

# 10

## Community Sentences

### Probation, Intermediate Sanctions, and Restorative Justice

It is well known that the United States' incarceration rate stands out relative to other nations. Indeed, it is the highest in the world. What is not so well known is that America is also exceptional with its use of probation. Probation is a far more common sanction than imprisonment, so we know it will be used more often than putting people behind bars, but relative to many other countries, the US probation rate is out of step. In a recent study, "American Exceptionalism in Probation Supervision," researchers at the Robina Institute of Criminal Law and Criminal Justice compared US probation rates to those of various European nations.<sup>2</sup> Here is a brief summary of their findings (also see Figure 12.1):

#### REALITYCHECK

##### Myth or Reality?

- Violent offenders who commit murder, rape, or assault are barred from probation.
- Probation officers can search a probationer's home without a warrant if they suspect foul play or criminal activity.
- Married probationers are more likely to succeed than their single or divorced peers.
- Convicted criminals can be forced to forfeit their homes and cars.

- The average adult probation rate (1,605 per 100,000 people) in the United States is more than five times that of 40 comparison nations (297 per 100,000 people).
- Several US states have probation rates 9 to 10 times than European nations.
- Of all 50 US states, Ohio puts the most adults on probation.
- Of the European nations examined (there were almost 40 of them), Turkey puts the most adults on probation (1,212 out of 100,000), but if Turkey were a US state, it would be in 29th place relative to other states.
- The United States has around 4 million people on probation compared to only 1.5 million in all the European nations examined.
- New Hampshire was the state with the lowest adult probation rate (379 per 100,000). Interestingly, 12 European countries reported fewer than 70 probationers per 100,000 people.

We hear often of mass incarceration. We do not hear much about mass probation. Fortunately, as prison populations in the United States have leveled off and even declined in recent years, so has probation; fewer adults are on probation in the United States now than a few years ago (we will look more closely at the data later in this chapter). Even so, European countries use probation much less often than the United States does. Why? Crime rates fail to

**probation** A sentence entailing the conditional release of a convicted offender into the community under the supervision of the court (in the person of a probation officer), subject to certain conditions for a specified time.

**judicial reprieve** The common-law practice that allowed judges to suspend punishment so that convicted offenders could seek a pardon, gather new evidence, or demonstrate that they had reformed their behavior.

**recognizance** The medieval practice of allowing convicted offenders to go unpunished if they agreed to refrain from any further criminal behavior.

**sureties** During the Middle Ages, people responsible for the behavior of an offender released before trial.

## What Is Probation?

As the term is used today, **probation** is a criminal sentence that suspends or delays a correctional term in a prison or jail so that, instead of being incarcerated, offenders are returned to the community for a period in which they must (1) abide by certain conditions set forth by the court, and (2) be supervised by a probation officer. It is the most commonly used means of dispensing correctional treatment to convicted offenders.

The fact that probation is used so often rests on the belief that most convicted criminals are neither dangerous nor a menace to society and can be reformed if given a second chance. Probation provides offenders the opportunity to prove themselves while being closely supervised in the community by trained personnel who can help them reestablish proper forms of behavior. Even felony offenders can be successfully rehabilitated if given the proper balance of community supervision, treatment, and control. And importantly, during tough economic times, probation is a cost-effective alternative to incarceration. So it's not just petty offenders who get probation: an overwhelming majority of convicted offenders including felons also get a "second chance" via probation.<sup>6</sup>

## The History of Probation and Community Sentencing

Where did the idea of community supervision and control begin? During medieval times, the practice of **judicial reprieve** allowed judges to suspend punishment so that convicted offenders could seek a pardon, gather new evidence, or demonstrate that they had reformed their behavior. Another practice, called **recognizance**, enabled convicted offenders to go unpunished if they agreed to refrain from further criminal behavior. Sometimes **sureties** were required—these were people who made themselves responsible for the behavior of an offender after the offender's release.

