RESTORATIVE CRIMINAL JUSTICE

Hadar Dancig-Rosenberg & Tali Gal*

ABSTRACT

This Essay develops a model that integrates restorative justice within the conventional punitive system of criminal responsibility and punishment. Contrary to the conventional wisdom, we demonstrate that restorative justice should form a synergy with retributivism, deterrence, incapacitation, and other punitive goals of criminal law. We show how this synergy can be formed, illustrate its operation and identify its potential contribution to social welfare.

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* Assistant Professor, Bar-Ilan University Law School, Israel. Assistant Professor, School of Criminology, University of Haifa, Israel. We would like to express our gratitude first and foremost to Alex Stein for his detailed comments and critical insights. We are also grateful to Ori Aronson, Michal Alberstein, Itai Bar-Siman-Tov, Briana Barocas, Richard Bierschbach, John Braithwaite, Nerya Cohen, Tsilly Dagan, Rashmi Goel, Anat Horovitz, Shahar Lifshitz, James Pulec, Dana Pugach, Leslie Sebba, Ron Shapiro, David Wexler, Uri Yanay, and participants in workshops and presentations at the Bar-Ilan University Law School, Hebrew University of Jerusalem Law School, the Israeli Law & Society Association 2011 Annual Meeting, Osgoode Hall Law School, and the University of Puerto Rico School of Law for many insightful comments and suggestions. Last but not least, we thank Hadas Osher-Lahav for excellent research assistance and the Wexler Foundation for financial support.

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INTRODUCTION

The last three decades marked the ascendance of restorative justice as a crime-control mechanism. Restorative justice has been developed as a supplement to, or a replacement for, the traditional criminal process. Although both approaches try to develop a socially optimal response to criminal behavior, each of them represents a distinct ideology. Academic literature cultivates this separationist stance by treating the two approaches as conflicting paradigms. Much of this literature focuses on the pros and cons of restorative vs. punitive modes of criminal justice, while trying to appraise empirically the efficacy of specific restorative programs. The interplay between restorative and

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2 See, e.g., HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE (2002) (presenting findings from the Reintegrative Shaming Experiments [RISE] comparing cases randomly assigned to either court or conference in Canberra, Australia); James Bonta, Rebecca Jessman, Tanya Rugge & Robert Cormier, Restorative Justice and Recidivism: Promises Made, Promises Kept?, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 108 (Dennis Sullivan & Larry Tifft eds., 2006) (presenting a meta-analytic review of findings regarding recidivism rates following punitive and restorative processes. The analysis concludes that restorative interventions have an approximately 7 per cent reduction impact on recidivism); Jeff Latimer, Craig Dowden & Danielle Muise, The Effectiveness of Restorative Justice Practices: A Meta-Analysis, 85 THE PRISON J. 127 (2005) (presenting a meta analytic review of findings regarding the effectiveness of restorative justice programs in comparison with formal punitive processes. Effectiveness was measured by victim and offender satisfaction, restitution compliance, and recidivism rates. The meta-analysis concluded that restorative justice interventions resulted in small, but significant reductions in recidivism and were more effective with low-risk offenders. Program effectiveness improved during the mid-nineties as programs became more structured and more theoretically anchored within restorative justice theory); LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE (2007) (presenting a systematic review of evidence drawn from reasonably unbiased tests comparing restorative justice with conventional criminal justice. The review reveals that, with only one exception, rigorous tests of restorative justice showed significant reductions in recidivism rates. Restorative justice reduces crime more effectively in more serious crimes, in violence rather than in property crimes, and when there is a personal victim).
punitive justice in the normative and conceptual domains of criminal law remains under-theorized. This Essay fills this gap.

We posit that restorative justice is a viable community-based mechanism for regulating criminal behavior. Contrary to the common wisdom, we show that the punitive approach is not the only means by which society can respond to and reduce crime. Indeed, we demonstrate that restorative justice provides an equally efficacious, if not superior, social response to crime. Most importantly, we develop a model that integrates the punitive and the restorative approaches within criminal law.

Our proposed model re-conceptualizes criminal liability by making it ideologically more inclusive and multifaceted and, consequently, more responsive to the needs of politically complex society. This re-conceptualization tracks the well-known criticism made by Professors Bibas and Bierschbach that criminal procedure leaves virtually no room for apology and repentance, and provides no opportunities for victims and offenders to engage in a dialogue.3 Our analysis, however, goes beyond that criticism and shows that restorative justice is criminal justice. We posit that, institutionally, restorative mechanisms monitored by state agencies and implemented under the formal legal framework form an integral part of criminal law. As far as substantive criminal law is concerned, we demonstrate that a synergetic application of the punitive and restorative mechanisms can achieve a different—and socially beneficial—blend of the criminal law objectives.

We capture the relationship between the punitive and restorative approaches in the form of two alternatives. One alternative is embedded in two partly overlapping circles: the intersecting part represents the goals of criminal law potentially achievable by both punitive and restorative approaches. These common goals include rehabilitation, deterrence, incapacitation, and denunciation of crime. The separate parts represent the approaches’ distinct goals: retribution (as a distinct goal of punitive justice) and reparation of harm and community empowerment (as two distinct goals of restorative justice). Another alternative situates itself within two concentric circles. The small circle represents the goals of punitive justice. The large circle represents restorative justice, which, in appropriate cases, promotes the goals of punitive approach as well (including retribution in a broad sense, which we term requital) in conjunction with the restorative objectives that include reparation of harm and community empowerment.

This scheme has many methodological advantages: it uncovers numerous points of intersection between the punitive and the restorative approaches to criminal law; it enables a more precise definition of the relationship between restorative and punitive justice; and it also helps identify the virtues and the vices of each respective approach across a variety of contexts.

Structurally, our Essay proceeds as follows. In Part I, we present the restorative and the punitive approaches as competing paradigms, reflecting the way they have largely been described in literature. In Part II, we analyze the goals that the two approaches strive to achieve and identify the points of intersection between those goals. In Part III we present our model and discuss its advantages over other models of criminal justice. As part of this discussion, we consider the recent court decision in State of New Jersey v. Dharun Ravi. We show that in this high-profile case, all of the parties involved — the defendant, the victims, and the entire community — could benefit from a restorative procedure that could bring about a socially desirable resolution of the case at hand. We conclude this Essay by outlining future applications of our integrative model in theory and in practice.

I. CRIMINAL JUSTICE: PUNITIVE VS. RESTORATIVE

Restorative justice grew out of disappointment with the punitive approach. The criticism against the criminal justice system related both to its ineffectiveness in reducing criminality and to its failure to address victims’ needs. Influenced by other emerging approaches such as Alternative Dispute Resolution (ADR) and community justice,
local initiatives sprang up aspiring to provide better responses to crime. Gradually these programs’ *modus operandi* was conceptualized and abstracted, resulting in the construction of restorative justice as the “antithesis” of punitive justice.

### A. Understanding and Responding to Crime

Punitive justice perceives crime largely as harm to protected social values. The perception of crime as causing a conflict between an individual and society is one of the distinct characteristics of criminal law. Liberal theory provides an explanation for the great importance of defendants’ rights. The role of the sovereign is to regulate behavior, and in doing so, to determine guilt and punishment. Defendants’ rights were developed to protect the individual against the mighty sovereign and its potentially arbitrary, harmful exertion of power.

Punitive justice authorities ask three questions in their reaction to crime: who committed it; whether the elements of criminal offense exist; and which penalty should properly be imposed on the perpetrator. When the perpetrator’s guilt is proved sentencing is carried out in as

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structured and uniforms a manner as possible by state-appointed courts. Punishment is proportional to the severity of the crime and influenced by mitigating and aggravating circumstances.

The restorative approach, in contrast, emphasizes the personal and relational harms caused by crime. Crime is perceived primarily as an act of personal harm. Accordingly, processes create space for discussing the actual harm caused to the direct and indirect victims, and for considering ways to promote a sense of safety and belonging among community members. The restorative justice approach focuses, therefore, on three questions: who has been harmed; what are their resulting needs; and who is responsible for meeting those needs. These questions are answered directly and jointly by the stakeholders: the offender and the victim, members of their families and representatives of their surrounding communities.

The formal definition of the offense is no more than a starting point in restorative processes; its concrete significance is shaped by the victim and others describing the way it affected them. At the same time, the severity of the offense is not defined exclusively by its direct outcome, nor is it regarded merely as a private conflict. Whereas the punitive approach ascribes importance to the negative message conveyed by the perpetrator in committing the crime to society as a whole, the restorative approach emphasizes the feeling of contempt for human dignity, rights or needs, which was experienced by the victim and others who have been affected. The emphasis on the ripple effects created by crime explains the community’s interest in responding to the crime.

