

RESTORATIVE CRIMINAL JUSTICE

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ABSTRACT

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

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INTRODUCTION

The last three decades marked the ascendance of restorative justice as a crime-control mechanism. Restorative justice has been developed as a supplement to, or a replacement for, the traditional criminal process. Although both approaches try to develop a socially optimal response to criminal behavior, each of them represents a distinct ideology. Academic literature cultivates this separationist stance by treating the two approaches as conflicting paradigms.¹ Much of this literature focuses on the pros and cons of restorative versus punitive modes of criminal justice, while trying to appraise empirically the efficacy of specific restorative programs.² The interplay between restorative and punitive justice in the normative and conceptual domains of criminal law remains under-theorized. This Article fills this gap.

We posit that restorative justice is a viable community-based mechanism for regulating criminal behavior. Contrary to the common

¹ See, e.g., Gordon Bazemore, *Restorative Justice and Earned Redemption*, 41 AM. BEHAV. SCI. 768 (1998); Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543 (2004). More recent scholarship acknowledges commonalities, as well. See, e.g., Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence*, 12 AUSTL. CENTRE FOR STUDY OF SEXUAL ASSAULT ISSUES 1 (2011); Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616 (2002); Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251 (1993).

² See, e.g., HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE (2002) (presenting findings from the Reintegrative Shaming Experiments (RISE) comparing cases randomly assigned to either court or conference in Canberra, Australia); James Bonta et al., *Restorative Justice and Recidivism: Promises Made, Promises Kept?*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 108, 114–15 (Dennis Sullivan & Larry Tiff eds., 2006) (presenting a meta-analytic review of findings regarding recidivism rates following punitive and restorative processes, and concluding that restorative interventions have an approximately seven percent reduction impact on recidivism). For a meta-analytic review of findings regarding the effectiveness of restorative justice programs in comparison with formal punitive processes, see Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 PRISON J. 127 (2005). Effectiveness in this study was measured by victim and offender satisfaction, restitution compliance, and recidivism rates. The meta-analysis concluded that restorative justice interventions resulted in small, but significant reductions in recidivism and were more effective with low-risk offenders. *Id.* Program effectiveness improved during the mid-nineties as programs became more structured and more theoretically anchored within restorative justice theory. *Id.* For a systematic review of evidence drawn from reasonably unbiased tests comparing restorative justice with conventional criminal justice, see LAWRENCE W. SHERMAN & HEATHER STRANG, THE SMITH INST., RESTORATIVE JUSTICE: THE EVIDENCE (2007). The review reveals that, with only one exception, rigorous tests of restorative justice showed significant reductions in recidivism rates. *Id.* at 68–71. Restorative justice reduces crime more effectively in more serious crimes, in violence rather than in property crimes, and when there is a personal victim. *Id.*

wisdom, we show that the punitive approach is not the only means by which society can respond to and reduce crime. Indeed, we demonstrate that restorative justice provides an equally efficacious, if not superior, social response to crime. Most important, we develop a model that integrates the punitive and the restorative approaches within criminal law.

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

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

This scheme has many methodological advantages: It uncovers numerous points of intersection between the punitive and the restorative approaches to criminal law; it enables a more precise definition of the relationship between restorative and punitive justice;

³ See generally Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).

and it also helps identify the virtues and the vices of each respective approach across a variety of contexts.

Structurally, our Article proceeds as follows. In Part I, we present the restorative and the punitive approaches as competing paradigms, reflecting the way they have largely been described in the literature. In Part II, we analyze the goals that the two approaches strive to achieve and identify the points of intersection between those goals. In Part III we present our model and discuss its advantages over other models of criminal justice. As part of this discussion, we consider the recent New Jersey Superior Court decision in *State v. Ravi*.⁴ We show that in this high-profile case, all of the parties involved—the defendant, the victims, and the entire community—could benefit from a restorative procedure that could bring about a socially desirable resolution of the case at hand. We conclude this Article by outlining future applications of our integrative model in theory and in practice.

