

Pono

A Pilot Restorative Justice Program

Kaulike

by Lorenn Walker and Hon. Leslie A. Hayashi

"I wanna talk to you. Where you always go? And you no listen to me! You should listen to yo' faddah!" The drunken man yells into his 28-year-old son's face. Stale alcohol emanates from the man's breath, he has been drinking for much of the day. Angry and frustrated, the son tries to walk around his father. Although they live in the same home and see each other daily, his father rarely speaks to him. "It's always when he's drunk, he yells and goes off," says the son later.

The father keeps yelling at his son and this time he blocks the son's path. They are standing in a doorway leading to an outside car garage. Finally, the son places his two hands on his father's shoulders and in one quick move, pushes him out of his way. The older man stumbles and falls backward, hitting his head on the hard cement floor. He is knocked unconscious. Blood gushes from the back of his head. Minutes later an ambulance arrives and takes the father to the hospital. His skull is fractured and his brain suffers swelling. Fortunately, the father survives the injury without permanent physical damage. The son is arrested and charged with abuse of a

family member, a full misdemeanor carrying the possibility of a fine up to \$2,000, up to one year in jail, or both, if convicted. Later the charge is amended to harassment, a petty misdemeanor offense carrying the possibility of a fine up to \$1,000, up to 30 days in jail or both as the maximum penalties.

A few months after the incident, father and son are in District Court awaiting trial. The son is willing to admit his guilt and plead to the charge. Because this is his first encounter with the criminal justice system, he is eligible for a deferred acceptance plea. Prior to sentencing, the son and his father are asked if they want to participate in a pilot restorative justice program. "It's a chance for you to discuss how you've been affected by the incident and what can be done to repair the harm," explains the program coordinator.

Both agree to participate.

The two men meet with a trained facilitator in a small conference room for a *Restorative Dialogue*. The son explains what happened, including what he was thinking and feeling at the time of the incident and what he has thought about since then.

The father then describes how saddened he was by his son's actions, and says, "Family means caring about each oddah. I wanna forgive him for dis. He's my boy." The son looks

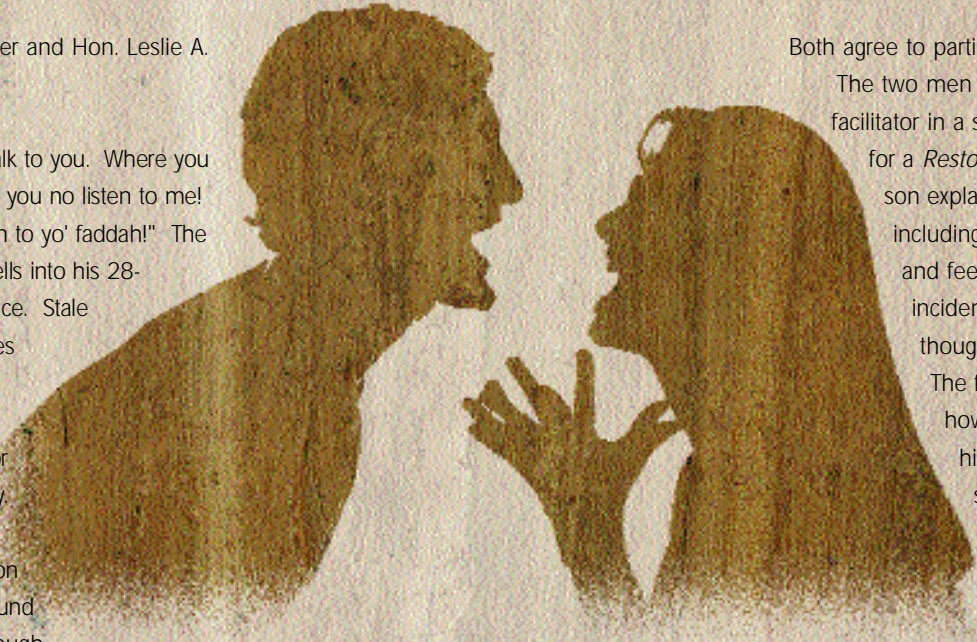
at his father through glassy eyes, and says, "I'm sorry." His father replies, "I sorry too. I forgive you."