### John Augustus and the Creation of Probation

John Augustus of Boston is usually credited with originating community sentencing.<sup>7</sup> As a private citizen, Augustus began in 1841 to supervise offenders released to his custody by a Boston judge. Over an 18-year period, Augustus supervised close to 2,000 convicted offenders and helped them get jobs and establish themselves in the community. Augustus had an amazingly high success rate, and few of his charges ever became involved in crime again.

In 1878, Augustus's work inspired the Massachusetts legislature to pass a law authorizing the appointment of a paid probation officer for the city of Boston. In 1880, probation was extended to other jurisdictions in Massachusetts, and by 1898, the probation movement had spread to the superior (felony) courts.<sup>8</sup> The Massachusetts experience was copied by Missouri (1887) and Vermont (1898) and, soon after, by most other states. In 1925, the federal government established a probation system for the US district courts. The probation concept soon became the most widely used correctional mechanism in the United States.<sup>9</sup>

## Probation Today

Approximately 2,000 adult probation agencies are currently in operation in the United States. Slightly more than half are associated with a state-level agency, whereas the remaining agencies are organized at the county or municipal level of government. About 30 states combine probation and parole supervision into a single agency; in some jurisdictions, probation supervision is carried out by private contractors.

As Figure 10.2 shows, the adult probation population grew between 2005 and 2007 until more than 4 million people were on probation. Then, in 2008, the number of people on probation slowly began to decline, a trend that has continued until today.<sup>10</sup>

While growth in the probation population has ended for now, there are still almost 4 million people on probation, and more than 2 million people are placed on probation annually.

**L01** Explain the concept of community sentencing

**L02** Describe the history of community sentences

Probation is unquestionably undergoing dramatic changes. In many jurisdictions, traditional probation is being supplemented by **intermediate sanctions**, which are penalties that fall between traditional community supervision and confinement in jail or prison. These new correctional services are discussed in the following sections.

**intermediate sanctions** Punishments that fall between probation and prison ("probation plus"). Community-based sanctions, including house arrest and intensive supervision, serve as alternatives to incarceration.

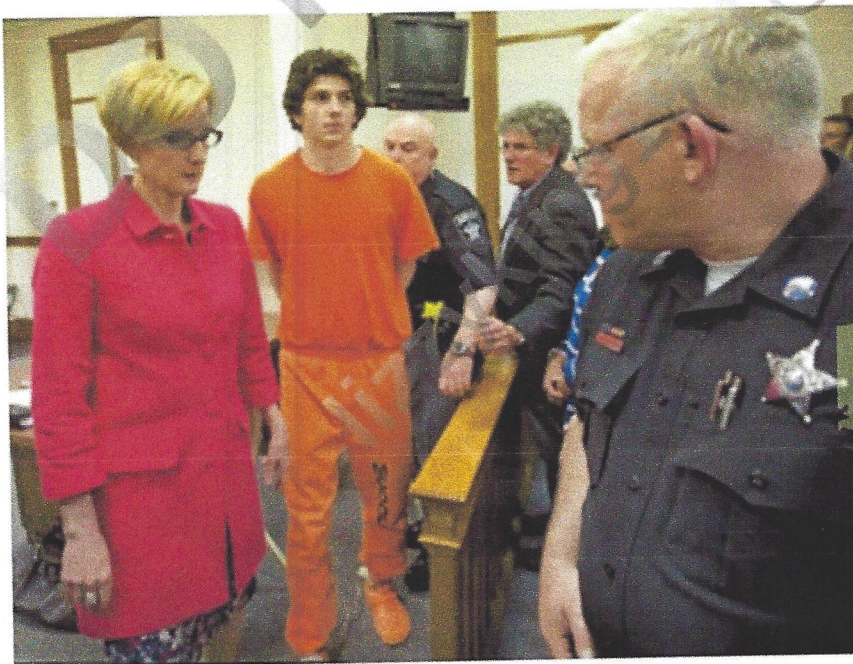
## Intermediate Sanctions

He may be willing to take a grenade for us, do the halftime show at the Super Bowl, and give us uptown funk, but will he do community service? Just a few days after winning the Grammy for "Best Male Pop Vocal Performance," Bruno Mars pleaded guilty to cocaine possession at a court in Las Vegas but was spared going to jail. His punishment was probation, a \$2,000 fine, 200 hours of community service at a nonprofit organization, and eight hours with a drug counselor in Los Angeles.

