are better prepared for the offender's eventual release and re-entry into the community.³⁸ Lastly, the community's needs are satisfied by a reduction of the fear, anger, and anxiety that plagues any community after a crime; additionally, interested community members and policy makers are given an opportunity to have a frank and honest discussion about problems in their community and how those problems contribute to crime.³⁹ The community also benefits because the Restorative Justice process produces a healthier offender who will be better suited for re-integration into the community.⁴⁰

B. Differences Between Restorative Justice and Retributive Justice

The central mission of the typical criminal justice system in the United States and abroad is determining the guilt or innocence of

³⁷ *Id.* (noting that “[o]ffenders end up with greater skills than when they entered the corrections system.”).

³⁸ Melissa Hook & Anne Seymour, *Victims and Offenders*, THE CRIME VICTIMS REP., July-Aug. 2001, at 43, available at <http://www.restorativejustice.org/resources/docs/hook/download>.

If victims and offenders understand that people in their communities are paying attention – that the community has a vested interest in making sure that the re-entry process goes smoothly – it could change the whole dynamic. Victims would be less vulnerable, offenders would be more responsible, and the community would be looking out for its own people, actively engaged in maintaining a safer and healthier culture.

Id.

³⁹ See Nicholl, *supra* note 4, at 101.

Crime harms relationships and these need to be rebuilt; victims need to feel the care of the community, offenders need to feel that they will not be banished, and the community needs to reconnect in order to promote healthy relationships. Restorative Justice recognizes the importance of community involvement in preventing and responding to crime . . . Empowering communities and the parties to jointly engage in addressing the meaning and consequences of crime promotes understanding, problem solving, and a willingness to work things through. The focus is on how much harm can be repaired, not how much punishment is appropriate.

Id.

⁴⁰ *Id.* (noting that “responsibility is more often accepted by offenders, and from that acknowledgement of responsibility, learning and reintegration can take place. This precludes the need for punishment in most cases. Offenders are reconnected with the community while they take active responsibility for their actions.”).

suspected offenders within the confines of due process according to the law.⁴¹ The State itself is seen as the victim of the crime; therefore, the State owns the conflict and decides how to react.⁴² The actual individual victim of the crime is largely left out of the process and has very little to no input into any criminal proceedings.⁴³ Unfortunately, this system can leave the victim feeling twice victimized, first by the offender and second by the system which has ignored and marginalized him or her.⁴⁴ The result is a system which focuses almost entirely on punishing the offender without any concern for the deeper needs of the victim.⁴⁵

Record-high crime rates, coupled with increasingly high recidivism rates show that not only is incarceration an unsuccessful deterrent, but that once in prison, the inmates are not being properly rehabilitated for eventually rejoining society;⁴⁶ in fact, their time in prison only exacerbates the problem.⁴⁷ These facts raise questions as to whether the current system is merely acting as a temporary bandage desperately trying to conceal far greater societal wounds.⁴⁸ Many have questioned if there is a better way to utilize the tremendous amount of time and money currently spent on the criminal justice system in such a way as to attack the true roots of criminal behavior.⁴⁹

While the current “eye-for-an-eye, tooth-for-a-tooth” justice system in the United States is based on retribution and focuses on

⁴¹ *Id.* at 46.

⁴² *See* Umbreit, Vos, Coates & Lightfoot, *supra* note 5, at 254.

⁴³ *Id.*

⁴⁴ *See* Umbreit, *supra* note 2.

⁴⁵ *Id.*

⁴⁶ *See* Siebels, *supra* note 17, at 8.

⁴⁷ *See* Nicholl, *supra* note 4, at 62.

Prisons can become schools for crime. Imprisonment damages people: it removes self-responsibility, wrecks relationships, and promotes drug abuse – while costing thousands of dollars per inmate. It would be better to direct the attention at the causes of so much crime – male violence, unemployment, sexual dysfunction, drug and alcohol addiction, racial and cultural alienation, and economic disparity.

Id.

⁴⁸ *See id.* at 61 (questioning “[h]ow many inmates are in jail or prison directly or indirectly because of defects in our social systems and structures? Imprisoning perpetrators may bring a welcome respite to those concerned about crime, but the relief is short-lived and camouflages important opportunities for community and societal problem solving.”).

⁴⁹ *See id.* at 62.

What if the investment were spread to create open spaces for new dialogue, diagnoses, proposals, and assessments as to what could be done differently to resolve the problem of crime? What if more effort were put into diminishing the fragmentation of communities, destruction of public spaces, and limitations on freedoms?

Id.

punishing offenders for their crimes, Restorative Justice keeps true to its name and shifts the focus to restoration of the victim, the community, and even the offender.⁵⁰ While there are many differences between retributive and Restorative Justice,⁵¹ the key disparity lies in the fact that Restorative Justice recognizes that crimes are committed against individuals and not the State and therefore the emphasis must be placed on “[r]epairing harm and restoring losses, allowing offenders to take direct responsibility for their actions, and assisting victims to move beyond vulnerability towards some degree of closure”⁵² Allowing the offender to take responsibility for his or her actions and restore the victim’s losses while simultaneously facilitating the victim’s movement away from anxiety and insecurity towards closure stands in stark contrast to overcrowded prisons, remorseless prisoners, and victims left to suffer alone.⁵³ Restorative Justice proponents believe that retributive models of justice can often leave all of the parties unfulfilled and in worse situations than they were previously, while “Restorative Justice, on the other hand, leads to growth, healing, and a sense of acceptance and community . . . by seeking to increase the understanding, impact, and consequences of the crime.”⁵⁴

C. Community Sentencing Circles

Restorative Justice is practiced around the world in a variety of different formats. Community Sentencing Circles is one technique which has been in existence and utilized by different cultures

⁵⁰ See Siebels, *supra* note 17, at 8.

⁵¹ See Umbreit, Vos, Coates & Lightfoot, *supra* note 5, at 257.

TABLE 1: Two Different Views of Justice

Criminal Justice	Restorative Justice
Crime is a violation of the law and the state.	Crime is a violation of people and relationships.
Violations create guilt.	Violations create obligations.
Justice requires the state to determine blame (guilt) and impose pain (punishment).	Justice involves victims, offenders, and community members in an effort to put things right.
Central focus: offenders getting what they deserve.	Central focus: victims needs and offender responsibility for repairing harm.

Id.

⁵² See *id.* at 255.

⁵³ See Andrus, Downes & Umbreit, *supra* note 26, at 5.

⁵⁴ See Siebels, *supra* note 17, at 9.

for many years,⁵⁵ and has recently gained popularity within the United States.⁵⁶ The underlying beliefs of the practice of Sentencing Circles are in line with those of the various other Restorative Justice programs – namely returning power and dignity to the victim, affording the offender an opportunity to look inward at themselves, as well as an overall focus on repairing the harm instead of punishing the offender. However, community Sentencing Circles break from traditional Restorative Justice mediation programs, which primarily focus on the victim and the offender by including the entire community in the healing process.⁵⁷

i. History of Community Sentencing Circles

The community Sentencing Circles⁵⁸ used today in the United States find their origins in North American aboriginal peoples’

⁵⁵ See Umbreit, Vos, Coatesm & Lightfoot, *supra* note 5, at 255.