At the end of the forty-five minute discussion, the father and son reach a four-point agreement:

- They forgive each other;
- They're both sorry;
- The son agrees to attend an anger management class;
- They will participate in a Restorative Conference at their home where the rest of the family, the son's mother and sister, can attend.

At sentencing, the judge reviews the agreement and formally orders the son to participate in a *Restorative Conference* as one of the conditions of his deferred acceptance plea.

Two months later, two facilitators meet with three family members: the



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father, mother and the son, at their home on a weekend evening at a time when they are available. The *Restorative Conference* lasts two hours. The mother describes the stress on the family caused by her husband's drinking. "He don't talk to nobody. Only when he gets drunk, then he just grumbles and talk bad. I feel so bad my son hurt his father, but my husband was wrong too. I think he was so drunk he lost his balance," says the mother. "I worry about him. He's sick. The doctor told him not to drink and smoke so much. I love him and don't want nothing to happen to him. I'm afraid."

Her son takes a deep breath. "I can't believe my mom has said all this. She never says anything about how she feels. It's good to hear her say how she feels. I love my father too and I want him to stop drinking and smoking."

Hearing this, the father admits that he drinks in excess and explains he does because "I no feel fine."

Both the mother and son ask the father to attend a program for alcohol abuse. He refuses. "I no like," he replies.

At the conclusion of the *Restorative Conference*, the family enters into another four-point agreement:

- The son will "willingly" complete anger management to make clear that he wants to take the class and is not doing so because of the judge's order;
- The father will cut back on cigarette smoking;
- The family will go to the beach together as soon as the sister is able to join them; and
- The family will attend church together.

All three participants were also asked to evaluate the *Restorative Conference* process. Each found that it met their needs and served justice. The mother considered the process to be "mixed," both positive and negative, because her "husband would not go along with our ideas," referring to her husband's refusal

to get help for his drinking problem. The father noted that the most useful thing about the *Conference* was the opportunity to "understand each other's problems and feelings." The son said he found "communication with everyone," to be most beneficial. Compared to the formal proceedings in court, he thought the *Conference* process made him "less nervous, more open."

Eight months after the *Conference*, the family reports things are "a lot better." The son has completed the anger management program. Although the father still drinks, no further conflicts have occurred. The family wanted to share their story to explain the benefits they received from the restorative justice process.

Nature and History of Restorative Justice

The purpose of restorative justice is to address the needs of victims, offenders and the community after wrongdoing has occurred.¹ The concept of restorative justice is not new nor is it restricted to Western legal justice systems. While the modern restorative justice movement began in the 1970s, "restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world's peoples."² Many indigenous cultures, including Hawaiians and other Pacific Islanders, have never stopped using it.³

One goal of modern restorative justice is to create a process for reconciliation between defendants who accept responsibility for their wrongdoing and those affected by the crimes, which includes the victims, the offenders' and victims' family and friends. "Restorative justice is by no means an answer to all situations. Nor is it clear that it should replace the legal system, even in an ideal world."⁴

Restorative justice should not be confused with mediation where parties are brought together to resolve civil disputes. "Although the term 'mediation' was

adopted early in the restorative justice field, it is being replaced by terms such as 'conferencing' or 'dialogue.'"⁵ The difference is more than semantic: mediation is a process whereby "disputing parties try to reach a mutually acceptable settlement."⁶ Criminal offenders and their victims are not *parties in dispute* and there is nothing for them to compromise or settle, especially after the defendant pleads to the charge. The conflict is over, and the important thing left to address is the harm that resulted from the offense.