According to some restorativists, restorative justice reflects a

14 The different terminologies used by the restorative and punitive approaches are also indicative of the vast differences between the two. Whereas punitive justice vocabulary includes terms such as offense, defendant/criminal and suspect, restorative justice terminology uses alternative terms such as wrong/harm and wrongdoer. The frequent shifts from one approach to the other in this Essay, in the course of comparing them, made it difficult to remain faithful to the respective terminologies. We emphasize, however, that restorative justice jargon excludes stigmatizing labels that associate the crime with the person who committed it, such as “criminal”.
15 Howard Zehr, The Little Book of Restorative Justice 20 (2002). We thank John Braithwaite for pointing out commenting on an earlier draft that at times the person who is expected to take responsibility is other than the person accountable for the crime, such as in cases of child offenders.
republican worldview, in which community members regulate their own behavior. Accordingly, the participants of restorative processes jointly and actively make decisions concerning the harm, its implications and the proper responses to it. The role of the sovereign is restricted to preserving basic human rights in addition to defining substantive criminal law. As long as there is no deviation from the “red lines” set by the state, the community is free to manage behavior as it wishes.

The two theories also have different approaches to the nature of the reaction to crime. Restorative justice considers penal sanctions as administrative aggression, imposed by the state in response to the aggression by the offender. Conversely, restorative justice processes seek to achieve restorative, corrective measures that can “put right” the harm done. Focusing on restoration does not mean abstaining from a response, or even providing a milder response; rather, it reflects a reaction which combines high social control with high social support.

B. Punitive and Restorative Approaches Compared

The criminal process opens with an investigation of the reported

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17 See John Braithwaite & Phillip Pettit, Not Just Deserts: A Republican Theory of Criminal Justice (1990); See also Walgrave, supra note 1 (describing restorative justice as a communitarian approach).

18 See Braithwaite & Pettit, id. (emphasizing that unlike liberal theory, which focuses on protecting individuals against the sovereign, republican theory relates to protection against other forms of domination resulting from social injustice and violence). See also Walgrave, id.; and Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 231 (explaining the differences between restorative justice, which is based on republicanism, and punitive justice, which is based on liberalism).

19 John Braithwaite, Setting Standards for Restorative Justice, 42 BRIT. J. CRIMINOL. 563 (2002) (discussing state-imposed boundaries that proscribe any violent or coercive expressions); John Braithwaite, Holism, Justice, and Atonement, 2003 UTAH L. REV. 389 (discussing the role of state-issued rules in ensuring victims’ ability to express their positions freely, as well as provisions for minimal emotional and physical support); Luna, id., at 289 (explaining that while lawmakers are least capable of making suitable decisions in concrete cases, they are most capable of setting general boundaries for punishment in different categories of crime, reflecting widely shared values and constitutional constraints. The stakeholders are than free to reach an agreeable outcome within these boundaries).

20 Zehr, supra note 11, at 199.

21 See Ted Wachtel & Paul McCold, Restorative Justice in Everyday Life, in RESTORATIVE JUSTICE IN CIVIL SOCIETY 117 (John Braithwaite & Heather Strang eds., 2000) (explaining that the restorative reaction to crime differs from the punitive approach, which reacts to crime through high social control and low social support. Both approaches differ from a neglectful approach, which provides both low social support and low social control, and a permissive, or rehabilitative approach, which provides high social support but low social control [the “social discipline window”]).
crime. The investigative material is passed on to the prosecution for indictment. Once an indictment has been filed, the legal process begins, with adjudication as its first stage and sentencing as the second. Adjudication becomes unnecessary in many cases, when the parties agree to a plea bargain. The decision on whether a trial is to be conducted is forced on both the victim and the offender. The process culminates in the imposition of punishment, which often ravages the defendant’s freedom and dignity.

The restorative justice approach offers processes that differ substantially from the criminal process. A precondition for a restorative justice process to take place is the offender’s admission of the crime. Secondly, both the offender and the victim are required to consent to a face-to-face restorative dialog, and this voluntarism is reexamined throughout the process. The practical significance of these two conditions is that restorative justice is inapplicable in many cases.

In restorative processes the interested parties themselves – as well as affected community members – are direct parties to the process. The professionals involved act largely as suppliers of information and service providers rather than as decision-makers. Attorneys are

22 This description is limited to Anglo-American legal systems in which adversarial criminal processes are customary. Criminal justice processes in Continental legal systems carry entirely different characteristics, affecting, among other things, the status of the victim.


24 See TONY MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW 5 (1999) (defining restorative justice as a process “whereby the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future”).

25 Different restorative justice programs define the requirement for the victim’s consent differently. See, e.g., Gabrielle Maxwell & Alison Morris, Youth Justice in New Zealand: Restorative Justice in Practice? 62 J. OF SOC. ISSUES 239, 253 (2006) (presenting findings that victims participate in about a half of the youth justice family group conferences that operate in New Zealand. Conferences take place even without the victim’s consent to the process, but they are free to decide whether to participate in them or not); SHERMAN & STRANG, supra note 2, at 36 (stating that victims involved in the RISE experiments in Canberra, Australia, were simply asked to name a time and date they could attend a conference, instead of being formally requested to give their consent to the process). See also Article 7 of the United Nations’ Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (E.S.C. Res. 2002/12, U.N. Doc. E/2002/INF/2/Add.2 [Aug. 3, 2002]) (providing that restorative justice processes should not be used without the free and voluntary consent of the victims and that they should be able to withdraw their consent at any time during the process).

26 “Mostly-restorative” processes, however, are possible when there is no specific victim, such as in cases of vandalism, tax fraud and drunk driving. For a typology of “fully”, “mostly”, and “partly” restorative justice processes see Paul McCold & Ted Wachtel, In Pursuit of Paradigm: A Theory of Restorative Justice, Address Before the XIII World Congress of Criminology (Aug. 10-15, 2003), available at http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/paradigm.pdf.
generally not invited to the process, and if they are present, their role is limited to the provision of information. Each participant’s voice is heard in its authentic form, without being processed through procedural or evidentiary filters. The only restriction is a prohibition against pressure, violence and domination.27

Crime victims are called to speak of their needs and the damage which they incurred as well as to propose ways of repairing the harm and preventing additional damage.28 Offenders are expected to take explicit responsibility for their actions, to listen and respond to what the victims have to say, and to propose their own ways of repairing the harm and preventing any recurrence of the offenses. Consequently, the outcomes of restorative justice processes are shaped by the parties themselves according to their needs and can be unique in nature.29 The restorative process has therefore often been described as an empowering experience, by contrast to the criminal process, which is commonly criticized as reawakening the trauma and disempowering the victim.30

Finally, the restorative process is not adversarial. Because restorative justice processes follow the offender’s admission there is no need to convince anyone present of the veracity of one party, at the expense of the other, or to agree on a plea bargain.31 Because the objective of the process is not to penalize the offender may take off the mantle of defense and engage in a sincere dialog toward the formulation of a reparation plan.32 A reparation plan typically includes both monetary reparation and a rehabilitative program. Community work is also often agreed upon by the participants.

There are several models of face-to-face restorative justice

27 Braithwaite, supra note 19, at 565.
28 The conception of the victim as a partner in the decision-making process following a crime is one of the key innovations of restorative justice. See David Miers, Situating and Researching Restorative Justice in Great Britain, 6 PUNISHM. & SOC. 23 (2004).
30 See, e.g., Barton, supra note 11.
32 See Bazemore, supra note 1 (portraying restorative justice as leading to “win-win” solutions: only by attending to the needs of the victim and the community following the crime can the offender be rehabilitated). See also STRANG, supra note 2, at ch.7 (providing a statistical proof for the “win-win” outcome of restorative justice: when victims responded positively to restorative justice conferences offenders responded positively as well in the majority of cases. Win-win results relating to dimensions such as participation, legitimacy, emotional restoration and procedural justice occurred significantly more often in conferences than in court, while win-lose occurred significantly more often in court).
processes, the most common being Victim-Offender Mediation (VOM),
Conferencing, and the Circle. The models differ primarily by the
number of participants and the level of community involvement in
them. Victim-Offender Mediation involves an intimate encounter
between the victim and the offender, together with a mediator.33
Conferences include the victim, the offender, and their respective
communities of support, as well as community representatives and
professionals.34 Circles are practiced mainly in native communities.35
They often involve members of an entire community, and include
spiritual and traditional elements representing the uniqueness of the
specific community. In all three models, the processes are conducted by
a neutral, professional facilitator. Before the encounter, a thorough
preparation phase takes place, administered by the facilitator. During
the gathering the participants discuss the offense and its implications
and collectively shape the reparation plan. When necessary, an
additional meeting is held. After the gathering, the implementation of
the decisions is monitored and reported to the state authorities. When a
criminal process has begun, the state authorities decide whether or not
to pursue it according to the results of the restorative process. In cases
where the reparation plan has not been carried out, the case is
transferred to (or remains in) the criminal process. Although the
community plays a dominant role in all of these models, state officials
participate in the processes and monitor their implementation, thus
retaining the state’s involvement.

