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# Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices

*Zvi D. Gabbay\**

It is no secret that the criminal justice system, society's means for responding to crime, is far from perfect. Crime victims often feel neglected and ignored by prosecutors and judges, the public does not perceive the system as just and fair, and the system's effectiveness in combating crime is questionable. Despite this reality, an alternative process has emerged, based on a new and entirely different paradigm of justice—the restorative justice paradigm. Empirical evidence suggests that restorative processes, which empower crime victims, offenders and communities to take an active part in the formulation of the public response to crime, increase public trust in the justice system and may even reduce re-offense rates. However, questions still remain as to whether employing such processes within the realm of criminal law can be justified and whether these processes conflict with governing theories of punishment.

This paper analyzes the premises of the two main theories of punishment that influence sentencing policies in most Western countries—retributivism and utilitarianism—and compares them to the basic values that structure the restorative justice theory. It then makes clear distinctions between restorative justice and the rehabilitative ideal and addresses the criticism that, like rehabilitation, restorative justice results in different punishments to equally culpable offenders. The paper concludes that restorative justice does not contradict retribution and utility as theoretical justifications for penal sanctioning. Moreover, it suggests that restorative practices rehabilitate the basic notions of retribution and deterrence that have been neglected in modern sentencing schemes, that restorativeness contributes new and deeper meaning to those notions and values, and that in doing so restorative justice practices improve and promote society's response to crime.

## I. PREAMBLE

It was a dry winter evening in January 2000. R., a young fighter pilot in the Israeli Air Force, was driving his car way home to one of the suburbs of Tel Aviv. Despite rush hour, traffic was moving smoothly, and R. was in no hurry. Suddenly the brake lights of the car in front of him came on and the car quickly came to a full stop. R. hit the brakes and tried to steer the car aside to avoid colliding with the car in front of him. He was unable to stop and the passenger sitting in the

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back seat of the car in front of him was killed instantly. The deceased was a mother on the way to her son's wedding. The driver of the car was her daughter. The police investigation determined that the car driving in front of R. slowed down and stopped due to heavy traffic and that the situation involved no unusual circumstances. If R. had paid more attention to the road ahead of him, he would have likely noticed the traffic delay and taken the necessary measures to avoid the accident. His negligence resulted in a fatal car crash.

The evidence of his negligence precluded any course of action other than to charge R. with negligent homicide, an offense for which the maximum punishment is three years imprisonment. In the arraignment hearing, R. entered a "not guilty" plea, which launched a long and intense trial. After nearly two years, R. was convicted as charged, but due to his impeccable record, his duties and contribution to society, and the circumstances of the accident, he was sentenced to six months of community service in an old age home and precluded from holding a driver's license for a few years. For the prosecutor, defense attorney and judge who tried the case, there was nothing special about it. It was one of many fatal car accident cases which they were accustomed to handling. The outcome of the trial was determined by professionals, dealing with complex questions of substantive criminal law, evidentiary rules and procedure.<sup>1</sup> The final sentence—well within the common range of sentencing for these types of cases—was anticipated from the start.

Ironically, even though the trial was controlled entirely by professionals, it was certainly not about them. It was the bereaved family, the deceased's friends and neighbors, R., and his family and close friends that were affected by the fatal accident. It was their lives that changed after the accident. Therefore, the question should be: 'How did the trial affect them?' The short answer is "not well." At the end of the trial, the bereaved family was devastated. They did not understand why the trial took so long and could not accept its outcome. They were personally hurt by the fact the young pilot did not assume responsibility immediately and lost all respect for the justice system that accepted this behavior. After close to two years of legal proceedings, the bereaved family and friends felt victimized again, this time by the justice system. Interestingly, R.'s reaction to his trial was probably not very different. As he clearly articulated in his confident testimony in court, he truly did not feel responsible for the accident. It is unlikely that he changed his mind after the conviction and probably perceived his conviction to be unjust.

Although the facts of this case occurred in Israel and were tried according to Israeli law, it is representative of the methods employed by most common law criminal justice systems as their primary response to crime. However, this method suffers from three basic deficiencies, illustrated in this case: (1) the lack of a meaningful role for crime victims, (2) inefficiency and ineffectiveness, and (3) inability to be perceived as just and fair. After two years of legal proceedings, the decedent's family was victimized again by the justice system, the offender did not

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1. See Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57 (examining the roles of professionals in the criminal justice system: the judge, prosecutor, defense attorney and probation officer—in light of the growing popularity of restorative justice practices).

learn anything he did not already know before the trial began, and both sides felt they were treated unjustly.

In this article, I will first discuss these three deficiencies in detail, introduce the restorative justice paradigm, offer a working definition for restorative practices and demonstrate their ability to successfully address the criminal justice system's deficiencies. Next, I will analyze the theoretical justification for using such practices in light of the retributive and utilitarian theories of punishment, since it is not self-evident that the law should grant any standing to a process designed to confront victims and offenders and encourage them to agree on ways of restoring the harm caused by the offense. I will argue that the law should do so and will show that not only is restorative justice theoretically compatible with both retributivism and utilitarianism, but it can rehabilitate, enrich and improve the fundamental premises of these punishment theories. At the same time, I will illustrate the differences between restorative justice and the rehabilitative ideal, which are often confused as variations on the same theme.

## II. THE CRIMINAL JUSTICE SYSTEM AND RESTORATIVE JUSTICE

### A. *What is wrong with our criminal justice system?*

#### 1. *The place of crime victims in the criminal justice system*

The case of R. illustrates a number of problems that are not sufficiently addressed by the current criminal justice system operating in most, if not all, of the western world. First, it demonstrates the way in which the justice system deals—or does not deal—with the victims of criminal offenses; in this case, the decedent's family. Their formal participation in the process was restricted to the testimony of the daughter, who drove the family car. In theory, that could have been a healing opportunity for her to tell her story and face the person accused of causing her mother's death. Not surprisingly, this was not how her experience in court turned out. During cross-examination, she was accused of lying and blaming the defendant in order to ease her guilty conscience. She had to sit silently while the defense presented the court with expert opinions by psychologists and psychiatrists diagnosing her as suffering from post-traumatic repression and as casting blame on another to save herself. She (as well as the other family members, for that matter) did not have any control over the trial or its outcome because crime victims and their families, in general, have no legal status in criminal proceedings. If the daughter had not been a relevant witness to the accident, she would not have been called to testify, hence leaving her and her family completely out of the legal process.

Typically, prosecutors do not consult with crime victims on appropriate ways of dealing with cases that concern them and, in most cases, pay very little attention to the victim's point of view in the course of plea-bargaining.<sup>2</sup> There are

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2. See GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 190-93 (Addison-Wesley 1995) (hereinafter WITH JUSTICE FOR SOME) (providing an example of a Brooklyn District Attorney who ignored the opinion of the parents of a kidnapped child in agreeing to

always exceptions, but normally, the prosecution will make the final decision. Disregard of the victim's interests, however, cannot be attributed solely to the practice of prosecutors. Even if the prosecution does its best to inform victims of developments in the proceedings, to listen to them and to treat them with the utmost respect and compassion, there still remains an inherent disregard of crime victims that stems from the basic theory of criminal law.<sup>3</sup> Criminal offenses are defined according to the acts of the offenders and their state of mind during those actions. A criminal trial is focused on proving the legal components of the specific violated norm. If these legal components are proven beyond a reasonable doubt, the discussion moves to the appropriate sanctions or treatment that is to be imposed on the defendant. The entire focus is on the offender. The protected interests behind the offenses are those of the commonwealth, the people or the state, rather than those of the particular victim.

Assuming we believe victim's interests should be addressed, at least to some extent, by the criminal justice system as part of the appropriate public response to crime,<sup>4</sup> it must be concluded that the existing justice system suffers a serious deficiency. This salient deficiency gave rise to many victim advocacy groups, to the creation of various victim's rights, and in numerous jurisdictions, even to legislative reforms providing certain acknowledgments of these rights.<sup>5</sup> However, while these changes may have improved the way crime victims are treated by the judicial system to some extent, none have attempted to amend the core deficiency. Victims still remain a foreign factor in the definition of a criminal offense and the substantive and procedural laws governing criminal proceedings. The question then is how should the justice system integrate crime victims' interests into the system? Since our justice system is based on the premise of finite rights that must be distributed, we are forced to decide when to prefer one legitimate right over

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a plea-bargain with the defendant. Fletcher concludes this example by arguing that crime victims should be given the power to approve or disapprove any plea bargain).

3. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *BUFF. CRIM. L. REV.* 51 (1999) (attempting to reconcile the legitimate interests of crime victims with the absence of any legal standing they might be expected to have in punishment theories).

4. It may be argued that the existing situation is correct, and that victim interests are a matter for civil suit. There certainly is merit in the common approach that crime is an offense against society, and not only against the victim. Therefore, the response should address the general harm done by the offense, not merely the one caused to the victim. However, as Fletcher suggests in *WITH JUSTICE FOR SOME*, *supra* note 2, there is still room for improvement even within the current commonlaw criminal justice system (see especially Chapter Six—"Victims at the Center"—for concrete suggestions as to how crime victims can be given a say within the criminal proceedings).

5. See Helen Reeves & Kate Mulley, *The New Status of Victims in the UK: Opportunities and Threats*, in *INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE* 125 (Adam Crawford ed. UK, 2000) (discussing recent reforms in crime victims' status in the UK); the Israeli Crime Victims' Rights Act, 2001 (an unprecedented Act in the Israeli legal system that provides enumerated rights for crime victims in the different stages of the criminal process, from the police investigation to the time the offender is about to be released from prison. Unfortunately, due to budget problems, most of the Act's provisions were stayed until funds are allocated). In the United States, the Federal Rules of Criminal Procedure, rule 32(i)(B), provides that a federal court "must address any crime of violence or sexual abuse at sentencing and must permit the victim to speak or submit any information about the sentence." *FED. R. CRIM. P.* 32(i)(6) (2004). Although this statute recognized the victim's right to be heard before sentencing, this right's scope is very limited. *Id.* First, it only applies to victims of violent or sexual crimes; second, it does not impose any duty on the judge to consider the victims' position before sentencing the defendant. *Id.* The statute provides certain victims with the opportunity to speak. *Id.* It does not determine who has to listen. *Id.*

others. When it comes to the criminal justice system, what is the correct balance between the need to address the public aspect of the crime and the legitimate needs of the particular victim? As will be seen, answering these concerns and questions are among the primary objectives of the restorative justice theory, and integrating the victim's perspective in the public response to crime is at the heart of restorative practices.

## 2. *Efficiency and effectiveness of the criminal justice system*

What is the ultimate goal of the criminal justice system? One approach is that it should do justice, as its name indicates. What this entails is a complex question which cannot be appropriately developed within the scope of this article. However, a utilitarian approach to the criminal justice system may attribute to it the goal of crime control.<sup>6</sup> While the criminal justice system is undoubtedly effective in reducing crime rates to some extent, it often achieves this goal inefficiently and at a significant fiscal expense. After more than 20 years of being "tough on crime," incorporating harsh sentencing guidelines, long prison terms and mandatory minimum punishments, the United States has reached the point where it may not be able to go any further in carrying out these policies. With more than 2.2 million people incarcerated in federal, state and local facilities,<sup>7</sup> the highest rate of imprisonment per population in the world,<sup>8</sup> and estimated expenses that may exceed \$30,000 per year per inmate,<sup>9</sup> policy-makers from both sides of the political spectrum, as well as practitioners, are forced to reexamine this huge monetary investment. One of the results of these new alliances can be found in new nationwide legislation that is aimed at keeping certain categories of offenders out of the prison system.<sup>10</sup> While this legislation is part of the solution, its existence sup-

6. This issue will be further developed later in the article through the comparison of utilitarianism and restorative justice.

7. According to a press release published by the U.S. Department of Justice, Bureau of Justice Statistics on July 27, 2003, the country's prisons, jails and juvenile facilities held 2,166,260 persons at the end of 2002, an increase in prison population of 2.6% (15,713 persons) compared to the previous year. Bureau of Justice Statistics, Press Release, U.S. Prison Population Rises 2.6 Percent During 2002 (July 27, 2003) available at <http://www.ojp.usdoj.gov/bjs/pub/press/p02pr.htm> (last visited Nov. 20, 2005).

8. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 415 n.10 (quoting the estimated imprisonment rate as 699 per 100,000 population). According to the Bureau of Justice Statistics Bulletin for 2003, the incarceration rate has increased to an estimated 714 per 100,000. Bureau of Justice Statistics, Press Release, U.S. Prison Population Rises 2.6 Percent During 2002 (July 27, 2003) available at <http://www.ojp.usdoj.gov/bjs/pub/press/p02pr.htm> (last visited Nov. 20, 2005). One in every 109 men were sentenced prisoners under the jurisdiction of State or Federal authorities at year-end 2003 State prisons are at 16% above capacity and Federal prisons are operating at 39% above capacity. *Id.*

9. Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration* 2003 UTAH LAW REVIEW 439, at 456 (citing ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 46, 468 (3d ed. 2000)); Drake Bennett & Robert Kuttner, *Crime and Redemption*, THE AMERICAN PROSPECT, December 2003, at 2; Matthew Yglesias, *The Research Wars*, THE AMERICAN PROSPECT, December 2003, at 2 (quoting a slightly different estimate of approximately \$20,000-\$25,000 per year per inmate).

10. See Bennett & Kuttner, *supra* note 9, at 1 (Texas has recently passed a bill mandating that first-time low-level drug offenders get treatment instead of prison time; Michigan passed three bills repealing the state's mandatory minimum drug laws; Colorado gave judges the discretion to put drug offenders on probation instead of prison sentences; Missouri and Delaware have reduced sentences for drug

ports the contention that the current criminal justice system is facing a serious problem that needs to be addressed. This deficiency was well-articulated by Darren Bush:

Given the decline in the value of additional years of imprisonment, it is questionable whether lengthy sentences will resolve the issue. The benefits of long-term incarceration will be outweighed by the costs under any analysis, given that it serves no deterrence purpose, increases societal costs, and leaves offenders who might otherwise be productive members of society without that ability.<sup>11</sup>

An additional concern is the effectiveness of the justice system's response to crime and its success in preventing it. Admittedly, studies show the United States is experiencing a substantial decline in crime rates, in both violent and property offenses.<sup>12</sup> In part, this has to do with the massive incarceration rates and their deterrent effect.<sup>13</sup> However, there is a general belief among scholars that the reduction in crime is the result of other social forces independent of the punitive legislation of the past two decades, such as improvement in the economy, changes in substance abuse patterns and, some even suggest, the declining rates of marriage.<sup>14</sup> In other words, while prison and deterrence work to some extent, it is clear they do not work very well, and definitely not well enough.<sup>15</sup> To Howard Zehr, one of the forefathers of the restorative justice movement, the reasons for the ineffectiveness of prison come as no surprise. In *Changing Lenses*,<sup>16</sup> Zehr described a case in which the judge, while sentencing a young offender to 20 to 85 years in prison, told the offender, "I trust that [in prison] you will forget the patterns of behavior which led to this violent offense."<sup>17</sup> True, it was a violent crime, but can we seriously hope the prison experience will teach this teenage offender normative patterns of behavior? As Zehr mentions, prison life teaches inmates the exact opposite. It teaches them to be obedient, but does not give them the tools to become self-governing and to take charge of their life in legitimate ways. It teaches them the virtues of manipulation and violence as means for problem solving and deprives them of the ability to cope peacefully with frustration and conflict. It is structured to dehumanize the inmates, denying them a sense of self-worth and self-respect and, in turn, the ability to respect others.<sup>18</sup>

While one might disagree with Zehr on different aspects of the incarceration experience, few people would argue that prison is an educational institution that prepares its inmates for the normative life they will be expected to live outside its walls. Since prison is, in many cases, perceived as the only appropriate punish-

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offenses and low-level felonies; Arizona, Washington and Indiana reduced drug-offender sentences and are channeling their savings into treatment programs).

11. Bush, *supra* note 9, at 457.

12. See Beale, *supra* note 8, at 422.

13. As Professor Franklin Zimring of Berkeley University Law School stated: "It would be astonishing if locking up 2 million people had zero effect on the crime rate." Yglesias, *supra* note 9, at 1.

14. See Beale, *supra* note 8, at 424; Yglesias, *supra* note 9, at 3.

15. See Yglesias, *supra* note 9, at 2.

16. HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990).

17. *Id.* at 18.

18. *Id.* at 35-40.

ment for almost every type of crime, and since we do not send every convicted offender to life imprisonment without parole, it is surprising how little energy is invested in preparations for “the day after,” the time in which the incarcerated offender will reenter society. There is an abundance of legislation, media coverage and political attention focused on the question of who gets locked up and for how long, but a lot less attention is given to the question of what happens once the sentence is over. What follows is a high rate of recidivism and re-arrest,<sup>19</sup> which raises serious questions regarding the effectiveness of the justice system currently employed by the vast majority of countries around the world. Moreover, in some cases re-offense might even occur for the mere purpose of reentering the only world the offender knows—prison.<sup>20</sup> As will be shown, the restorative justice theory focuses on designing a public response to crime that is open to stakeholder participation, offering a meaningful response to those most affected by the crime. While this aspect of restorative justice clearly emphasizes justice (or more accurately procedural justice<sup>21</sup>) as the center of the criminal justice system, it still remains to be asked whether restorative justice can achieve utilitarian goals, such as the reduction of recidivism and enhancement of public safety. As will be shown later in this part, the answer to these questions is that restorative justice at least will not do worse, and may even do better, than the current criminal justice system regarding crime control.