I. CRIMINAL JUSTICE: PUNITIVE VERSUS RESTORATIVE

Restorative justice grew out of disappointment with the punitive approach.⁵ The criticism of the criminal justice system related both to its ineffectiveness in reducing criminality⁶ and to its failure to address victims' needs.⁷ Influenced by other emerging approaches such as Alternative Dispute Resolution (ADR)⁸ and community justice,⁹ local initiatives sprang up aspiring to provide better responses to crime.¹⁰

⁴ N.J. Super. No. 11-04-00596, 2012 N.J. Super. Unpub. LEXIS 1757 (App. Div. May 21, 2012).

⁵ STRANG, *supra* note 2, at 43.

⁶ See Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 CRIM. L. & PHIL. 21 (2008) (summarizing the criticism against punitive justice as being ineffective, unneeded, expensive, and unjust); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727 (1999); Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (showing punitive measures, as well as rehabilitative ones, to be largely ineffective); Heinz Steinert, *Is There Justice? No—Just Us! Justice as an Attempt to Control Domination and the Problem of State-Organized Pain Infliction*, 25 ISR. L. REV. 710 (1991) (describing the claims made by abolitionists against the punitive approach).

⁷ LESLIE SEBBA, *THIRD PARTIES: VICTIMS AND THE CRIMINAL JUSTICE SYSTEM* 25, 55–56 (1996) (describing the punitive paradigm as ignoring victims' needs, considering them as “evidentiary tool” and frequently causing secondary victimization).

⁸ See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977) (coining the term “conflict as property” and arguing that conflicts should be handled largely by the direct stakeholders rather than by the state).

⁹ See DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 12–19 (3d ed. 2006) (summarizing the ideological movements that contributed to the evolution of the restorative justice movement).

¹⁰ See Rashmi Goel, *Aboriginal Women and Political Pursuit in Canadian Sentencing Circles: At Cross Roads or Cross Purposes?*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST*

Gradually these programs' modus operandi was conceptualized and abstracted, resulting in the construction of restorative justice as the "antithesis" of punitive justice.¹¹

A. *Understanding and Responding to Crime*

Punitive justice perceives crime largely as harm to protected social values. The perception of crime as causing a conflict between an individual and society is one of the distinct characteristics of criminal law. Liberal theory provides an explanation for the great importance of defendants' rights. The role of the sovereign is to regulate behavior, and in doing so, to determine guilt and punishment. Defendants' rights were developed to protect the individual against the mighty sovereign and its potentially arbitrary, harmful exertion of power.¹²

Punitive justice authorities ask three questions in their reaction to crime: Who committed it; whether the elements of criminal offense exist; and which penalty should be imposed on the perpetrator. When the perpetrator's guilt is proved, sentencing is carried out in as structured and uniform a manner as possible by state-appointed courts.¹³ Punishment is proportional to the severity of the crime and is influenced by mitigating and aggravating circumstances.

WOMEN 60 (James Ptacek ed., 2010) (describing justice circles operated by aboriginal communities in Canada); Allison Morris & Gabrielle Maxwell, *Restorative Justice in New Zealand*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 257 (Andrew Von Hirsch et al. eds., 2003) (describing family group conferences in New Zealand, conducted pursuant to the 1989 Children, Young Offenders and their Families Act); Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511 (2007) (describing the first victim-offender mediation processes and their development).

¹¹ Compare CHARLES K.B. BARTON, RESTORATIVE JUSTICE: THE EMPOWERMENT MODEL 15–16 (2003) (arguing that the punitive approach inherently disempowers the primary stakeholders in the conflict while restorative justice empowers them), HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 180 (1990) (defining restorative justice as a "new lens" through which to look at crime and reactions to it), and Bazemore, *supra* note 1 (describing restorative justice processes as ceremonies of "earned redemption" for offenders and positioning restorative justice against the retributive/rehabilitative dichotomy), with MARK S. UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 8 (2011) (explaining that after over twenty-five years of practice and research, Zehr and others have come to the understanding that the "sharp polarization" between the punitive and restorative approaches is "somewhat misleading"), and Paul McCold, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357 (2000) (presenting a purist approach of restorative justice).