⁵⁶ *Id.* at 260 (noting that “[t]he movement began to enter the mainstream in some local and state jurisdictions beginning in the mid-1990s . . .”).

⁵⁷ For an interesting Circle Sentencing case study see Kay Pranis as told by Angie Ober, *Not In My Backyard*, <http://www.restorativejustice.org/resources/docs/praniskay2>. In the mid 1990’s the State of Minnesota Department of Corrections wanted to build a home in a Minnesota suburb to be used as a transitional house for male sex offenders after they leave prison. Though they did not need community permission, the department knew there would be opposition and so they approached Kay Pranis about mediating a circle in order to come to achieve some agreement. Kay initially met with the sexual offenders and detailed how the circle would be conducted and what they could expect. She then went door to door around the neighborhood inviting all the neighbors to the circle to express their concerns. Seventy members of the community arrived to take part. Surprisingly, people began to discuss their own personal problems; Kay was “amazed that so many people, total strangers for the most part, could come together for the first time and share so intimately from their lives.” After this initial round of story sharing, the participants discussed their fears about their children’s safety and devaluation of their property should the house be allowed to be built. Eventually the conversation went from their initial fears to how as a community they could come together to not only support each other, but to offer the offenders a place where they too could get the support they needed. By the end of the night, the debate had shifted from why the transition house should not be built, to how to provide the things needed by the community, the Corrections Department, and most surprisingly – the offenders. Not only did the community vote to allow the house but several community members assisted in its construction and preparation. Other members created sexual abuse support groups for those who had admitted to having suffered abuse during the circle in the hopes of healing the whole community’s pain. Each time a new offender was introduced to the neighbors before being allowed to move into the house, he was greeted warmly and welcomed to the community. Amazingly, when the state government tried to close the transition house down due to zoning concerns, the neighborhood took up arms and tried to convince the government to keep the house where it was.

⁵⁸ See Umbreit, Vos, Coatesm & Lightfoot, *supra* note 5, at 269–270 (explaining that Sentencing Circles are also known as community Sentencing Circles, peacemaking circles, Restorative Justice circles, and repair circles).

“talking circles.”⁵⁹ For generations, these people survived without a structured criminal system and used the circles to put an end to any disputes.⁶⁰ In these aboriginal societies, instead of focusing on punishment,⁶¹ the main objectives of the circles were achieving a balance between individuals and the community,⁶² as well as restoring harmony.⁶³ Modern circle models base their methods and goals on the practices and beliefs of these aboriginal peoples.⁶⁴

The introduction of traditional community circles to the criminal justice system occurred in Canada throughout the 1980’s.⁶⁵ The First Nations People of the Yukon and local justice officials of that area attempted to better integrate the native aboriginal people into the formal justice system.⁶⁶ Judge Barry Stuart of the Yukon Territorial Court was the first to introduce the use of community circles in an official proceeding.⁶⁷ From there, the use of community circles spread throughout western Canada and was first adopted by a mainstream United States criminal corrections department in Minnesota in 1996.⁶⁸

ii. Scope of Community Sentencing Circles

Sentencing Circles are not appropriate in every case;⁶⁹ rather, certain specific criteria have been established to ensure that the only cases allowed to be heard before a circle are those where the community and the parties involved are ready and willing to en-

⁵⁹ AFCNEWSOURCE.org, Circle Sentencing, http://www.acfnewsresource.org/religion/circle_sentencing.html (last visited Oct. 4, 2006) [hereinafter *Circle Sentencing*].

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See Rosenbaum & Walker, supra* note 10.

⁶⁴ *See Nicholl, supra* note 4, at 167 (noting that, “[t]he circle process is based on Aboriginal concepts of justice, which stress the importance of the spiritual connectedness of people. It rests on the belief that offenders are created, not born, and that healing is possible if problems are aired in a caring and respectful manner.”).

⁶⁵ Restorative Justice Online, Circle Sentencing, <http://www.restorativejustice.org/intro/tutorial/processes/circles> (last visited Oct. 4, 2006) [hereinafter *RJ Online*].

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ Lisa Rieger, *Circle Peacemaking*, Alaska Justice Forum 17(4). 2001, available at http://justice.uaa.alaska.edu/forum/17/4/winter2001/a_circle.html (last visited Oct. 4, 2006) (noting that In the United States circles have predominantly been used in first time juvenile and non-violent offender cases, whereas “in Canada [circles] are used not only in minor juvenile misdemeanor cases, but also in serious felonies, including domestic violence cases, for offenders with long criminal histories.”).

gage in a meaningful, honest, and respectful conversation.⁷⁰ There are some variations among the different programs as to when exactly in the legal process a sentencing circle may be called;⁷¹ however, in order to first be considered for a circle, the offender typically must agree to plead guilty to the crime as well as agree to abide by the circle's ultimate decision.⁷²

If a case is deemed suitable, the officiating mediator will meet with the offender and the victim separately before the circle takes place.⁷³ These pre-circle meetings give the mediator a chance to get both parties on track with the overall goal of the process and to get them thinking about what they have to say during the actual circle.⁷⁴ It is up to the mediator to ensure that the offender,⁷⁵ the victim,⁷⁶ the community leaders,⁷⁷ and the representatives of the criminal justice system⁷⁸ all understand what their individual roles are and what will be asked of them.

The mediator will arrange a time and location in which to hold the circle;⁷⁹ on that date the victim and offender will meet the me-

⁷⁰ *R. v. Joseyounen*, W.W.R. 438, 442–46 (1995). In order for a circle to occur, the accused must agree to be referred to the sentencing circle, the accused must have roots in the community, respected community leaders must be willing to participate, the victim must be willing to participate, disputed facts have been resolved in advance, and the court must be willing to depart from the usual range of sentencing and abide by the circle's decision. *Id.*

⁷¹ See Bazemore & Umbreit, *supra* note 11, at 8. Circle Sentencing “[m]ay be [a] diversion or alternative to formal court hearings and corrections process for indictable offenses.” *Id.*

⁷² See Adams, *supra* note 8.

⁷³ See Nicholl, *supra* note 4, at 70 (noting that “the pre-conference process is generally viewed as a screening device and a key indicator to circle participants that the offender is serious about personal change.”).

⁷⁴ See Pranis, *supra* note 57. Kay Pranis, a Sentencing Circle mediator, recounts how she met with the interest parties before a circle began: “I also met with the offenders . . . I spent time with them individually and as a group, walking them through a peacemaking circle process, talking about potential things that could be said and then assisting them to think through how they wanted to respond respectfully.” *Id.*

⁷⁵ Native Law Centre of Canada, Sentencing Circle: A General Overview and Guidelines, <http://www.usask.ca/nativelaw/publications/jah/circle.html> (last visited Oct. 4, 2006). The offender must accept responsibility, face their victims, face the community, and do whatever the circle deems necessary to repair the harm they caused to the victim and the community. *Id.*

⁷⁶ See *id.* (noting that the victim must be “willing to become involved with the community in some way to facilitate the healing of the offender.”).