Beyond the practical differences between restorative and criminal
processes, proponents of each approach have emphasized the
weaknesses of the respective rivalries, continuing to portray the two
approaches as irreconcilable with each other. Restorativists argue that
the criminal process is based on a confrontational paradigm that
excludes victims. The trial is perceived as a rivalry between the
prosecution and the defense, and the binary structure of the verdict in
the criminal process creates a “zero-sum game”, whereby the victory of
one party is perceived as the failure of the other.

33 Mark S. Umbreit, Crime Victims Seeking Fairness, Not Revenge: Toward Restorative
34 See Shapland, Atkinson, Atkinson, Colledge, Dignan, Howes, Johnstone, Robinson &
Sorsby, supra note 29 (describing conferences as strengthening the social bonds between
offenders and their family members, between victims and their relatives and among the various
supporters).
35 Julian Roberts & Kent Roach, Restorative Justice in Canada: From Sentencing Circles to
Sentencing Principles, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR
RECONCILABLE PARADIGMS? 237 (Kent Roach, Julian Roberts, Anthony E. Bottoms & Andrew
Punitivists, on the other hand, have raised serious concerns regarding the ability of restorative justice processes to protect offenders’ due process rights, and in particular the presumption of innocence. The admission requirement creates a risk of false admissions, particularly among offenders belonging to minority groups, those with mental illnesses and juveniles. When restorative processes begin after the admission or finding of guilt, due process rights protect the offenders’ interests other than maintaining their innocence. But when restorative justice is used as a diversion from the criminal process or takes place before the admission or finding of guilt, the risk of false admission raises constitutional concerns. Punitivists also question the ability of restorative justice to provide deterrent, effective and “just” reactions to serious crimes. Restorative justice, in other words, is perceived as a “soft option” by punitivists.

In practice, restorative justice processes are currently being used in thousands of programs throughout the world. Many studies consistently indicate the effectiveness of restorative processes in reducing recidivism rates. Empirical findings also indicate the satisfaction of victims and the improvement in their emotional state as a


38 But see STRANG, supra note 2, and SHERMAN & STRANG, supra note 2 (proving that in fact, offenders who were referred to restorative justice processes were more likely to experience the process as fair than those who were referred to court). See also Kathleen Daly, Mind the Gap: Restorative Justice in Theory and Practice, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 219 (Andrew Von Hirsch, Julian V. Roberts, Anthony Bottoms, Kent Roach & Mara Schiff eds., 2003) (providing similar results in juvenile offenders); ADAM CRAWFORD & TOM BURDEN, INTEGRATING VICTIMS IN RESTORATIVE YOUTH JUSTICE 58, 70-71 (2005) (demonstrating that even young offenders who met directly with their victims felt that the process outcomes were fair and that they were treated with respect by their victims).


40 Bonta, Jesseman, Rugge & Cormier, supra note 2 (reviewing thirty nine restorative justice studies in various jurisdictions and presenting small, but significant and consistent reductions in recidivism rates); SHERMAN & STRANG, supra note 2 (comparing court and conferencing processes in Canberra, Australia); and Latimer, Dowden & Muis, supra note 2 (conducting a meta-analysis of findings from twenty two studies regarding recidivism rates following restorative justice programs and showing a significant reduction of crime compared with recidivism rates following court processes).
result of their participation in restorative processes.\textsuperscript{41} Therefore, irrespective of one’s position toward restorative justice, it is clearly “here to stay”. Our purpose in this Essay is to identify the position of restorative justice vis-à-vis punitive justice, focusing on their respective goals.

II. THE GOALS OF THE CRIMINAL PROCESS

Whereas the punitive approach generally considers retribution, deterrence (general and personal), rehabilitation, incapacitation and denunciation of the crime\textsuperscript{42} as the goals of penal sanctions, many restorative justice scholars present it as promoting entirely different goals.\textsuperscript{43} Restorative justice, however, can in fact achieve the punitive goals in addition to its unique consequentialist objectives. Section A presents the arguments explaining how both approaches may achieve the goals of criminal law as well as those presenting the unique objectives of restorative justice. The dispute largely revolves around the question of whether requital\textsuperscript{44} is either attainable or desirable within the restorative philosophy. We will address this question in Section B.

\textsuperscript{41} Barton Poulson, \textit{A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice}, 2003 \textit{UTAH L. REV.} 167 (combining data from seven evaluation studies comparing restorative justice and court processes and showing that in all psychological measures restorative justice produced significantly better outcomes for victims); STRANG, supra note 2 (presenting findings regarding enhanced satisfaction and healing for victims whose cases were randomly assigned to conferences instead of court in Canberra, Australia); \textit{and} Caroline M. Angel, \textit{Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice}, Conference on Victims Post-Traumatic Stress Symptoms (Jan. 1, 2005) (unpublished dissertation, University of Pennsylvania), available at http://repository.upenn.edu/dissertations/AAI3165634 (presenting findings regarding reduced post-trauma symptoms among robbery and burglary victims whose cases were randomly referred to conferences).

\textsuperscript{42} Denunciation does not always appear as a separate traditional goal of punitive justice. We chose, however, to present it in this Essay as one of the punitive justice goals because of its centrality for both deontologists and utilitarians. \textit{See} ANDREW VON HIRSCH, \textit{Censure and Sanctions} (1993) (presenting “censure” as a justification for punishment within a retributivist approach); BRAITHWAITE & PETTIT, supra note 17 at 48 (presenting denunciation as a utilitarian justification for punishment). For simplicity we categorize denunciation as a utilitarian goal since it encapsulates, inter alia, utilitarian components. We acknowledge, however, that denunciation also involves, at least for some writers, other meanings as well.

\textsuperscript{43} \textit{See}, \textit{e.g.}, BRAITHWAITE & PETTIT, \textit{id} (arguing that the goal of restorative justice is promoting equal dominion among all members of society).

\textsuperscript{44} We choose the term requital for its broad meaning that includes the various interpretations on retribution. Requital is also a neutral term that has been left outside the academic discourse about punishment and its justification. \textit{See}, \textit{e.g.}, BRAITHWAITE & PETTIT, \textit{id} (using, critically, the term retribution); VON HIRSCH, supra note 42 (considering censure as a goal of punishment); Joel Feinberg, \textit{Doing and Deserving: Essays in the Theory of Responsibility} 98 (1970) (proposing the term “hard treatment”).
A. What Do Punitive and Restorative Approaches Try to Accomplish?

Table 1
The goals of the retributive and restorative paradigms

<table>
<thead>
<tr>
<th>Utilitarian Goals – Crime Reduction</th>
<th>Punitive Justice</th>
<th>Restorative Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Deterrence</td>
<td>External incentives: escalating punishments combined with strict enforcement</td>
<td>Internal incentives: reintegrative shaming and procedural fairness encouraging self-regulation</td>
</tr>
<tr>
<td>General Deterrence</td>
<td>Consistent and predictable sanctions</td>
<td>Increasing reporting rates and strengthening community ties</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>Rehabilitation programs as alternatives or supplement to punishment</td>
<td>Focusing on crime - not criminal; offender’s involvement in decision-making; rehabilitation within the community</td>
</tr>
<tr>
<td>Incapacitation</td>
<td>Imprisonment; death penalty</td>
<td>Spreading responsibility on many among offender’s community</td>
</tr>
<tr>
<td>Denunciation, Norm-Setting</td>
<td>Public judicial decisions</td>
<td>Authentic expressions by process participants backed up by reparation plan; offender’s remorse</td>
</tr>
<tr>
<td>Additional Consequential Goals</td>
<td>Reparation of Harm</td>
<td>Addressing needs of anybody affected by crime</td>
</tr>
</tbody>
</table>
In what ways can restorative justice serve the utilitarian objectives of the punitive approach? Punishment, according to utilitarianism, may be justified only when it is imposed in order to attain objectives which result in benefit to society: for the sake of deterrence, the prevention of recidivism and the rehabilitation of the offender. As Table 1 above demonstrates, restorative justice can potentially achieve the objectives of the classic utilitarian school in addition to its own stated goals. Accordingly, criticism is not directed principally at the utilitarian goals themselves, but rather at the inefficient, unjust and coercive methods that the punitive approach adopts in pursuing them.