### 3. “Justice must satisfy the appearance of justice”<sup>22</sup>

One of the main concerns of the justice system is to provide the public with a “fair procedure” through which the questions of substantive law will be determined. In criminal law, this concern gave rise to a complex and well developed constitutional right to “due process.” Numerous statutes and court decisions provide criminal defendants with a detailed procedure intended to protect them from abuse of governmental power and false accusations. The presumption of innocence, the unique burden of proof imposed on the criminal accuser, rules of evidence discovery—all are examples of rules designed to ensure the fairness of the process. However, the justice system is most concerned with another aspect of “fairness,” and that is the way it is perceived by the public. In many instances, judges cite the famous quote: “justice must satisfy the appearance of justice.”<sup>23</sup> Moreover, judges often emphasize that “it is not merely of some importance but is of *fundamental* importance that justice should not only be done, but should mani-

19. According to a study published by the U.S. Department of Justice, Bureau of Justice Statistics, of nearly 300,000 released prisoners from 15 different states during 1994, 67.5% were rearrested within 3 years. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* (June 2002) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf> (last visited Dec. 1, 2005) [hereinafter Bureau of Justice Statistics]. A study of 1983 releases estimated 62.5% were rearrested. *Id.*

20. See ZEHR, *supra* note 16, at 39.

21. See Tom R. Tyler & Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (Joseph Sanders and Lee Hamilton eds., 2001) (explaining the concept of “procedural justice” and providing empirical evidence in support of this approach to the concept of justice).

22. *Offutt v. United States*, 348 U.S. 11, 14 (1954).

23. *Id.* See also *Mickens v. Taylor*, 535 U.S. 162, 189 (2002); *Republican Party v. White*, 536 U.S. 765, 817 (2002); *Liteky v. United States*, 510 U.S. 540, 565 (1994).



festly and undoubtedly be seen to be done.”<sup>24</sup> Returning to the story of R., the negligent driver, it is clear that none of the people most affected by the tragic accident felt that the criminal proceedings that followed the accident contributed to a just result. In this case, one may wonder if justice had indeed been done since none of the participants perceived it as so. It is not clear that a legal process can be considered fair simply because the professionals controlling it performed their duties in accordance with the law. If the appearance of justice is indeed so “fundamentally important” to the fairness of the process, the absence of such an appearance should implicate a serious question as to the viability and legitimacy of the process, and should encourage the search for an alternative that may be perceived as more just.

One of the main problems with searching for this kind of alternative is the vagueness of the terms “justice” and “fairness.” Do we really know what “justice” is? Is it enough to recognize a “fair” process when we see one without abstractly defining it in advance? There is no consensus on the answer to these questions, and many different paradigms have been offered for better understanding the meaning of these terms. Nevertheless, it seems that one of the identifiable problems regarding the appearance of justice in the justice system is that it is controlled solely by professionals.<sup>25</sup> It is these professionals who determine what is considered to be a just outcome, according to predetermined rules. Therefore, it is not surprising to find that occasionally, the non-professional participants in the process, the ones most affected by the events leading to these proceedings, experience the outcome in legal proceedings in an entirely different way. Since they have no control over the process, there is a substantial chance they will feel the process mistreated them or failed to achieve an outcome important to them.

But is it true that the current justice system is not perceived as just and fair? Apparently, it seems to satisfy the appearance of justice to some extent. The question is whether that extent is satisfactory. We might be facing the same situation we faced when examining the efficiency and effectiveness of the criminal justice system—it works, but not well enough. Similarly, the system is generally perceived positively, but if we assume the appearance of justice is indeed a “fundamentally important” component of justice, we may want to improve that appearance. Empirical studies support this conclusion. When asked to describe the degree of fairness or unfairness with which the criminal justice system treats people accused of committing a crime, 32% of the respondents in a national survey answered that the system was unfair. The great majority of respondents in the same survey were willing to concede that the system was “somewhat fair,” but only a minority perceived the system as “very fair.”<sup>26</sup> Under all of the different categories of respondents (sex, race, age, education, income, community type, region in the U.S. and political affiliation), there was a substantially higher percentage of people who perceived the system as unfair to some extent than those who perceived it as “very fair.” In other words, if the appearance of justice is as important

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24. *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) (emphasis added).

25. Olson & Dzur, *supra* note 1, at 62.

26. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online (2003) [hereinafter Sourcebook], available at [www.albany.edu/sourcebook](http://www.albany.edu/sourcebook) (last visited Dec. 1, 2005).

as is often stated, the system has much to improve. As will be shown, restorative practices have much to contribute to this aspect of legal proceedings.

### *B. Is restorative justice able to amend these deficiencies?*

Before examining whether restorative practices have the ability to amend the deficiencies specified above, it is important to enumerate some of the major premises of the restorative justice theory and provide a working definition for restorative practices that are based on this theory.

#### *1. What is restorative justice?*

The restorative justice paradigm shifts the traditional view of crime from the violated norm to the harm caused to the individuals most affected by the crime. In *CHANGING LENSES*, Zehr provides a short but thorough description of what he calls “the restorative lens.” Zehr describes the restorative lens as the view that “crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.”<sup>27</sup>

Although this description is not flawless, it offers a clear understanding of the restorative justice paradigm. It emphasizes people rather than norms. It highlights the obligation imposed on offenders, holding them accountable for the offense they committed. It illustrates the necessity of involving the real stakeholders affected by the criminal offense in the justice process and shifts the objective of that system from punishment and the infliction of pain to repairing the harm. These are the basic principles of the restorative justice theory.

One of the flaws of this description lies in the vagueness of the obligation to “make things right.” In fact, it is not always clear what the harm is; let alone how to amend it.<sup>28</sup> Furthermore, the importance attributed to the role of communities in the restorative justice theory raises the question of what constitutes a community. It is not self-evident to assume that a “community” always exists in urban life in the 21<sup>st</sup> century. Another problem is the intensified focus on the victim. This may well be derived from the words of Randy Barnett, who is sometimes quoted by restorative justice theorists:

Where we once saw an offense against society we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt therefore, is not to society; it is to the victim.<sup>29</sup>

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27. ZEHR, *supra* note 16, at 181.

28. For the common answer to the question of what does it take to “make things right?”, see JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11* (2002) [hereinafter BRAITHWAITE, *RESTORATIVE JUSTICE*] (“whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context.”).

29. RANDY E. BARNETT & JOHN HAGEL III, *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS* 363 (1977).

However, Barnett's view does not reflect the restorative justice paradigm, but is better defined as the Restitution Approach to criminal justice.<sup>30</sup> Although the latter method shares with the restorative approach a strong emphasis on victim compensation, it differs from the restorative approach in calling for the abolishment of criminal law as a separate body of law. Every crime has both a public and private dimension. Instead of focusing almost solely on the offender and the public dimension and neglecting to address the private dimension of the victim, the restorative justice theory advocates for a better balance between the two. Restorative justice does not promote a system which totally focuses on victims. That is the realm of civil and tort law, which cannot use state power and punishment in to respond to crime. As of today, restorative justice practices operate as alternative processes within the criminal justice system. They are all part of the *public* attempt to find a justifiable, efficient and effective response to crime, and therefore should be considered as a complementary component of the criminal justice system.

## 2. What are restorative justice practices?

The difference between the traditional criminal justice system and restorative justice dictates the use of different methods in responding to crime. In the traditional criminal justice system, the first question is whether a legal norm defining a criminal offense was violated, and if so, what is it. The second question is how do you prove who violated the law. The third question concerns the consequences of the violation and the appropriate punishment for the offender. The restorative justice paradigm follows a different path. Its starting point is the harm caused to victims and their needs in the aftermath of the offense. A victim-centered discussion begins any restorative justice practice. Then the discussion turns to the offenders and demands that they be held accountable for their wrongdoing in both dimensions of the crime: privately, towards the victim and the closely affected community; and publicly, towards society in general.<sup>31</sup> The proceedings are not controlled by detached professionals but rather by the people and community affected by the crime,<sup>32</sup> through a deliberative process facilitated by at least one trained neutral facilitator. The victim is no longer regarded merely as a witness, but is granted a substantial role in the justice system. At the same time, the of-

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30. In the words of Barnett himself: "I propose that [the breakdown of our system of criminal justice] could be solved by the adoption of a new paradigm of criminal justice—restitution." *Id.* at 349. See also Conrad G. Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in *THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE* 31, 43 (Michael L. Hadley ed. 2001) (providing a summary of the restitution approach to criminal justice).

31. The theoretical concept of offender accountability will often be manifested through a wide variety of specific actions the offender undertakes in the restoration agreement, which cater to both the private and public dimensions of crime. These may include: monetary compensation to the victim, community service work, treating a substance or alcohol abuse problem, getting a job, continuing education toward the GED test or professional certification, etc.

32. Barb Toews Shenk and Howard Zehr, *Ways of Knowing for a Restorative Worldview*, in *RESTORATIVE JUSTICE IN CONTEXT: INTERNATIONAL PRACTICE AND DIRECTIONS* 257 (Weitekamp & Kerner eds. 2003) [hereinafter Shenk & Zehr]. See also D. Van Ness, *Proposed Basic Principles on the Use of Restorative Justice: Recognizing the Aims and Limits of Restorative Justice*, in *RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?* 157 (Von Hirsch, Roberts & Bottoms eds. 2003).

fender will not be taken through the judicial process passively, but will be confronted with the full consequences of the wrongdoing, and is expected to take an active role in making amends and helping the victim and the community to heal.

The most acceptable working definition for a restorative justice practice was offered by Tony Marshal and endorsed by John Braithwaite, one of the leading authorities in the field: "A process whereby all 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."<sup>33</sup> The purpose of the process is to "restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just."<sup>34</sup> The questions of "what" must be restored and "how" this restoration is to be fulfilled are answered by the participants in the restorative process, as they become empowered to make these decisions on their own.

After establishing a basic understanding of the restorative justice principles and the main characteristics of the way they are practiced, we may then examine how restorative practices can better deal with the deficiencies of the criminal justice system.

### *C. How restorative justice addresses these deficiencies*

#### *1. Restorative justice and crime victims*

The first deficiency mentioned above concerned the fundamental disregard of crime victims in the criminal justice system. Due to this disregard, it would seem logical to assume that any alternative process which provides for some degree of victim participation would address this deficiency better than the current system. Since the restorative paradigm turns to the affected parties of the crime and brings forth their perspectives as well as the harm they have suffered individually, it seems self-evident that it has the ability to offer victims a promising and improved alternative.

But this, alone, is not enough for two reasons. First, one must take into account potential risks to victims. Designing a process in which victims and offenders meet face-to-face involves an inherent risk of physical and emotional harm to the victim. There may be some reasons for an offender to try to physically hurt the victim, from revenge for being charged or arrested to an attempt to prevent the victim from testifying in court (by intimidation or physical incapacitation). But even if the risk of physical harm is neutralized by technical means in addition to the presence of a skilled facilitator (holding the restorative process in a guarded facility, seating the parties in such a way as to preclude the possibility of harming each other, etc.) there is still the risk of emotional harm to the victim—revictimization. For this to occur offenders could take control over the conversation, belittle the trauma expressed by the victim, state they are not remorseful for their actions or even merely signal some disrespect towards the victim or the process by minute body gestures. All of these may cause the victim to relive the

33. BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 11.

34. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?* 46 *UCLA L. REV.* 1727, 1743 (1999) [hereinafter Braithwaite, *Punishment*].

trauma that resulted from the first encounter with the offender, the one that led to the current meeting. Before allowing victims and their offenders to meet, one must take all necessary steps to reduce the risk of revictimization.<sup>35</sup> This can be achieved by professional screening of the cases referred to restorative practices, sufficient preparation of all parties partaking in the restorative process and controlling the discussion during the actual meeting by the intervention of a trained facilitator.

Second, even if we can successfully minimize the risks to an acceptable level and find restorative justice does indeed offer victims a process that better addresses their concerns, one must assess whether the improvement is worth a complete change of the current justice paradigm. It may be argued (as it often is) that crime victims do not really wish to participate in the legal proceedings, but merely to be timely informed of their developments; that crime victims are dissatisfied with the current system because they perceive it as too lenient with their offenders; and most of all, that a crime victim would not want to meet face-to-face with his or her offender. It is possible that crime victims would not want to spend additional time with their offenders, let alone in a process that may lead to a mitigated sentence or the sealing of their files without a criminal conviction. In order to deal with these arguments, and ultimately answer our primary concern—whether the benefit is worth the paradigm change—it would be wise to observe what crime victims actually have to say on these matters.

Research in this area has steadily shown that crime victims do not center their criticism on the leniency of the sentences imposed on their offenders, but rather on the precise fundamental deficiency pointed out above—their inability to participate in the legal proceedings concerning the criminal acts to which they were victim.<sup>36</sup> This participation includes, according to studies, receiving information about their cases, a fair and respectful opportunity to be consulted with, and the recognition of all aspects of the harm they suffered, emotional as well as material.<sup>37</sup> Restorative processes provide victims with just that since, in part, that is

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35. It may be argued that the risk of revictimization ought to be neutralized completely before allowing a face-to-face meeting between a victim and offender to occur. However, I do not believe this effort is possible. Even in the current criminal justice system, the offender may attempt to harm the victim in many different ways. Moreover, it is a well-known phenomenon that many crime victims are revictimized during the legal proceedings, not by their offender, but by the system itself. This is referred to as “critogenic harm.” See Mary P. Koss, Karen J. Bacher & C. Quince Hopkins, *An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses*, in CRIME PREVENTION—NEW APPROACHES 7 (H. Kury & J. Obergfell-Fuchs eds., 2003) (“criminal justice response often disappoints and traumatizes victims”). If both the victim and offender are prepared for the meeting, and all necessary steps are taken to minimize the risk of revictimization, beginning with the initial screening of the case, followed by the preparation process and continuing with actual control of the meeting, in addition to a professional assessment that revictimization is not likely to occur, a face-to-face meeting should be enabled.

36. Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18 [hereinafter Strang & Sherman].

37. *Id.* at 18 (citing MIKE MAGUIRE, BURGLARY IN A DWELLING: THE OFFENSE, THE OFFENDER AND THE VICTIM 134-38 (1982); LESLIE SEBBA, THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM 104-06 (1996); JOANNA SHAPLAND ET AL., VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 47-50 (1985); Joanna Shapland, *Victims and the Criminal Justice System*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 210, 214-16 (Ezzat A. Fattah ed., 1986); HEATHER STRANG, REPAIR OR REVENGE: VICTIMS OF RESTORATIVE JUSTICE 2-3 (2002); IRVIN WALLER & NORMAN OKIHIRO, BURGLARY: THE VICTIM AND THE PUBLIC 45-46 (1978)).

what they are all about. The results of Heather Strang's RISE study<sup>38</sup> sufficiently support this argument. In her study, Strang examined 275 cases over a five-year period, from 1995 to 2000.<sup>39</sup> These cases involved property crimes committed by juvenile offenders and middle-range violent crimes committed by young adults in Canberra, Australia. These cases were disposed of randomly either by the courts, in the traditional fashion, or by a restorative justice conference. A restorative justice conference is a facilitated meeting between offenders and victims, along with each party's supporters.

As mentioned above, victims want more information about the proceedings against their offenders and the outcome of those proceedings. When asked whether they were informed "in good time" about developments in their cases, victims' responses varied greatly between the cases handled by the courts and those referred to conferences. In the former, "victims were rarely told anything officially about their case when they were not required as witnesses."<sup>40</sup> This finding especially stands out due to the existence of specific legislation providing victims with the right to be informed of progress in the proceedings.<sup>41</sup> In the cases dealt with in a conference, on the other hand, all victims had the opportunity to be as involved and informed as they wished.<sup>42</sup>

Almost all restorative processes follow the same pattern, regardless of the process-type. After the preparation stage is successfully completed, programs typically hold a meeting. In the RISE study, for example, the meeting was convened in the form of a family-group conference, but it can be held in any other forum or type of process. In this meeting, the parties are encouraged to talk about

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38. Lawrence W. Sherman, Heather S. Strang & Daniel J. Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Nov. 2000) [hereinafter *RISE Final Report*] (unpublished report of findings from the RISE project), available at <http://www.aic.gov.au/rjustice/rise/recidivism/report.pdf> (last visited Nov. 20, 2005). See Strang & Sherman, *supra* note 36, at 25. See also HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* 63 (2002).

39. STRANG, *supra* note 38, at 63; Strang & Sherman, *supra* note 36, at 25.

40. Strang & Sherman, *supra* note 36, at 26.

41. See Victims of Crime Act, 1994, c. 4 (Austl.), available at <http://www.legislation.act.gov.au/1994-83/current/pdf/1994-83.pdf>. The Victims of Crime Act states:

4. Governing principles

In the administration of justice, the following principles are to, as far as practicable and appropriate, govern the treatment of victims:

- (a) a victim should be dealt with at all times in a sympathetic, constructive and reassuring way and with appropriate regard to his or her personal situation, rights and dignity;
- (b) a victim should be told at reasonable intervals (generally not more than 1 month) of the progress of police investigations about the relevant offense, except if the disclosure might jeopardize the investigation, and, in that case, the victim should be told accordingly;
- (c) a victim should be told about the charges laid against the accused and of any modification of the charges;
- (d) a victim should be told about any decision concerning the accused to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation of leniency in sentencing;
- (e) a victim should be told about any decision not to proceed with a charge against the accused;
- (f) if any victim's property is held by the Territory for the purposes of investigation or evidence—inconvenience to the victim should be minimized and the property returned promptly;
- (g) a victim should be told about the trial process and of the rights and responsibilities of witnesses;
- (h) a victim should be protected from unnecessary contact with the accused and defence witnesses during the course of the trial.