⁷⁷ See *id.* The community must be willing to devote resources to assist the offender in his/her endeavors to repair the harm done as well as be actively involved in the supervision of the offender's long term commitments as determined by the circle. *Id.*

⁷⁸ See *id.* The criminal justice system representatives must be willing to accept the sentencing decision of the circle regardless of what the more traditional penal code might dictate. *Id.*

⁷⁹ See *id.*

diator along with their supporters, representatives from the court system, and any interested members of the community.⁸⁰

The structure and format of a circle can vary dramatically from jurisdiction to jurisdiction.⁸¹ However, traditional circles are structured so that the participants' seats are arranged in the shape of two circles, one smaller circle inside of a larger circle.⁸² The smaller circle is reserved for the offender and the victim, their families, and representatives from the court,⁸³ while the outer circle is comprised of members of the community who have a vested interest in the proceeding.⁸⁴ The mediator will begin by speaking to the group to review the goals of the circle and how best to achieve them. The mediator must ensure that only one speaker is allowed to speak at a time and that everyone's individual opinions are listened to and respected.⁸⁵ To achieve this, a "talking piece"⁸⁶ is passed around the room and only the circle member holding the object may speak.⁸⁷

The circle will then go through multiple rounds of dialogue; with each round generally having a different focus.⁸⁸ The first round may allow the participants to review the particular facts of the case, explain who they are, and why they are attending.⁸⁹ The subsequent rounds include discussions of how the victim and the community have been affected by the crime.⁹⁰ The offender is also granted an opportunity to discuss what circumstances led to the crime and their family and supporters are allowed to describe the

⁸⁰ U.S. Department of Justice Office of Justice Programs, Sentencing Circles, http://www.ojp.usdoj.gov/nij/publications/rest-just/CH5/3_sntcir.htm (last visited Nov. 17, 2007) (noting that "[s]entencing circles . . . involve the victim, victim supporters, the offender, offender supporters, judge and court personnel, prosecutor, defense counsel, police, and all interested community members.").

⁸¹ See Umbreit and Bazemore, *supra* note 11, at 6 (noting that "[s]pecifics of the circle process vary from community to community and are designed locally to fit community needs and culture.").

⁸² See McCold, *supra* note 27, at 6.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Hook & Seymour, *supra* note 38 (stating that "[t]here are no interruptions while a person is speaking . . . At all times during the proceedings of a sentencing circle the Chairperson will maintain the order and the process of the circle.").

⁸⁶ See *RJ Online*, *supra* note 65.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Nicholl, *supra* note 4, at 165.

⁹⁰ See *RJ Online*, *supra* note 65 (explaining that "[f]or the victim and each of the community participants, the circle provides an opportunity to explain the impact the crime has economically, physically, and emotionally.").

offender's virtues and importance in their lives.⁹¹ Multiple rounds may take place, and if needed, additional circles can be held in order for the group to come to a consensus on a suitable outcome.⁹² Thus, the "circle . . . discusses what happened, what impact it had on the victim and community, and what punishment is warranted."⁹³

The agreed upon punishment is typically geared to serve the needs and wants of the victim, the offender, the community, and the criminal justice system.⁹⁴ Some characteristic plans may call for the offender to make an apology to the victim, meet with the victim's family to gain appreciation for the harm they have caused, attend counseling or self-improvement classes, do volunteer work around the community, speak with other offenders about what they learned during the circle, or a short prison term coupled with any of the other alternatives.⁹⁵ The participants will return to several subsequent circles over the weeks and months following the sentence.⁹⁶ If the circle members see that the offender is not complying with their decision and/or is not making personal progress, they have the option of sending them back to the court system for more traditional sanctions.⁹⁷

Like other Restorative Justice programs, the primary goals of the sentencing circle are to bring healing and understanding to the victim and the offender.⁹⁸ However, it is the expansion of the healing environment to include the community along with the victim and offender which sets Sentencing Circles apart.⁹⁹ By involving the community in the decision making process, Circles empower community members to achieve an understanding of why the crime was committed and what needs to be changed so as to prevent any further occurrences.¹⁰⁰

By bringing the entire community into the process, Circles give individual community members an opportunity to do some-

⁹¹ See Nicholl, *supra* note 4, at 165.

⁹² See *RJ Online*, *supra* note 65 (noting that "[t]hrough this process of sharing the participants are able to develop a strategy for addressing the crime (i.e. restitution, or community service) . . .").

⁹³ See Circle Sentencing, *supra* note 59.

⁹⁴ See Nicholl, *supra* note 4, at 161.

⁹⁵ *Id.*

⁹⁶ See Jim Adams, *supra* note 8.

⁹⁷ *Id.*

⁹⁸ See *RJ Online*, *supra* note 65.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

thing that the typical judicial process does not allow.¹⁰¹ Through the circle, the individual has the power to directly influence their surroundings and do what is best for the community and not just acquiesce to the “formal justice system.”¹⁰² By empowering the community, along with both the offender and the victim,¹⁰³ circles build a sense of unity through a “shared responsibility in finding constructive resolutions”¹⁰⁴ which is in everyone’s best interest.

III. HATE CRIME

Throughout human history there have always been horrible offenses committed against individuals and cultural groups motivated by hatred, racism, and persecution; history is rife with examples which show this dark side of mankind.¹⁰⁵ It is only within the last three decades that these types of crimes have been specifically designated as “hate crimes.”¹⁰⁶ The term hate crime is applied to any “criminal offense committed against a person or property which is motivated in whole or in part by the offender’s bias against a race, religion, disability, sexual orientation or ethnic/national group.”¹⁰⁷ These crimes may include a wide range of offenses, including vandalism, robbery, harassment, assault, rape,

¹⁰¹ See Nicholl, *supra* note 4, at 156.

¹⁰² *Id.* at 157.

¹⁰³ United States Department of Justice, *Restorative Justice Fact Sheet*, http://www.ojp.usdoj.gov/nij/publications/rest-just/CH5/3_sntcir.htm (last visited Nov. 17, 2007) (describing how the offender is empowered by creating a safe environment for them to recount their side of the story and allowing them a forum for a sincere apology; the victim is empowered since they are given a chance to directly confront the offender and explain in detail the ramifications of the offenders actions).

¹⁰⁴ See *id.*

¹⁰⁵ BARBARA PERRY, *IN THE NAME OF HATE* 1 (2001).

We have all been programmed to respond to the human difference between us with fear and loathing and to handle that difference in one of three ways; ignore it, and if that is not possible, copy it If we think it is dominant, or destroy it if we think it subordinate.

Id. (citing AUDRE LORDE, *SISTER OUTSIDER* (1984)).