Punitive justice justifies punishment for its deterrent effect. Deterrence theory assumes rationality, but at least in certain types of offenses and certain segments of the population, it is doubtful whether...
the severity of the punishment affects the future behavior of offenders.\textsuperscript{50}
In a reality of high case attrition,\textsuperscript{51} the certainty of enforcement is low
as well. What actually deters people from committing crimes, according
to restorativists, is \textit{shame}. According to Braithwaite’s reintegrative
shaming theory, restorative justice provides a more efficient personal
deterrent, because it creates a space in which the community shames
offenders for their deeds, while expressing commitment and concern
toward them. The combined message of denunciation of the wrongful
act with the acceptance of the wrongdoer enables the offender to
reintegrate into society after having taken measures to repair the harm
caused by the crime.\textsuperscript{52}

Tom Tyler’s procedural justice theory establishes that respectful
and inclusive processes are more effective than threatening, aggressive
discourses.\textsuperscript{53} Offenders who took part in restorative justice processes
reported feelings of fairness, attentive listening, neutrality and the
ability to influence, which encouraged them to fulfill their
undertakings.\textsuperscript{54} The theory of procedural justice and the theory of
reintegrative shaming provide two prominent explanations for the
empirical findings that restorative justice is generally more efficient
than the criminal process in reducing recidivism rates.\textsuperscript{55}

Consistent and predictable penal sanctions are also intended to
achieve general deterrence, according to punitivists. Proponents
of restorative justice, however, question the validity of the general
deterrence theory. Instead, they suggest that systemic use of restorative
justice processes will lead to general deterrence and to a decrease in the
crime rate. The alliance created through restorative processes between
victims and community members produces greater satisfaction and trust,
consequently increasing the percentages of reported new crimes. The

\textsuperscript{50} See Luna, supra note 18, at 212-213.
\textsuperscript{51} Joan R. Petersilia, Allan Abrahamse & James Q. Wilson, Police Performance and Case
(aiming to examine the reasons for the high case attrition rate in the United States, where less
than a half of all felony arrests result in conviction. Some police practices and community
characteristics where identified, explaining approximately a half of the variation in attrition rates
across different police agencies).
\textsuperscript{52} John Braithwaite, Crime, Shame and Reintegration (1989).
\textsuperscript{53} Tom R. Tyler, Restorative Justice and Procedural Justice: Dealing with Rule Breaking, 62
\textsuperscript{54} Strang, supra note 2.
\textsuperscript{55} These findings were verified in randomized-assignment tests. See Sherman & Strang,
supra note 2; Latimer, Dowden & Muise, supra note 2. Other studies have identified diversity in
the effectiveness of restorative justice in reducing reoffending. See Bonta, Jessemee, Rugge &
Cormier, supra note 2.
rise in the reporting rates increases the risk of being caught and hence the reluctance of potential offenders to commit offenses.56

Indeed, punitivists question the ability of restorative justice to achieve general deterrence because restorative processes are contingent upon the victim’s consent. This variability decreases the certainty of legal reactions to crime and reduces public trust in the justice system. The restorativist response is that as restorative practices become more visible and more attuned to victims’ expectations, victims’ consent rates increase, thus increasing the probability of enforcement through restorative processes.57 Yet, as long as restorative justice remains at the margins of legal systems, it is impossible to expect a “critical mass” of cases handled restoratively and an increase in reporting rates thereby; and as long as the general deterrent effect of restorative justice is not substantiated by empirical evidence it is unlikely that it would become the mainstream enforcement mechanism. A realistic view of restorative justice, then, acknowledges its limitations in achieving general deterrence. At the same time, a realistic view of punitive justice acknowledges its own weakness in achieving this goal.58

Offenders’ rehabilitation is another utilitarian goal of punitive justice. Imprisonment is expected to provide rehabilitative measures in addition to its incapacitative roles, while other (non)-punitive measures involve even more explicit rehabilitative goals. But according to critics the criminal process condemns offenders, not only their deeds;59 their imprisonment removes them from the law-abiding community; and prison is known as “the best school of crime”. 60 In restorative justice

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58 See Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science, 91 THE PRISON J. 48 (2011); Ryan S. King, Marc Maier & Malcolm C. Young, Incarceration and Crime: A Complex Relationship (The Sentencing Project, 2005) (explaining that no more than 25% of the crime reduction of the 1990s can be attributed to increased incarceration). See also Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not, 18 J. ECON. PERSPECT. 163 (2004) (estimating that approximately one third of the crime reduction of the 1990s was related to increased incarceration, but that this can be attributed to the incapacitation effect rather than future deterrence).
59 See Braithwaite, supra note 56, at 77 (arguing that even when the sanction is rehabilitative, the outcome is still one of labeling offenders – if not as “evil”, than as “sick”; if not as “criminals”, than as “crazy”; In addition, the imposition of “rehabilitative” sanctions leaves offenders in a passive position after having been “diagnosed” as in need of recovery, passiveness that reduces the prospects for successful rehabilitation).
processes, by contrast, the active involvement of offenders and their supporters in selecting the rehabilitation program, along with the strengthening of their own familial and societal bonds, make restorative justice an effective means of rehabilitating offenders.\footnote{In the Canadian province of Newfoundland and Labrador, for instance, restorative conferences that were used in family violence cases strengthened family ties considerably. See \textit{Joan Pennell & Gale Burford, Family Group Decision-Making: Protecting Children and Women, 79 CHILD WELFARE 131 (2000).}}

Incapacitating offenders is considered an additional utilitarian goal of punitive justice. Proponents of restorative justice, however, point out the high percentage of violence in prisons and the increase in recidivism post-release.\footnote{Ezzat A. Fattah, \textit{A Critical Assessment of Two Justice Paradigms: Contrasting the Restorative and Retributive Justice Models, in SUPPORT FOR CRIME VICTIMS IN A COMPARATIVE PERSPECTIVE 99 (Ezzat A. Fattah & Tony Peters eds., 1998) (describing the detrimental implications of imprisonment); \textit{Z EDNER, supra note 48, at 94 (explaining that the stigmatizing effects of imprisonment and the intrusion in family life increase the likelihood of reoffending}).} Erroneous identifications and speculative risk assessments are additional obstacles toward effective incapacitation.\footnote{Luna, \textit{supra} note 18, at 211.} In restorative justice, it is suggested, the community can incapacitate offenders in creative ways, such as placing in-house inspectors in scofflaw businesses, having a relative move into the offender’s home, or taking away the offender’s car keys on weekends.\footnote{As Braithwaite vividly describes: “...the Uncle Harrys of this world come up with ideas more attuned to the reality of the offender’s circumstances than a judge, and are better monitors of their implementation than police officers because one Uncle Harry might have more contacts with the offender in a month than all the police in the city during a year. Intimates, in short, can incapacitate more intensively, more creatively, more sensitively, more consensually, and in a more dynamically responsive way than the criminal justice system.” Braithwaite, \textit{supra} note 56, at 123.} If activity at this level does not accomplish prevention, it will be necessary to move up in the enforcement pyramid\footnote{\textit{JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 30 (2002) (presenting the regulatory pyramid which has at its base the most restorative dialogue-based approach for securing compliance with the law; as we move up the pyramid more coercive methods are used to enforce the law).}} toward more coercive measures.\footnote{Braithwaite, \textit{supra} note 56, at 123. Many abolitionists hold a similar view. See Jim Thomas & Sharon Boehlhefeld, \textit{Rethinking Abolitionism: “What Do We Do with Henry?” Review of de Haan, the Politics of Redress, 18 SOCIAL JUSTICE 239 (1991).}}