¹² Ashworth & Zedner, *supra* note 6.

¹³ Andrew Ashworth, *Responsibilities, Rights and Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 578, 581–82 (2002).

The restorative approach, in contrast, emphasizes the personal and relational harms caused by crime. Crime is perceived primarily as an act of personal harm. Accordingly, processes create space for discussing the actual harm caused to the direct and indirect victims, and for considering ways to promote a sense of safety and belonging among community members.¹⁴ The restorative justice approach focuses, therefore, on three questions: Who has been harmed; what are their resulting needs; and who is responsible for meeting those needs.¹⁵ These questions are answered directly and jointly by the stakeholders: The offender and the victim, members of their families and representatives of their surrounding communities.

The formal definition of the offense is no more than a starting point in restorative processes; its concrete significance is shaped by the victim and others describing the way it affected them. At the same time, the severity of the offense is not defined exclusively by its direct outcome, nor is it regarded merely as a private conflict. Whereas the punitive approach ascribes importance to the negative message conveyed by the perpetrator in committing the crime to society as a whole,¹⁶ the restorative approach emphasizes the feeling of contempt for human dignity, rights or needs, which was experienced by the victim and others who have been affected. The emphasis on the ripple effects created by crime explains the community's interest in responding to the crime.

According to some restorativists, restorative justice reflects a republican worldview,¹⁷ in which community members regulate their own behavior.¹⁸ Accordingly, the participants of restorative processes

¹⁴ The different terminologies used by the restorative and punitive approaches are also indicative of the vast differences between the two. Whereas punitive justice vocabulary includes terms such as "offense," "defendant/criminal," and "suspect," restorative justice terminology uses alternative terms such as "wrong/harm" and "wrongdoer." The frequent shifts from one approach to the other in this Article, in the course of comparing them, made it difficult to remain faithful to the respective terminologies. We emphasize, however, that restorative justice jargon excludes stigmatizing labels that associate the crime with the person who committed it, such as "criminal."

¹⁵ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 20 (2002). We thank John Braithwaite for commenting on an earlier draft that at times the person who is expected to take responsibility is someone other than the person accountable for the crime, such as in cases of child offenders.

¹⁶ See Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998) (portraying crime as an act of communicating the offender's disregard of social values).

¹⁷ See JOHN BRAITHWAITE & PHILLIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990); see also Walgrave, *supra* note 1, at 561–63 (describing restorative justice as a communitarian approach).

¹⁸ See BRAITHWAITE & PETTIT, *supra* note 17 (emphasizing that unlike liberal theory, which focuses on protecting individuals against the sovereign, republican theory relates to protection against other forms of domination resulting from social injustice and violence); see also Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003

jointly and actively make decisions concerning the harm, its implications, and the proper responses to it. The role of the sovereign is restricted to preserving basic human rights in addition to defining substantive criminal law. As long as there is no deviation from the “red lines” set by the state, the community is free to manage behavior as it wishes.¹⁹

The two theories also have different approaches to the nature of the reaction to crime. Restorative justice considers penal sanctions as administrative aggression, imposed by the state in response to the aggression by the offender. Conversely, restorative justice processes seek to achieve restorative, corrective measures that can “put right” the harm done.²⁰ Focusing on restoration does not mean abstaining from a response, or even providing a milder response; rather, it reflects a reaction which combines high social control with high social support.²¹

B. *Punitive and Restorative Approaches Compared*

The criminal process opens with an investigation of the reported crime. The investigative material is passed on to the prosecution for indictment. Once an indictment has been filed, the legal process begins, with adjudication as its first stage and sentencing as the second. Adjudication becomes unnecessary in many cases, when the parties agree to a plea bargain. The decision on whether a trial is to be conducted is forced on both the victim and the offender.²² The process

UTAH L. REV. 205, 231 (explaining the differences between restorative justice, which is based on republicanism, and punitive justice, which is based on liberalism); Walgrave, *supra* note 1, at 554–55.