¹⁰⁶ See e.g. DONALD ALTSCHILLER, *HATE CRIMES* ix (Contemporary World Issues 1999) (noting that “[t]he term ‘hate crime’ is of very recent vintage. According to NYU law professor James B. Jacobs, the phrase first appeared in the media in 1985, with eleven articles on hate crime published in newspapers throughout the country.”); RYKEN GRATTET & VALERIE JENNESS, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT* 18 (Russel Sage Foundation, 2001) (outlining “recently invented . . . terms like “hate crime,” “bias crime,” and “hate-motivated crime . . .”).

¹⁰⁷ U.S. Department of Justice, *Hate Crime Data Collection Guidelines* 4, <http://www.fbi.gov/ucr/hatecrime.pdf>.

murder, and other criminal acts as long as the victim is chosen because they belong to one of the above-mentioned groups.¹⁰⁸

Victims of hate crimes experience all of the typical symptoms of post traumatic stress: Vulnerability, anger, depression, physical ailments, learning problems, and difficult interpersonal relations.¹⁰⁹ Moreover, victims tend to suffer these debilitating symptoms for longer periods of time than do victims of ordinary crime.¹¹⁰ Some victims can never overcome these effects and experience dramatic reductions in the quality of their lives.¹¹¹

People of all ages, races, and religions have been convicted of hate crimes.¹¹² While there are several recognized economic and political factors¹¹³ that may fuel the fires of hate, it is primarily cultural animosity and ignorance which compel someone to act out against a targeted minority in a violent and destructive manner.¹¹⁴

¹⁰⁸ The National Center for Victims of Crime, *Hate Crimes*, <http://www.ncvc.org/ncvc/>.

¹⁰⁹ *See id.*

A sense of anger is one of the common responses to being the victim of a hate crime, but so is a deep sense of personal hurt and betrayal. Victims experience feelings of powerlessness, isolation, sadness and suspicion. Fear is another pervasive victim response. Victims fear for their own safety and for their family's safety.

Id.

¹¹⁰ American Psychological Association, *Hate Crimes Today: An Age-Old Foe In Modern Dress*, available at <http://www.apa.org/releases/hate.html> (declaring that "hate crime victims have needed as much as [five] years to overcome their ordeal. By contrast, victims of non[-]bias crimes experienced a decrease in crime-related psychological problems within [two] years of the crime.").

¹¹¹ *See* Altschiller, *supra* note 106 (stating that "[m]ost report changes in their lifestyle such as where they walk, how they answer the phone, reactions to strangers, suspicion of co-workers, and other such changes. Fear can take on paranoid qualities and drastically disrupt the lives of some victims.").

¹¹² *See, e.g.*, Federal Bureau of Investigations, *Hate Crime Statistics 2005: Offenders*, <http://www.fbi.gov/ucr/html> (indicating that of all the known hate crime offenders in 2005 60.5% were white, 19.9% were black, 12.3% were unknown, 5.2% were multiple races, 1.1% were American Indian, and .9% were Asian); Partners Against Hate, <http://www.partnersagainsthate.org> (33% of all hate crime offenders are under the age of 18).

¹¹³ *See* Perry, *supra* note 105, at 74. Perry explains that in past times minorities were relegated to lower class jobs while the white majority enjoyed the higher paying less menial employment; in recent decades this has changed and many minorities are able to climb the economic ladder. This has caused aggravation amongst some whites as the minorities are seen as either taking jobs away from whites or overstepping the more traditional boundaries of the past:

[T]hey blame their perceived loss of privilege on the undeserving Other, who usually is constructed in racial terms. It is the African-Americans, Asian-Americans, Hispanic-Americans, and immigrant minorities who are thought to obtain 'privilege' through affirmative action and welfare, for example. Consequently, the racialized Other is viewed with hostility and resentment.

Id.; *see also* Altschiller, *supra* note 106 (proposing that "[e]conomic competition by minorities is proposed . . . as an aggravating factor in some attacks. . .").

¹¹⁴ *See, e.g.*, *Hate Crimes Today: An Age-Old Foe In Modern Dress*, *supra* note 110.

People are quick to blame those who are different from themselves for any of their problems; blame then leads to fear and anger, which open the door for violence.¹¹⁵ One theme present in all hate crimes regardless of their initial motivation is their ability to send a message to all those similar to the victim that they are unwanted and are potential targets; this itself may often be the initial impetus for the crime.¹¹⁶

A. Hate Crimes in America

Americans are no strangers to hate crime;¹¹⁷ it has been an ugly part of our society from the nation's very beginning and seems to linger on through the generations.¹¹⁸

Alcohol and drugs may sometimes help fuel these crimes, but the main determinant appears to be personal prejudice, a situation that colors people's judgment, blinding the aggressors to the immorality of what they are doing. Such prejudice is most likely rooted in an environment that disdains someone who is "different" or sees that difference as threatening.

National Victim Assistance Academy Textbook, *Hate and Bias Crime*, http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter22_1.html (stating "many others are obsessed by their fear, insecurity, and limited ability to provide for their families, combined with an overwhelming urge to hurt those whom they have designated as scapegoats to explain their own powerlessness or failures."). (Last visited November 17, 2007).

¹¹⁵ Partners Against Hate, *Frequently Asked Questions About Hate Crime and Hate on the Internet*, http://www.partnersagainsthate.org/about_hate_crimes/faq-html.html (noting that "[h]ate crimes often occur as a result of prejudice and ignorance. A lack of understanding about differences among people and their traditions contributes to fear and intolerance. Left unaddressed, these sentiments may often lead to acts of intimidation and ultimately hate-motivated violence.").

¹¹⁶ See, e.g., *Hate Crimes Today: An Age-Old Foe In Modern Dress*, *supra* note 110 (declaring "[t]hey are different from other crimes in that the offender is sending a message to members of a certain group that they are unwelcome in a particular neighborhood, community, school, or workplace."); see Perry, *supra* note 105, at 10 (stating that "[o]ftentimes, the specific victim is almost immaterial. The victims are interchangeable. Unlike actuarial or instrumental crimes, hate crimes are symbolic acts aimed at the people 'watching.' The target audience is not so much the victim as it is others like him or her.").

¹¹⁷ See Jenness & Grattet, *supra* note 128, at 18.

[I]t is hardly necessary to point out our nation's history of bias: Native Americans were brutally murdered as the West was conquered; the blood and sweat of Chinese and other immigrant workers stain the expanses of railroad tracks across the Midwest; lynchings of blacks were once common; violence against various European immigrants and Jews was a fact of life. Clearly, violence motivated by racism, xenophobia, anti-Semitism and other biases is not new.

Id.

¹¹⁸ See Perry, *supra* note 105, at 2.