Another utilitarian objective of punishment is denunciation of crime.\footnote{\textit{ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 18 (6th ed., 2009).}} More broadly, and more recently, a goal of exchanging finding employment, as well as the societal and familial troubles encountered by ex-convicts push them back into criminal behavior and prevent their reintegration into society; Michael A. Hallett, \textit{Race, Crime and forprofit Imprisonment: Social Disorganization as Market Opportunity, 4 PUNISHM. SOC. 369 (2002) (explaining that the negative effects of prisons are greater than their positive impact on prisoners).}
messages between the various parties to the criminal process has been identified. Moving beyond the traditional goals of punitive justice, expressive theories emphasize the negative message that the crime conveys and the condemning message that punishment communicates.\textsuperscript{68} Punishment, from this perspective, is perceived as a way to express negative emotions held by the public in large.\textsuperscript{69} Restorative justice processes attain the goal of social condemnation as well, when all those present express their sorrow, shame or anger at what happened, provide details of the damage caused, and formulate a multidimensional reparation plan.\textsuperscript{70} Such a message is arguably more credible and more effective than a sentence handed down by an unfamiliar judge.\textsuperscript{71} Moreover, offenders typically express remorse,\textsuperscript{72} thereby validating the denunciatory message even further. In fact, the distinction made in restorative justice processes between the denunciation of the crime and acceptance of the offender enables offenders and their supporters to condemn the criminal act wholeheartedly, by contrast to the criminal process, which incentivizes defendants to minimize their responsibility.

A claimed limitation, however, of restorative justice is that, while it can educate and strengthen micro-communities, such as an extended family, a school or a social circle,\textsuperscript{73} it falls short of transforming whole communities. Our response to this argument is that, when there is a need to convey clear public message reparation plans can be made public while maintaining the anonymity of the participants.

One of the concerns against restorative justice is that strengthening the status of traditional community institutions as law enforcement agents might hinder the promotion of “acceptable” norms of behavior.\textsuperscript{74}


\textsuperscript{69} See Kahan, supra note 16 (discussing punishment having the function of reflecting the repugnance of the community, i.e., “the emotions of the community”).

\textsuperscript{70} Kay Pranis, Conferencing and the Community, in FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 40 (Gale Burford & Joe Hudson eds., 2000).

\textsuperscript{71} Barbara Hudson, Restorative Justice: The Challenge of Sexual and Racial Violence, 25 J. LAW. SOC. 237 (1998) (emphasizing that the message is especially powerful when the reparation plan is backed by community and government services and supervised by the enforcement authorities).

\textsuperscript{72} Expressions of remorse and requests for forgiveness occur in many restorative processes. See STRANG, supra note 2, at 115; SHERMAN & STRANG, supra note 2.

\textsuperscript{73} Braithwaite, supra note 56, at 37.

“Traditional customs” such as female genital mutilation and violence against women and children may be overlooked or even justified and the victims and their stories silenced. It is important, therefore, to involve state authorities as “watchdogs” in community-based restorative processes, to warn against violations of basic human rights. The question whether restorative processes are successful in resolving these problems depends largely on how they are practiced.

Beyond the unititarian goals of punitive justice, the restorative approach has its own unique consequential objectives. By contrast to the punitive approach, restorative justice focuses on victims, and the reparation of the harm done to them and to others constitutes its primary goal. The restorative approach criticizes punitive justice for taking a high toll from victims in the promotion of societal goals. As an alternative, it offers processes that can empower victims, strengthen social bonds, and heal, irrespective of their outcomes. In fact, findings have shown that victims who participated in restorative justice processes experienced a dramatic decrease in their post-trauma symptoms. The therapeutic effect was so dramatic that those processes were compared to cognitive-behavioral therapy, an effective psychological treatment method for reducing post-trauma symptoms. Victims’ rights reforms across the globe have brought the punitive approach closer to restorative justice in terms of empowering victims. But the gap between the two approaches is still significant; promoting the wellbeing of victims is not a primary goal of punitive justice.

(Heather Strang & John Braithwaite eds., 2002) (discussing the problems in some restorative justice programs addressing family violence in indigenous communities where the safety of women was placed at the hands of local men, some of whom were themselves abusers).

But see Braithwaite, supra note 19 at 564 (arguing that empirical evidence indicates that, in fact, women’s voices are heard more frequently than males’ in restorative justice processes, in contrast with the reality in formal courtrooms).

An example is the involvement of judges in sentencing circles in Canada and in the United States. The judge is passive during the circle but it is within his (or her) authority to decide whether or not to accept the outcome plan as a part of the sentence or as a replacement to it. See Goel, supra note 10.

See Barbara Hudson, Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity, 10 THEO. CRIM. 29 (2006) (suggesting that restorative processes should meet the principles of discursiveness, relationalism and reflectiveness to address this concern).

See BRAITHWAITE & PETTIT, supra note 17 (explaining why it is a consequential theory of justice).

Martin Wright, The Court as Last Resort: Victim-Sensitive, Community-Based Responses to Crime, 42 BRIT. J. CRIMINOL. 654 (2002); Fattah, supra note 62, at 257; ZEHR, supra note 11.

See BARTON, supra note 11 (explaining the notion of empowerment in restorative processes as therapeutic).

Angel, supra note 41.

Hadar Dancig-Rosenberg & Dana Pugach, Pain, Love, and Voice: The Role of Domestic
An additional stated goal of restorative justice is to repair and strengthen community ties. While the punitive approach focuses on offenders as individuals and considers the community a passive victim at most, the restorative approach places the community at the center of the process. Indeed, “community” is a vague, illusive concept in our modern urban society. A “community” in the restorative sense is not an entity defined by geography. Rather, it is a network of different social, familial and professional ties. Restorative justice processes awaken inactive ties and strengthen functioning ones by recruiting acquaintances of offenders and victims to sit together and discuss the crime and the appropriate reactions to it. The community is perceived as (secondarily) responsible for the occurrence of the offense and as a (secondary) victim. Community members, representing the shared responsibility of the community, are invited to restorative processes to take part in the design of the restoration plan. As a (secondary) victim, the community needs are strengthening social bonds, regaining residents’ sense of security and reducing crime rates. Community bonds are strengthened through the intensive discussion of the consequences of the offense, as well as by the active participation in, and supervision of, the reparation plan.

Restorative justice, then, can potentially address the utilitarian goals of the punitive approach, all aimed at reducing crime. Restorative justice deters offenders from committing additional crimes through the use of fair and rehabilitative shaming ceremonies. System-wide restorative justice may potentially achieve general deterrence as well, by raising the level of certainty that offenses will be reported and handled. Restorative justice processes also constitute effective community mechanisms for censuring offenses and confirming norms. Incapacitation can be achieved through the recruitment of family,
community and governmental enforcement mechanisms that prevent
offenders from reoffending. Restorative justice also provides a response
to two additional distinct consequentialist objectives, namely the
reparation of harm and community empowerment.

B. **Requital**

While the dispute between the restorative and the punitive
approaches regarding the utilitarian purposes focuses on the ways to
achieve them, the dispute around requital is fundamental to the very
concept. The theory of retribution is derived from the deontological
moral philosophy, which holds that, irrespective of the outcome of
the penal sanction, it is morally necessary to ensure that the punishment is
proportionate with the severity of the offense. Causing harm to a person
who harmed societal values has intrinsic positive moral value.

Restorativists differ about the deontological theory. Some utterly
reject the notion of justifying punishment through requital and hold
that punishment can only be justified when it promotes the common
good. The desire to revenge, although natural, is irrational and
unworthy. Consequently, if there is evidence that restorative justice is
likely to reduce criminal behavior while severe punishment is not, it is
preferable to take a pragmatic approach and waive the “primitive” urge
for requital or revenge. Another school of thought opposes the
deontological approach on the grounds that the existence of a “public
desire” to requite offenders is not supported by findings; rather, crime
victims seek to achieve entirely different objectives – principally those
of a fair and respectful process, compensation, acknowledgment of their

89 By “requital” we mean both the goal of achieving proportionality in punishment (“just
deserts”), and the goal of “making offenders pay” for their deeds (retribution).
90 Deontological moral theories highlight the intrinsic value of actions and norms. See GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: FOUNDATIONS, at ch. 5.3 (2007).
91 See John Rawls, Two Concepts of Rules, 64 PHILOS. REV. 3, 5 (1955) (explaining that
according to the retributivist approach, “The state of affairs where a wrongdoer suffers
punishment is morally better than the state of affairs where he does not”).
92 For a review of the various positions regarding retribution within restorative justice see
MICHAEL KING, ARIE FREIBERG, BECKY BATAGOL, & ROSS HYAMS, NON-ADVERSARIAL
93 See MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE
94 Lode Walgrave, Restorative Justice for Juveniles: Just a Technique or a Fully Fledged
95 Id.
suffering and opportunities to influence the outcome of the process.\textsuperscript{96} Indeed one could argue that retributivism is normative and should not be subjected to the influence of empirical arguments. Anyone who attributes at least some significance to empirical findings, however, will have difficulty ignoring the changes in the perception of justice by the public in general and by victims in particular.