*Id.*

42. Strang & Sherman, *supra* note 36, at 26-27.

the facts of the criminal event, share with one another how the event affected their lives, and finally work toward a written restitution agreement.<sup>43</sup> The victim is not only given a “counseling” status, but is invited to take an active role in the process and the formation of the restitution agreement. As we have seen earlier, this is far from being the case in the criminal justice system. The Australian “Victims of Crime Act” (Act) sets a good example of victims’ treatment by the justice system. In this Act, victims have a right to be told about various aspects of their case, but never to be consulted. Even in the United States Federal Rules of Criminal Procedure, where the court “must address any victim of a crime of violence or sexual abuse who is present . . . and must permit the victim to speak,” the words of a victim are not part of the considerations a judge must take into account when sentencing a defendant.<sup>44</sup> It is apparent that restorative justice provides victims with processes that more deeply engage them than the criminal justice system.

How do restorative justice practices perform with regards to victims’ needs to have their emotional and financial harm recognized? One of the most common ways for a person to acknowledge harming another is to apologize. This is the customary way of communicating to the other that we understand our wrongdoing, and of recognizing the harm done to the other. In the RISE study, 86% of the victims who attended a restorative justice conference received apologies from their offenders.<sup>45</sup> In court, the percentage was only 16% of the victims.<sup>46</sup> The difference speaks for itself.<sup>47</sup> But what about the financial harm caused to the victim? As a number of studies show, here too, restorative justice tends to perform better than the criminal justice system. A vast majority of restorative processes results in a restitution agreement, in which offenders undertake to compensate their victims for their monetary losses. Studies show that these agreements enjoy a significantly higher compliance rate by offenders than court-ordered restitution decrees.<sup>48</sup>

It seems, then, that restorative justice provides crime victims with a process that answers their most important needs: for participation, involvement and acknowledgement. The problem is, however, that this conclusion rests on the assumption that victims *want* to participate in restorative processes and, in fact, do

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43. Mark S. Umbreit, FACT SHEET: VICTIM-OFFENDER MEDIATION, RESTORATIVE JUSTICE THROUGH DIALOGUE, 1 (1997) [hereinafter Umbreit, FACT SHEET], <http://ssw.che.umn.edu/rjp/Resources/Documents/cumb97d.pdf> See also Leena Kurki, *Evaluating Restorative Justice Practices*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 293, 297-303 (Andrew Von Hirsch et al. eds., 2003).

44. FED. R. CRIM. P. 32(i)(4)(B) (2000).

45. RISE Final Report, *supra* note 38.

46. *Id.*

47. It is important to bear in mind, however, that not all apologies are authentic or sincere, and not all include the recognition of any kind of culpability on the part of the apologizing person. See generally Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000) (all three articles analyze the role of apology in the legal system, and identify and suggest different types of apologies for various functions in the legal system).

48. Strang & Sherman, *supra* note 36, at 34; Jeff Latimer & Steven Kleinknecht, *The Effects of Restorative Justice Programming: A Review of the Empirical* (Jan. 2000) (unpublished research review), available at <http://canada.justice.gc.ca/en/ps/rs/rep/tr00-16a-e.pdf> (stating the findings of different studies, among them a 1994 study that found a restitution completion rate of 81% in restorative justice compared to only 58% in court).

partake in these proceedings. As it turns out, the merits of this assumption may not be valid. On one hand, studies point out a general willingness in the public, and among crime victims, to consider victim offender mediation in cases of non-violent juvenile offenders.<sup>49</sup> Interestingly, some studies show a correlation between the victims' emotional response to the crime and their willingness to meet their offenders: the more victims feel emotionally upset by the offense, the more likely they are to agree to meet their offenders and to be open to reparation by the offender.<sup>50</sup> On the other hand, in practice, only a minority of victims both agree to, and actually participate in, the process.<sup>51</sup> In addition, restorative justice practitioners also experience difficulties when introducing this alternative process to crime victims.<sup>52</sup>

If that is the case, then one might ask, "why bother?" If victims do not wish to participate in restorative processes, shouldn't it be inferred that despite its great promise to victims, restorative justice is simply not appealing enough for them? Encountering practical difficulties in introducing a new paradigm of justice to the public is not surprising at all and should not deter innovative efforts to improve our criminal justice system. First, the studies cited above show the public at large, and crime victims in particular are generally supportive of these innovations. But more importantly, if anything, these studies show that victims at least *want to be asked* for their preferences, and that they value being given the option to *choose*

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49. See Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, W. CRIMINOLOGY REV. (1998) [hereinafter Umbreit, *Victim-Offender Mediation*], available at <http://wcr.sonoma.edu/v1n1/lumbreit.html> (citing a study by VORP, Orange County, California—the largest victim-offender mediation program in North America, with over 1,000 referrals a year—that “found that 75 percent of victims of minor property and personal offenses were interested in participating in the mediation process.” Umbreit then cites two other studies, performed by him, that found that “70 percent of victims who were never even referred to mediation indicated their interest in meeting with the juvenile offender if the opportunity were presented to them,” and that “82 percent of citizens (many of whom were crime victims) indicated that he or she would be likely to consider participating in a mediation session with a juvenile or young adult offender if he or she were the victim of a nonviolent property crime”). See also Strang & Sherman, *supra* note 36, at 18 (citing victim surveys conducted in Britain, the later of which found that “over 40% of British crime victims surveyed said they would have accepted the opportunity to meet their offender, and almost 60% of victims said they would have been willing to accept a reparative activity from their offender”).

50. Strang & Sherman, *supra* note 36, at 18.

51. See Carolyn Hoyle, *Securing Restorative Justice for the 'Non-Participating' Victim*, in *NEW VISIONS OF CRIME VICTIMS* 97, 103 (Carolyn Hoyle & Richard P. Young eds., 2002) (describing the findings of a four-year research project that examined three restorative practices in England, where over 80% of the cases, in which there had been a victim, that victim did not attend the restorative process).

52. See Susan M. Olson & Albert W. Dzur, *Revisiting Informal Justice: Restorative Justice and Democratic Professionalism*, 38 *LAW & SOC'Y REV.* 139, 169 (2004) (describing difficulties on the part of restorative justice practitioners in the Salt Lake City “Passages” program to recruit community volunteers). In Polk County, Iowa, for instance, every crime victim is offered the opportunity to confront his or her offender as part of a Victim Offender Reconciliation Program (VORP). During the years 2001-2004 nearly 9,000 crime victims were given the opportunity to participate in a VORP, but only slightly over 1,500 were actually held, equaling roughly 17% of all cases. Admittedly, this is not solely due to lack of victim participation, since many other factors influence the decision to perform a VORP; however, uninterested victims are among the most dominant factors to affect this outcome. Interview with David Lerman, Dir., Milwaukee County Dist. Attorney's Office Restorative Justice Program; interview with Fred Gaye, Dir., Polk County Attorney's Office Restorative Justice Center, in Des Moines, Iowa; interview with Vicki Shoap, Program Coordinator, 31st Judicial Dist. Circuit Court Restorative Justice Program, Office of Dispute Resolution, Prince William County, Manassas, Va. (all interviews on file with author).



whether or not to participate in the public response to the criminal act that personally affected them. The mere act of asking for their opinion provides an opportunity for crime victims to experience a sense of participation in the proceedings and gain the minimal assurance that the offender and justice system recognize their personal harm. For those who choose to partake in the restorative process, the outcome in the vast majority of cases succeeds in responding to the victims' main concerns.<sup>53</sup>

## 2. Efficiency and effectiveness in restorative processes

As mentioned previously, utilitarianists may depend on the criminal justice system to reduce crime and ensure public safety. Based on the data gathered in recent years, serious doubts arise regarding the effectiveness of our system in achieving this goal.<sup>54</sup> Moreover, not only are the results of combating crime insufficient, but they come at a great monetary cost. Since the criminal justice system is a public mechanism, funded by the public and created for the welfare of the public, it is our obligation as citizens to demand its improvement and explore alternatives that have the potential to perform better—both in reducing crime and, eventually, the resources and funding they require. Restorative justice offers such an alternative. Admittedly, this argument is somewhat presumptuous and lacks a well-based empirical foundation. Nonetheless, restorative justice consists of certain elements that enhance its ability to achieve improved results in reducing crime, and it does so relatively efficiently. In addition, while the empirical data gathered to date does not provide conclusive evidence, it does show the potential that restorative justice has to achieve these goals.

Restorative processes can be implemented during any stage of the criminal process, in a wide range of offenses, and as such are good candidates for institutionalization and general application. However, among the main determinative prerequisite factors for the initiation of such a process are the offender's willingness to concede wrongdoing on his or her part,<sup>55</sup> and the parties' agreement to participate in the process. One may argue that this narrows down the number of cases that can even be initially considered for restorative justice to a marginalized number of cases. If so, it may not matter whether restorative processes are effective and efficient since they cannot be applied to the vast majority of cases in the criminal justice system. Such marginalization of restorative processes will deem them irrelevant to any attempts at improving the effectiveness and efficiency of the criminal justice system. As will be shown, this argument is not valid. Even with their preconditions, restorative processes are extremely relevant to this analysis.

A close examination of the way cases are disposed of in the justice system will prove the above argument wrong. It is not a new figure, and it is definitely not surprising, that 95% of all criminal cases in federal and state courts in the

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53. Strang & Sherman, *supra* note 36, at 27-28; Latimer & Kleinknecht, *supra* note 48, at 14 (citing a study that found "83% of victims in conference cases versus 8% of victims in court cases, received both reparation and an apology from the offender").

54. See *infra* part II.a.2.

55. This may or may not require entering a guilty plea in court or admitting to the crime before a police officer, depending on the jurisdiction and the different restorative justice programs.

United States result in guilty pleas, usually by plea-bargain.<sup>56</sup> This figure is important to the examination of the relevancy of restorative justice to the criminal justice system in two ways. First, it indicates that in almost all cases, the offender is willing to assume responsibility for his or her behavior (by pleading guilty), fulfilling the initial precondition for a restorative process. Second, it negates the general assumption that disposition of criminal cases is not a matter for discussion and negotiation, but rather a matter for adjudication. Plea-bargaining, the primary means of disposing criminal cases, is all about negotiation, in which the subject of discussion is both the specific circumstances of the offense and the appropriate way of concluding the case. In restorative processes, the circumstances of the offense are discussed but are not subject to negotiation, but the resolution of the case is subject to negotiation between the parties, just as in plea-bargaining. The one exception is that a neutral third party facilitates the resolution in restorative processes.

The second precondition for the initiation of a restorative process—the parties' consent to participate—poses a more difficult problem. One of the greatest sources of power in the criminal justice system is that it does not require the consent of any party. In appropriate cases, the police will investigate a crime irrespective of the victim's wish, and offenders can be indicted and tried despite the victim's efforts to prevent it. This feature of the criminal justice system enables it to be applicable to all cases, as a systematic and well-defined response to crime. This feature does not exist in restorative practices, leaving them vulnerable to the changing whims of individual parties. For this reason, I do not contend that restorative justice should entirely replace the current system. Instead, I call for its implementation as the process of first-resort in appropriate cases<sup>57</sup> (which in my view consist of a substantial number of cases in the criminal justice system). This would leave the current system to deal with all other cases as the default process. It is important to note that in cases of non-cooperative victims and interested offenders, restorative justice practitioners are developing innovative solutions, such as the use of "surrogate" victims or community members,<sup>58</sup> thus mitigating to

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56. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001 55 (2003) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs01.pdf>; Bureau of Justice Statistics, U.S. Department of Justice, STATE COURT SENTENCING OF CONVICTED FELONS, 2000 43 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf>.

57. The question of identifying "appropriate cases" for restorative justice programs is not a simple one and tends to differ from jurisdiction to jurisdiction. For instance, in Polk County, Iowa, all crime victims are given the opportunity to meet their offender, regardless of the type of offense committed. See Fred Gaye, *supra* note 52. In many other jurisdictions, restorative processes are applied only to non-violent property offenses or only to juvenile delinquency. In practice today, the scope of "appropriate cases" is determined locally and incorporates the special needs and characteristics of each different jurisdiction. It is important to note, however, that restorative justice has its limitations. Not all cases or offenders are capable of participating in these deliberative-type processes and there may be certain categories of crime in which the application of a restorative process may be impractical or inappropriate. The question of the limits of restorative justice is an important one—one that requires much discussion which extends beyond the scope of this article. On this subject, see Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?* 42 BRIT. J. CRIMINOLOGY 616 (2002) (exploring the limitations of restorative justice, especially in regard to domestic violence and sexual assault). See also BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 137.

58. See The Report of the Dept. of Admin., Milwaukee County Dist. Attorney's Office, Restorative Justice Coordinator Report (unpublished report made pursuant to WIS. STAT. § 978.044(3) (2003), submitted February 13, 2004, at p. 1., on file with author) (introducing "Modified Conferences" con-

some extent the practical implications of this vulnerability. In addition, a multi-state study conducted by Umbreit in 1994 found that 72% of juvenile offenders tried by the court indicated they would have chosen to participate in mediation had they been given the opportunity.<sup>59</sup> This too, is an indicator that the inclusion of restorative justice within our criminal justice system has the potential of dealing with a significant number of cases, thereby affecting the entire system.

Is restorative justice effective? One of the main factors in determining the answer to this question is the rate in which known offenders go back to offending.<sup>60</sup> As mentioned before, studies that followed released inmates for a measured length of time (usually, between one to three years) revealed relatively high rates of re-offense and re-arrests due to continued criminal activity.<sup>61</sup> Hypothetically, if it can be proven that restorative processes achieve lower recidivism rates, it may be concluded that they are more effective in reducing crime than the current system. The problem is, however, that in practice this is difficult to prove due to different definitions of recidivism<sup>62</sup> and the many variables that influence re-offense rates.<sup>63</sup> In addition, restorative processes are currently applied to relatively small numbers of offenders, leaving researchers with a limited population in which every individual offender has significant influence on the research outcome. Therefore, the results described here should be taken with caution.

Currently, most empirical studies conducted in this area show that restorative processes have a positive effect on recidivism rates. However, it is important to note that some studies do not share this conclusion and, of those, some even show an increase in recidivism rates. One of the better-known examples for this last result is the increase in offending by drunk drivers found in the RISE study (by six crimes per 100 offenders per year.)<sup>64</sup> On the other hand, the same study found a substantial drop in offending rates by violent offenders (by 38 crimes per 100

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ducted in specific circumstances where the victim is not interested in participating or there is no identifiable victim).

59. Umbreit, *Victim-Offender Mediation*, *supra* note 49.

60. See John J. Dilulio, Jr., *Rethinking the Criminal Justice System: Toward a New Paradigm*, in PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM: DISCUSSION PAPERS FROM THE BJS-PRINCETON PROJECT 1, 11 (1993), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pmcjs.pdf>.

61. See Bureau of Justice Statistics, *supra* note 19.

62. For example, recidivism can be defined only as a re-conviction, or include a re-arrest with no conviction disposition available on the post-release criminal history record or even the revocation of probation or post-prison supervision. U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4-5 (2004), available at [http://www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf).

63. Such as: age and gender of offender, race and ethnicity, employment status, education attainment, marital status and illicit drug use. See *id.* at 11-15.

64. RISE Final Report, *supra* note 38, at 13. There are a few factors that offer a partial explanation for this finding. The first, brought by Sherman, Strang and Woods, in page 14 of the report, is that drivers' licenses are usually suspended in court proceedings whereas restorative conferences do not have the power to do this. *Id.* at 14. Another explanation, provided by Braithwaite, is that while the conferences dealt with the specific crime of drinking and driving, they did not confront the underlying drinking problem. BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 62. In my opinion, there is another plausible explanation: the lack of a victim. In these cases, the offenders were detected by the police by random breath testing. Research shows a certain relation between a face-to-face meeting of victims and offenders and a drop in recidivism and compliance rates. See Hoyle, *supra* note 51, at 112 (finding that offenders were "slightly more likely to fulfill the agreement when they have met the victim").

offenders per year.)<sup>65</sup> In any case, even if not considered to be solid proof of the effectiveness of restorative processes, the cumulative effect of the recidivism studies in the area of restorative processes provides a strong indication of the potential of these processes. For example, a meta-analysis conducted by Umbreit, aimed at searching for “evidence that VOM [victim offender mediation] participation is related to a decrease in the prevalence or severity of subsequent delinquent behavior,”<sup>66</sup> found “a clear relationship between VOM participation and subsequent delinquent behavior.”<sup>67</sup> According to this meta-analysis, after neutralizing the differences in definition of recidivism among the analyzed studies and other relevant variables, VOM participants were found to re-offend at a rate varying between 9% to nearly 27% lower than that of non-participants.<sup>68</sup> Other studies show a reduction of approximately 20% in recidivism rates for offenders who participated in different types of restorative processes, although some findings demonstrate smaller differences and others differences reaching as high as a 38% reduction in recidivism.<sup>69</sup> In addition, many of these studies found that in cases where participants in restorative processes did re-offend, this involved less serious offenses than those committed by non-participants.<sup>70</sup> This data is important for two reasons: First, even a 9% reduction in recidivism rates is a substantial improvement and should not be taken lightly. Second, the fact that numerous studies, analyzing different programs in different countries, all find a certain improvement in recidivism rates among participants of restorative processes shows that applying a new paradigm of justice does not risk endangering the public by irresponsible experimentation with potentially dangerous people. On the contrary, it shows that this new paradigm consists of correct and useful measures, which perhaps require additional honing but are definitely worth working on.