It is important to keep in mind that what we currently refer to as hate crime has a long historical lineage. The contemporary dynamics of hate-motivated violence have their origins in historical conditions. With respect to ethnviolence, at least, history

With the proliferation of the Internet throughout the nation, new and more advanced modes of communication are available to the public. A regrettable consequence of this new technology is that hateful and racist communications are able to be spread over the web with relative ease. There are currently hundreds of websites, blogs, and electronic mailing lists on American web servers devoted to racist groups and ideologies.¹¹⁹ Despite legislative and judicial attempts to educate the public and create stiffer sentencing requirements for hate crimes,¹²⁰ they continue to be a very real and escalating problem in the United States.¹²¹

does repeat itself as similar patterns of motivation, sentiment, and victimization recur over time. Just as immigrants in the 1890s were subject to institutional and public forms of discrimination and violence, so too were those of the 1990s; likewise, former black slaves risked the wrath of the Ku Klux Klan when they exercised their new-found rights in the antebellum period, just as their descendants risked violent reprisal for their efforts to win and exercise additional rights and freedoms in the civil rights era; and women who demanded the right to vote on the eve of the twentieth century suffered the same ridicule and harassment as those who demanded equal rights in the workplace later in the century. While the politics of difference that underlie these periods of animosity may lie latent for short periods of time, they nonetheless seem to remain on the simmer, ready to resurface whenever a new threat is perceived—when immigration levels increase, or formerly powerless groups are suddenly empowered, or when relationships between groups shift for other political, economic, or cultural reasons.

Id.

¹¹⁹ The Hate Directory, <http://www.bcpl.net/~rfrankli/hatedir.pdf>. (Last visited Nov. 17, 2007).

¹²⁰ See, e.g., Partners Against Hate, Federal Activities and Initiatives, http://www.partnersagainstthate.org/about_hate_crimes/federal_overview.html. (“Hate Crime Statistics Act (28 U.S.C. § 534) (enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which “manifest prejudice based on race, religion, sexual orientation, or ethnicity” (later extended to disability) from law enforcement agencies across the country and to publish an annual summary of the findings); Violence Against Women Act of 1994 (42 U.S.C. § 13981) (in 1998, Congress passed the Violence Against Women Act, a comprehensive federal response to the increasing violence directed at women because of their gender); Church Arsons Prevention Act (18 U.S.C. § 247) (in 1996, the Church Arsons Prevention Act was signed into law in response to the rash of fires at churches with predominantly African American congregations.); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding the use of penalty enhancements as a legal method of creating harsher sentences for hate crimes).

¹²¹ Federal Bureau of Investigation, Hate Crime Statistics 2005: Offenders Table 3, <http://www.fbi.gov/ucr/hc2005/table3.htm>. In the year 2005 there were 7,163 reported hate crimes committed in the United States including 6 murders; 3 rapes; 817 aggravated assaults; 1,324 simple assaults; 2,044 acts of intimidation; 127 robberies; 136 burglaries; 221 larceny-thefts; 18 motor vehicle thefts; 39 cases of arson; 2,528 acts of vandalism; and 125 crimes classified as “other.”

B. Common Groups Targeted By Hate Crime

i. African Americans

Anti-black violence has been the most predominant and visible category of hate crimes within the United States.¹²² From early colonial days up until just a few decades ago African Americans have been systematically oppressed and abused on a scale unparalleled by any other minority group in the country.¹²³ In the 1990's hate crimes perpetuated against African Americans took place in the form of church burnings.¹²⁴

Today, even as proponents of civil rights continue to make strides and tolerance between the races is at its all time high, there are still instances of horrendous violence. On December 20, 1986, Michael Griffith, an African American, was ambushed and beaten by a group of white youths in Howard Beach, New York.¹²⁵ The group of attackers had no more motivation for the assault than the mere presence of Griffith and his other African-American companions in their predominantly white town.¹²⁶ Mr. Griffith attempted to escape his attackers by running across a major thoroughfare, where he was ultimately struck by an oncoming vehicle and killed.¹²⁷

¹²² Federal Bureau of Investigation, Hate Crime Statistics 2005: Offenders Table 1, <http://www.fbi.gov/ucr/hc2005/table1.htm> (noting that crimes committed against African Americans have accounted for the highest percentage of the total hate crimes committed every year since the U.S. Department of Justice started to record the number of hate crimes; in 2005 crimes against African-Americans made up nearly seventy percent of all race motivated hate crimes and almost half of the crime committed against African-Americans were violent in nature).

¹²³ See Altschiller, *supra* note 106 at 3 (noting that “[v]iolence against black Americans has a long and tragic history in the United States, starting with slavery and continuing with lynchings, firebombings, cross burnings, and assassinations. From 1882 to 1968, a reported 4,743 people were lynched; of those, the vast majority were black.”).

¹²⁴ *Id.* at 5 (noting that “[i]n our society, arson of a church attended predominately by African Americans carries a unique and menacing threat that these individuals are physically vulnerable because of their race,” testified Deval Patrick, assistant attorney general for civil rights, before the U.S. House of Representatives . . .”).

¹²⁵ Reed Albergotti, Thomas Zambito, Marsha Schrager & John Rofe, *Racism Comes Home: The Howard Beach Case*, <http://www.queenstribune.com/anniversary2003/howardbeach.htm> (noting that the trial of the white youths involved in the attack received a high level of media attention. In spite of an attempt by the defense to paint the victim(s) as criminals, three of the defendants were found guilty. Three of the New York teens were convicted of second degree manslaughter and first-degree assault and received sentences ranging from five to thirty years in prison.).

¹²⁶ *Id.*

¹²⁷ *Id.*

ii. Jews

The past atrocities committed against Jewish people throughout the world are well known. It is fortuitous that these horrors have not resurfaced within the United States;¹²⁸ in fact, incidents motivated by anti-Semitic violence are quite low as compared to other minority groups.¹²⁹ However, acts of anti-Semitic motivated harassment and vandalism are rampant within the United States.¹³⁰ Some examples from this past year include: an ambulance operated by a volunteer Jewish organization in New York was defaced with spray paint swastikas; sixty-four headstones were overturned in a New Jersey Jewish cemetery; a synagogue in Massachusetts was defaced with racial slurs and swastikas; and students in a California high school were caught chanting, “Hitler was right,” and, “Burn the Jews.”¹³¹

iii. Homosexuals

While statistically not the most prevalent of all the hate crimes committed within the United States,¹³² crimes against homosexual men and women seem to be the most socially accepted.¹³³ Aside from being the most socially accepted, attacks against homosexuals also tend to be the most inhumane and violent.¹³⁴ A wide range of

¹²⁸ ANTI-DEFAMATION LEAGUE, ANNUAL ADL AUDIT: Anti-Semitic Incidents Decline in 2005 but Levels Still Of Concern In U.S., [hereinafter ADL Audit], http://www.adl.org/PresRele/ASUS_12/audit_2005.htm (noting that “[The ADL] ha[s] always said that America is different, that the Jewish communities here are fortunate to be largely immune from the kind of anti-Semitic violence experienced by some European Jewish communities.”).

¹²⁹ Federal Bureau of Investigation, Hate Crime Statistics 2005: Offenders Table 4, <http://www.fbi.gov/ucr/hc2005/table4.htm> (noting that in 2005 there were 58 acts of anti-Jewish motivated physical violence as opposed to: 982 motivated by anti-Black bias; 111 motivated by anti-Homosexual bias; and 300 motivated by anti-Hispanic bias).

¹³⁰ See Annual ADL Audit: Anti-Semitic Incidents Decline in 2005 but Levels Still Of Concern In U.S., *supra* note 128 (noting that more than 1,700 acts of Anti-Jewish harassment and vandalism were perpetrated in the year 2005).