Other restorativists acknowledge the legitimacy of requital and hold that the restorative approach includes components of punishment.\textsuperscript{97} While requital is not an objective of restorative justice, reparation plans constitute, in practice, a burden on the perpetrator that is a function of the severity of the offense.\textsuperscript{98} Furthermore, a detailed discussion of the implications of the offense and of the offender’s liability potentially results in fairer and more proportional sanction than the sentence pronounced by a judge.\textsuperscript{99} More importantly, the “punishment” is more constructive and more significant than the standard punitive justice sentence as it can meet the actual needs of the victim, the community, and the offender.\textsuperscript{100}

The difficulty arising from this line of argument is that the tailor-made treatment produces highly distinct outcomes, violating the equality requirement.\textsuperscript{101} The restorativist response to the inequality concern is that by referring every admitting offender to restorative justice processes according to known criteria represents equal treatment. Equality in its restorative meaning is followed through the respectful

\textsuperscript{96} STRANG, supra note 2; Jo-Anne Wemmers, The Meaning of Justice for Victims, in THE INTERNATIONAL HANDBOOK OF VICTIMOLOGY 27 (Martin Kett, Paul Knepper & Shlomo G. Shoham eds., 2009).

\textsuperscript{97} See R. A. Duff, Alternatives to Punishment - or Alternative Punishment?, in RETRIBUTIVISM AND ITS CRITICS 44 (Wesley Cragg ed., 1992) (arguing that restorative justice processes do not offer alternatives to punishment but rather alternative forms of punishments); Luna, supra note 18, at 295, 299 (arguing that successful restorative justice processes may lead to agreed-upon resolutions that represent the participants’ varying interests and punishment ideologies).

\textsuperscript{98} See, e.g., Kathleen Daly, Does Punishment Have a Place in Restorative Justice?, Address Before the Australia and New Zealand Society of Criminology Annual Conference (Sept. 28-30, 1999); ZEHR, supra note 1, at 210; Walgrave, supra note 1.

\textsuperscript{99} JOANNA SHAPLAND, ANNE ATKINSON, HELEN ATKINSON, JAMES DIGNAN, LUCY EDWARDS, JEREMY HIBBERT, MARIE HOWES, JENNIFER JOHNSTONE, GWEN ROBINSON, ANGELA SORSBY, DOES RESTORATIVE JUSTICE AFFECT RECONVICTION? THE FOURTH REPORT FROM THE EVALUATION OF THREE SCHEMES (MINISTRY OF JUSTICE RESEARCH SERIES 10/08, 2008).


\textsuperscript{101} Andrew Von Hirsch & Andrew Ashworth, Not Just Deserts: A Response to Braithwaite and Pettit, 12 OXFORD J. LEGAL STUD. 83, 92 (1992). Compare with Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. R. 65, 69, 77 (1999) (explaining why victims’ wishes regarding the appropriate punishment should not be considered according to retribution theory).
and fair treatment of all participants during the process, notwithstanding its outcomes. Furthermore, restorativists argue that by involving crime victims in various junctions of the criminal process it is the punitive approach that has moved away from the strictly just desert ideology.102

Another stream in the restorative justice literature does not rule out the deontological approach, but rather confers a broad, “positive” interpretation of requital, beyond the classical understanding of justice inspired by Hegelian and Kantian thinking. The attainment of justice and the rectification of moral balance can be obtained by having the stakeholders agree on the appropriate reaction instead of imposing forcible punishment.103 The offender’s efforts to make amends and the promotion of the victim’s wellbeing are likely to restore the moral balance which was disrupted by the offense (“righting the wrong”),104 thus becoming the offender’s secular penance,105 without imposing pain upon him. This is how justice in the restorative sense is achieved.106

III. INTEGRATION

This part proposes a model for re-conceptualizing the relationship between the restorative and the punitive approaches. While we echo those who criticize punitive justice for failing to provide opportunities for apology and repentance,107 we argue that symbolic reparation can indeed occur within our criminal law system once we understand restorative justice as part of it. Restorative justice is not private justice. Admittedly, the community takes over most of the facilitative role traditionally allotted to the state. Nonetheless, the state retains the possibility of intervention. The state refers cases to restorative processes; it often monitors the fulfillment of the reparation plan; and state representatives have the authority to decide whether or not to drop the case after a restorative process has been completed. Accordingly, criminal law does not axiomatically imply the punitive approach as its sole executor. Criminal law constitutes a procedural and substantive platform for regulating behavior in response to the perpetration of

102 See, e.g., Heidi M. Hurd, Punishment and Crime: Expressing Doubts About Expressivism, 2005 U. CHI. LEGAL F. 405, 408 (objecting the inclusion of victims’ voices in sentencing because they regard victims as revenge agents).
103 Wenzel, Okimoto, Feather & Platow, supra note 100.
105 Id., at 315.
106 Id.
107 Bibas & Bierschbach, Supra note 3.
crimes; as such, it represents a framework into which various types of values-oriented content may be injected through different procedures. Restorative justice provides another tool – in addition to punitive justice – through which socially desirable values may be injected into criminal law. The restorative justice tool is capable of promoting societal and therapeutic objectives; but it can, at least to some extent, also achieve requital in its restorative sense. This means that both approaches may find shelter under the wings of the criminal law system. In other words, in appropriate cases, criminal justice is restorative justice.

Our analysis in the previous part showed that the restorative philosophy can potentially attain the utilitarian objectives of deterrence, condemnation, incapacitation and rehabilitation, although they are not its stated goals. The principal instrument of the punitive approach is punishment. The principal instrument of the restorative justice approach is social capital – the community surrounding the offender and the victim. Restorative justice also promotes its own stated and distinct goals – reparation of harm and community empowerment. Notwithstanding the empirical question as to which of the philosophies can better achieve the utilitarian goals of criminal law, at the end of the day, much of the debate eventually boils down to the question on how each approach views requital as a goal.

A. Synergizing Punitive and Restorative Approaches

Given the ambivalence displayed by restorative justice proponents to requital, the relationship between the two paradigms – punitive and restorative – may be described in two alternative ways. The first is in terms of two equal, partially intersecting circles (see Figure 1). The intersecting area reflects the goals that both approaches can potentially achieve. The separate areas reflect the distinct goals of each paradigm. This version seems preferable for anyone who remains faithful to requital in its strict retributive meaning, which only the punitive approach seeks to promote. The second alternative portrays the relationship in two concentric circles. The smaller circle, which represents the goals of the punitive approach, is encompassed by the larger, which represents the goals of the restorative approach (see

108 We chose “retribution” in the part representing the distinct goals of punitive justice to clarify its purely retributive meaning, in contrast with “requital”, which can enclose the different restorative meanings of deontological reactions to crime.
Figure 2). According to this description, restorative justice can potentially attain the objectives of punitive justice in their entirety, including that of requital in its restorative sense, as well as its own. This version may seem appealing for those who assign a broad, “positive” meaning to requital. Punitive justice, by contrast, assigns little or no weight to the reparation of harm. 109 Although it does not object to the promotion of victims’ wellbeing, this goal is relegated when in conflict with others. Community empowerment is likewise not one of the goals of punitive justice, which considers the community as a passive victim. Accordingly, it is the restorative justice circle that encompasses the punitive justice circle, and not the opposite.