Toews and Zehr argue that one of the most fundamental elements of justice is achieved by giving meaning to the actions taken in response to crime.<sup>71</sup> This meaning must be “constructed from the perspectives and experiences of those most affected: victim, offender and perhaps community members.”<sup>72</sup> Since this notion is so fundamental to restorative practices, it should not come as a surprise

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65. RISE Final Report, *supra* note 38, at 12.

66. William. R. Nugent, Mona Williams and Mark S. Umbreit, *Participation in Victim Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 139.

67. *Id.* at 163.

68. *Id.* (during the first six months after involvement in VOM, participants recidivate at a rate nearly 27% lower than non-participants. After thirty months, the reduction in recidivism rate goes down to 9%).

69. Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in 5 Countries* 12-15 (May 1, 2002) [hereinafter Umbreit, *Conferencing*], at <http://2ssw.che.umn.edu/rjp/Resources/RJP%20CONFERENCEING-mono%205-5-02.pdf>. See also BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 55-62 (describing a particularly interesting study by Michael Little who examined the effects of applying restorative processes to persistent juvenile offenders in Kent, England. Little found a statistically significant reduction in re-arrest during two years of follow-up after the application of a “multisystemic approach that involved a family group conference, joint and heightened supervision by police and social services staff, and improved assessment combined with an individual treatment plan and mentoring by a young volunteer”).

70. Umbreit, *Conferencing*, *supra* note 69, at 16-17.

71. Shenk & Zehr, *supra* note 32, at 257.

72. *Id.*

that restorative justice has the potential to reduce recidivism rates. In the criminal justice system, offenders are taken through the system without requiring them to take any action at all, even when they plead guilty. Moreover, the current system encourages offenders not to assume responsibility (since the high burden of proof is entirely on the prosecution) and to remain as passive (and often as quiet) as possible. As a result, many defendants do not find their trial to be a meaningful event, but rather a detached occurrence, unrelated to them, run by lawyers and judges. Detached and unrelated events have little effect on the way people perceive themselves and the morality of their actions. If most offenders are not engaged in a process that challenges their current perceptions and encourages them to reevaluate their own behavior, what would prevent them from going back to committing the same actions in the future, once they get the chance? In restorative practices, the offenders are active participants in the process. They are expected to tell their stories, answer questions, explain their motives, and most of all listen to the victim and community members and agree on a way they will help repair the harm they caused. Through offenders' active participation, restorative processes are given meaning. It is this unique meaning that raises the hope that participating offenders might be less likely to commit further crimes in the future.<sup>73</sup>

Is restorative justice cost-efficient and time-efficient? As with recidivism studies, it is difficult to provide conclusive data supporting a determination regarding the cost-effectiveness of restorative processes. One of the main reasons for this difficulty is that these programs, when found, are relatively small, therefore having a marginal effect on the criminal justice system. Costs and recourses needed to support programs of this sort tend to vary greatly, depending on the number of cases they are required to handle, the amount of time spent on each case and the logistical structure of each individual program. On the other hand, I believe restorative justice may have the potential to reduce costs while, as shown above, improving the effectiveness of the public response to crime.

The first way in which restorative processes can help improve the efficiency of the criminal justice system is by diverting all appropriate cases away from the standard court proceedings. By doing so, all costs incurred during those court proceedings, i.e. judicial and prosecutorial time and resources, the costs of grand-jury convening, etc., are altogether avoided. Admittedly, the restorative process itself requires certain expenses, but those are often substantially lower. For exam-

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73. A study aimed at finding a connection between increased respect for law enforcement agencies and recidivism rates sets a good example in support of my argument. Lawrence W. Sherman, Heather Strang & Daniel J. Woods, *Captains of Restorative Justice: Experience, Legitimacy and Recidivism by Type of Offense*, in RESTORATIVE JUSTICE IN CONTEXT, INTERNATIONAL PRACTICE AND DIRECTIONS 229 (Elmar G.M. Weitekamp & Kerner eds., 2003). The results of the study examined different types of offenses. *Id.* Drunk driving offenders, randomly assigned either to court or a restorative justice conference, were followed for a period of two to four years. *Id.* The study found that "the average risk of repeat offending for offenders reporting increased respect for police was less than half that for offenders who came away from the legal process reporting no change or a decrease in their respect for police." *Id.* at 242. A previous study, conducted by Strang, showed that restorative justice conferences are far more effective than courts in producing increased respect for police. *Id.* at 237. This increase in respect for a law enforcement agency is in fact an increase in the perceived legitimacy of the criminal justice system, which is an important factor in furthering compliance with the law. *Id.* This is a result of a process that manages to engage offenders in reassessing their values and therefore has the power to influence its participants in positive ways.

ple, the city of Chilliwack in British Columbia, Canada founded the “Chilliwack Restorative Justice & Youth Diversion Association” to deal with first time youth and adult offenders in certain categories of offenses.<sup>74</sup> A cost-benefit analysis conducted during the fiscal year of 2001 revealed that while the total cost of a case referred to the restorative justice program is \$80, the cost of dealing with the same case through the court system would total \$2649.50. Since the Chilliwack Restorative Justice program handles an average of 100 referrals per year, the local criminal justice system is saving approximately \$260,000 per year.<sup>75</sup> In Henderson County, North Carolina, researchers found a two-thirds reduction in the number of trials due to the operation of a restorative process, leaving a substantial impact at the county level.<sup>76</sup>

The second way restorative processes can be used to increase the efficiency of the criminal justice system is by offering an alternative to the main mechanism for punishing offenders in the current system—imprisonment.<sup>77</sup> In the case of R., the prosecution had little choice but to argue that the appropriate punishment was imprisonment. While there is a need for an unequivocal condemnation of the defendant’s negligence (such as incarceration), it does not mean that it is the only way to express such condemnation. By allowing the affected parties to decide on an appropriate outcome through a deliberative process, society can broaden its mechanisms of expressing public condemnation in more innovative yet equally effective means. For example, Genesee County, New York has been diverting convicted offenders to community service sentencing as a substitute for imprisonment since 1981.<sup>78</sup> The County reports taxpayer savings of \$3,990,000, the amount saved by avoiding the expense of \$70 per day per inmate for the aggregate sum of 57,000 jail days.<sup>79</sup> Another example can be found in a study conducted on the Restorative Resolutions Project in Manitoba, Canada, which found that most offenders referred to the program would have received a prison sentence had they gone through the court system.<sup>80</sup>

Finally, one of the most indicative elements of efficiency in any system is the amount of time invested in order to produce the desired outcome. Here too, restorative processes have the potential to perform better than the criminal justice system. For example, during the 2003 fiscal year it took an average of six months from the time of filing to dispose of a case in which the defendant pled guilty in

74. See City of Chilliwack—Chilliwack Restorative Justice and Youth Diversion Association, <http://www.gov.chilliwack.bc.ca/main/page.cfm?id=178> (last visited Nov. 14, 2005).

75. See City of Chilliwack—Cost-Benefit Analysis, <http://www.gov.chilliwack.bc.ca/main/attachments/files/178/Cost-Benefit-Analysis.pdf> (last visited Nov. 14, 2005) [hereinafter *Chilliwack Cost-Benefit Analysis*].

76. Umbreit, *Conferencing*, *supra* note 69, at 16 (citing a study by Clarke, Valente, Jr. & Mace).

77. “In 2002, 69% of all felons convicted in State courts were sentenced to a period of confinement.” Bureau of Justice Statistics, *Criminal Sentencing, Summary Findings* at <http://www.ojp.usdoj.gov/bjs/sent.htm>; (last visited Nov. 14, 2005); Bureau of Justice Statistics, *Federal justice system, Sentencing* at <http://www.ojp.usdoj.gov/bjs/fed.htm#Sentencing> (last visited Nov. 14, 2005).

78. See Genesee County, NY—Official Website, *Genesee Justice Progress Report*, at <http://www.co.genesee.ny.us/frameset.html?dpt/communityservices/csprogress052604.html&l> (last visited Nov. 14, 2005).

79. *Id.*

80. Latimer & Kleinknecht, *supra* note 48, at 15 (citing study by Bonta, Wallace-Capretta & Rooney, 1998).

U.S. District Courts.<sup>81</sup> During this period, the case is assigned to a U.S. attorney and federal judge and in many cases to a public defender and to other agencies with responsibilities relevant to the particular defendant. All of these participants invest substantial amounts of time during these six months until final disposition. In restorative justice, this is not usually the case. In most restorative programs, once the case has been referred and screened by the program staff members, it will be assigned to a facilitator, who will actually prepare the parties and facilitate their meeting.<sup>82</sup> Typically, cases can be dealt with in a few hours, and offenders do not necessarily require legal representation. As a result, costs of restorative processes are often substantially lower than the criminal justice system.<sup>83</sup> The cost-benefit analysis conducted by Chilliwack Restorative Justice & Youth Diversion Association<sup>84</sup> provides a good example for this aspect of efficiency as well. According to the report, the average amount of time needed to dispose of a case in the restorative justice program is 12 hours and 45 minutes.<sup>85</sup> This includes administrative and volunteer hours, beginning with the initial referral and ending when the case is completed.<sup>86</sup> In the court system, according to the report, the same exact case would have required 34.5 hours, which includes administrative time, court time (two appearances in court), legal services rendered by the defense attorney, probation officer supervision and community work supervision.<sup>87</sup>

However, it must be noted that not all types of restorative programs are time-efficient in comparison to the court system and, due to an overwhelming caseload, courts may dramatically limit the amount of time spent on each case. For instance, in the RISE study it was shown that while the average court case for drunk drivers takes six minutes, the average conference takes 88 minutes.<sup>88</sup> Similarly, while the average court case for young offenders in property and violence offenses takes 13 minutes, the restorative justice conference requires an average of 71 minutes.<sup>89</sup> Another example of a restorative practice that increases expenses can be found in sentencing circles. This process is conducted after a court finds the of-

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81. Sourcebook of Criminal Justice Statistics (2003), available at <http://www.albany.edu/sourcebook/pdf/t543.pdf> (last visited Nov. 14, 2005).

82. In most restorative programs, once a case has been referred, a representative will contact the victim and offender, often by telephone, and introduce the program to them. If they are willing to participate in the program, both parties will undergo a preparation stage, which typically will include separate meetings with a volunteer facilitator or program manager. Although this stage is often regarded as most important and most time-consuming, it usually consists of one or slightly more meetings with the offender and victim. Then, a face-to-face meeting between the victim and offender will be arranged, typically lasting for an hour and half to two hours. For more detail on the process, see Umbreit, a simulated demonstration videotape "Complete Victim Offender Mediation and Conferencing Training," Center for Restorative Justice & Peacemaking, University of Minnesota. The outline of the process can be found in Mark S. Umbreit and Jean Greenwood, National Survey of Victim Offender Mediation Programs in the U.S., 4, 12-19 (1998), at <http://ssw.che.umn.edu/rjp> (last visited Nov. 14, 2005).

83. See Latimer & Kleinknecht, *supra* note 48, at 14.

84. See Chilliwack Cost-Benefit Analysis, *supra* note 75.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Lawrence W. Sherman and Heather Strang, Restorative Justice and Deterring Crime, Australian National University, Canberra, RISE Working Papers, no. 4 (April 1997), available at <http://www.aic.gov.au/rjustice/riase/working/risepap4.html> (last visited Nov. 14, 2005).

fender guilty or after he or she is willing to assume responsibility for the offense. The sentencing circle brings together the victim, the offender, their peers, their family, and respected community members. However, unlike other types of restorative practices, here, the sentencing judge, the lawyers and the police are active participants as well.<sup>90</sup> The practical implications of such involvement are an immediate increase in the amount of time the judges and lawyers must invest in the sentencing stages of the trials they handle. Participation in a sentencing circle requires a few hours, while sentencing arguments and judgment can often be completed within minutes.<sup>91</sup>

As shown above, studies show that restorative processes have the potential to be both more efficient and more effective than the criminal justice system. It is also clear that the two are indispensably connected to each other, since a criminal justice system cannot decide to cut its expenses, resources and amount of time invested in each case without accounting for the predictable outcome of such a cut. Likewise, a system's efficiency cannot be evaluated without considering its effectiveness. In other words, there is a price for devoting 13 minutes of court time to a young offender. That price can be embodied in high recidivism rates, in a basic lack of respect for the law and law enforcement agencies and perhaps, as mentioned above, in the belief that the criminal justice system does not do justice. Restorative justice offers an entirely different paradigm, which, as studies indicate, can improve the outcome and lower the expense. Although these studies are insufficient to prove the extent to which restorative processes reduce recidivism and costs, they do provide a strong indication of their potential. This, in turn, justifies expanding the use of such processes and testing their performance in dealing with larger numbers of cases.

### *3. The perception of justice in restorative processes*

As noted above, a gap exists between the way the justice system expects to be perceived by its participating parties and the way it is actually perceived. The fact that the justice system regards the "perception of justice" as fundamentally important is not at all surprising, since the public perception of the system's fairness is part of the foundation of the system's legitimacy. Once the public ceases to believe in the fairness and justness of the justice system, it will begin questioning its legitimacy and may, in cases where rulings are considered to be unjust, choose to deviate from implementing final decisions rendered by the system. Therefore, it is imperative for the criminal justice system to provide individuals and communities affected by crime with a process they perceive as fair and just.

It is in this category that restorative justice substantially and almost undisputedly outperforms the criminal justice system. A recently published meta-study, analyzing seven published studies which evaluated the psychological outcomes of restorative justice and court based programs from around the world, concluded that the data reviewed was "consistently favorable to restorative justice when

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90. For more information on Sentencing Circles, see: "Sentencing Circle: a General Overview and Guidelines, published by the Native Law Centre of Canada, available at <http://www.usask.ca/nativelaw/publications/jah/circle.html> (last visited Nov. 14, 2005).

91. See Victims of Crime Act, *supra* note 41, at 18, § 4.2.1.



compared to adjudication.”<sup>92</sup> The seven studies included four evaluations of a restorative practice model called victim-offender mediation and three evaluations of a restorative practice model called family group conferencing. The programs were based in the United States, Canada, England and Australia, and the comparative studies were conducted and published between the late 1970s and 1999. Data were gathered from a total of 4602 respondents (1297 victims in restorative justice, 1189 victims in court, 1077 offenders in restorative justice, and 1039 offenders in court).<sup>93</sup> The meta-study found that “both victims and offenders in restorative justice were significantly and substantially more likely (3.4 times more likely for victims and two times more likely for offenders) to believe that the criminal justice system was fair than were victims or offenders in court.”<sup>94</sup> In addition, victims and offenders in restorative justice programs were more likely to believe that the mediator was fair than victims and offenders in court were to believe the same thing about the judge (2.3 and 6.0 times more likely for victims and offenders, respectively).<sup>95</sup> The same can be said regarding victims’ and offenders’ belief that the outcome of the process was fair (2.6 times more likely for all participants in restorative justice compared to participants in the court system).<sup>96</sup> Other studies, comparing satisfaction rates of victims and offenders who participated in restorative practices with those who were parties to court proceedings persistently showed similar results.<sup>97</sup> This data shows that the criminal justice system suffers from a shortcoming in its ability to satisfy the appearance of justice, but more importantly, it shows that restorative practices, no matter when or where practiced, have a much better chance of achieving this goal.

### III. IS THE USE OF RESTORATIVE JUSTICE JUSTIFIABLE?

After showing that restorative justice has the potential to ensure victims are treated differently by the justice system, reduce crime rates and costs and improve the public’s regard of the criminal justice system’s fairness, it is important to challenge the theoretical justifications for restorative processes before advocating for their implementation as an inseparable part of the criminal justice system. In other words, now that we have seen restorative justice can help amend our justice system, the question still remains—should restorative justice be used for that purpose? Up to this point, this article has been dedicated to the empirical studies regarding whether restorative justice is capable of addressing some of the deficiencies in the justice system. The common denominator of those deficiencies is that they are all consequentialist; they all embody different aspects of only one side of the criminal justice system—its practical outcome. As desirable as it is to address these deficiencies, that should not be the primary goal of the criminal justice system. Moreover, unlike civil law, where alternative practices that em-

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92. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 201.

93. *Id.* at 169.

94. *Id.* at 178.

95. *Id.* at 185.

96. *Id.* at 192.

97. See BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 47-51 (victim satisfaction), 54-55 (fairness and satisfaction for offenders).

power parties to determine the outcome of their cases enjoy the solid theoretical foundation of contract law, criminal law is entirely different. In this arena, not only are the participating parties different, the objectives are different as well.