¹³¹ *Id.*

¹³² See Hate Crime Statistics 2005, *supra* note 122 (noting that in 2005 there were 111 reports of violent attacks motivated by anti-Homosexual bias, as compared to 982 violent attacks motivated by anti-Black bias).

¹³³ See Hate Crimes Today: An Age-Old Foe In Modern Dress, *supra* note 110 (noting that “[t]he most socially acceptable, and probably the most widespread, form of hate crime . . . are those targeting sexual minorities . . .”).

¹³⁴ See Altschiller, *supra* note 106, at 10.

According to one study, “an intense rage is present in nearly all homicide cases involving gay male victims. A striking feature . . . is their gruesome, often vicious nature. Seldom is the homosexual victim simply shot. He is apt to be stabbed a dozen or more times, mutilated, and strangled.” A hospital official in New York City remarked, “Attacks against gay men were the most heinous and brutal I encountered

sociological explanations have been introduced as to why hate crime assailants commit such brutal attacks on homosexuals,¹³⁵ but as with other hate crimes there is no one true answer.

The news is filled with stories of this unwarranted hate and rage so often targeted at people of different sexual orientations. In 1993 Brandon Teena had been living a life similar to any other twenty-one-year-old man in Falls City, Nebraska.¹³⁶ Unbeknownst to those around him, he had actually been born Teena Brandon and raised for most of his life as a girl.¹³⁷ When two local men learned his true gender they beat and raped him.¹³⁸ When these same attackers discovered that he had gone to the police and pressed criminal charges, they shot and killed him.¹³⁹

C. Hate Crimes Affect the Entire Community

Any crime committed within a society affects all the members of that society to some extent. It begins with the victim and the offender and radiates out to their families and friends and community, ultimately detracting from the overall quality of life of the entire country.¹⁴⁰ However, hate crimes above all other types of crime are particularly adept at poisoning an entire community.¹⁴¹

. . . showing the absolute intent to rub out the human being because of his (sexual) preference.”

Id. (citing Anthony S. Winer, HARVARD C.R.-C.L. L.REV., Summer 1994).

¹³⁵

Ideology assailants report that their crimes stem from their negative beliefs and attitudes about homosexuality that they perceive other people in the community share. They see themselves as enforcing social morals. Thrill seekers are typically adolescents who commit assaults to alleviate boredom, to have fun and excitement, and to feel strong. Peer-dynamics assailants also tend to be adolescents; they commit assaults in an effort to prove their toughness and heterosexuality to friends. Self-defense assailants typically believe that homosexuals are sexual predators and say they were responding to aggressive sexual propositions.

Id.

¹³⁶ Hate Crime Victims, <http://www.hatecrime.org/index.html>. Brandon Teena's story was the inspiration for the movie *BOYS DON'T CRY* (Fox Searchlight Pictures 1999). (last visited Nov. 17, 2007).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Altschiller, *supra* note 106.

¹⁴¹ Federal Bureau of Investigation, Hate Crime Statistics 1999, <http://www.fbi.gov/ucr/99hate.pdf>.

The diversity of its people makes the United States a unique nation. However, when crimes are committed because of our differences, the effects can reverberate beyond a single person or group into an entire community, city, or society as a whole. These

The vast majority of hate crimes are offenses committed against property;¹⁴² the perpetrators wish to leave a message, be it in the form of a burning cross, spray-painted swastika, or overturned grave, stating that those who are different are not welcome. These crimes, vandalism, intimidation, and more serious acts of physical violence, are not happening out of sight of the public. They are occurring in residential areas, school zones, places of worship, and other public areas¹⁴³ — they are all committed in the public eye and are subsequently suffered by the community at large.

In communities where there is a large population of members of the same minority targeted by the crime, the message of hate has a greater impact, often leading to feelings of fear and outrage and sometimes escalating to violent acts of revenge and retaliation.¹⁴⁴ The 1991 Crown Heights riots showcase the potential retaliation that even an accident can provoke if it is perceived as bias-motivated crime.¹⁴⁵ On August 19th of that year, a Hasidic Jew driving in a motorcade lost control of his vehicle and struck and killed an African-American child on the street.¹⁴⁶ This event triggered looting and rioting by outraged and exasperated African-American members of the community, which eventually led to thousands of dollars of property damage, multiple assaults on Hasidic men and the tragic murder of one Hasidic man.¹⁴⁷

crimes, committed because of a bias against race, religion, disability, ethnicity, or sexual orientation, are not limited to cities of a particular size or a region of the country, but occur in communities of all sizes throughout the country.

Id.

¹⁴² Federal Bureau of Investigation, FBI Releases its 2005 Statistics on Hate Crime, <http://www.fbi.gov/pressrel/pressrel06/hatecrimestats101606.htm> (noting that in 2005, 3,109 hate crime offenses against property were reported and “[d]amage/destruction/vandalism was the most frequently reported. . .”).

¹⁴³ *Id.* (noting that 30% occurred in or near homes; 18.3% on highways and streets; 13.5% at colleges and schools; 6.6% in parking lots or garages; and 4.3% at public places of worship).

¹⁴⁴ National Youth Violence Prevention, Hate Crimes, <http://www.safeyouth.org/scripts/teens/hate.asp#References>.

¹⁴⁵ John Kifner & Felicia R. Lee, *In Crown Heights, a Decade of Healing After Riots, but Scars Remain*, N. Y. TIMES, Aug. 19, 2001.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

D. Effect of the September 11, 2001 Attacks

Unfortunately, Arab-Americans and Muslims living in the United States are no strangers to the pains of bias motivated crimes;¹⁴⁸ however, “[t]he hate crimes that followed the September 11 attacks nonetheless were unique in their severity and extent.”¹⁴⁹ Arabs and members of other ethnicities similar in appearance to Arabs were subject to violent crimes “includ[ing] murder, beatings, arson, attacks on mosques, shootings, vehicular assaults and verbal threats.”¹⁵⁰ Intense feelings of anger exploded into acts of violence against anyone perceived to share a common religious or ethnic background with the al-Qaeda members responsible for the September 11 attacks.¹⁵¹

In total, there were 9,730 hate crimes reported in the United States in 2001,¹⁵² an increase by over 1,600 incidents from the previous year.¹⁵³ Prior to 2001 the most prevalent type of reported hate crimes were those motivated by religion and sexual orientation, with ethnicity based crimes accounting for the least amount of occurrences.¹⁵⁴ These numbers changed dramatically after September 11; incidents of religious and ethnicity based victimizations skyrocketed and became the two most prevalent bases for hate crimes.¹⁵⁵

¹⁴⁸ Amardeep Singh, “*We Are not the Enemy*” *Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11*, HUMAN RIGHTS WATCH, NOV. 2002 Vol.14 No.6 at 1 (noting that “[t]he post-September violence against Arabs and Muslims was not unprecedented. Over the past twenty years backlash hate crimes against Arabs and Muslims in the United States have become predictable, triggered by conflict in the Middle East and acts of terrorism associated with Arabs or Muslims.”).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (noting that “Arabs and Muslims in the United States, and those perceived to be Arab or Muslim, such as Sikhs and South Asians, became victims of a severe wave of backlash violence.”).