¹⁹ John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389 (discussing the role of state-issued rules in ensuring victims’ ability to express their positions freely, as well as provisions for minimal emotional and physical support); John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563 (2002) (discussing state-imposed boundaries that proscribe any violent or coercive expressions); Luna, *supra* note 18, at 289 (explaining that while lawmakers are least capable of making suitable decisions in concrete cases, they are most capable of setting general boundaries for punishment in different categories of crime, reflecting widely shared values and constitutional constraints; the stakeholders are then free to reach an agreeable outcome within these boundaries).

²⁰ ZEHR, *supra* note 11, at 186.

²¹ See Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 114, 116–17 (Heather Strang & John Braithwaite eds., 2001) (explaining that the restorative reaction to crime differs from the punitive approach, which reacts to crime through high social control and low social support, and that both approaches differ from a neglectful approach, which provides both low social support and low social control, and a permissive, or rehabilitative approach, which provides high social support but low social control (the “social discipline window”).

²² This description is limited to Anglo-American legal systems in which adversarial criminal processes are customary. Criminal justice processes in Continental legal systems carry

culminates in the imposition of punishment, which often ravages the defendant's freedom and dignity.²³

The restorative justice approach offers processes that differ substantially from the criminal processes.²⁴ A precondition for a restorative justice process to take place is the offender's admission of the crime. Secondly, both the offender and the victim are required to consent to a face-to-face restorative dialogue, and this voluntarism is reexamined throughout the process.²⁵ The practical significance of these two conditions is that restorative justice is inapplicable in many cases.²⁶

In restorative processes the interested parties themselves—as well as affected community members—are direct parties to the process. The professionals involved act largely as suppliers of information and service providers rather than as decision-makers. Attorneys are generally not invited to be part of the process, and if they are present, their role is limited to the provision of information. Each participant's voice is heard in its authentic form, without being processed through procedural or evidentiary filters. The only restriction is a prohibition against pressure, violence, and domination.²⁷

Crime victims are called to speak of their needs and the damage which they incurred as well as to propose ways of repairing the harm and preventing additional damage.²⁸ Offenders are expected to take explicit responsibility for their actions, to listen and respond to what the

entirely different characteristics, affecting, among other things, the status of the victim.

²³ Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 526 (2005).

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

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

²⁶ “Mostly-restorative” processes, however, are possible when there is no specific victim, such as in cases of vandalism, tax fraud, and drunk driving. For a typology of “fully,” “mostly,” and “partly” restorative justice processes, see Paul McCold & Ted Wachtel, *In Pursuit of Paradigm: A Theory of Restorative Justice*, RESTORATIVE PRACTICES E-FORUM (Aug. 10–15, 2003) (presented at the thirteenth World Congress of Criminology), available at http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/paradigm.pdf.

²⁷ Braithwaite, *Setting Standards for Restorative Justice*, *supra* note 19, at 565.

²⁸ The conception of the victim as a partner in the decision-making process following a crime is one of the key innovations of restorative justice. See David Miers, *Situating and Researching Restorative Justice in Great Britain*, 6 PUNISHMENT & SOC'Y 23 (2004).

victims have to say, and to propose their own ways of repairing the harm and preventing any recurrence of the offenses. Consequently, the outcomes of restorative justice processes are shaped by the parties themselves according to their needs and can be unique in nature.²⁹ The restorative process has therefore often been described as an empowering experience, by contrast to the criminal process, which is commonly criticized as reawakening the trauma and disempowering the victim.³⁰

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

There are several models of face-to-face restorative justice processes, the most common being Victim-Offender Mediation (VOM), Conferencing, and the Circle. The models differ primarily by the number of participants and the level of community involvement in them. VOM involves an intimate encounter between the victim and the offender, together with a mediator.³³ Conferences include the victim, the offender, and their respective communities of support, as well as community representatives and professionals.³⁴ Circles are practiced mainly in native communities.³⁵ They often involve members of an

²⁹ Joanna Shapland et al., *Situating Restorative Justice Within Criminal Justice*, 10 THEORETICAL CRIMINOLOGY 505 (2006).