Although it is the government who prosecutes the offender on behalf of the people of the state, the victim has a direct stake in the case, as may other members of the community. In response to meeting the needs of those affected by crime, the restorative process asks two basic questions: "How have people been affected by the wrongdoing?" and "What can be done to repair the harm?" These questions are addressed in a facilitated manner during the restorative justice process.

In 2000, after two years of meetings throughout the State between judges and administrators to discuss restorative justice, Chief Justice Ronald T.Y. Moon issued the Judiciary's Resolution Concerning Restorative Justice and the Concept of *Pono Kaulike*, equal rights and justice for all. The Resolution states that the "Hawaii State Judiciary shall continue to act in accordance with the principles of Restorative Justice and the concept of *Pono Kaulike*, signifying a dedication to "Equal Rights and Justice for All" and shall, in conformity with governing law, attempt to deliver services and resolve disputes in a balanced manner that provides attention to all the participants in the justice system including parties, attorneys, witnesses, jurors, and other community members who are active participants in the justice system."⁷

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Offenses range from illegal camping, shoplifting or theft, disorderly conduct, harassment, assault in the third degree, criminal property damage, trespass, drinking in public and prostitution. The penalties range from violations where there is only the possibility of a fine to a full misdemeanor with the possibility of a \$2,000 fine, one year in jail or both as maximum penalties. Recently, concurrent jurisdiction of cases involving abuse of a household member cases, which are also misdemeanor cases, was conferred upon district courts. In these cases, defendants can be placed on probation for two years instead of the usual one year for other misdemeanor cases.

Victims are subpoenaed to testify in court against defendants. As with domestic violence cases, witnesses who are related to or in an intimate relationship with the defendant, may be reluctant to appear, subjecting the cases to dismissal. When the complaining witness does appear, cases are generally treated as isolated or specific offenses; the underlying relationship or emotional issues between a defendant and the complaining witness is left unaddressed.

This restorative justice program provides an opportunity to identify

potential problems between the parties that may arise again without some type of intervention.

Brook Hart, a long time criminal defense attorney who represented a referred defendant, believes this is an important feature of the program. "It gives people the opportunity to address the underlying emotional and personal issues which need to be addressed. This is especially important for people who have a future together, whether it is family, co-employees, or neighbors. If these emotional issues are not addressed, the resolution of the legal dispute doesn't

work to bring ultimate peace to the situation which will lead to reoccurrence of the problem," says Hart.

Implementation of Restorative Justice Pilot Program in First Circuit

In September 2002, the Hawai'i Friends of Civic and Law Related Education, a non-profit organization, collaborated with the District Court of the First Circuit in Honolulu to develop a pilot restorative justice program in accordance with the Judiciary's resolution.⁹ Approval to implement the project was received from Chief Justice Ronald Moon, Chief Judge Colleen Hirai and Deputy Chief Judge Colette Garibaldi. A grant from The Wallace Alexander Gerbode Foundation funded the pilot project.

Meetings were held with representatives from the primary stakeholders--the Office of the Public Defender, City and County of Honolulu Office of the Prosecuting Attorney, the Victim Witness Kokua Program, an adjunct of the prosecutor's office, District Court and the private criminal defense counsel bar--to design an acceptable protocol. Under the protocol, cases may be referred by any of these entities. The program

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Case Referrals

It became evident that the most appropriate cases for this restorative program were those involving parties with an ongoing relationship such as relatives, neighbors, friends, spouses, or those with an intimate relationship. The specific charges included disorderly conduct, harassment, assault, terroristic threatening in the second degree, criminal property damage or animal nuisance (barking dogs).

Initially it was anticipated that the defendant, victim and their family and friends would engage in a *Restorative Conference*. However, the program evolved to provide three distinct types of restorative justice processes:

1. A *Restorative Conference* occurs when the defendant, victim, and supporters of both parties meet in a group. The group discusses how each member has been affected by the wrongdoing and how the harm may be repaired. The parties enter into a written *Restorative Conference Agreement*. Four *Restorative Conferences* have been held in this program to date.