¹⁵¹ *Id.*

¹⁵² Federal Bureau of Investigation, Hate Crime Statistics 2001, <http://www.fbi.gov/ucr/01hate.pdf>.

¹⁵³ Federal Bureau of Investigation, Hate Crime Statistics 2000, http://www.fbi.gov/ucr/cius_00/hate00.pdf (noting that 8,063 hate crimes were reported in the United States in 2000).

¹⁵⁴ See Hate Crime Statistics 2001, *supra* note 152.

¹⁵⁵ See *id.*

That distribution changed in 2001, presumably as a result of the heinous incidents that occurred on September 11. For many offenders, the preformed negative opinion, or bias, was directed toward ethnicity/ national origin. Consistent with past data, by bias type, law enforcement reported that most incidents in 2001 were motivated by bias against race. However, crime incidents motivated by bias against ethnicity/national origin were the second most frequently reported bias in 2001, more than doubling the number of incidents, offenses, victims, and known offenders from 2000 data.

The backlash against Arabs after September 11 had tragic and sometimes deadly consequences.¹⁵⁶ Given the current unrest in the Middle East and the possibility of further acts of terrorism and violence against the United States at the hands of violent Islamic fundamentalists, the nation may once again see a swell in anti-Arab hate crimes as a consequence of any such attack. Americans must learn from the experiences of post September 11 not only to prepare for and prevent such crimes, but also to provide victims and communities with the appropriate tools to handle the fear and anger resulting from such victimization.

IV. RESTORATIVE JUSTICE AND HATE CRIMES

Various restorative justice techniques have been proposed as effective means of repairing the harm caused by hate crimes. Victim-Offender Mediation is one program in particular that has received strong recommendations.¹⁵⁷

Additionally, the anti-other ethnicity/national origin category quadrupled in incidents, offenses, victims, and known offenders. Another noticeable increase in 2001 was among religious-bias incidents. Anti-Islamic religion incidents were previously the second least reported, but in 2001, they became the second highest reported among religious-bias incidents (anti-Jewish religion incidents were the highest), growing by more than 1,600 percent over the 2000 volume. In 2001, reported data showed there were 481 incidents made up of 546 offenses having 554 victims of crimes motivated by bias toward the Islamic religion.

Id.

¹⁵⁶ See Singh *supra* note 148, at 17 (noting that on September 15, 2002 Frank Roque shot and killed Balbir Singh Sodhi, a forty-nine-year-old Sikh man, because he wanted to “kill the ragheads responsible for September 11;” on October 4, 2001 Mark Stronman shot and killed Vasudex Patel because of anger due to the September 11 attacks; on September 15, 2001 James Herrick set fire to and burnt down an Indian restaurant in Utah because he knew the owners were from Pakistan; and on September 16, 2001 a Pakistani-owned mechanic shop was burnt and destroyed in Texas).

¹⁵⁷ See *e.g.* Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185 (2001); Katie Long, *Community Input at Sentencing: Victim’s Right or Victim’s Revenge?*, 75 B.U.L. REV. 187 (1995); Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1 (2003); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

A. Victim-Offender Mediation

Of all the various restorative justice programs, Victim-Offender Mediation is the most developed¹⁵⁸ and widespread.¹⁵⁹ Its contribution to the criminal justice system was recognized in 1994 when it was officially endorsed by the American Bar Association.¹⁶⁰ Victim-Offender Mediation “provides interested victims. . .the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender directly accountable for their behavior while providing important assistance and compensation to the victim.”¹⁶¹ Victim-Offender Mediation programs have achieved great success and are for the most part endorsed by both the victim and the offender.¹⁶²

However, while Victim-Offender Mediation programs may achieve their goals, the benefit of the mediation process is only immediately felt by the participants – the victim and offender. The fact that Victim-Offender Mediation limits the participants to victims and offenders means that the members of the community affected by the crime do not get to benefit from the mediation process. The key behind Restorative Justice is the desire to heal the victim and the offender as well as the community,¹⁶³ Victim-Offender Mediation only satisfies the needs of two of these three entities.

The exclusion of the community from the healing process by Victim-Offender Mediation and other Restorative Justice pro-

¹⁵⁸ See Umbreit, *supra* note 2.

¹⁵⁹ See Bazemore and Umbreit, *supra* note 11, at 2.

[Victim Offender Mediations] have a respectable [twenty]-year track record in the United States, Canada, and Europe. Currently, there are approximately 320 victim-offender mediation programs in the United States and Canada and more than 700 in Europe. Several programs in North America currently receive nearly 1,000 case referrals annually from local courts.

Id.

¹⁶⁰ See Greenwood & Umbreit *supra* note 6, at 3 (“[a]fter many years of supporting civil court mediation, with limited interest in criminal mediation, the ABA now endorses the process and recommends the use of ‘victim-offender mediation and dialogue’ in courts throughout the United States”).

¹⁶¹ See Umbreit, *supra* note 2.

¹⁶² *Id.* Victims commented that “I was allowed to participate and I felt I was able to make decisions rather than the system making them for me . . . I liked the personal quality of mediation. . . it made me feel less like a victim, but still a victim.” While offenders were quoted as saying “I like the fairness of it . . . To understand what the victim feels makes me different. . . I was able to understand a lot about what I did.”

¹⁶³ See McCold, *supra* note 27, at 1 (noting that “[R]estorative Justice theory always included a concern for victims, offenders, and community, and the needs crime creates for all three.”).

grams makes Sentencing Circles the ideal technique to be used in hate crime cases. The effects of hate crimes are particularly damaging to the community,¹⁶⁴ as such, it is imperative that a technique be used which incorporates the community into the healing process to allay the community's fears as well as prepare them for the eventual reincorporation of the offender back into the neighborhood.

B. Implementing Community Circle Sentencing in Hate Crime Cases

This Note proposes that when dealing with hate crime, Restorative Justice must be used as a supplement to the current retributive criminal justice system. By following the ideals behind restorative justice, namely, bringing the healing of the victim to the forefront, rehabilitating the offender, and involving the community throughout the process,¹⁶⁵ we could better succeed in preventing future acts of hate on a national level and more efficiently deal with the poignant emotions involved in hate acts on a more individual level. Combining incarceration and other punishments with restorative justice would send the message that while there are still consequences for your actions, you will not simply be locked away and forgotten about. But rather, all the parties involved will have a chance at rehabilitation and at achieving a greater mutual understanding and appreciation of each other.

Restorative justice has taken form in a multitude of different procedures.¹⁶⁶ Sentencing Circles is one such process that has had preliminary success when dealing with a variety of offenses.¹⁶⁷

¹⁶⁴ See Department of Justice, *supra* note 12.