³⁰ See, e.g., BARTON, *supra* note 11, at 15, 16.

³¹ See Bazemore, *supra* note 1, at 797 (suggesting that restorative justice only applies to offenders who have admitted guilt or who have been found guilty, in contrast with punitive justice which, despite due process protections, is often based on "bargaining in the service of retributive ends" and attorneys' interests).

³² *Id.* (portraying restorative justice as leading to "win-win" solutions; only by attending to the needs of the victim and the community following the crime can the offender be rehabilitated); see also STRANG, *supra* note 2, at 155-91 (providing a statistical proof for the "win-win" outcome of restorative justice: When victims responded positively to restorative justice conferences offenders responded positively as well in the majority of cases. Win-win results relating to dimensions such as participation, legitimacy, emotional restoration, and procedural justice occurred significantly more often in conferences than in court, while win-lose occurred significantly more often in court.).

³³ Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52, 53 (1989).

³⁴ See Shapland et al., *supra* note 29, at 520-21 (describing conferences as strengthening the social bonds between offenders and their family members, between victims and their relatives, and among the various supporters).

³⁵ Julian V. Roberts & Kent Roach, *Restorative Justice in Canada: From Sentencing Circles to*

entire community, and include spiritual and traditional elements representing the uniqueness of the specific community. In all three models, the processes are conducted by a neutral, professional facilitator. Before the encounter, a thorough preparation phase takes place, administered by the facilitator. During the gathering the participants discuss the offense and its implications, and collectively shape the reparation plan. When necessary, an additional meeting is held. After the gathering, the implementation of the decisions is monitored and reported to the state authorities. When a criminal process has begun, the state authorities decide whether or not to pursue it according to the results of the restorative process. In cases where the reparation plan has not been carried out, the case is transferred to (or remains in) the criminal process. Although the community plays a dominant role in all of these models, state officials participate in the processes and monitor their implementation, thus retaining the state's involvement.

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

Punitivists, on the other hand, have raised serious concerns regarding the ability of restorative justice processes to protect offenders' due process rights, and in particular the presumption of innocence. The admission requirement creates a risk of false admissions, particularly among offenders belonging to minority groups, those with mental illnesses, and juveniles.³⁶ When restorative processes begin after the admission or finding of guilt, due process rights protect the offenders' interests other than maintaining their innocence.³⁷ But when restorative

Sentencing Principles, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?, *supra* note 10, at 237, 237, 240.

³⁶ Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845 (2003). *But see* Gina Villar, Joanne Arciuli & Helen M. Paterson, *Remorse in Oral and Handwritten False Confessions*, 18 LEGAL & CRIMINOLOGICAL PSYCHOL. (forthcoming 2013) (showing that expressions of remorse are significantly more elaborated and more common in cases of true confessions compared with false ones).

³⁷ *But see* Tamar M. Meekins, *Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 46, 77 (David B. Wexler ed., 2008) (considering the role of defense attorneys in drug courts as the promoters of their clients' "best interests"); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender*

justice is used as a diversion from the criminal process or takes place before the admission or finding of guilt, the risk of false admission raises constitutional concerns.³⁸ Punitivists also question the ability of restorative justice to provide deterrent, effective, and “just” reactions to serious crimes. Restorative justice, in other words, is perceived as a “soft option” by punitivists.

In practice, restorative justice processes are currently being used in thousands of programs throughout the world.³⁹ Many studies consistently indicate the effectiveness of restorative processes in reducing recidivism rates.⁴⁰ Empirical findings also indicate the satisfaction of victims and the improvement in their emotional state as a result of their participation in restorative processes.⁴¹ Therefore, irrespective of one’s position toward restorative justice, it is clearly “here to stay.” Our purpose in this Article is to identify the position of restorative justice vis-à-vis punitive justice, focusing on their respective goals.

About Drug Treatment Court Practice, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 58–59 (2000) (discussing similar concerns relating to problem-solving courts).