2. A *Restorative Dialogue* occurs when the defendant and victim meet without family or friends. The victim and defendant enter into a *Restorative Dialogue Agreement*. Often victims want to know that the offender is remorseful for his/her negative behavior.¹⁰ Seven *Restorative Dialogues* have been held in this program as of April 2004.

Many people believe that crime victims feel that reconciliation and repair are impossible and they have no interest in meeting with offenders. However, results from a number of different restorative justice programs, show an average 57% of all victims offered restorative services do want to meet with offenders.¹¹ In this district court pilot program 65% of the victims who participated to date, chose to meet with

the defendants.

3. A *Restorative Session* occurs when the parties are unwilling to meet with each other, but wish to meet with a facilitator. Thus, a *restorative session* may be provided for the victim or the defendant separately, in which a *Restorative Plan* is prepared. Sometimes the defendant's plan includes a willingness to enter into a *Restorative Conference* or *Dialogue* at a later date, if and when the victim becomes willing.

In a *Restorative Session*, the defendant can consider the effect of her or his negative or unacceptable behavior and determine what he or she needs to do to achieve rehabilitation and reconciliation with the victim and community. This aspect of the program "makes it solution based and a preventative measure," says Laurel Silva, a District Court adult probation officer, who has had several clients participate in the program. "It is important for defendants to know how their behavior affected the victim and the community. It's a ripple effect. Every action taken affects others in our environment," Silva points out.

Victims as well often need an opportunity to understand what has happened to them and also benefit from a restorative process even if the defendant does not participate.¹² In this program, two victims in the same case, a mother and her young daughter, met with the facilitator without the defendant's participation. They said they felt "afraid" when the defendant committed the crimes of terroristic threatening and harassment against them. They said the harm they suffered could be repaired if the defendant participated in parenting classes, anger management, and a drug treatment program. When the facilitator met with the defendant later, and he learned what the victims wanted, he agreed and made a *Restorative Session Plan*, stating he would attend the programs the victims wanted. According to Silva, who is also a volunteer facilitator of a women's victim support group,

"victims need peace and vindication."
Having a voice to express how they were affected and how the harm can be repaired helps meet these victims' needs.

To date, eight defendants and three victims have participated in *Restorative Sessions*. In each of the *Restorative Sessions*, the defendant developed a *Restorative Plan*, which identified self-improvement goals. The plans also included how the defendant intended to reconcile with the victim if that had not already occurred and/or indicated their willingness to meet with the victim if the victim ever agreed to.

The *Restorative Conference Agreements*, *Restorative Dialogue Agreements* and *Restorative Plans* are provided to the court and probation officers. Isaac Lawton, a District Court adult probation officer who has had four clients participate in the program, likes it because, "When the defendant meets with the victim, the parties have an opportunity to address underlying issues and work out a solution." Lawton also sees value for the defendant to participate in a *Restorative Session*. "Preparing a *Restorative Plan* makes the defendant accountable for his actions and future behaviors. It's like a 'behavioral plan' or a 'relapse prevention plan', which addresses specific events and what the defendant will do."

As of April 2004, twenty-seven cases have been referred to the program, nineteen cases have received services with a total of forty individuals participating.¹³ Twenty-three cases involve some type of long-term relationship between the parties. Most have been harassment charges between family members including the father and son described here, adult siblings, a daughter and father, a nephew and aunt, a son in law and sister in law, and two couples who were living together. Other cases where the parties no longer lived together also received services. One case involved neighbors complaining over barking dogs.

Program Evaluation



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Although the program has not been in existence long enough to determine whether it reduces crime, the measure of success for restorative programs includes more than a reduction in recidivism. A restorative response to crime leads to cognitive processes that underlie a healthy adaptation to trauma¹⁴ and promotes the resiliency of the participants.¹⁵ These benefits are vital for victims and the community.