Because of their unique psychological impact on the victim, bias crimes can have a more devastating effect than other crimes on both the victim and the victim's community. Bias crimes are considered "message crimes" – crimes that send a message of fear and terror, based on a foundation of bigotry. Bias crimes have an impact on the victim's community. As a result, a seemingly insignificant incident can exacerbate existing tension within the community, with the potential for reprisals and escalating violence.

Id.

¹⁶⁵ See McCold, *supra* note 27, at 1.

¹⁶⁶ See Bazemore and Umbreit, *supra* note 11 ([v]ictim Offender Mediation, Community reparative boards, family group conferencing, and Sentencing Circles are an example of just four of the many different Restorative Justice processes.).

¹⁶⁷ See Umbreit, Vos, Coates & Lightfoot, *supra* note 5, at 276.

[v]ictim satisfaction is cited as "very high" in the Healing/Sentencing Circles Program in Whitehorse, Yukon Territory. Participant satisfaction with Restorative Justice cir-

These circles are the ideal setting for dealing with hate crimes in a manner that stays true to the tenets of restorative justice. While Circles have primarily dealt with non-violent offenses, it is a stark reality that hate crimes manifest themselves in a spectrum of offenses including the ultra-violent.¹⁶⁸ Despite the fact that Sentencing Circles have primarily dealt with non-violent offenses, they are well equipped to handle more serious offenses and should be implemented in hate crime cases.

Hate crime is different from other types of criminal activity in that even the most minor offenses can stir up deep seated feelings of fear and anger. The impetus behind such crimes is neither greed nor lust; such crimes are fueled by the ignorance, bias and stereotypes harbored by the offender. Curing ignorance and erasing negative stereotypes is therefore the only way to defeat such crimes. That is why restorative justice would be so effective with these crimes. Through its processes, the victim and offender delve deep into the underlying causes of the crime and seek to remove any negative feelings towards one another. Circles in particular would work well because unlike other restorative justice processes, it allows the community to take a very active role in the healing.¹⁶⁹

Involving the community in the healing process is of utmost importance when dealing with hate crime because of its ability to tear a community apart along racial/ethnic/religious lines. Other restorative justice processes such as victim-offender mediation focus mainly on the victim and the offender while the community they are a part of has only limited to no input. Circles on the other hand, addresses the reality that both the victim and the offender are members of the community and so what happens to them impacts the community at large. Circles also acknowledge the fact

cles for misdemeanors and low level assaults in South St. Paul, Minnesota, was also high. Each of the thirty victim and offender participants who were interviewed indicated that he or she would recommend the circle process to others who were in similar circumstances.

Id.

¹⁶⁸ See Hate Crime Statistics 2005, *supra* note 122 (of all the recorded hate crimes in 2005 “30.2 percent were simple assaults, 20.5 percent were aggravated assaults, 0.2 percent included six murders and three forcible rapes.”).

¹⁶⁹ See Bazemore and Umbreit, *supra* note 11, at 17 (stating “[o]f the four models considered in this Bulletin, circle sentencing appears to be the most advanced in terms of primacy of the community’s decision making role. In its placement of neighborhood residents in the gatekeeper role, this model provides the most complete example of power sharing.”).

that factors contributing to the crime could very well be problems stemming from the community itself.¹⁷⁰

In communities with diverse populations a hate crime can make the targeted minority feel as if the entire majority is coming down on them.¹⁷¹ If the actual perpetrator is caught and brought to justice, it is typically only the direct victim who is thought to be vindicated; so unless the crime reaches national media attention the community is not considered and simply thought to have forgotten the event and moved on. But without treatment these emotions can fester and grow to create a general state of anxiety and resentment. The Crown Heights riot mentioned above is a clear example of what can happen when racial tensions are left to simmer under the surface and explode after a perceived racially motivated crime.

The Circle creates an opportunity for the community to meet the offender and come face to face with the person who has caused so much fear and anger. Listening to their story and hearing their apology helps to remove the view of the offender as some sort of monster, thereby enabling the community to see them as just another misguided person. Removing the monstrous and often overwhelming facade of the offender can alleviate fears the community may have about such a person living amongst them. Participating in the Circle can lead to a feeling of empowerment for the minority members of the community; the experience can transform the negative and consistently unsatisfied energy of rage into a powerful and socially productive yearning to go out into the community and address the topics discussed. By learning of the negative and ignorant ways they might be viewed, the community can educate others similar to the offender in such a way as to prevent further incidents. Additionally, when the community gains a greater understanding of the offender, it facilitates a much smoother reintegration of the offender back into the community without any

¹⁷⁰ Heino Lilles, *Yukon Sentencing Circles and Elder Panels*, <http://www.restorativejustice.org/resources/docs/Lilles>. Lilles notes the importance of

[t]he circle[be] premised on three principles . . . [f]irstly, a criminal offence represents a breach of the relationship between the offender and the victim as well as the offender and the community. Secondly, the stability of the community is dependent on healing these breaches. The third premise is that the community is better positioned to address the causes of crime, which are often rooted in the economic or social fabric of the community.

Id.

¹⁷¹ See Altschiller, *supra* note 106 (noting that “[t]he victims may ‘perceive their offenders as representative of the dominant culture in society and an agent of that culture’s stereotyping of the victim’s culture.’”).

negative stigmas. Furthermore, after going through such a positive experience, the offender can be motivated to return to the community and educate others on the wrongs of bias and hate.

V. CONCLUSION

Over the past four decades the pendulum of societal thought has begun to swing away from viewing crime as an offense against the State and has moved towards focusing on the victim, their needs, and the underlying cause of the crime. At the forefront of this change is restorative justice, a movement which utilizes the input of both the victim and the offender in an attempt to set things right for both parties and prevent future crimes. Restorative justice charges the criminal justice system with moving beyond the current punishment oriented retributive system, implementing a process where the true causes of crime can be dealt with.

For generations, many aboriginal and Native American people have been using Circles as a peaceful means of addressing a wrong and healing the victim without ostracizing the offender from the community. Although it is relatively new tool in the American justice system, results have so far been positive and communities have had successes utilizing Circles when dealing with juvenile crime and other issues. This Restorative Justice process is ripe for use in dealing with more expansive crimes and offenses.

Once such area that would benefit from restorative justice and Circles in particular is bias motivated hate crimes. These crimes not only cause the same damaging emotions that are related to other non-hate motivated victimization, but they also serve to create widespread anger and fear throughout an entire community. Unfortunately, the United States has seen an increase in these types of crimes despite attempts by the legislature to curb the problem. As the number of hate crime offenses increases, the danger of retaliation by the targeted groups also grows and threatens to explode into violence.

One way to prevent future hate crimes as well as decrease the possibility of violent retaliation is to utilize Restorative Justice ideals in conjunction with the current punitive system. By conducting Sentencing Circles an emotionally charged community can explore why the victim acted as he or she did, bring validation and closure to the victim, and allay the community's anger and fear of future hate crime. Circles would provide the ideal environment for di-

verse groups to come together and gain a greater understanding of each other, and thus, through open discussions and dialogue, future hate crimes can be prevented. Only by building understanding and tolerance can this egregious crime be stamped out of our society.