Bruno Mars's sentence reflects the growing trend to add additional sanctions to traditional probation sentences; in his case, the sanctions were monetary fines and community service. These programs can be viewed as "probation plus" because they add restrictive penalties and conditions to traditional community service orders, which feature treatment and rehabilitation over control and restraint.<sup>64</sup> Here are some of the advantages of intermediate sanctions:

- They are less costly than jail or prison sentences.
- They help the offender maintain family and community ties.
- They can be structured to maximize security and maintain public safety.
- They can be scaled in severity to correspond to the seriousness of the crime.
- They can feature restoration and reintegration rather than punishment and ostracism.
- By siphoning off offenders from the secure correctional system, they reduce the need for future prison and jail construction.
- Intermediate sanctions help meet the need to develop community sentences that are fair, equitable, and proportional.<sup>65</sup>
- They can be designed to increase control over probationers whose serious or repeat crimes make a straight probation sentence inappropriate, yet for whom a prison sentence would be unduly harsh and counterproductive.<sup>66</sup>

**L09** Explain what is meant by intermediate sanctions



**Owen Labrie is escorted out of the Merrimack County Superior Courtroom** in Concord, New Hampshire, after a judge agreed to new bail conditions. Labrie, a prep school graduate convicted of sexually assaulting a 15-year-old freshman girl as part of a game of sexual conquest called Senior Salute, will be required to use electronic monitoring via GPS.

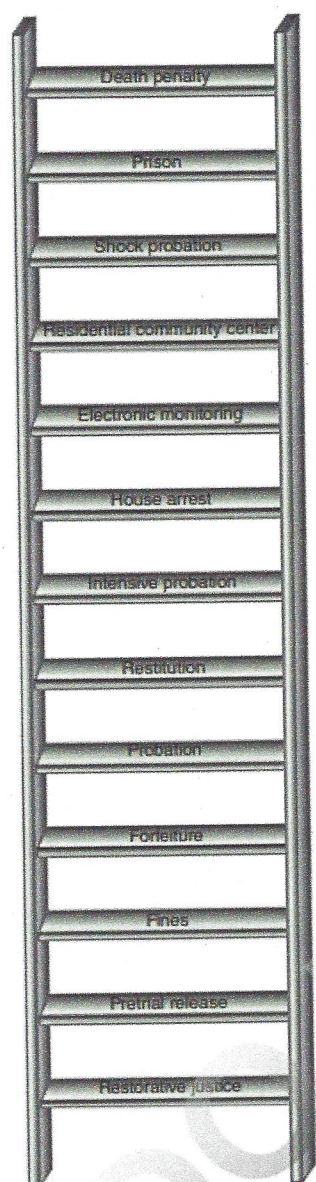


FIGURE 10.3 Punishment Ladder

**fines** Money payments levied on offenders to compensate society for their misdeeds.

**day fines** Fines geared to the average daily income of the convicted offender in an effort to bring equity to the sentencing process.

**forfeiture** The seizure of personal property by the state as a civil or criminal penalty.

- Intermediate sanctions can potentially be used as halfway-back strategies for offenders who violate the conditions of their community release. Rule violators can be placed under increasingly more intensive supervision before actual incarceration is required.

Intermediate sanctions include programs that are usually administered by probation departments: intensive probation supervision, house arrest, electronic monitoring, restitution orders, shock probation or split sentences, and residential community corrections.<sup>67</sup> Intermediate sanctions also involve sentences that may be administered independently of probation: fines and forfeiture, pretrial programs, and pretrial and post-trial residential programs. Intermediate sanctions therefore range from the barely intrusive, such as restitution orders, to the highly restrictive, such as house arrest accompanied by electronic monitoring and a stay in a community correctional center.