According to Immanuel Kant's theory, the preeminent goal of criminal law is retribution. Punishment is an end in itself,<sup>98</sup> not an instrument for achieving other practical ends (such as reducing crime rates or providing for victims' compensation and healing). Georg Hegel, who developed Kant's philosophy of retribution, further provides an explanation for this end goal: crime negates moral law, and only punishment can restore the negated moral right.<sup>99</sup> It may be argued that since restorative justice aims to reduce the number of offenders punished in the traditional way, and since it directly contradicts the notion that traditional punishment—the infliction of additional pain on convicted offenders—is the correct “medicine” for the infringed “moral right,” it may be utterly irrelevant and morally unjustifiable to introduce it as an appropriate process within the justice system.<sup>100</sup>

This may also be the inevitable conclusion when analyzing the purposes of the criminal justice system from an entirely different perspective as well. Utilitarianism, as a theory of punishment, justifies criminal penalties when they have the ability to deter the general public from committing future crimes.<sup>101</sup> Assuming we accept the imposition of community service on an offender in a restitution agreement as a form of punishment, it undoubtedly has a lesser (if any) general deterrence effect than its imposition in a court-ordered sentence, due to the latter's publicity, authority and status. Moreover, an important component of deterrence is disabling the individual offender from re-offending in the future—incapacitation. This is precisely what imprisonment achieves and is therefore one of the main reasons why imprisonment is the “punishment of choice”<sup>102</sup> in most western-world jurisdictions. As mentioned previously, reducing the incarceration rates and avoiding imprisonment to the greatest extent possible is well within the stated goals of restorative justice, hence directly negating a basic justification for punishment and leaving the theory of restorativeness unjustifiable in that arena.

In addition, almost by definition, restorative processes “result in grossly unequal treatment for equally culpable offenders,”<sup>103</sup> since the harm resulting from

98. Immanuel Kant, *On Punishment*, in *THE PHILOSOPHY OF LAW*, reprinted in *WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS* 252-54 (Robert C. Solomon and Mark C. Murphy eds., 1990).

99. GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT*, §§ 71, 218-20 (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

100. See Braithwaite, *Punishment*, *supra* note 34, at 1750 (“Restorative justice is a social movement . . . that might just allow it to transform the criminal justice system by leading to the marginalization of punishment as the primary method of responding to wrongdoing.”).

101. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 165 (J.H. Burns and H.L.A. Hart eds., Methuen: London and New York, 1982). See also Eric Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 208 (providing a short summary of the principles of utilitarianism).

102. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996) [hereinafter Kahan, *Alternative Sanctions*].

103. David Dolinko, *Restorative Justice and the Justification of Punishment* 2003 UTAH L. REV. 319, 337. See also Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community and Justice*, 52 STAN. L. REV. 751 (2000) (offering a comprehensive critique of the restorative justice movement, including inconsistency in punishment for otherwise similar cases). *Id.*

the crime and the way to “make things right”<sup>104</sup> are all defined by the particular participants in the restorative process.<sup>105</sup> This is a serious problem both from the retributive perspective and from a utilitarian point of view.<sup>106</sup> Therefore, it must be asked: even if we grant the positive attributes specified in part one above, is the use of restorative justice practices within the criminal justice system justifiable?

Throughout history, many philosophers developed theories to explain and justify criminal punishment. Two dominant punishment theories, “utilitarianism” and “retributivism,” have immensely influenced sentencing policies in the majority of jurisdictions in the western world. Additionally, a third approach to punishment evolved in the early 20<sup>th</sup> century and had a tremendous influence on the criminal justice system for a few decades—the rehabilitative ideal. Although this latter approach is no longer considered to be predominant in determining sentencing policies in most jurisdictions, it nevertheless still remains an important objective for the criminal justice system. Although “punishment theories brutalize one another, staking out turf on principle and refusing to budge from their respective positions,”<sup>107</sup> in reality, both retributivism and utilitarianism play important roles in our criminal justice system, often simultaneously, in forming sentencing policies and justifying punishment for the offenses enumerated in our penal codes.<sup>108</sup> Since restorative practices do not relate to the fact-finding role of the criminal justice system and are focused on offering an alternative process only to its sentencing role, it is necessary to examine the relationship between these punishment theories and restorative justice.<sup>109</sup> I am not arguing against either theory; rather, I hope to legitimize the use of restorative processes by demonstrating its compatibility with basic principles of both retributivism and utilitarianism. At the same time, I want to show the differences between restorative justice and the rehabilitative ideal to a misconception that I am equalizing the two. Hence, I attack the

104. See ZEHR, *supra* note 16, at 181.

105. See BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28.

106. From a retributive point of view, every offender must be punished according to his “just desert.” Any deviation from that “just desert” constitutes a departure from the norm of equal treatment. From a utilitarian perspective, different outcomes to “equally culpable” offenders will diminish those outcomes from deterring others in the future, since the “price” for committing the crime and getting caught is left unclear, which in itself may cause it to be perceived as lower than its “real” value.

107. Luna, *supra* note 101, at 205.

108. Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: the Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2081 (2002). (“almost all modern criminologists acknowledge that each of the four traditional justifications for punishment—retribution, deterrence, rehabilitation and incapacitation—must continue to play some role in the criminal justice system”). See also Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000) (demonstrating how retribution was restored as an essential purpose of punishment via judicial activism.); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (suggesting that the use of utilitarian justifications for punishment—its “disembodied idiom of costs and benefits”—allows society to avoid the underlying reasons for punishing offenders, which inherently involve difficult moral and cultural debates).

109. Even though restorative processes are not aimed at bypassing traditional fact-finding processes (and may very well be applied after the completion of the fact-finding phase of a criminal trial, for example) they may have an effect on the fact-finding process as well. Restorative processes include a discussion on the facts of the case and require concession of certain facts on the part of offenders. As a result, facts different from or additional to those determined in a prior fact-finding process may emerge and be included in the factual basis of the case.

legitimacy of restorative justice through the theoretical and empirical breakdown of the rehabilitative welfare model.<sup>110</sup>

### A. *Restorative justice and retributivism*

At first, it may seem as though the restorative paradigm of justice is in complete contrast to the retributive philosophy. Both Kant and Hegel, the forefathers of modern retribution, emphasize the injury to society as opposed to the harm caused to the individual victim, as the basis for justifying punishment.<sup>111</sup> Hegel proclaims that without focusing on the offense and the “injured universal,” punishment would be nothing more than personal revenge.<sup>112</sup> In other words, retributivism does not allow us to focus on the specific harm caused to a specific victim as the basis for the public response to crime, and any impositions upon the offender to restore that harm would be deemed unjustifiable. Moreover, the public response to crime cannot be used to achieve additional goals other than punishing offenders according to their “just deserts,” if these goals alter in some way the “deserved” punishment. In Kant’s words:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime ... the law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.<sup>113</sup>

It still remains to be asked what a typical “deserved” punishment is. The answer according to the retributive philosophy is any punishment that “equals” the crime,<sup>114</sup> but in essence, punishment is about the infliction of pain and deprivation upon the offender as “the only way *justice can be restored.*”<sup>115</sup> Only by painful sanctions can the public express its disapproval of the offender’s conduct.<sup>116</sup>

When comparing these principles to those of restorative justice, we find just how far apart they seem to be. While restorative justice focuses on the individuals involved in the criminal event—the victim, offender and close community, retributivism emphasizes the violation of the offense and the threat to society in general. While restorative justice focuses on changing future behavior and repairing the harm, retributivism is interested in only two time frames: the past criminal

110. See Hoffman, *supra* note 108, at 2078-79.

111. See Hegel, *supra* note 99, at 140-41, §§ 218-20.

112. *Id.*

113. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100, (John Ladd trans., Macmillan 1986) (1797).

114. See *id.* at 101-02 (“Inasmuch as someone steals, he makes the ownership of everyone else insecure . . . [H]e must let the state have his labor at any kind of work it may wish to use him for (convict labor), and so he becomes a slave, either for a certain period of time or indefinitely, as the case may be. If, however, he has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirement of legal justice.”).

115. Brunk, *supra* note 30, at 38.

116. See ANDREW VON HIRSCH, CENSURE AND SANCTIONS, 9-11 (1993).

act and the deserved present punishment based on the past. Retributivism is not interested in the future at all. While restorativists see the response to crime as an opportunity to heal individuals and relationships, therefore believing punishment should help achieve those goals, not infringe on them, retributivists see punishment as the goal in itself. The mere concept of a victim-oriented process, not to mention victim healing, is entirely foreign to a retributive criminal justice system. But these concepts alone are not the only ones which are irrelevant to a retributive theory of punishment. Concepts like reducing crime and enhancing the public's perception of the justice system's fairness are equally irrelevant as well. Of course, so long as the punishment "fits" and "equals" the crime, it may consist of additional otherwise "foreign" virtues, but those are clearly secondary to the primary goal of "just deserts."

So how can retributivism and restorative justice go hand-in-hand despite these fundamental differences? As will be shown, despite the practical differences in outcome and approach, the two paradigms of justice can be (and are, in my opinion) philosophically compatible. The first level of compatibility can be found in the core premises of restorativism<sup>117</sup> and retributivism. As Hegel clearly articulates, punishment is not imposed on an offender by society, but by the offender himself, who voluntarily chose to violate the law and face up to the consequences of his actions.<sup>118</sup> Moreover, according to positive retributivists, the violation of the law and the morally culpable behavior of the offender obligate the state to punish that offender.<sup>119</sup> In other words, the criminal offense can be seen as a "call for action" that requires the state to punish the offender. This retributive premise goes hand-in-hand with the restorative justice principle of offender accountability.<sup>120</sup> Here too, the criminal offense is a "call for action," but in addition to society's obligation to respond to the crime and "annul" its moral repercussions, restorative justice turns to offenders as well and demands their accountability. In this aspect, both restorative justice and retributivism are backward-looking, connecting past acts to present moral obligations. Restorative justice does not contradict the abstract notion of the state's obligation. On the contrary, it casts this notion with content and applies it to smaller, more intimate (and perhaps more meaningful) societal entities such as the close community and the affected parties' families. But it does not stop there. Just as retributivism sees the criminal event as the basis for justifying the state's obligation, restorative justice sees it as the basis for justifying the imposition of obligations upon the offender. As Howard

117. See Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 304 (using the term "restorativism" as a synonym for restorative justice).

118. HEGEL, *supra* note 99, at 70, §100 ("The [penalty] which falls on the criminal is not merely implicitly just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself, i.e. in his objectively embodied will, in his action"). See also M.D. Dubber, *Crime and Punishment: Rediscovering Hegel's Theory of Crime and Punishment: Hegel's Political Philosophy: Interpreting the Practice of Legal Punishment*, 92 MICH. L. REV. 1577, 1607-08 (1992) (explaining Hegel's theory of punishment of the rational offender).

119. MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 91 (1997) ("Moral responsibility in such a view is not only necessary for justified punishment, it is also sufficient. Such sufficiency of justification gives society more than merely a right to punish culpable offenders. It does this, making it not unfair to punish them, but retributivism justifies more than this. For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish.")(emphasis added).

120. See ZEHR, *supra* note 16.

Zehr phrased it: “When someone wrongs another, he or she has an obligation to make things right. This is what justice should be about. It means encouraging offenders to understand and acknowledge the harm they have done and then taking steps, even if incomplete or symbolic, to make that wrong right.”<sup>121</sup>

This deep connection between the past criminal event and the rise of present moral and practical obligations, on society, communities and offenders, is an important basic principle for both retributivism and restorativism. The main difference, however, is that while retributivism satisfies itself with the offender’s obligation to bear punishment, restorativism broadens that obligation to include positive steps to restore at least part of the physical harm caused by the offense. It may be erroneously inferred from the comparison above that while retributivism emphasizes the importance of annulling the crime and restoring justice through punishment and infliction of pain, restorative justice emphasizes repairing the harm and seeks out alternatives to avoid punishment. This conclusion is incorrect on two levels: first, in contrasting “restoring justice” with “repairing the harm;” second, in the automatic association of retributivism with punishment and restorativism with the avoidance thereof.

On the first level, we must examine the relationship between the retributive restoration of justice and the restorative reparation of the harm. According to George Fletcher, a prominent advocate for the retributive paradigm, including the suffering of victims as part of the theory of retributive punishment can only enrich that theory, not negate it. Fletcher recognizes the “particular relationship” established between the offender and victim in the criminal act, giving the offender “a form of dominance that continues after the crime has supposedly occurred.”<sup>122</sup> It is that dominance that offers us another level of justification for arrest, trial and punishment of offenders—the attempt to restore the position and dignity of victims.<sup>123</sup> In other words, the acknowledgment of victims’ perspectives does not only, in itself, contradict retribution, but actually strengthens the theoretical foundations of retribution and deepens its justification. Restorative justice takes this notion one step further. If retributive justice seeks “equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her antecedent suffering,”<sup>124</sup> why shouldn’t the deserved punishment include components that acknowledge that suffering and strive to restore the equality between the parties? Retributivism does not reject *a priori* other inherent attributes of a punishment, so long as that punishment is the offender’s “just deserts.” The meaning of this is that the retributive “restoration of justice” may very well include the restorative “reparation of the harm.”

The question still remains, how does restorative justice deal with the other components of a retributive “deserved” punishment, those embedded in the Kantian “eye for an eye” ideal?<sup>125</sup> In order to better answer this question, inherent in the second level of analysis described above, I will rephrase it as two separate questions: (1) Does retribution mandate pain and suffering as part of punishment? (2) Does restorative justice really reject the concept of punishment?

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121. *Id.*

122. Fletcher, *supra* note 3, at 57-58.

123. *Id.* at 58.

124. *Id.*

125. See KANT, *supra* note 113.

In order to answer these questions, we must better understand the different meanings given to the concept of punishment. These different meanings can be placed on an axis, starting from the most restricting definitions, on the far left, which include only a very limited number of responses which are considered punishment, and ending with the right side of the axis which contains broader definitions. For example, some theorists regard the intention of imposing pain on offenders, whether through incarceration or fines, as determinative. To them, the lack of such intention inherently negates punishment. Therefore, sentencing an offender to rehabilitation or compensation of the victim would be considered as the use of constructive, non-punitive measures.<sup>126</sup> These theorists would probably be located closer to the left end of the axis. A broader approach, closer to the right end of the axis, contends that punishment should be considered as any unpleasant burden imposed on the offender. This would obviously include paying a fine, but most probably would also include compensating the victim, performing community service and even attending a counseling program—all typical outcomes of restorative practices.<sup>127</sup> Moreover, following this broad definition of punishment, it may be argued that the mere participation of the offender in a restorative process, which entails having to confront an angry victim and in many cases family and community members as well, listening to their concerns and answering their questions, is an extremely difficult and unpleasant experience, and as such may be considered part of the punishment.

According to the latter definition, the gap between retributivism and restorativeness is minimized, and the answer to the second question posed above emerges. Following the broad definition of punishment leads to the conclusion that restorative justice does not reject the concept of punishment nor does it attempt to avoid it as a matter of principle. Rather, by offering a new model of justice it encourages us to think about punishment in new innovative ways. By relying so heavily on incarceration and fines, the criminal justice system elevated these specific technical forms of punishment to the level of punishment paradigms, in effect stopping us from looking for other ways of punishing and automatically associating the concept of punishment with these mechanisms. Therefore, as R.A. Duff suggests, restorative justice should not be seen as implementing alternatives to punishment but rather as enriching the criminal justice system with alternative forms of punishment.<sup>128</sup> This suggested understanding of restorativeness is beginning to gain support among scholars and proponents of restorative justice due to its theoretical and practical importance.<sup>129</sup> Its theoretical importance is in the justification it provides for putting offenders through restorative processes and

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126. See Kathleen Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, in *RESTORATIVE JUSTICE: FROM PHILOSOPHY TO PRACTICE* 39 (Heather Strang & John Braithwaite eds., 2000).

127. See *id.* at 39-40.

128. R.A. Duff, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 92-99 (2001).

129. See Daly, *supra* note 126 (explicitly endorsing this understanding). See also Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of Restorative Justice*, 2003 UTAH L. REV. 375 (while stating the advantages of restorative processes, Robinson argues that restorative justice cannot do without punishment and cannot substitute the criminal justice system. Not only does Robinson attack the disassociation of punishment and restorative justice, but he ends the article by suggesting to increase “the punishment available to restorative processes,” and to see them as “punishment units” that are granted the discretion to determine the method of punishment in addition to its amount).

their outcomes. Its practical importance is in the indispensable contribution it makes to the restorative process. Since the participants in these processes are members of the general society, and share the same beliefs and perceptions common to the general society, it is imperative that restorative practices acknowledge these perceptions and implement them. These common notions include the strong association of censure and public condemnation associated with the concept of punishment. As Andrew von Hirsch clearly articulated, it is by the infliction of unpleasant and burdening sanctions that society can express its disapproval of the offender's actions.<sup>130</sup> It is this explicit condemnation of the act (not the actor) that grants victims the legitimacy to feel angry and resentful toward offenders at first, while subsequently allowing them to repair the harm to the extent they can.<sup>131</sup> In return, it is this unequivocal censure that enables offenders to undergo a learning experience which stresses the different levels of their wrongdoing and the actual consequences of their actions. This learning experience can be seriously impeded if the message sent to offenders condones their conduct. What follows is that the absence of punishment in restorative processes may actually impede the achievement of the most important objectives of these processes, and therefore punishment in its broad sense should be seen as an indispensable aspect of restorative justice.