Figure 1
Relationship between the goals of the restorative and the punitive approaches: partially overlapping circles

109 Bruce Winick, Therapeutic Jurisprudence and Victims of Crime, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE 3 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011) (explaining the tension between the needs of the criminal justice system and victims’ needs). In the last decades states have introduced far-reaching reforms providing legal and constitutional rights to crime victims concerning their participation in the legal process, their privacy and safety. Nevertheless, despite the substantial “softening” of the pure adversarial criminal process it is still far from being victim-oriented. See DOUGLAS E. BELLOOF, PAUL G. CASSELL & STEVEN TWIST, VICTIMS IN CRIMINAL PROCEDURE (2005); Erin A. O’Hara, Victim Participation in the Criminal Process, 13 J.L. & POL’Y 229 (2005) (describing recent developments in victims’ rights); Erin C. Blondel, Victims’ Rights in an Adversary System, 58 Duke L. J. 237 (2008) (arguing that despite victims’ reforms the adversarial process is not victim-centered).
Emphasizing the retributiveness in requital distances restorative justice from that purpose while emphasizing the component of proportionality (just deserts) or of “justice” in its positive sense brings it closer. Generally speaking, in most offenses, reparative measures may be considered as the infliction of pain on the offender in proportion with the severity of the offense. Reparative measures may also be considered steps for “righting the wrong” or rebalancing the imbalance created by the offense. This tool is distinct from punishment, but its purpose is similar – the restoration of justice. Emphasizing the punitiveness of requital accentuates the gap between punitive and restorative tools, in light of the fundamental objection to considerations of revenge which is inherent to the restorative philosophy.

The debate among restorativists about the meaning and legitimacy of requital becomes acute when considering crimes of the most serious nature, such as murder, rape, or extreme violence. The more serious the crime, the more difficult it is to regard the burdens imposed on the offender through the reparation plan as just deserts. It is equally difficult to regard the reparation measures as restoring justice or “righting the wrong” in those severe crimes. When restorative processes lead to symbolic and material reparation for victims and community but are
unable to achieve requital there is no escape from a value-based decision on whether to prioritize punitivism or restorativism.110

Accordingly, the model predicts that in the most serious types of crime the part of the punitive circle representing the goal of retribution will be pushed out of the restorative circle, and the two circles will overlap only in part (Figure 1). In most offenses, however, the model illustrates how the restorative justice philosophy addresses the full scope of the goals. Requital can also be achieved through restorative justice, because the reparative measures may be perceived as a proportional infliction of burden and as acts of “righting the wrong”, thus restoring the balance of justice (Figure 2).

The model does not reflect a sweeping preference for either one of the philosophies, nor does it imply that either one of them can fully attain the stated goals of criminal law in every case. Rather, it presents the theoretical explanations each philosophy provides for its potential in addressing the various goals. Similarly, we do not intend to determine the proper interpretation of requital nor do we wish to make conclusive statements about its appropriateness as an independent justification for punishment. Rather, our goal is to demonstrate the way in which the meaning and significance assigned to requital affects the relationship between the restorative and punitive approaches. The proposed typology holds that, the more we accept a broad understanding of requital, the greater the degree to which restorative justice may be perceived as attaining the full scope of criminal law goals. Alternatively, a strictly retributive interpretation of requital amplifies the tension between retribution and restoration.

B. Practical Implications

Our model highlights that restorative justice is suitable for systemic use not only in jurisdictions that prioritize victim empowerment and offender rehabilitation; it can equally fulfill criminal law objectives in legal systems that assign prominence to deterrence and

110 Cf. Luna, supra note 18 (presenting a holistic perception of restorative justice processes, according to which participants holding different punishment theories, including that of just desert, may be satisfied with the process outcomes once its core procedural principles have been met). We agree that the individual stakeholders in a certain case might indeed hold conflicting punishment ideologies and still share similar levels of satisfaction with the process and its outcomes. Other community members, however, and the public in general, may object the use of restorative justice processes in cases of crimes of the most serious nature even when these processes yield satisfactory results for their participants.
incapacitation. Many states in America, therefore, might find restorative justice at least as (if not more) suitable for achieving these goals as the punitive justice approach.\textsuperscript{111} Moreover, even jurisdictions that explicitly construct retribution as their primary punitive goal in their sentencing guidelines\textsuperscript{112} can re-construct the definition of their “just desert” policies to include both the restorative and the punitive meanings.\textsuperscript{113} Such a broadened understanding enables a synergy between the restorative and retributive philosophies and thus extends the achievable goals beyond their traditional scope to include socially beneficial outcomes such as victim healing and community empowerment.

The model is helpful in pinpointing the virtues and the vices of each philosophy across a variety of contexts. Accordingly, either one of the paradigms can be used in different circumstances reflecting the estimations regarding their level of success in attaining the preferred goals. First, restorative justice is applicable only when the preconditions of offender’s confession and the parties’ consent have been met.\textsuperscript{114} Beyond these essential preconditions, however, other parameters emerge identifying the relative effectiveness of each paradigm in

\textsuperscript{111} See, e.g., Umbreit, Vos, Coats & Lightfoot, \textit{supra} note 10, at 551-54 (reviewing the range and types of legislative provisions relating to victim-offender mediation in the United States. According to the review, as to 2005, statutes in twenty-nine states have at least a reference to victim-offender mediation or a similar program. Seven of these states provide comprehensive guidelines for victim-offender mediation programs in their statutes. Seven additional states have a clear statutory authority for victim-offender mediation with fewer detailed requirements. In nine states victim-offender mediation is included as one among a list of options for courts to consider. Finally, seven states have statutes that allow the establishment of victim-offender mediation programs and reflect strong commitment to restorative justice principles, but do not explicitly discuss victim-offender mediation).

\textsuperscript{112} In California, for instance, sentencing policies were altered in 1976 with the enactment of Article 1170 of the Penal Code, reflecting preference to retributive considerations. The most recent legislation we are aware of concerning sentencing policy is Amendment No. 113 of the Israeli Penal Code, enacted in January 2012, which makes proportionality the guiding principle for determining sentencing.

\textsuperscript{113} In Israel, for instance, just desert is the guiding principle in sentencing policy as was stated in the recent criminal code amendment of 2012 (Amendment No. 113, the Israeli Penal Code, enacted in January 2012).

\textsuperscript{114} Although restorative justice processes are held in cases without a direct victim (such as drunk driving, drug related and vandalism offenses), there is far less empirical evidence that they actually achieve the goals of criminal law. See STRANG, \textit{supra} note 2 (showing that restorative justice had no effect on offender’s recidivism in drunk driving and shoplifting offenses). Victim’s safety might be seen as an additional precondition for restorative justice. When a restorative process puts the victim at risk of violence or in a threat thereof, safety measures must be taken to minimize that risk before the process takes place. Punitive justice, however, might increase the risk of re-victimization of victims as well. See Judith L. Herman, \textit{The Mental Health of Crime Victims: Impact of Legal Intervention}, 16 J. TRAUM. STRESS 159, 160 (2003) (explaining that beyond the psychological risks, legal processes also place victims at risk of retaliation by the perpetrator).
achieving the criminal law goals across a variety of contexts.

The level of commitment of the local community to address crime is a useful parameter in deciding which of the paradigms is more likely to achieve the various criminal law objectives. The community’s ability to provide active assistance for the parties involved affects the level of success of restorative processes in attaining victim healing and preventing the future perpetration of crime by the offender. Without the active involvement of the community in the fulfillment of the reparation plan restorative justice may fail to achieve rehabilitation and incapacitation. Similarly, the attainment of a clear norm-setting depends, among other things, on the willingness of community members to condemn the crime expressly. Without a wall-to-wall agreement on the wrongfulness of the act expressed by community members, restorative justice is less likely to achieve the goals of denunciation of the crime and victim healing. Without the willingness of at least some community members to condemn the crime and take part in fulfilling the restorative outcomes many of the advantages of restorative justice are lost.\(^{115}\) The centrality of the State as the sole decision-maker in punitive justice becomes virtuous in these cases.

The importance and feasibility of a sincere apology provide an additional parameter. The exchange of an apology and forgiveness between victims and offenders is one of the central assets of restorative justice.\(^{116}\) In cases where the sincerity of the apology is inherently questionable,\(^{117}\) or when the victim does not assign importance to it,\(^{118}\) restorative justice loses much of its advantage over punitive justice.

The seriousness of the crime is another factor for selecting the preferable philosophy in concrete cases. The more serious the offense,
the greater the difficulty in achieving requital through the restorative approach alone. At the same time, the level of emotional harm caused to the victim is a predictor for the success of restorative justice processes. In other words, when the crime is heinous in nature and has caused significant harm to the victim, restorative justice has the most to offer in terms of victim healing – but has the least to offer in terms of retribution. In these cases there would be a need for a value-based decision in selecting between retribution and healing. In practice, this means that, for major offenses, three possibilities exist: (1) the restorative approach will not be used, reflecting a preference for retribution over the therapeutic goals of restorative justice; (2) only the restorative process will take place, and the goal of requital will be relinquished for the benefit of the other goals; and (3) the criminal process and the restorative process will be combined, in order to achieve both requital and victim healing.