As Figure 10.3 illustrates, intermediate sanctions can form the successive steps of a meaningful "ladder" of scaled punishments outside of prison, thereby restoring and equity to nonincarceration sentences.<sup>68</sup> Forgers may be ordered to make restitution to their victims, and rapists can be placed in a community facility and receive counseling at a local clinic. This feature of intermediate sanctions enables judges to fit the punishment to the crime without resorting to a prison sentence.

The forms of intermediate sanctions currently in use are more thoroughly discussed in the following sections.

### Fines

Monetary payments, or  **fines**, can be imposed on offenders as an intermediate punishment for their criminal acts. They are a direct offshoot of the early medieval practice of requiring that compensation (*wergild*) be paid to the victim and the state for criminal acts. Fines are still commonly used in Europe, where they are often the sole penalty, even in cases involving chronic offenders who commit fairly serious crimes.<sup>69</sup>

In the United States, fines are most commonly used in cases involving misdemeanors and lesser offenses. Fines are also frequently used in felony cases where the offender benefited financially.

Fines may be used as a sole sanction but are typically combined with other punishments, such as probation. Judges commonly levy other monetary sanctions along with fines, such as court costs, public defender fees, probation and treatment fees, and victim restitution, to increase the force of the financial punishment. However, evidence shows that many offenders fail to pay fines and that courts are negligent in their efforts to collect unpaid fees.<sup>70</sup>

In most jurisdictions, little guidance is given to the sentencing judge directing the imposition of the fine. Judges often have inadequate information on the offender's ability to pay, and this results in defaults and contempt charges. Because the standard sanction for nonpayment is incarceration, many offenders held in local jails are confined for nonpayment of criminal fines. Even though the US Supreme Court in *Tate v. Short* (1971) recognized that incarcerating a person who is financially unable to pay a fine discriminates against the poor, many judges continue to incarcerate offenders for non-compliance with financial orders.<sup>71</sup> To compensate for this disparity, some jurisdictions have experimented with  **day fines** geared to an offender's net daily income. Used in Europe, day fines are designed to be equitable and fairly distributed, by being weighted by a daily-income value taken from a chart similar to an income tax table; the number of the offender's dependents is also taken into account. The day fine concept means that the severity of punishment is geared to the offender's ability to pay.<sup>72</sup>

### Forfeiture

Another intermediate sanction with a financial basis is criminal (*in personam*) and civil (*in rem*)  **forfeiture**. Both involve the seizure of goods and instrumentalities related to the commission or outcome of a criminal act. The difference is that criminal forfeiture proceedings target criminal defendants and can only follow a criminal conviction. In

contrast, civil forfeiture proceedings target property used in a crime and do not require that formal criminal proceedings be initiated against a person or that the person be proved guilty of a crime.<sup>73</sup> Federal law provides that after arresting drug traffickers, the government may seize the boats they used to import the narcotics, the cars they used to carry the drugs overland, the warehouses in which the drugs were stored, and the homes paid for with the drug profits; on conviction, the drug dealers lose permanent ownership of these “instrumentalities” of crime.

Forfeiture is not a new sanction. During the Middle Ages, “forfeiture of estate” was a mandatory result of most felony convictions. The Crown could seize all of a felon’s real and personal property. Forfeiture derived from the common-law concept of “corruption of blood,” or “attaint,” which prohibited a felon’s family from inheriting or receiving his property or estate. The common law mandated that descendants could not inherit property from a relative who might have obtained the property illegally: “[T]he Corruption of Blood stops the Course of Regular Descent, as to Estates, over which the Criminal could have no Power, because he never enjoyed them.”<sup>74</sup>

Forfeiture gained momentum in US law with the passage of the Racketeer Influenced and Corrupt Organization (RICO) Act and the Continuing Criminal Enterprises Act, both of which allow the seizure of any property derived from illegal enterprises or conspiracies. Although these acts were designed to apply to ongoing criminal conspiracies, such as drug or pornography rings, they are now being applied to a far-ranging series of criminal acts, including white-collar crimes. More than 100 federal statutes use forfeiture of property as a punishment.