³⁸ *But see* SHERMAN & STRANG, *supra* note 2, at 13 (proving that, in fact, offenders who were referred to restorative justice processes were more likely to experience the process as fair than those who were referred to court); STRANG, *supra* note 2, at 126–29; *see also* ADAM CRAWFORD & TOM BURDEN, INTEGRATING VICTIMS IN RESTORATIVE YOUTH JUSTICE 58, 70–71 (2005) (demonstrating that even young offenders who met directly with their victims felt that the process outcomes were fair and that they were treated with respect by their victims); Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS?, *supra* note 10, at 219 (providing similar results for juvenile offenders).

³⁹ Mark S. Umbreit, Robert B. Coates & Betty Vos, *The Practice of Victim Offender Mediation: A Look at the Evidence*, in INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE 691, 692 (Shlomo Giora Shoham, Ori Beck & Martin Kett eds., 2008).

⁴⁰ SHERMAN & STRANG, *supra* note 2, at 68–71 (comparing court and conferencing processes in Canberra, Australia); Bonta et al., *supra* note 2, at 113–15 (reviewing thirty-nine restorative justice studies in various jurisdictions, and presenting small, but significant and consistent reductions in recidivism rates); Latimer, Dowden & Muise, *supra* note 2, at 137–39 (conducting a meta-analysis of findings from twenty-two studies regarding recidivism rates following restorative justice programs and showing a significant reduction of crime compared with recidivism rates following court processes).

⁴¹ STRANG, *supra* note 2, at 132–39 (presenting findings regarding enhanced satisfaction and healing for victims whose cases were randomly assigned to conferences instead of court in Canberra, Australia); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167 (combining data from seven evaluation studies comparing restorative justice and court processes, and showing that in all psychological measures restorative justice produced significantly better outcomes for victims); Caroline M. Angel, *Crime Victims Meet Their Offenders: Testing the Impact of Restorative Justice Conferences on Victims’ Post-Traumatic Stress Symptoms* (Jan. 1, 2005) (unpublished Ph.D. dissertation, University of Pennsylvania), available at <http://repository.upenn.edu/dissertations/AAI3165634> (presenting findings regarding reduced post-trauma symptoms among robbery and burglary victims whose cases were randomly referred to conferences).

II. THE GOALS OF THE CRIMINAL PROCESS

Whereas the punitive approach generally considers retribution, deterrence (general and personal), rehabilitation, incapacitation, and denunciation of the crime⁴² as the goals of penal sanctions, many restorative justice scholars present it as promoting entirely different goals.⁴³ Restorative justice, however, can in fact achieve the punitive goals in addition to its unique consequentialist objectives. Section A presents the arguments explaining how both approaches may achieve the goals of criminal law as well as those presenting the unique objectives of restorative justice. The dispute largely revolves around the question of whether requital⁴⁴ is either attainable or desirable within the restorative philosophy. We will address this question in Section B.

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

⁴³ See, *e.g.*, BRAITHWAITE & PETTIT, *supra* note 17, at 54–85, 91–92 (arguing that the goal of restorative justice is promoting equal dominion among all members of society).

⁴⁴ We choose the term “requital” for its broad meaning which includes the various interpretations on retribution. Requital is also a neutral term which has been left outside the academic discourse about punishment and its justification. See, *e.g.*, BRAITHWAITE & PETTIT, *supra* note 17 (using, critically, the term “retribution”); JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970) (proposing the term “hard treatment”); VON HIRSCH, *supra* note 42 (considering censure as a goal of punishment).