Although restorative justice does not reject the concept of punishment, but rather contains alternative forms of punishment, it still remains to analyze the relationship between these alternatives and retributivism. Do retributive punishments necessarily demand inflicting the maximum amount of pain and suffering possible, as their end goal, or can they condone alternative punishments that emphasize other qualities in addition to the imposition of unpleasant burdens? Retribution is not—and should not—be limited solely to the infliction of pain and suffering upon offenders. It can, and should, be seen to demand a “deserved” punishment for guilty offenders, but it does not necessarily equate that punishment with the infliction of the most painful sanction allowed under the specific circumstances. In the words of Robinson and Darley:

While the amount of punishment to be imposed must match the amount required by community perceptions of desert, the method of inflicting that punishment is generally irrelevant to the goal of desert.

...

[T]he judge need only take account of the “punishment bite” of each sanctioning method used and ensure that the total “bite” of all sanctions add up to the amount deserved, not noticeably more or less . . . [W]e have recently published research on public perceptions of the punitive bite of alternative sanctioning methods . . . . It shows that non-incarcerative sen-

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130. ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 10-11 (1993). See also Kahan, *Alternative Sanctions*, *supra* note 102, at 598 n.27 (citing a number of leading scholars, such as Jean Hampton and Robert Nozick, expressing the significance of punishment as moral condemnation).

131. See Daly, *supra* note 126, at 41.



tences frequently can be used to inflict the punishment deserved, even for many non-minor offenses.”<sup>132</sup>

This conclusion is also consistent with the broader definition of punishment presented above, which better achieves von Hirsch’s primary purpose for punishment—the expression of censure. If according to “the leading modern advocate of retribution”<sup>133</sup> punishment is meant to convey a message, it ought to have at its disposal as many tools as possible in order to fulfill its purpose. Limiting retributive punishments to incarcerations and fines puts the retributive ideal of giving offenders their “just deserts” at risk. Who said offenders necessarily deserve to be incarcerated for their wrongdoing? Why shouldn’t they deserve to be confronted by their victims and families and to be obligated to take action in repairing what they have harmed? Limiting our scope of punishment and associating punishment with incarceration and fines is the product of overusing these specific techniques for a very long period of time, not the product of a deep philosophy mandating these forms of punishment and precluding others.<sup>134</sup>

Incarceration and fines have become western society’s “hammer,” the only tool used to fix our problems, which unsurprisingly will all “look like nails.”<sup>135</sup> There is no contradiction to retributivism in viewing “desert” in ways other than “nails” and using innovative tools that are not all “hammers.” Moreover, by including restorative processes within the framework of the punishments available to the criminal justice system, we can achieve a more complete retributive response to crime. In thinking about the Hegelian “annulment” of the crime,<sup>136</sup> we think of punishment as a way of fixing the moral right violated by the criminal act. However, crime violates not only the abstract moral right, but also the dignity of specific victims, by the “wrongdoer’s message of superiority”<sup>137</sup> over them. If we are serious about the “annulment” of crime, we should not disregard this latter personal violation and hold offenders accountable for this aspect of their wrongdoing as well. Jean Hampton expressed this notion:

[T]he demand for a wrongdoer to “make amends” to his victim is a retributive idea, arising from the retributive claim that repairing diminishment requires, among other things, repairing the wrongdoer’s damage to

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132. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 491 (1997).

133. See Luna, *supra* note 107, at 218.

134. See Kahan, *Alternative Sanctions*, *supra* note 102. Kahan argues that alternative sanctions are rejected by the public because they do not express condemnation “as dramatically and unequivocally” as imprisonment. *Id.* at 592. Although this argument presents a theoretical explanation supporting the use of incarceration, Kahan does not proceed to claim that the necessary condemnation cannot be achieved by the use of other punitive measures. *Id.* He does, however, argue that for any alternative to be publicly acceptable they must be combined with “shaming penalties” or “impose shame themselves.” *Id.* at 594. Interestingly, Kahan’s conclusion consists of similar elements as delineated in the “Reintegrative Shaming Theory” developed by one of the world’s leading authorities on restorative justice, John Braithwaite. BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 74.

135. Sir Charles Pollard stated, “If your only tool is a hammer, all your problems will look like nails.” RESTORATIVE JUSTICE AND CIVIL SOCIETY 165 (Heather Strang & John Braithwaite eds., 2001).

136. HEGEL, *supra* note 99 at 71, § 101.

137. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992).

the victim's entitlements (generated by her value). A punishment can have built into it actions or services that constitute such amends.<sup>138</sup>

Therefore, using restorative processes as complementary alternatives to the current criminal justice system does not negate retributive justifications for punishment. Furthermore, they offer the possibility of deepening the retributive response to the criminal act by adding a new dimension to the "annulment" of crime and the "restoration" of justice.<sup>139</sup>

### *B. Restorative justice and utilitarianism*

While retributivism is a strictly backward-looking justification of punishment, delineating a strong connection between moral culpability and the violated norm, the utilitarian theory offers the exact opposite. First and foremost, it is forward-looking, entirely rejecting punishments that cannot achieve "the general object which all laws have . . . to augment the total happiness of the community . . . to exclude some greater evil."<sup>140</sup> In other words, a utilitarian punishment must serve some other desired objective—the increase of the aggregated common good. Utilitarianists are not concerned at all with the offender's past behavior as a basis for punishment, since "all punishment is mischief: all punishment in itself is evil."<sup>141</sup> They view punishment as a means, not an end, which is the only way in which the infliction of punishment may be justified.

But there is a deeper purpose in changing the perspective from backward-looking to forward-looking; by doing so, utilitarianism can make two important distinctions that illuminate the philosophical basis for punishment in a different light: the first differentiates between legal and moral obligations; the second makes a clear distinction between the offense and the offender. By leaving the offense in the past and concentrating on the future, utilitarianists free themselves from dealing with the difficult link between law and morality. A retributive punishment is justified (and even mandated) due to the offender's moral wrongdoing and the need to restore the "moral right."<sup>142</sup> But to utilitarianists, the law is not about morality. It is about defending "the public liberty"<sup>143</sup> and protecting society

138. *Id.* at 1697.

139. See Garvey, *supra* note 117. Garvey suggests that whereas retributivism answers the morally "wrong" in the criminal offense, restorativism answers only to the physical "harm" caused by it. *Id.* at 308. Using this distinction, Garvey argues that the only way to answer wrongdoing is by retributive punishment, as opposed to atonement, achieved by restorative processes. *Id.* While Garvey's distinctions are important and relevant, I believe he has misapplied them to restorative justice by viewing the restoration of the harm caused to crime victims as the primary objective of restorative processes. Admittedly, while restoring this harm is an important goal in restorative justice, it is, to my understanding, not the most important one and it does not predominate other important objectives these processes consist of. What follows is that restorative justice is not aimed primarily at restoring "harms," and therefore may be considered as addressing "wrongs" as well.

140. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns and H.L.A. Hart eds., 1982) (1783).

141. *Id.*

142. HEGEL, *supra* note 99.

143. THE MARQUIS BECCARIA OF MILAN, AN ESSAY ON CRIMES AND PUNISHMENTS 17 (Albany: 1872).

from offenders.<sup>144</sup> Therefore, it should only be used to the extent it promotes the public welfare. Moral wrongdoing has nothing to do with what utilitarian punishment is about. As a result of this first distinction, a second one becomes possible: one that differentiates between the physical conduct that violated the law and the individual who committed the offense. Since utilitarian punishment does not imply moral wrongdoing, its infliction does not promulgate the offender as a morally wicked person. All it means is that the offender broke the law.<sup>145</sup> This distinction dictates that “punishment should fit the offender and not the offense,”<sup>146</sup> hence changing dramatically the retributive calculation of a “just” (or appropriate) punishment for the offense committed and broadening the types of sanctions and punishment mechanisms that can be imposed on convicted offenders by the criminal justice system.

When it comes to these principles, it seems as though restorative justice and utilitarianism are in agreement. Although the former is backward-looking in that it emphasizes the role of the offense as the moral basis for the offender’s obligations toward the victim and community, it does not neglect the utilitarian aspects of punishment. Just like utilitarianism, restorative justice does not accept the infliction of sanctions on offenders merely because they “deserve” them. Rather, it accepts the premise that past wrongdoing creates future obligations, but it demands that these obligations are not seen as the primary objectives in themselves. At this point, restorative justice becomes forward-looking, as dictated by utilitarian justifications of punishment. In other words, if we are going to punish because offenders “deserve” to be punished (since they have obligations to make things right), we might as well impose sanctions that aspire to achieve other noble goals, namely reducing crime and increasing public welfare. For this reason, restorative justice accepts the two distinctions mentioned above, between moral wrongdoing and committing a criminal offense and between the physical act and the actor. It is these distinctions that enable the restorative process to maintain offenders’ reintegration back into their communities as one of its primary goals, since offenders are not perceived as morally “bad” people that should be alienated from society but rather as people who committed a “bad” act.

The most distinctive utilitarian goals to be achieved by criminal sanctioning are: general deterrence (detering others from committing crimes at all and reducing the severity of the crimes that are committed)<sup>147</sup> and specific deterrence (detering the particular offender from re-offending in the future). Deterrence of the general public is assumed to be accomplished by using a particular offender’s punishment as a warning and example to other potential offenders. Specific deterrence is based on the assumption that the offender is a rational person who will abstain from committing a criminal act if and when its costs outweigh the benefits,

144. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

145. Wesley Cragg, *THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE* 33 (1992).

146. *Id.* at 35.

147. See BENTHAM, *supra* note 140, at 165 (“His first, most extensive, and most eligible object, is to prevent, in as far as it is possible, and worth while, all sorts of offenses whatsoever: in other words, so to manage, that no offense whatsoever may be committed. But if a man must commit an offense . . . the next object is to induce him to commit an offense *less* mischievous, *rather* than one *more* mischievous, of two offenses that . . . suit his purpose”).

i.e. the painful consequences of the offense are not worth the anticipated gain it will provide the offender.<sup>148</sup> These goals, especially the second one, prescribe the use of incapacitation and rehabilitation (disabling the offender from reoffending, namely through incarceration, and “curing” the “illness” that caused the offender to commit the offense, respectively) as the main utilitarian mechanisms employed in increasing public safety and welfare.

According to the utilitarian theory of punishment, there should be no difficulty in employing restorative processes in response to crime, so long as they can provide public and specific deterrence which are at least equal to the criminal justice system. Since punishment is a “utility” for the achievement of other objectives, and not the goal in itself, the type of mechanism used should be determined by empirical data. The process of choice would be whichever process delivers the best results in the specific case. The problem, however, is that this kind of data, especially the long term effects of any new process employed, is extremely difficult (and often quite impossible) to obtain. If the only test is an empirical one, and the necessary data is unavailable, how can the use of restorative processes ever be justified?

One immediate answer to this question is that most of the recidivism studies that compared re-offense rates of offenders who participated in restorative practices with those sentenced by the court found substantial differences in favor of the restorative processes.<sup>149</sup> However, this answer may be deemed insufficient since it does not account for the studies, few as they may be, that point to the opposite and show an increase in recidivism rates for offenders who participated in restorative processes. If anything, these studies indicate that certain types of restorative processes are ineffective or that certain types of participants or facilitators are unsuitable for these processes, questioning the legitimacy of even experimenting with potentially ineffective processes when other somewhat effective alternatives exist. Since questions of legitimacy should not be taken lightly and restorative processes cannot be treated as a panacea, since their success, as in the case of other processes, depend on the personality and capabilities of their operators and participants,<sup>150</sup> other justifications for the use of restorative processes must be provided.

A different approach to the lack of empirical evidence supporting the utility of restorative practices can be provided by comprehensive theories that explain why these processes ought to succeed in reducing crime. The main advantage in turning to the theoretical sphere is that it can respond to those studies that portray restorative justice as failing to meet utilitarian standards and provide a systematic approach to the analysis of restorative justice’s legitimacy. Turning to the theo-

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148. Bush, *supra* note 9, at 442-51 (summarizing the fundamental concepts of rationality, deterrence and compensation in the law and economics theory in the context of criminal law).

149. See *supra* notes 64-70 (regarding the effectiveness of restorative practices).

150. Even in the criminal justice system, which provides a supposedly “catch-all” process, not only does the outcome of a trial depend greatly on the competence of the judge and lawyers but also on the relationship between the prosecutor and defense lawyer or the relationship between the defense lawyer and the client. These relationships may determine whether or not there will be a plea-bargain, and if there is a plea-bargain, may influence the terms of the agreement. These relationships may determine the amount of information offenders decide to share with their lawyers, and their personalities will dictate whether they appear remorseful at sentencing, whether they decide to speak in court and the content of their words. All of these factors directly impact the final outcome of a criminal trial.

retical level can also help strengthen the empirical justification for restorative practices where other studies, conducted in other areas, can be shown to be sufficiently relevant to these practices. Therefore, if it were possible to provide an established, substantially related theory that proves restorative justice “works,” restorative practices could be given a go-ahead without negating a utilitarian theory of punishment. John Braithwaite suggests five theories that, in his opinion, do just that—offer explanations for “why restorative justice processes might be effective in reducing crime and accomplishing other kinds of restoration.”<sup>151</sup>

One of the theories suggested is Braithwaite’s Reintegrative Shaming Theory, which emphasizes the disapproval of the act while refraining from negatively stigmatizing and humiliating the offender.<sup>152</sup> Interestingly, this theory would not be able to arise in the absence of the utilitarian distinction between the offense (the act) and the offender (the person). It is this important distinction that enables parents to discipline their children in a way that demonstrates unequivocal disapproval of the child’s misconduct, while at the same time reinforcing their love and respect for the child. The literature in this area shows that children of parents that employed this kind of disciplining, as opposed to “laissez-faire parenting” or “punitively authoritarian parenting,” are less likely to be delinquents.<sup>153</sup> The theory of Reintegrative Shaming was tested when applied to the inspection of Australian nursing homes compliance with the law between 1993 and 1996. The study found that nursing homes inspected by stigmatizing or understanding inspectors suffered a reduction in compliance, while those checked by inspectors with a “Reintegrative Shaming philosophy” demonstrated improved compliance with the law.<sup>154</sup> There are many correlations between the Reintegrative Shaming Theory and restorative practices. For one, they take place in a supportive environment for both the victim and the offender. In family group conferencing and community conferencing the support given to offenders is significantly strengthened through the attendance of family and friends, those respected by the offenders. Consequently, the shaming, inherent to the discussion of the consequences of the crime (a discussion imperative to every restorative practice model), is structured and channeled to avoid unproductive stigmatization; the message sent to the offender clearly shows disapproval of the misconduct, but does not demand that the offender be cast out of the community. The presence of support people for the offender reiterates that message. Based on the empirical merits of the Reintegrative Shaming Theory, it may be inferred that restorative justice is potentially more effective in reducing crime than the current system.

Another theory offered by Braithwaite as an explanation of why restorative justice works is the Procedural Justice Theory. Studies found that citizens were more likely to obey the law when they felt they were treated fairly by the justice system.<sup>155</sup> As demonstrated in Part II above, restorative processes persistently

151. BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 73. The theories suggested by the author are: the Reintegrative Shaming Theory, the Procedural Justice Theory, the Theory of Unacknowledged Shame, the Defiance Theory and the Self-Categorization Theory. *Id.* In this article, I will touch upon the first three theories.

152. *Id.* at 74.

153. BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 54-68 (1989) [hereinafter BRAITHWAITE, CRIME]; BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 74.

154. *Id.* at 77.

155. *Id.* at 78.

receive higher evaluations than the courts when it comes to participants' perception of fairness of the process they underwent. Since evidence shows that the fairer the proceedings are perceived to be the better they are at attaining compliance with the law, it may be concluded that restorative processes are more effective in reducing crime than the current system.

A third theory mentioned by Braithwaite is the Theory of Unacknowledged Shame, which emphasizes the productive role of shame and the acknowledgment of that shame in encouraging normative behavior (rather than merely focusing on the ways of expressing condemnation of the act, as in the Reintegrative Shaming Theory). Evidence seems to support the argument that "unacknowledged shame contributes to violence."<sup>156</sup> Restorative processes encourage offenders to take responsibility for their actions and induce apologies—one of the most obvious and natural ways people acknowledge the shame they feel—in a vastly higher number of incidents compared to those resolved by the courts,<sup>157</sup> therefore contributing to the conclusion that the former processes are better at reducing violence and enhancing society's welfare than the latter.

These three mentioned theories in conjunction with the numerous studies that demonstrate a reduction in recidivism rates for participants of restorative practices provide a sufficient empirical showing of these processes' ability to deter. The problem is, however, that their relevancy is narrowed to only one of the utilitarian goals—specific deterrence. They do not tell us anything about restorative practices' ability to deter other potential offenders, their capability to provide an equally important utilitarian goal—adequate general deterrence. Moreover, logic dictates that these processes would have a negative effect in deterring the public, since they are perceived as more lenient than the formal criminal justice system, hence lowering the "price" for criminal conduct and making it more attractive to potential offenders. Additionally, in order for any specific punishment to serve as a public deterrent it must be publicized. Sentences imposed on offenders by the courts attain the necessary publicity by the very fact that they are given in open court, by their publication in official court reports and by the attention they receive in the mass media.<sup>158</sup> Typically, restorative sanctions do not receive such exposure. They are reached in a closed and private setting, are often not documented in any official publicly accessible report and rarely attract any media at-

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156. *Id.* at 81.