Although law enforcement officials at first applauded the use of forfeiture as a hard-hitting way of seizing the illegal profits of drug law violators, the practice has been criticized because the government has often been overzealous in its application. For example, million-dollar yachts have been seized because someone aboard possessed a small amount of marijuana; this confiscatory practice is referred to as **zero tolerance**. This strict interpretation of the forfeiture statutes has come under fire because it is often used capriciously, the penalty is sometimes disproportionate to the crime involved, and it makes the government a “partner in crime.”<sup>75</sup> It is also alleged that forfeiture unfairly targets a narrow range of offenders. For example, it is common for government employees involved in corruption to forfeit their pensions, but employees of public companies are exempt from such punishment.<sup>76</sup> There is also the issue of conflict of interest: because law enforcement agencies can use forfeited assets to supplement their budgets, they may direct their efforts to cases that promise the greatest “payoff” rather than to cases that have the highest law enforcement priority.<sup>77</sup>

## Restitution

Another popular intermediate sanction is **restitution**, which can take the form of requiring offenders either to pay back the victims of crime (**monetary restitution**) or to serve the community to compensate for their criminal acts (**community service restitution**).<sup>78</sup> Restitution programs offer offenders a chance to avoid a jail or prison sentence or a lengthier probation period. The programs may help them develop a sense of allegiance to society, better work habits, and some degree of gratitude for being given a second chance. Restitution serves many other purposes, including giving the community something of value without asking it to foot the bill for an incarceration, and helping victims regain lost property and income.

If a defendant is sentenced to pay monetary restitution as part of her probation order, victim loss is determined, and a plan is developed for paying fair compensation. To avoid the situation in which a wealthy offender can fill a restitution order by merely writing a check, judges will sometimes order that compensation be paid out of income derived from a low-paid social service or public works job.

Community service orders usually require duty in a public nursing home, shelter, hospital, drug treatment unit, or works program; some young vandals may find that they must clean up the damage they caused to the school or the park. Judges and probation officers have embraced the concept of restitution because it appears to benefit

## REALITYCHECK

### Myth or Reality?

**Convicted criminals can be forced to surrender their homes and cars.**

**REALITY.** Under forfeiture programs, people can be forced to surrender the instrumentalities of their criminal behavior.

**Should someone convicted of DWI for the third time forfeit his or her vehicle?**

**zero tolerance** The practice of seizing all instrumentalities of a crime, including homes, boats, and cars. It is an extreme example of the law of forfeiture.

**restitution** A condition of probation in which the offender repays society or the victim of crime for the trouble and expense the offender caused.

**monetary restitution** A sanction requiring that convicted offenders compensate crime victims by reimbursing them for out-of-pocket losses caused by the crime. Losses can include property damage, lost wages, and medical costs.

**community service restitution** An alternative sanction that requires an offender to work in the community at such tasks as cleaning public parks or working with disabled children in lieu of an incarceration sentence.

### CONCEPT SUMMARY 10.1 Intermediate Sanctions

Sanction	Goal	Problems
Fines	Monetary sanction	Overburdens the poor
Forfeiture	Monetary sanction, equity	Can be overreaching
Restitution	Pay back victim	Does not reduce recidivism
Shock incarceration and split sentence	"Taste of bars" as a deterrent	Can cause labeling and stigma
Intensive probation	Small caseloads, more supervision	High failure rate
House arrest	Avoids jail	Lacks treatment possibility
Electronic monitoring	Supervision by computer	Technology-dependent, no treatment
Residential community	Less secure than prison	Expensive, high failure rate

than traditional probation. It is commonly used in the juvenile justice system for youths who need a more secure environment than can be provided by traditional probation yet are not deemed a threat to the community and do not require a secure placement.

More than 2,000 state-run community-based facilities are in use today. In addition, up to 2,500 private, nonprofit RCC programs operate in the United States. About half also house inmates who have been released from prison and use the RCC placement as a way to ease back into society. The remainder are true intermediate sanctions, including about 400 federally sponsored programs.