Assisting victims and the community in coping with crime is equally important as reducing recidivism and should be a goal of our justice system. Indeed, this is applying justice in a truly "balanced manner." Regardless of whether a defendant commits more crimes in the future, the needs of victim and the community should be addressed. Likewise, the defendant should be given the opportunity to

address reconciliation, particularly when she or he admits guilt, regardless of his or her future behavior.

To date, twenty-eight of the thirty-seven individuals who have received restorative justice services have completed written evaluations of the program. The

survey consists of five statements with possible rankings from "very positive" to "very negative." The statements are: "I believe the Restorative process was;" "I believe the Agreement made is;" "I believe justice was served with this *Restorative* process;" "I feel the participants needs

were met during the *Restorative* process;" "Compared to court, the Restorative process was;" and "I think the facilitator did good work with the *Restorative* process."

All twenty-eight surveyed participants stated the process was positive and only one, the mother in the father and son case discussed here, believed the resulting agreement was "mixed" because her husband would not "go along with our ideas," which included his participation in an alcohol treatment program.

The surveyed participants also indicated they preferred the restorative process to their court



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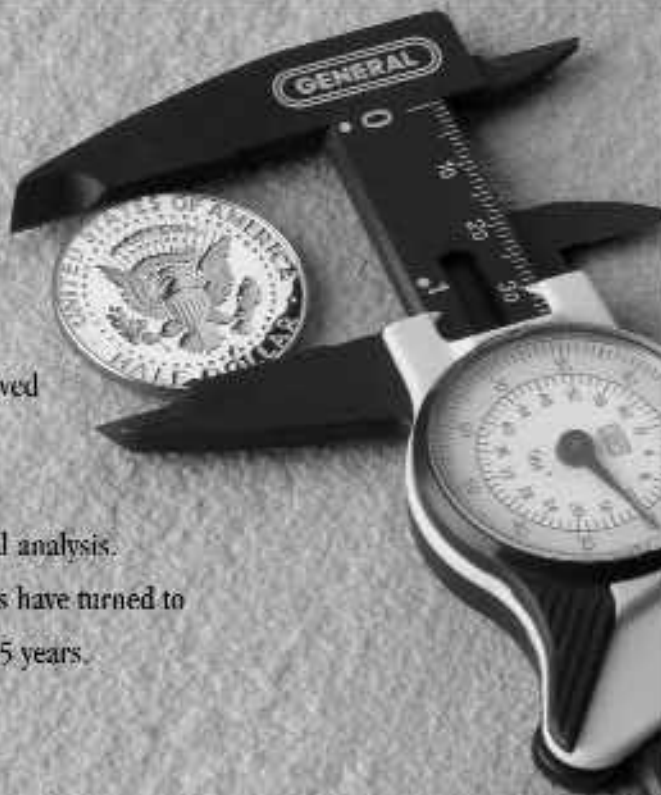
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experience. One defendant stated: "When I was in court, I felt scared and not comfortable. The conference is different because I can show and tell them how I felt." Another defendant stated that the conferencing process was "more in depth about relationship and communication."

A woman who had been assaulted by her nephew stated she found that "being able to apologize to my nephew" was the most useful thing about the Conference. When her nephew was arrested, she herself was intoxicated and she felt partly responsible for their getting into a fight and his arrest. Both she and her nephew agreed to attend substance abuse programs in their *Restorative Conference Agreement*. Indeed, in many of the agreements between victims and offenders, the victims agreed to various aspects of self-improvement, something that the court cannot order victims to do. The father who had been injured by his son stated he thought the best thing about the *Conference* was "to clean everything

up and for forgiveness."