A. *What Do Punitive and Restorative Approaches Try to Accomplish?*

Table 1
The goals of the retributive and restorative paradigms

		Punitive Justice	Restorative Justice
Utilitarian Goals: Crime Reduction	Personal Deterrence	External incentives: escalating punishments combined with strict enforcement	Internal incentives: reintegrative shaming and procedural fairness encouraging self-regulation
	General Deterrence	Consistent and predictable sanctions	Increasing reporting rates and strengthening community ties
	Rehabilitation	Rehabilitation programs as alternatives or supplements to punishment	Focusing on the crime, not the criminal; offender's involvement in decision-making; rehabilitation within the community
	Incapacitation	Imprisonment; death penalty	Spreading responsibility on many among offender's community
	Denunciation, Norm-Setting	Public judicial decisions	Authentic expressions by process participants backed up by reparation plan; offender's remorse

Additional Consequential Goals	Reparation of Harm		Addressing needs of anybody affected by crime
	Community Empowerment		Recruiting communities of support in crafting and implementing reparation plan
Deontological Goals	Requital	Just desert, proportionality	Illegitimate goal; reparation plan as burden; reparation as restoration of justice

In what ways can restorative justice serve the utilitarian objectives of the punitive approach?⁴⁵ Punishment, according to utilitarianism, may be justified only when it is imposed in order to attain objectives which result in benefit to society: for the sake of deterrence, the prevention of recidivism and the rehabilitation of the offender.⁴⁶ As Table 1 demonstrates, restorative justice can potentially achieve the objectives of the classic utilitarian school in addition to its own stated goals.⁴⁷ Accordingly, criticism is not directed principally at the utilitarian goals themselves, but rather at the inefficient, unjust, and coercive methods that the punitive approach adopts in pursuing them.⁴⁸

Punitive justice justifies punishment for its deterrent effect. Deterrence theory assumes rationality,⁴⁹ but at least in certain types of offenses and certain segments of the population, it is doubtful whether

⁴⁵ See JOHN STUART MILL, *UTILITARIANISM* (1861), reprinted in *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 1, 6 (Wildside Press 2007) (1910) (defining the utilitarian ethical theory, which holds that the criterion for examining the worthiness of any given action is its ability to achieve the maximization of happiness and minimization of suffering).

⁴⁶ See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., Univ. of London 1970) (1789) (arguing that punishing a first-time offender when reoffending is unlikely to occur is immoral and unjustified).

⁴⁷ See BRAITHWAITE & PETTIT, *supra* note 17, at 64–65; Philip Pettit, *Republican Theory and Criminal Punishment*, 9 *UTILITAS* 59 (1997) (presenting a republican approach which adopts the consequentialist goal of dominion or freedom as non-domination).

⁴⁸ MICHAEL H. TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); LUCIA ZEDNER, *CRIMINAL JUSTICE* 94 (2004). *But see* BRAITHWAITE & PETTIT, *supra* note 17, at 52–53, 202 (criticizing utilitarianism as vague and preferring a consequential theory the goal of which is the promotion of personal dominion).

⁴⁹ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. POL. ECON.* 169 (1968) (explaining that a person committing an offense considers whether the expected utility of the crime exceeds its anticipated damage, and that the damage is a function of the probability of conviction and the estimated punishment).

the severity of the punishment affects the future behavior of offenders.⁵⁰ In a reality of high case attrition,⁵¹ the certainty of enforcement is low as well. What actually deters people from committing crimes, according to restorativists, is *shame*. According to Braithwaite's reintegrative shaming theory, restorative justice provides a more efficient personal deterrent, because it creates a space in which the community shames offenders for their deeds, while expressing commitment and concern toward them. The combined message of denunciation of the wrongful act with the acceptance of the wrongdoer enables the offender to reintegrate into society after having taken measures to repair the harm caused by the crime.⁵²

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

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

⁵⁰ See Luna, *supra* note 18, at 212–13.

⁵¹ JOAN R. PETERSILIA, ALLAN ABRAHAMSE & JAMES Q. WILSON, RAND CORP., POLICE PERFORMANCE AND CASE ATTRITION (1987), available at <http://www.rand.org/pubs/reports/R3515> (aiming to examine the reasons for the high case attrition rate in the United States, where less than half of all felony arrests result in conviction, and identifying some police practices and community characteristics which explain approximately half of the variation in attrition rates across different police agencies).

⁵² JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

⁵³ Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307 (2006).

⁵⁴ STRANG, *supra* note 2, at 170–77.