**DAY REPORTING CENTERS** One recent development in community corrections has been the use of RCC facilities as **day reporting centers (DRCs)**.<sup>102</sup> These provide a single location to which a variety of clients can report for supervision and treatment. They can be used as a step up in security for probationers who have failed in the community and as a step down in security for jail or prison inmates.<sup>103</sup>

Evaluations show that DRCs can be successful at reducing recidivism.<sup>104</sup> DRCs seem to work better with certain types of offenders, such as those who are older and more experienced, than with others, such as younger offenders.<sup>105</sup> DRC participants with alcohol problems, criminal companions, and poor living situations are also more likely to fail. In contrast, those who receive counseling seem to do better.<sup>106</sup>

Concept Summary 10.1 sets out the goals and problems of the various forms of intermediate sanctions.

## Restorative Justice Programs

Some critics and specialists in criminal justice believe that the new alternative and intermediate sanctions add a punitive aspect to community sentencing that can hinder rehabilitation efforts. Instead, the advocates of **restorative justice** suggest a policy based on restoring the damage caused by crime and creating a system of justice that includes all the parties harmed by the criminal act: the victim, the offender, the community, and society.<sup>107</sup>

Restorative justice models are consistent with the thought of Australian justice expert John Braithwaite, who argues that crime control today involves shaming and stigmatizing offenders. This helps set them apart from normative society and undermines their potential for change. Instead, he calls for a policy of "reintegrative shaming." Here disapproval is limited to the offender's evil deeds. Law violators must be brought to realize that although their actions have caused harm, they are still valuable people—people who can be reaccepted by society. A critical element of reintegrative shaming occurs when the offenders themselves begin to understand and recognize their wrongdoing and shame. To be reintegrative, shaming must be brief

### day reporting centers (DRCs)

Nonresidential community-based treatment programs.

### L010 Define restorative justice, and discuss its merits

**restorative justice** A view of criminal justice that advocates peaceful solutions and mediation rather than coercive punishments.

and controlled, and it must be followed by ceremonies of forgiveness, apology, and repentance.<sup>108</sup> Braithwaite's work is at the core of the restorative justice movement.

### The Concept of Restoration

According to the restorative view, crimes bring harm to the community in which they occur. The traditional justice system has done little to involve the community in the justice process. What has developed is a system of coercive punishments administered by bureaucrats that is inherently harmful to offenders and reduces the likelihood that they will ever again become productive members of society. This system relies on punishment, stigma, and disgrace. What is needed instead

is a justice policy that repairs the harm caused by crime and involves all parties that have suffered from that harm, including the victim, the community, and the offender. Exhibit 10.1 sets out the principles of the restorative justice approach.

An important aspect of achieving these goals is that offenders must accept accountability for their actions and responsibility for the harm their actions caused. Only then can they be restored as productive members of their community. Restoration involves turning the justice system into a "healing" process rather than a distributor of retribution and revenge.

Most people involved in offender-victim relationships actually know one another or were related in some way before the criminal incident took place. Instead of treating one of the involved parties as a victim deserving sympathy and the other as a criminal deserving punishment, it is more productive to address the issues that produced the conflict between these people. Rather than taking sides and choosing whom to isolate and punish, society should try to reconcile the parties involved in conflict.<sup>109</sup> The effectiveness of justice ultimately depends on the stake a person has in the community (or a particular social group). If a person does not value her membership in the group, she will be unlikely to accept responsibility, show remorse, or repair the injuries caused by her actions.

### EXHIBIT 10.1 Basic Principles of Restorative Justice

- Crime is an offense against human relationships.
- Victims and the community are central to justice processes.
- The first priority of justice processes is to assist victims.
- The second priority is to restore the community, to the greatest degree possible.
- The offender has a personal responsibility to victims and to the community for crimes committed.
- The offender will develop improved competency and understanding as a result of the restorative justice experience.
- Stakeholders share responsibilities for restorative justice through partnerships for action.

**Source:** Anne Seymour, "Restorative Justice/Community Justice," in the *National Victim Assistance Academy Textbook* (Washington, DC: National Victim Assistance Academy, 2001), updated June 2015.