The Future

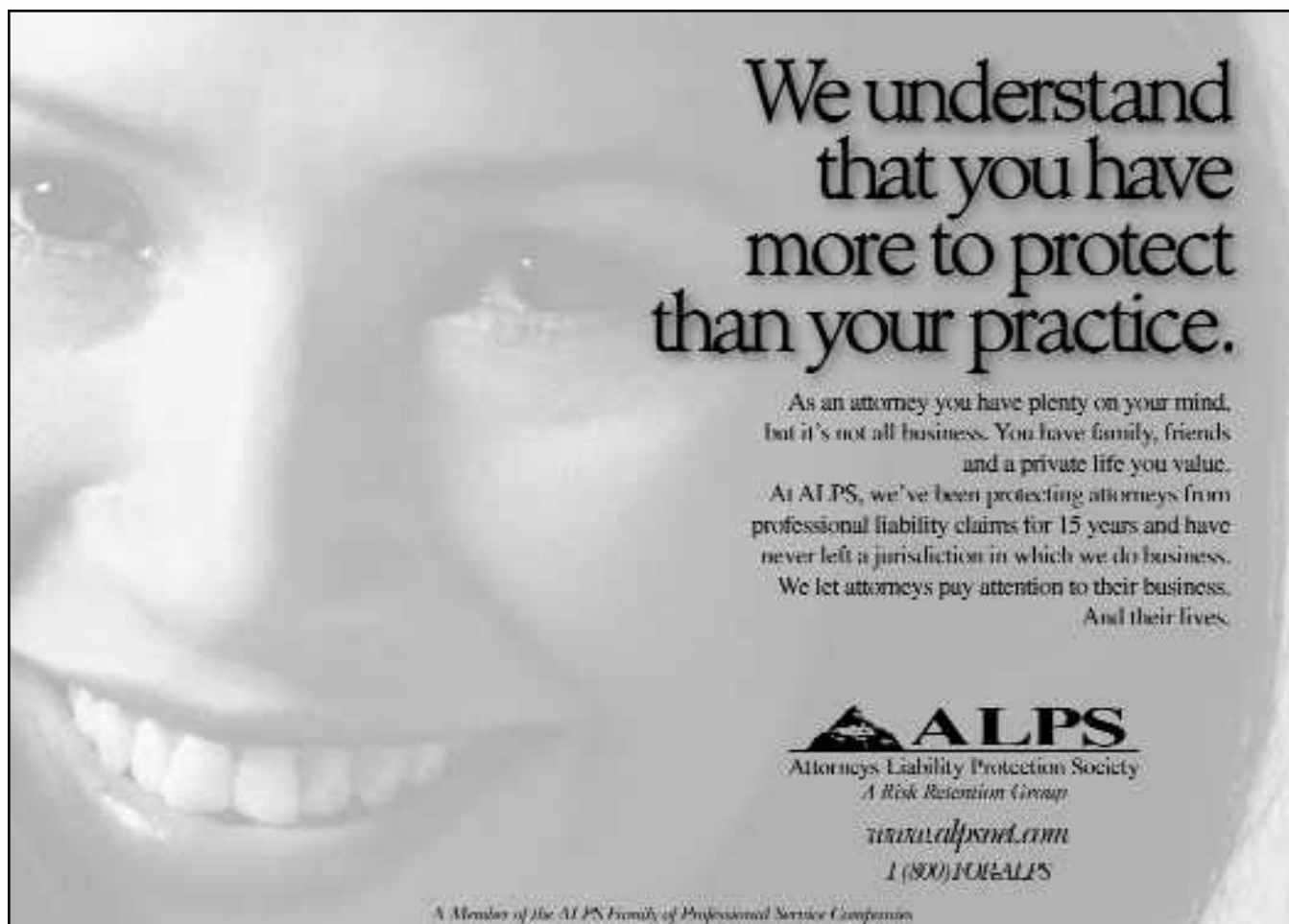
Initially the Honolulu division was chosen as the only site in which cases would be referred. However, because the facilitators were able to provide restorative services at convenient locations and times including evenings and weekends, rural court cases have also been referred to the program. Many other potential cases have been identified at arraignment and trial.