Admittedly, integrating restorative processes into the formal punitive system may not always resolve the tension between retribution and victim healing. A prime example for that tension is the Clotworthy case of the Supreme Court of New Zealand. In that case the victim and the offender participated in a mediation process following a violent attack. The parties reached an agreement, according to which the offender took upon himself to pay a significant amount of money to the victim in order to finance a cosmetic surgery that would have treated the scars the attack left on him. The Auckland District Court accepted the agreement. The Supreme Court, however, decided, following an appeal by the prosecution, that the public interest for a deterring sentence overrides the victim’s individual interest for reparation. The offender was sentenced to three years of incarceration and the restitution amount was significantly reduced.

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119 SHERMAN & STRANG, supra note 2, at 68 (concluding that “The key finding is that restorative justice may work better with more serious crimes rather than with less serious crimes, contrary to the conventional wisdom”).

120 Restorative justice processes are used as an addition to the formal legal process in many parts of the world including in Britain, the United States, Europe, Australia, New Zealand and Israel.


122 R v Clotworthy [1998] 15 CRNZ 651 (CA) (Justice Tipping, delivering the sentence, explained: “We record that Mr. Cowan was present at the hearing. We gave him the opportunity to address us. He reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself. We can understand Mr. Cowan’s stance. He is to be commended for having forgiven Mr. Clotworthy and for the sympathetic way he has approached the matter. It must be said, however, that a wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity
Notwithstanding the potential tension between the various social goals, synergizing the restorative and retributive perspective may achieve a different – and a socially beneficial blend – of criminal law objectives. The recent trial of *State of New Jersey v. Dharun Ravi*\(^{123}\) provides a useful example of a formal criminal process leading to lose-lose outcomes. In this high profile case, Rutgers University student Dharun Ravi was convicted of 15 counts of second degree bias intimidation and invasion of privacy after placing a webcam that documented his dormitory roommate Tyler Clementi during an intimate encounter with a man. Ravi consequently tweeted about what he saw and invited others to watch a planned second encounter. A few days later, the victim committed suicide by jumping off the Washington Bridge. Ravi was not charged with causing Clementi’s death. After his jury convictions and facing up to 10 years in prison for second degree hate crimes, Superior Court Judge Glenn Berman sentenced him to only 30 days in the county jail, three years probation, 300 hours of community service, a $10,000 fine and counseling.

In this case, the criminal process failed to provide healing for the victims, provided no space for a sincere apology, and sent a mixed message to the public. The victim’s parents stated early during the process that they “did not want to see the defendant go to prison” if he took responsibility for what he had done. The other victim, the man who visited Clementi (and remained anonymous throughout the trial), submitted a victim impact statement describing how the incident changed his life. The defendant, however, threatened by the risk of being found guilty for committing hate crimes, refused to confess, denied any responsibility for the outcomes, and opted to remain silent at the sentencing hearing. His “letter of apology” released publicly just before the sentencing hearing was accepted with distrust and anger by the victims as it did not mention either of them. The public interest was particularly strong in this precedential case as it was an opportunity to convey a clear message of norm setting regarding gay rights, hate crimes and cyber bullying. Nevertheless, the lenient 30 days sentence handed by the judge mocked the jury’s decision to convict Ravi in all bias intimidation counts.

Could restorative justice provide a better legal reaction in this case? And if so, what goals would it have achieved? Surely, victim healing was not achieved in this litigation. Apologies granted within the

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criminal process are suspect of insincerity, as this case vividly illustrates. More broadly, this lawsuit illustrates that despite the far-reaching reforms made in recent decades enhancing victims’ participation in the criminal process, victims’ need for symbolic reparation is not met even when they are able to submit victim impact statements. The formal criminal process similarly did not promote retribution, nor was it considered an important goal in this case, as the sentence revealed. In fact, Ravi demonstrates that the dichotomous nature of guilty/innocent verdicts may produce exceedingly lenient sentences which in turn fail to convey a clear denunciating message to the public. Consequently, other goals of criminal law are also left behind due to the leniency of the sentence.

Had restorative justice been used sometime along the criminal process, in contrast, all of the parties involved – the defendant, the victims, and the community – could have potentially benefitted from its outcomes. The victims could have confronted the offender, talked about their loss and engaged in an emotional dialogue. The offender, liberated from the threat of imprisonment and granted an opportunity to explain his deeds, could have taken responsibility for his actions and freely apologized. Members of the gay community and the public in general could have benefitted from a constructive discussion regarding the devastating outcomes of intimidating acts against people belonging to minority groups even when they are not knowingly intended to bias the victim. A meaningful reparation plan and a public apology could have overcome the legal questions arising in this case, providing a more suitable platform for condemning hate crimes even in disputed cases such as this. In other words, a restorative process could have provided a tailor-made, multifaceted reaction to the specific offense promoting both victims’ needs, community interests, and offender accountability. Analyzing this example through our proposed model, it becomes clear that once retribution cannot, or should not be pursued in its conventional form, alternative approaches should be considered, promoting the goals of victim healing and community empowerment. Moreover, instead of compromising criminal law goals, we see that restorative justice can promote these goals in addition to its own stated objectives. Restorative justice, therefore, does not replace criminal

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124 See Bibas & Bierschbach, supra note 3, at 98 (explaining that, for most defendants, the sentencing hearing is their first chance to apologize, and that therefore it is “no wonder that, when apologies do occur at sentencing, they often are stilted, forced, or “not enough.” Many defendants simply read from a piece of paper”) (citations omitted).
justice nor does it abandon its traditional goals;\textsuperscript{125} it is used \textit{within} the criminal justice system.

\textbf{CONCLUSION}

Accepting restorative justice as a possible philosophy alongside the punitive philosophy broadens our understanding of substantive criminal law. Restorative justice offers a different blend of the various goals of punishment, compared with the one offered by mainstream punitive philosophy. The utilitarian and consequential goals, some of which go beyond those of punitive justice, are prioritized. Requital is granted a substantially different meaning. In this context, this Essay also seeks to contribute to the debate surrounding the role and meaning of punishment within criminal law. Our re-conceptualization of criminal liability enables a versatile, dynamic and responsive set of instruments from which to select tailor-made reactions to crime in different contexts.

Defining restorative justice as a legal instrument within the diverse toolbox of criminal law extends the ability of criminal law to provide multifaceted solutions for different cases. The specific circumstances of each case dictate the appropriate weight granted to each of the various goals and hence the desirable application of the synergy between the different approaches. Certain parameters, such as those discussed in the previous part, may be helpful in predicting which of the paradigms would be more suitable in specific circumstances. They may also give some inkling of the effectiveness of each of the approaches in achieving the various objectives. Given that legal systems assign different weight to the varying criminal law goals our analysis is useful for making informed decisions based on a combination of factual estimations and value-based selection of objectives.

Methodologically, the proposed model describes the relationship between the two paradigms focusing on their shared and distinct objectives under the framework of criminal law. This type of analysis opens the door for integrating other non-adversarial processes as part of the toolbox of criminal law and for developing new ones.\textsuperscript{126} Just as it is

\textsuperscript{125} Contra Bibas & Bierschbach, \textit{supra} note 3, at 123 (arguing against the ability of restorative justice to address punitive justice goals that “Restorative justice requires no amends to right the imbalanced scales of justice and no bite to underscore society’s condemnation of the crime”).

\textsuperscript{126} See \textsc{King, Freiberg, Batagol, & Hyams, supra} note 92 (gathering different non-adversarial reforms such as restorative justice, therapeutic jurisprudence, alternative dispute resolution, managerial justice, preventive law, problem-solving courts and holistic law under the roof of non-adversarial justice, and outlining the diversities and commonalities between them).
possible to envision a restorative criminal justice, perhaps one could think of other platforms for achieving criminal law goals. Perhaps it is possible to expand the aspirations of criminal law beyond its traditional goals to include other socially beneficial outcomes. The proposed model can assist in the development of guiding parameters for identifying the preferred approach in various circumstances and in accordance with the various criminal law objectives. Empirical studies may be helpful in providing insights toward the identification of additional parameters for choosing between the two paradigms. For instance, it would be interesting to see whether the reason for committing a crime – be it expressionist or instrumentalist – is a predictor of the success of either paradigm. Notwithstanding the need for empirical examinations of “what works”, in what circumstances and under which conditions, our analysis envisions an eclectic use of values and procedures within a pluralistic criminal law framework.