157. Poulson, *supra* note 92, at 189 ("offenders were 6.9 times more likely to apologize to the victim in restorative justice settings than in court. To put this difference into perspective, very nearly three out of four (74%) offenders in restorative justice apologized, whereas almost three out of four (71%) offenders in court did not apologize").

158. For example, in December 2004 in the United States it was widely known that Scott Peterson, a young fertilizer salesman from California, was found guilty of murdering his wife and unborn child, and was sentenced to death. See Rusty Dornin, CNN, *Jury Recommends Death for Peterson*, <http://www.cnn.com/2004/LAW/12/13/peterson.case> (last visited November 13, 2005). But at the same time, hardly anyone knows about meetings conducted between inmates and ex-convicts who were convicted of serious violent crimes and their victims as part of the RSVP program operated by the San Francisco Sheriff's Department. See San Francisco Sheriff's Department Homepage, *RSVP: Resolve to Stop the Violence Project*, [http://www.sfgov.org/site/sheriff\\_index.asp?id=25413](http://www.sfgov.org/site/sheriff_index.asp?id=25413) (last visited November 13, 2005). See also Dolores Fox Ciardelli, *Face to Face*, PLEASANTON WEEKLY, November 14, 2003, [http://www.pleasantonweekly.com/morgue/2003/2003\\_11\\_14.justice14.html](http://www.pleasantonweekly.com/morgue/2003/2003_11_14.justice14.html). (discussing the meeting between Sue Solis and a hit-man, hired to murder her but successful only at wounding her after shooting her in the stomach, 12 years previously).

tion. If they do not even know about these sanctions, how can potential offenders ever be deterred?

The answer is that restorative sanctions provide for a different type of general deterrence. As explained previously, the conventional, Benthamian deterrence is based on the intimidation of future potential offenders by using individual punishment as a demonstration of the outcome offenders must account for when engaging in wrongful conduct.<sup>159</sup> Unfortunately, this classic type of deterrence has been empirically shown to have a very modest effect in preventing crime, mainly because studies show that potential offenders are less interested in the harshness of the punishment they may face but are more concerned with the probability of actually having to face that punishment (which in most cases is not very high).<sup>160</sup>

Although I do not wish to defend or criticize the utilitarian theory of punishment in this article, I bring forth this critique only to set the grounds for a new understanding of the term “deterrence,” which utilitarianists should agree is more effective than the classic understanding of general deterrence. Since a utilitarian theory of punishment justifies sanctioning only when it can “exclude some greater evil,”<sup>161</sup> i.e. prevent crime, it must consider the elements that cause people to obey the law. Robinson and Darley identify two elements as empirically proven to be most dominant: according to the first, people fear the disapproval of their social group for violating the law; the second states that people generally perceive themselves as moral human beings who try to conduct themselves accordingly.<sup>162</sup> In other words, there are two mechanisms that induce us to comply with the law, one external and the other internal. The external mechanism is based on the social sanctions one experiences when deviating from the normative behavior expected from a member of a particular social group. These sanctions, which are not restricted merely to criminal wrongdoing, may consist of neighbors’ frowning faces in the local grocery store, social isolation, loss of trust or even loss of a job. The

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159. BENTHAM, *supra* note 101, at 158 (“The immediate principal end of punishment is to control action. This action is either that of the offender, or of others . . . that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*.”).

160. See Robinson & Darley, *supra* note 132, at 458-64, nn.12-22 (citing studies that demonstrate the low risk of getting caught, convicted and imprisoned after committing serious offenses; they also cite studies that demonstrate the low deterrent effect of imprisonment and the uselessness of lengthy prison terms. The authors conclude this part arguing that taking into account the studies above, it would require ridiculous periods of imprisonment, which the community could never accept, to truly deter potential offenders). See Bush, *supra* note 9, at 454-57 (discussing whether, from a law and economics perspective, the criminal justice system deters crime. He finds in conclusion a “marginal deterrence value to prison,” but determines that the benefits of “long-term incarceration will be outweighed by the costs under any analysis, given that it serves no deterrence purpose, increases societal costs, and leaves offenders who might otherwise be productive members of society without that ability”). See Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 361 (1997) [hereinafter Kahan, *Social Influence*] (describing how despite the heavy reliance on imprisonment during the 1980s, crime rates steadily continued to increase). See also BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 102, 108 (demonstrating the failure of deterrence as a policy and outlining the “deterrence trap,” leading to the conclusion articulated by Robinson and Darley above).

161. BENTHAM, *supra* note 140, at 158.

162. Robinson & Darley, *supra* note 132, at 468-70 (citing scholars and researchers that emphasize the dominant role of “informal forces of social control” and “interpersonal influence” in inducing compliance with the law, over legal sanctioning). See also Kahan, *Social Influence*, *supra* note 160, at 357 (citing studies that show that “most people refrain from engaging in crime not because they fear formal penalties but because they fear damage to their reputation and loss of status”).

internal mechanism is the product of the moral rules one adapts while growing up and the sense of obligation to uphold these moral rules.<sup>163</sup> There is, of course, an unavoidable connection between the two mechanisms, since we tend to internalize the social norms dictated by our cultural environment. Eventually “people come to hold the moral standards of the cultures in which they are raised; internal moral standards and external norms generally label the same actions right or wrong.”<sup>164</sup> Dan Kahan identifies a third empirically supported reason for people’s willingness to obey various laws. According to Kahan, people tend to obey those laws they believe others, whom they respect, view as worthy of obedience. In Kahan’s words: “If compliance is perceived to be widespread, persons generally desire to obey; but if they believe that disobedience is rampant, their commitment to following the law diminishes.”<sup>165</sup> Restorative processes emphasize these three elements and enable them to fully affect not only the offender, but all other participants as well. It is this latter aspect of restorative practices that provides the desired utilitarian general deterrence.

However, in the context of restorative practices general deterrence takes on a different meaning. According to Günther Jakobs, a German theorist, general deterrence can be achieved by strengthening and supporting the basic norms prohibiting criminal conduct as opposed to using intimidation and threat of inflicting pain in cases of non-compliance. I find this new understanding of general deterrence, coined by Jakobs as “positive general deterrence,”<sup>166</sup> extremely appropriate to the analysis here, providing restorative practices with a strictly utilitarian justification of punishment. As mentioned above, the internal aspiration to do the morally right thing, fear of the community’s disapproval and the belief that the community values such compliance are among the most dominant elements of compliance with the law. This is precisely how positive general deterrence works. After a criminal act has been committed, the community must express its disapproval of the conduct.<sup>167</sup> By doing so, it reiterates the value of complying with the law in general and reemphasizes the importance of the specific norm that was violated by the criminal act. It also strengthens the community’s consensus around acts that constitute wrongdoing in the eyes of the community, not only in the eyes of the law, and induces the offender to internalize these norms. However, as with “negative general deterrence,”<sup>168</sup> the primary means used to convey this

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163. Robinson & Darley, *supra* note 132, at 469.

164. *Id.* at 469-70. See also Kahan, *Social Influence*, *supra* note 160, at 358-59 (“individuals tend to adapt their moral convictions to those of their peers”).

165. Kahan, *Alternative Sanctions*, *supra* note 102, at 604. See also Kahan, *Social Influence*, *supra* note 160, at 350-51 (describing and explaining the dominant roles of “social influence” and “social meaning” in crime prevention. According to Kahan, these terms refer to the way “individuals’ perceptions of each others’ values, beliefs, and behavior affect their conduct, including their decisions to engage in crime,” and the way in which “the law creates and shapes information about the kinds of behavior that members of the public hope for and value, as well as the kinds they expect and fear,” respectively).

166. See Manuel C. Meliá, *Victim Behavior and Offender Liability: A European Perspective*, 7 BUFF. CRIM. L. REV. 513, 514 n.5 (2005); Fletcher, *supra* note 3, at 54.

167. In the traditional criminal justice system, the prosecutor represents the community, and the court promulgates the publicly expressed condemnation of the offender’s act.

168. Fletcher, *supra* note 3, at 54 (describing the classic understanding of general deterrence).



message is by penal sanctioning.<sup>169</sup> It is through punishment that positive general deterrence is achieved. But as with retributivism, a broader definition of punishment may be introduced, thus including any unpleasant burden imposed on the offender,<sup>170</sup> with one main caveat; in the words of Bentham, it must “answer the purpose of a moral lesson” and “inspire the public with sentiments of aversion towards those pernicious habits and dispositions with which the offense appears to be connected.”<sup>171</sup> With this broad understanding of the concept of punishment, it is now possible to turn back to restorative practices and examine their ability to achieve positive general deterrence.

Community and family-group conferences and circles<sup>172</sup> are among the commonly practiced restorative processes in the United States and many other English-speaking countries. The most distinct commonality of these processes is the inclusion of a wide number of participants, mainly as community representatives. Due to the centrality of the restorative justice premise that criminal acts are wrong and therefore give rise to certain obligations on the part of the wrongdoer, offenders in restorative conferences or circles will find themselves facing their families, neighbors and community members as they express their disapproval of the criminal conduct and expect offenders to live up to their obligations. By doing so, not only defendants experience the unequivocal condemnation of their acts, but each and every participant experiences it. All participants, whether they are victims, support people or community members, form a social group that reiterates the importance of abiding by the law. Then, they all take an active part in forming the restitution agreement, which transforms the abstract disapproval of the conduct into practical obligations the offender must perform in order to right the wrong. Requiring that offenders agree to their restorative punishments induces them, at least in part, to internalize and recognize their wrongdoing. By providing people close to and respected by the offenders with the opportunity to clarify their negative view of the offense, and by allowing the community and the offender to agree on an appropriate punishment, restorative justice is able to give full effect to the most dominant elements in inducing compliance with the law. It is in this way that restorative processes can achieve, quite literally, positive general deterrence.

Interestingly, it may be argued that by empowering communities to deal with criminal conduct that affects their members, society as a whole will enjoy an improvement in the conventional understanding of (negative) general deterrence as well. As mentioned above, one of the main practical problems utilitarianists face is that the low probability of detection precludes the full deterrent effect of pun-

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169. Gunther Jakobs, *Imputation in Criminal Law and the Conditions for Norm Validity*, 7 BUFF. CRIM. L. REV. 491, 495 (2004) ([A sanctions is] “a response to an act, which should be conceived of as a protest against the validity of the norm, i.e. against the configuration of society. This response does not pursue an indirect confirmation of the societal context, but is the direct confirmation itself. When society sanctions, it refuses to think about modifying its configuration—that is, to think about a criminal act as an evolutionary act, as a possible option. Rather, society insists against this proposal to change by remaining in the status quo.”).

170. See Daly, *supra* note 126, at 39-40.

171. BENTHAM, *supra* note 140, at 171.

172. See Latimer and Kleinknecht, *supra* note 48, at § 2.3. See Barry Stuart, *Guiding Principles for Peacemaking Circles*, RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 219 (Gordon Bazemore & Mara Schiff eds., 2001) (providing an introductory explanation of circle processes).

ishment, thus undermining its utility.<sup>173</sup> In other words, raising the chances an offender will eventually get caught will immediately increase the deterrent effect of punishment. Moreover, empirical studies show that even when the severity of punishments imposed on the caught and convicted offenders is diminished, crime rates are reduced where there is a high certainty of punishment.<sup>174</sup> It is in this aspect that restorative justice can help rehabilitate negative general deterrence. Evidence shows that communities and families know about far more wrongdoing than do the police.<sup>175</sup> Reality dictates that most of these known crimes are simply never reported to the authorities for a variety of reasons.<sup>176</sup> Restorative justice can provide communities with the incentive to take action and not remain silent, since they maintain a relatively high level of control over the process and its outcome. In the words of Braithwaite: “When the community knows about many crimes and reacts restoratively, the benefits of restoration motivate others to speak up, increasing community members’ knowledge of crimes they will want to do something about.”<sup>177</sup> If the police know of more crimes, the probability of detection, conviction and punishment increase accordingly. In addition, communities might even attempt to prevent the known offenders from reoffending themselves, using some of the informal sanctions mentioned above or any other innovative means they find appropriate, if and when they feel it is in their interest to do so. By empowering communities the way restorative justice does, communities may find it is not only in their interest to report more crimes to law enforcement authorities, but to try and prevent them as well.<sup>178</sup> Although this argument is yet to be empirically tested, it may turn out that restorative practices are better at incapacitating

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173. See Bush, *supra* note 9, at 464 (defining deterrence as a “means some punishment adjustment to the expected cost of committing a crime above and beyond the probability of being caught multiplied by the disgorgement of ill-gotten gains”).

174. Kahan, *Social Influence*, *supra* note 160, at 379-80 (citing empirical evidence supporting the assertion that high-certainty/low-severity strategies are more likely to achieve low crime rates).

175. BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 117 (citing studies that empirically support this argument). See Brief for the Chicago Neighborhood Organizations as Amicus Curiae supporting Petitioner, *City of Chicago v. Morales*, 527 U.S. 41 (1998) (Dan Kahan and Michele Odorizzi, acting as counsel for Amici Curiae, provide evidence that emphasizes the relationship between street gang members and the local community, as well as the knowledge held by gang-ridden neighborhood residents as to the operation methods and whereabouts of street gang members).

176. See Kahan, *Social Influence*, *supra* note 160, at 380-81 (providing researched reasons for law abiding citizens to refrain from cooperating with law enforcement authorities; reasons such as family connections to the law-breakers, fear of retaliation on the part of offenders who were reported to the authorities, or even the perception that severe punishments of members of minority groups expresses contempt for the entire race or class).

177. BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 121.

178. The main difficulty with this argument is its complete reliance on the existence of a community. As mentioned above, there are no guarantees that offenders will even have a community to influence them in urban 21st century life. Moreover, this argument does not seem to take into account communities that exist but do the exact opposite, inducing their members to commit crimes. Although this issue deserves a broad and thorough analysis, such a discussion would exceed the scope of this article. The short answer, however, is that restorative justice processes can (and do) create ad hoc communities of care based on neighbors, friends or families, when a “conventional” community is not available. Braithwaite cites a study showing that “homeless youth in Toronto and Vancouver were far from alone.” BRAITHWAITE, *RESTORATIVE JUSTICE*, *supra* note 28, at 142. It is these relationships that turn into supportive communities of care through restorative processes.

potential offenders (a prominent utilitarian goal) than the primary incapacitation mechanism—imprisonment.<sup>179</sup>

In concluding this last point, it may be argued that restorative practices can have a ripple effect enlarging the number of crimes that would otherwise go undetected, increasing the community's motivation to report them and respond adequately, and even inducing communities to attempt to prevent future offending by the potentially dangerous. As a result, the criminal justice system will increase its negative general deterrence effect in addition to the positive general deterrence restorative practices are well designed to achieve.

### C. Restorative justice and the rehabilitative ideal

Unlike modern retributivism and utilitarianism, which have their philosophical roots in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries and are still extremely relevant to sentencing policies nowadays, the rehabilitative approach to punishment became dominant only in the early part of the 20<sup>th</sup> century, but was abandoned after being regarded a complete failure by the 1970s.<sup>180</sup> Nevertheless, rehabilitation is still considered to be one of the goals of the criminal justice system, even if not among the primary ones, and in many ways is enjoying a certain revival through the increasingly growing phenomenon of "therapeutic" courts.<sup>181</sup>

In essence, the rehabilitative ideal views offenders as "patients" or "victims," who commit crimes because of an "illness" or under the influence of a dysfunctional social environment.<sup>182</sup> This approach dictates that in order to effectively reduce crime, it is not enough to deal with the particular offense, since it is merely a symptom of a larger problem. Rather, it is the duty of the criminal justice system to "cure" the offender's "illness."<sup>183</sup> This is to be achieved by penal treatment intended to "effect changes in the characters, attitudes, and behavior of convicted offenders."<sup>184</sup> The deeper meaning of this approach, however, is that offenders are not to be morally blamed for their wrongdoing. They are not responsible for

179. *Id.* at 123.

180. For a more comprehensive analysis of the reasons for the decline of the rehabilitative approach to punishment, see FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

181. These courts are the practical application of a relatively new approach to the judiciary and the law in general better known as "therapeutic jurisprudence." Different types of courts operate under this title, including Drug Treatment Courts, Juvenile Courts, Domestic Violence Courts, Mental Health Courts and Reentry Courts. For a general description of these courts and a deeper analysis of therapeutic jurisprudence, see *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003).

It must be noted that despite the commonalities between the rehabilitative ideal and therapeutic jurisprudence, they are not merely different titles to the same method. For further analysis of the differences and similarities of the two approaches, see Philip Bean, *Drug Courts, the Judge and the Rehabilitative Ideal*, in *DRUG COURTS: IN THEORY AND IN PRACTICE* 235 (James L. Nolan Jr. ed., 2002); William D. McColl, *Theory and Practice in the Baltimore City Drug Treatment Court*, in *DRUG COURTS: IN THEORY AND IN PRACTICE* 3 (James L. Nolan Jr. ed., 2002).

182. BRUNK, *supra* note 30, at 42.

183. This concept is well illustrated by the words of U.S. Supreme Court Justice Hugo Black: "Retribution is no longer the dominant objective of the criminal law. Reform and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams v. New York*, 337 U.S. 241, 248 (1949).