**WEB APP 10.2** There are many sources detailing restorative justice. A few sites that can help you learn more about this approach include the following:  
Restorative Justice Online, <http://www.restorativejustice.org>, and Eastern Mennonite University, Center for Justice and Peacebuilding, <http://www.emu.edu/cjp/restorative-justice/>.



#### Restorative justice programs can be aimed at the front end of the system

as an alternative to incarceration, but can also be aimed at people already in the system. Here Manuel Zarate hugs his daughter Brittany and grandson Andrew Almodovar at the end of a "Get On the Bus" visiting day to Folsom State Prison arranged by the California Department of Corrections and Rehabilitation (CDCR) and the Center for Restorative Justice Works (CRJW) in Folsom, California. Buses with children and their caregivers traveled free of charge to two prisons, as part of an outreach program to reunite children with their incarcerated fathers.

## Restoration Programs

Restoration programs try to include all the parties involved in a criminal act: the victim, the offender, and the community. Although processes differ in structure and style, they generally include the following:

- Recognition by offenders that they have caused injury to personal and social relations, and a determination and acceptance of responsibility (ideally accompanied by a statement of remorse)
- A commitment to both material reparation (e.g., monetary restitution) and symbolic reparation (e.g., an apology)
- A determination of community support and assistance for both victim and offender

The intended result of the process is to repair injuries suffered by the victim and the community, while ensuring reintegration of the offender.

Negotiation, mediation, consensus building, and peacemaking have been part of the dispute resolution process in European and Asian communities for centuries.<sup>110</sup> Native American people and members of Canada's First Nations have long used the type of community participation in the adjudication process (in sentencing circles, sentencing panels, and panels of elders) that restorative justice advocates are now embracing.<sup>111</sup>

In some Native American communities, people accused of breaking the law meet with community members, victims (if any), village elders, and agents of the justice system in a **sentencing circle**. All members of the circle express their feelings about the act that was committed and raise questions or concerns. The accused can express regret about his or her actions and a desire to change the harmful behavior. People may suggest ways in which the offender can make things up to the community and those who were harmed. A treatment program, such as Alcoholics Anonymous, may be suggested, if appropriate.

**sentencing circle** A type of sentencing in which victims, family members, community members, and the offender participate in an effort to devise fair and reasonable sanctions that are ultimately aimed at reintegrating the offender into the community.

## Restoration in Practice

Restorative justice policies and practices are now being adapted around the world. Restorative justice is being embraced on many levels in the justice system.

**SCHOOLS** Some schools have employed restorative justice practices to avoid more punitive measures such as expulsion in dealing with students involved in drug and alcohol abuse. Schools in Minnesota, Colorado, and elsewhere are trying to involve students in "relational rehabilitation" programs, which strive to improve offenders' relationships with key figures in the community who may have been harmed by their actions.<sup>112</sup>

**POLICE PROGRAMS** Restorative justice has also been implemented when police first encounter crime. The new community policing models can be viewed as an attempt to incorporate restorative concepts into law enforcement. Restorative justice relies on criminal justice policy makers listening to and responding to the needs of those who will be affected by their actions, and community policing relies on policies established with input and exchanges between officers and citizens.<sup>113</sup> The technique is also being used by police around the world. In England, police are using a format called restorative cautioning. After an arrest was made, police in England and Wales traditionally had four alternative procedures they could follow: (1) take no further action, (2) give an informal warning, (3) administer a formal police caution, or (4) decide to prosecute by sending the case to the Crown Prosecution Service. In the new restorative cautioning approach, a trained police facilitator uses a script to encourage an offender to take responsibility for repairing the harm caused by the offense. Sometimes the victim is present, in which case the meeting is called a restorative conference; usually, however, the victim is not present. Traditional cautioning, by contrast, lasts only a few minutes, requires no special training, and focuses on the officer explaining the possible consequences of future offending.<sup>114</sup>

**PRETRIAL PROGRAMS** Some jurisdictions have instituted restorative justice programs as a form of diversion from the court process. A popular restorative justice method is the family group conference, made up of the person who has committed the offense (usually