This program could be expanded to include a diversion process for certain cases. In fact, one animal nuisance case was successfully resolved even though the defendant had not pled to the charge. In the future, HPD could refer cases that required intervention, but do not warrant prosecution. In addition, a screening prosecutor could also determine if the cases are appropriate for diversion and make a referral. Upon compliance with the agreement reached at the restorative

process, the charges could be dropped.

Several restorative justice diversion programs have already been successfully implemented in Hawai'i. On the Big Island, district court criminal diversion programs are administered by the West Hawai'i Mediation Center and the Ku'ikahi Mediation Center. Approximately one hundred cases have received restorative services through these programs.

Franco Acquaro, Executive Director of the West Hawai'i Mediation Center, explains, "The program started about three years ago as a diversion project from the prosecutor's office for relatively minor cases where the defendant accepted responsibility. The focus is not on the outcome of the charge, but on repairing the harm caused by the crime." Since then the program started, it has expanded. Last year Acquaro, an adolescent and family therapist, facilitated a *Restorative Conference* focusing on the "reintegration" of a defendant returning to a small town after serving time for manslaughter in




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prison on the mainland. According to Acquaro working in restorative justice offers "a glimpse of people at their finest."

On Maui, therapist Kit Gillette, coordinator of the Court Diversion Program for the Mediation Services of Maui, says that the program has successfully dealt with about a dozen cases. Select district court criminal cases were not prosecuted if the victims were satisfied with the outcome of the restorative process. Gillette has trained facilitators and is hopeful that more cases will be referred to the program.

Since September, 2003, probation officers with the Family Court on Kaua'i have been referring juvenile offenders for *Restorative Conferences* to Hale 'Opio a nonprofit agency, which offers multiple services to at-risk youth. Lynn Pizzitola, a marriage and family therapist, who supervises Hale 'Opio's restorative services program says three *Conferences* have been completed to date and six more cases have been referred. Pizzitola likes the program because the juvenile "acknowledges responsibility" and this, he says, "is really healthy."

In Honolulu, a juvenile diversion program offering Restorative Conferences was also successful.¹⁴ This program piloted by the Honolulu Police Department (HPD) diverted 102 juveniles from traditional criminal justice interventions. From March to September 2000, over 400 individuals participated in *Restorative Conferences*. Research of the program's effectiveness demonstrated extremely high participant satisfaction, a decrease in recidivism in one important area, and

agreement compliance, which included a higher level of restitution payments (87%) than what is normally obtained from court ordered restitution. Major Bart Huber, head of HPD's juvenile services division, likes the idea of offering Restorative Conferences along with other interventions because "they offer victims a way of

seeing the event through to the end and feeling better about the result."

He would like HPD to be able to refer cases to a diversion program that offers *Restorative Conferences*.

Restorative justice makes our criminal justice system stronger and more effective by offering a "balanced

approach." In the words of a victim and offender who participated in a Restorative Dialogue, "We'll accept that everyone makes mistakes and no one is perfect. We'll continue to have what we always had which is love and respect for each other." This program, while not a panacea for all criminal cases, provides an important opportunity for many affected by crime to experience justice in the spirit of *pono kaulike*, equal rights and justice for all.

service is found under HRS 706-624; HRS 706-605 authorizes restitution.

⁴ Zehr, *supra*, p. 12.

⁵ Zehr, *supra*, p. 9.

⁶ Bush, R., & Folger, J., (1994). *The Promise of Mediation*. San Francisco: Jossey-Bess.

⁷ Hawaii State Judiciary, (2000). News and Reports, Judiciary in the Media, Hawaii State Judiciary Website. Retrieved February 14, 2004 from the World Wide Web: <http://www.courts.state.hi.us>

⁸ The mission of the statewide district courts is to serve the people of Hawai'i through the fair and efficient adjudication and resolution of cases and controversies brought before it.

⁹ Lorenn Walker, a public health educator, lawyer and trained facilitator, represented the Hawaii Friends of Civic and Law Related Education; Judge Leslie A. Hayashi represented district court; Diane Stowell, a Honolulu therapist, facilitated with Walker in many referred cases.