184. ALLEN, *supra* note 180, at 2.

their criminal act; instead, their sickness is to blame. As was clearly articulated in the comparison between retributivism and restorative justice, this is fundamentally different from the way restorative justice views the offender and the goals of the criminal justice system. As mentioned above, offenders' culpability is one of the premises of any restorative practice. It is the basis for the offenders' obligations to repair the harm they caused, which according to restorativists should be the primary goal of the criminal justice system. Admittedly, in any restorative process, offenders must be treated with respect, which means allowing them to explain the reasons that led them to commit the crime and understanding (as opposed to accepting) their reasons.<sup>185</sup> In many cases, these reasons will undoubtedly include substance abuse or growing up in a destructive environment,<sup>186</sup> and the terms of the restitution agreement may well include a section calling for some kind of commitment on the part of the offender to try and treat his or her underlying problems. This example of the way restorative justice deals with issues that under a rehabilitative regime would be considered an "illness," reiterates the basic principle of offender responsibility. The restorative justice theory does not blame the drugs for the offense; it blames the drug users. It does not undertake to "cure" offenders, but demands that they take practical steps to treat their problem as part of their overall obligation to repair the harm they caused.

The main philosophical premise of the rehabilitative ideal according to which criminals are sick and need to be "cured" by the state led to a variety of practices that have become the rehabilitative ideal's most distinct manifestations. Among these practices were indeterminate sentencing and probation. According to the former, the actual length of a sentence imposed on a convicted offender was not determined by the sentencing judge, but by parole boards and judges who supervised the inmate's rehabilitation. When they were satisfied the inmate completed the rehabilitation program, the inmate would be released.<sup>187</sup>

While indeterminate sentencing was the vehicle that enabled rehabilitation to take place, it was the probation officers who were the actual "implementers of the rehabilitative ideal,"<sup>188</sup> treating the individual offenders according to their specific needs. These distinct manifestations emphasize another fundamental distinction between the rehabilitative approach to punishment and restorative justice. The combination of indeterminate sentencing and probation embodies a highly paternalistic approach towards offenders while granting extreme discretion and power to the assigned state professionals dealing with them. In a dominant rehabilitative regime, offenders are not asked whether they want their problems treated. Treatment is forced upon them and continues to be until they appear to be "rehabilitated"—at which point, the "reformed" offender can finally be released from

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185. See Marty Price, *Comparing Victim-Offender Mediation Program Models* 6 VOMA QUARTERLY (Summer 1995), available at <http://www.vorp.com/articles/compare.html> (last visited Nov. 30, 2005) (comparing two types of victim-offender mediation, and describing their basic elements.)

186. According to recent studies, 67% of all male adult arrestees in 43 U.S. cities and counties in 2003 were drug users and 68.7% of all inmates in the U.S. in 2002 reported using drugs regularly. See Sourcebook, *supra* note 26.

187. For a more comprehensive description of the history and development of indeterminate sentencing, see Marvin Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 WAYNE L. REV. 45 (1977).

188. Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 940 (1995).

prison. Besides the obvious ineffectiveness of coercing a person to undergo psychological therapy and the vagueness and ambiguity of the rehabilitative techniques, goals, and ways of assessing them,<sup>189</sup> this paternalistic approach has another detrimental effect. Not only does the rehabilitative regime ignore the positive influence families and communities have on offenders,<sup>190</sup> it diminishes any influence that may have existed by disempowering these social groups.<sup>191</sup> Restorative justice does the exact opposite. First and foremost, it will not force offenders into rehabilitation programs, and it will not define for them the “reasons” for their wrongdoing. A restorative practice will usually require the offender’s voluntary consent to even begin the process,<sup>192</sup> let alone undergo a therapeutic plan. But it also does not overlook the invaluable influential power held by the offender’s close family and community.

As seen above, social influence can play an important role in deterrence and crime control.<sup>193</sup> At the same time, it can contribute immensely to any rehabilitation efforts that are chosen by offenders and their families and friends. Unlike the rehabilitative ideal, where these efforts are undertaken by government employees who must simultaneously deal with dozens if not hundreds of cases, the restorative paradigm channels these efforts to a supportive and effective community environment. That said, it is not to be inferred that restorative justice is merely a new and more efficient method of rehabilitation. The point is that the differences in the way the restorative and the rehabilitative practices are designed, as illustrated by the quantity and identity of their participants, as well as their different goals, indicate the fundamental differences in approach.

I believe the substantial differences between these two approaches to the criminal justice system and penal sanctioning are sufficient to prevent the misconception that restorative justice is merely a new form of the failed rehabilitative ideal, and therefore destined to the same fate. As I have shown above, there are fundamental differences between the two theories that are exemplified *inter alia* by very different practices and objectives. At the same time, there are a few distinct commonalities that may be the source of confusion. For instance, both the rehabilitative ideal and the restorative justice theory emphasize the importance of personalizing the criminal event. Both are concerned with the individuals behind the story told by the criminal indictment. However, while the rehabilitative ideal is concerned almost exclusively with the offender, as is the criminal justice system, the restorative justice theory concerns itself with victims and their families just as much as it does with offenders. Another commonality, directly derived from the personalization aspect of the rehabilitative ideal and restorative justice, is the holistic approach taken by both theories. As Braithwaite described it, holism is “a capacity to see the same case as many things at once.”<sup>194</sup> Whereas the tradi-

189. ALLEN, *supra* note 180, at 51-52.

190. See Kahan, *Social Influence*, *supra* note 160.

191. BRAITHWAITE, RESTORATIVE JUSTICE, *supra* note 28, at 95-96 (citing the Maori critique of the Western justice system as weakening families by “taking away their responsibility for dealing with crime and preventing recurrence.” Braithwaite further cites studies that show the centrality of families and communities in crime control and rehabilitation).

192. Price, *supra* note 185.

193. Kahan, *Social Influence*, *supra* note 160.

194. John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 245 (2002) [hereinafter Braithwaite, *Therapeutic Jurisprudence*].

tional criminal justice system systematically narrows down the issues and individuals to be dealt with in each case to a minimum, neither restorative justice nor the rehabilitative ideal do so. The holistic approach adopted by the rehabilitative ideal enables it to look beyond the specific criminal act of the offender and to provide treatment for problems that might seem entirely unrelated to the offense at hand. In the same way, a holistic approach enables restorative practices to involve a wider array of participants and to respond to the needs of victims and communities, as well as the needs of the offender.<sup>195</sup> However, as before, there is a clear difference between the two theories regarding the attention and status each theory is willing to grant stakeholders other than the offender. For this reason, as well as for the other reasons brought forth in this part, restorative justice should not be affiliated with the once dominant rehabilitative ideal.

#### *D. Restorative justice and equality*

One of the primary critiques of restorative justice is that its practical implementations host a wide variety of results, even in cases that appear to be alike. This inherent inconsistency in outcome is often viewed as an infringement on the principle of equality and a contradiction to the criminal justice system's ideal of uniformity and consistency.<sup>196</sup> According to the retributive theory, a punishment should be proportionate to only one factor, which is "how blameworthy the *actor* is in committing the conduct, not how the victim should be compensated for his or her injury."<sup>197</sup> As Andrew von Hirsch asserts, this calls for the standardization of crime seriousness and culpability, which in return will determine the actual punishment a convicted offender deserves.<sup>198</sup> What follows is that the intentional lack of standardization and predictability, which is inherent in restorative processes that leave the end result to be decided by the particular participants, necessarily leads to the infliction of unproportionate, unpredictable—therefore unjustifiable—sanctions. Similarly, but for a different reason, a strictly utilitarian regime will value the standardization and predictability of punishment. As mentioned above, the main mechanism employed by the utilitarian theory of punishment to reduce crime is deterrence, which is achieved by "some punishment adjustment to the expected cost of committing a crime above and beyond the probability of being caught multiplied by the disgorgement of ill-gotten gains."<sup>199</sup> Accordingly, it is evident that in the absence of standardized and predictable punishments, it becomes extremely difficult, if not impossible, to achieve deterrence, since punishment is part of the "expected cost" of committing a crime. How then can the use of restorative practices, which oppose standardization and create unpredictable results, be justified?

There are a few possible ways to resolve this problem. First and foremost, it must be noted that restorative justice does not advocate for chaos and complete

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195. See John Braithwaite, *Holism, Justice and Atonement*, 2003 UTAH L. REV. 389, 395 [hereinafter Braithwaite, *Justice and Atonement*] (stating that restorative justice is as committed to the victim and community as much as it is committed to the offender).

196. See *supra* note 103.

197. Von Hirsch, *supra* note 130, at 77.

198. *Id.*

199. Bush, *supra* note 9, at 464-65.

unpredictability in the public response to crime. On the contrary, as part of the criminal justice system, it accepts, and even welcomes, certain restrictions and supervision over these practices' outcomes. For instance, as Braithwaite argues: "the law can and should assure [the offenders] that they will never be punished beyond upper limits."<sup>200</sup> Similarly, the law can and should assure offenders they are not denied their constitutional rights,<sup>201</sup> and the criminal justice system can install control mechanisms to ensure offenders are not subject to degrading or entirely unacceptable sanctions in restorative processes.<sup>202</sup> By doing so, the criminal justice system can reduce the otherwise unlimited diversity of outcomes and contribute to a more foreseeable range of possible results.

Setting upper limits to punishment does not come close to the levels of standardization and predictability that are thought necessary in the retributive and utilitarian theories of punishment—that it can hardly be considered as striving towards equality in punishing equally culpable offenders. In order to respond to this argument, a reintroduction of the broad understanding of punishment as applied to restorative practices is useful.<sup>203</sup> Since according to that definition, restorative practices result in punishing offenders, it is not enough to compare one form of punishment to another and conclude that due to their differences equally culpable offenders were treated unequally. As Dan Kahan argued elsewhere: "To indict a particular alternative sanction on grounds of equality, then, requires showing not only that it differs in some way from imprisonment but that the difference is morally relevant."<sup>204</sup> Although retributivists may seem to demand that equally culpable offenders must be treated exactly in the same way, it has been established previously that this is not an accurate statement.<sup>205</sup> Rather, retributivism dictates that equally culpable offenders should be subject to "sentences that make them suffer the same amount,"<sup>206</sup> even if those sentences are different. This deeper understanding of equivalent treatment requires us to determine the amount of punishment according to the aggregated effect of all aspects of the restorative practice and outcome, and to compare the result with that of a similarly situated offender. It is on that level that offenders should be treated equally, not merely according to external and superficial characteristics.<sup>207</sup> This approach helps re-

200. Braithwaite, *Justice and Atonement*, *supra* note 195, at 395.

201. There are circumstances in which an offender can make an informed and conscious decision to waive certain rights.

202. See Olson and Dzur, *supra* note 52, at 166-67 (describing the way criminal justice "professionals" guide and supervise the nature of sanctions imposed by Community Reparative Boards (CRBs) in Vermont).

203. See *supra* notes 111-15.

204. Kahan, *Alternative Sanctions*, *supra* note 102, at 647.

205. See Robinson & Darley, *supra* note 132.

206. Kahan, *Alternative Sanctions*, *supra* note 102, at 620.

207. I am aware of the fact that in order to engage in such calculations, it is necessary to determine the parameters according to which each component of punishment is determined. Although these determinations require further thought and analysis, which are not in the scope of this work, it is important to note that such an analysis is not new to the sentencing schemes employed by the current criminal justice system. Criminal courts these days determine on a daily basis what "mix" of different types of sanctions amount to a deserved punishment, choosing between (or a combination of) imprisonment, deferred imprisonment, fines, victim compensation, community service, probation and more. The specific choice of one or more types of sanctions and their amount is the product of assessing their specific and general deterrent effect, the amount of condemnation and stigma they express, the burden and suffering they impose. For a more comprehensive analysis of assessing the particular effect of

solve the perceived need for equal treatment of offenders in restorative practices under a utilitarian regime as well.<sup>208</sup> Once we have established that restorative practices do punish offenders, and in a way that will deter them from committing future crimes as shown above, all that is necessary is that this conviction is conveyed to the public. If potential offenders know they will be adequately punished in a restorative process, then they can include this punishment in their calculation of the offense's expected "costs," which according to a utilitarian theory gives that punishment the power to deter.

It should be noted that the notion of equal punishment for equal wrongs became so central to punishment theories due to the criminal justice system's restricted focus on the offender. Once this paradigm is changed, as offered by the restorative justice theory, this notion becomes only one aspect of the integrity we demand of our criminal justice system, since we must take into account the equal treatment of victims and communities as well. The most obvious practical result of this holistic view is that just as offenders will not be assured the exact equal treatment in each and every case, victims will not be guaranteed the opportunity to fulfill any aspiration they may have regarding their case. As Braithwaite suggests:

Restorativists must abandon both equal punishment for offenders and equal justice (e.g., compensation, empowerment) for victims as goals and must seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime. The restorative justice circle is an imperfect vehicle for institutionalizing that aspiration (though for a wide range of cases, less imperfect than courts of law). But I would argue that the aspiration is right.<sup>209</sup>

I believe this aspiration offers a new perspective to the demand for equal treatment of equally culpable offenders in the criminal justice system, especially given the fact that the current justice system is "far from perfect in realizing this goal"<sup>210</sup> and treats it as an aspiration as well. In the restorative justice paradigm equality in treatment of offenders is indeed an important aspiration, but one that must be balanced against other important and at times competing aspirations, such as attending to victims' needs. Moreover, by lending itself to the particular needs, interests and wishes of the different participants, the restorative justice paradigm strives to refrain from a different type of unequal treatment—the equal treatment of otherwise differently situated offenders, one of the main repercussions of overly standardized sentencing. When the premise is that people are essentially different and their particular needs are to be addressed in the public response to crime, unequal treatment of similarly situated offenders becomes less of a concern.

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community service, fines, imprisonment and shaming sanctions, see Kahan, *Alternative Sanctions*, *supra* note 102.

208. According to utilitarianism, which differentiates between the physical offense and the offender, the tension is not as apparent as in retributivism. In the former, different punishments to different offenders are perfectly acceptable, if they are the most efficient deterrents, even if the offenders are equally culpable. See *supra* note 94, at 125-31.

209. Braithwaite, *Justice and Atonement*, *supra* note 195, at 395.

210. Delgado, *supra* note 103, at 759.



#### IV. CONCLUSION

What might have happened if R.'s case were dealt with in a restorative practice instead of being prosecuted? Although we will never know with certainty, I believe the outcome could have been entirely different. True, R. would have been required to admit to the factual scheme claimed by the prosecution, but given that he did not have any personal knowledge to contradict that scheme (he admitted that he was unable to see since the accident happened rather quickly) and that it was based mainly on objective expert opinions, this may not have been a real impediment. Moreover, if the threats of imprisonment and a lengthy criminal trial were eliminated right at the start, there may have been a further incentive to concede to the facts.

Once R. conceded, this may have been the alternative scenario: After some preparation, R. and his family and the bereaved family would meet with the assistance of a trained facilitator. At that meeting, they would begin by talking about the accident. The daughter, who drove the car in front of R., would tell her side of the story and R. would tell his, but they would not be testifying in court. They would share the pain, instead of fighting over it. I know R. felt that pain. I saw it in his eyes. I was his prosecutor.

The two families would then talk about the way the accident impacted their lives, and the bereaved family would probably receive the much needed apology from R. They would then discuss ways in which R. can symbolically restore some of the harm done. Their agreement would likely consist of the same community service he was sentenced to in court except it would not be in an old age home but rather would require R. to work with car accident victims. But the agreement would be able to offer more. R. would have the opportunity to acknowledge the suffering of the bereaved family by offering to pay some kind of monetary compensation or make a donation to a charitable organization commemorating the decedent's name. The agreement might have required, for example, that R. talk to young drivers in his community, telling them his story, teaching them that even an Air Force pilot cannot afford to lose his concentration even for one second while driving. The positive impact on those young people could have been great. But most importantly, it would have taken a few hours instead of two years and would have had a positive healing and educational impact on both families. The bereaved family would have learned that R. was not a monster, but a person who made a terrible mistake, and must learn to continue living with it. They would have understood the difference between a "murderer" (the way they referred to him before and during the trial) and someone who negligently killed another. R., in return, would have allowed himself to react naturally to this traumatic incident. He could have expressed the way he felt and acknowledged his wrongdoing. All participants would have emerged out of this process feeling they were treated fairly and that their main concerns were addressed. They would have felt that the criminal justice system reacted to the accident sensitively, swiftly and appropriately. They would have felt that justice had been served.

I am well aware that for many, especially within the legal community, justice is a matter of well-defined rules and procedures, and punishment is a matter of inflicting pain on convicted offenders. As I tried to demonstrate in this article, justice can be given a deeper meaning, and punishment can be viewed in a broader respect. I have shown that employing this different understanding does not con-

tradict the basic principles upon which the current criminal justice system is based. On the contrary, they promote these principles and deepen their meaning. To be specific, the inclusion of restorative practices which are based on an entirely different paradigm of justice, in the criminal justice system, is not without theoretical foundation. These processes consist of fundamental principles from both a retributive and a utilitarian perspective and can therefore go hand in hand with these theories of punishment, as they guide and influence sentencing policies in jurisdictions around the world. Through their inclusion, they can help amend some of the deficiencies our criminal justice system suffers from and advance a few of the goals this system strives for. But in addition to doing so, restorative practices can transform the way crime victims and their communities perceive crime and see offenders. By inducing apologies, understanding and healing, restorative practices serve as a vehicle for promoting mutual recognition and offer its unfortunate participants (who find themselves confronted with the aftermath of a criminal offense in some way or another) with a meaningful experience they can relate to naturally and intuitively.