¹⁰ In a Honolulu study of restorative conferencing with 102 juvenile offenders, over 70% of the participating victims simply wanted to hear the offender say he or she was sorry for committing the offense. Walker, L., (2002). *Conferencing: A New Approach for Juvenile Justice in Honolulu*, Federal Probation Journal, 66(1), 38-43.

¹¹ Braithwaite, *supra*; Hoyle, C., (2002). *Securing Restorative Justice for the 'Non-Participating' Victim*. In, Carolyn Hoyle and Richard Young, eds., *New Visions of Crime Victims*. Oxford: Hart Publishing; Kerner, H., Marks, E., & Schreckling, J. (1992). *Implementation and Acceptance of Victim-Offender Mediation Programs in the Federal Republic of Germany: A Survey of Criminal Justice Institutions*, In: H. Messmer and H.U. Otto (eds.), *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation: International Research Perspectives*. Dordrecht, NETH: Kluwer Academic; Maxwell, G. & Morris, A. (1996). *Research on Family Group Conferences With Young Offenders in New Zealand*. In J. Hudson, et al. (eds.), *Family Group Conferences: Perspectives on Policy and Practice*. Monsey, NY: Criminal Justice Press, p88-110; McCold, P. & Wachtel, B. (1996). *Restorative Policing Experiment: The Bethlehem Police Family Group Conferencing Project*. Community Service Foundation: Pipersville, Pennsylvania. Retrieved December 17, 2003 from the World Wide Web: <http://www.realjustice.org/Pages/mn98papers/s>

¹ Zehr, H., (2002). *The Little Book of Restorative Justice*, Intercourse, PA: Good Books.

² Braithwaite, J., 2002. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press, p. 5.

³ Concepts such as restitution and community service, which have long been included among Hawaii's sentencing options under Hawaii Revised Statutes 706-600 et seq. are also examples of restorative justice. Community

ummary.html; Moore, D. B. & O'Connell, T. (1994). *Family conferencing in Wagga Wagga: a communitarian model of justice*. In C. Alder & J. Wundersitz (eds.). *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Canberra, ACT: Australian Institute of Criminology, p 45-86; Strang, H. (2000). *Victim Participation in a Restorative Justice Process: The Canberra Reintegrative Shaming Experiments*, unpublished PhD thesis, Australian National University; Trimboli, L., (2000). *An evaluation of the NSW Youth Justice Conferencing scheme*. Sydney, Australia: New South Wales Bureau of Crime Statistics and Research.

¹² Another pilot project offering restorative justice processes to crime victims, where no offenders participate (mainly because the defendants are unknown), has been conducted in Honolulu since August 2002 with positive results for crime victims, some of whom were victimized by crimes committed as much as 20 years earlier. Walker, L. (2004). *Restorative Justice without Offender Participation: A Pilot Program for Victims*, Restorative Practices E Forum, February 10, 2004. Retrieved February 10, 2004 from the World Wide Web: <http://www.iirp.org/library/lwalker04.html>.

¹³ Additional cases are pending.

¹⁴ Greenberg, M., (1995). *Cognitive Processing of Traumas: The Role of Intrusive Thoughts and Reappraisals*, Journal of Applied Psychology, 25:1262-1296.

¹⁵ Walker, L., (2000). *Conferencing: A Group Process that Promotes Resiliency*. Presented at 2nd International Conference on Conferencing and Circles, August 10-12, 2000, Toronto, Canada. Retrieved December 1, 2003 from the World Wide Web: http://www.restorativepractices.org/Pages/t2000/t2000_walker.html.

¹⁶ Walker, 2002, *supra*.

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Judge Leslie A. Hayashi is a district court judge in the First Circuit and was the 2003 recipient of the American Bar Association's Franklin N. Flaschner award given to the nation's outstanding judge in a court of special or limited jurisdiction.

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