⁵⁵ These findings were verified in randomized-assignment tests. See SHERMAN & STRANG, *supra* note 2; Latimer, Dowden & Muise, *supra* note 2. Other studies have identified diversity in the effectiveness of restorative justice in reducing reoffending. See Bonta et al., *supra* note 2.

being caught and hence the reluctance of potential offenders to commit offenses.⁵⁶

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

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

⁵⁶ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME & JUST.* 1, 60 (1999).

⁵⁷ See LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE*, *supra* note 2, at 15.

⁵⁸ See RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* 4 (2005) (explaining that no more than twenty-five percent of the crime reduction of the 1990s can be attributed to increased incarceration); Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *PRISON J.* 48S (2011); see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 *J. ECON. PERSP.* 163, 178–79 (2004) (estimating that approximately one-third of the crime reduction of the 1990s was related to increased incarceration, but that this can be attributed to the incapacitation effect rather than future deterrence).

⁵⁹ See Braithwaite, *supra* note 56, at 68–70 (arguing that even when the sanction is rehabilitative, the outcome is still one of labeling offenders—if not as "evil," then as "sick"; if not as "criminals," then as "crazy"; in addition, the imposition of "rehabilitative" sanctions leaves offenders in a passive position after having been "diagnosed" as in need of recovery, passiveness that reduces the prospects for successful rehabilitation).

⁶⁰ JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (2010) (arguing that the difficulties in finding employment, as well as the societal and familial troubles encountered by ex-convicts push them back into criminal behavior and prevent their reintegration into society); ZEDNER, *supra* note 48, at 94; Michael A. Hallett, *Race, Crime and For-Profit Imprisonment: Social Disorganization as Market Opportunity*, 4 *PUNISHMENT & SOC'Y* 369, 379–81 (2002) (explaining that the

processes, by contrast, the active involvement of offenders and their supporters in selecting the rehabilitation program, along with the strengthening of their own familial and societal bonds, make restorative justice an effective means of rehabilitating offenders.⁶¹

Incapacitating offenders is considered an additional utilitarian goal of punitive justice. Proponents of restorative justice, however, point out the high percentage of violence in prisons and the increase in recidivism post-release.⁶² Erroneous identifications and speculative risk assessments are additional obstacles toward effective incapacitation.⁶³ In restorative justice, it is suggested, the community can incapacitate offenders in creative ways, such as placing in-house inspectors in scofflaw businesses, having a relative move into the offender's home, or taking away the offender's car keys on weekends.⁶⁴ If activity at this level does not accomplish prevention, it will be necessary to move up in the enforcement pyramid⁶⁵ toward more coercive measures.⁶⁶

Another utilitarian objective of punishment is denunciation of crime.⁶⁷ More broadly, and more recently, a goal of exchanging messages between the various parties to the criminal process has been

negative effects of prisons are greater than their positive impact on prisoners); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1054–56.

⁶¹ In the Canadian province of Newfoundland and Labrador, for instance, restorative conferences that were used in family violence cases strengthened family ties considerably. See Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131 (2000).

⁶² ZEDNER, *supra* note 48, at 94 (explaining that the stigmatizing effects of imprisonment and the intrusion in family life increase the likelihood of reoffending); Ezzat A. Fattah, *A Critical Assessment of Two Justice Paradigms: Contrasting the Restorative and Retributive Justice Models*, in SUPPORT FOR CRIME VICTIMS IN A COMPARATIVE PERSPECTIVE 99, 99–100 (Ezzat A. Fattah & Tony Peters eds., 1998) (describing the detrimental implications of imprisonment).

⁶³ Luna, *supra* note 18, at 211.

⁶⁴ As Professor Braithwaite vividly describes:

[T]he Uncle Harrys of this world come up with ideas more attuned to the reality of the offender's circumstances than can a judge, and are better monitors of their implementation than police officers because one Uncle Harry might have more contacts with the offender in a month than all the police in the city during a year. Intimates, in short, can incapacitate more intensively, more creatively, more sensitively, more consensually, and in a more dynamically responsive way than the criminal justice system.

Braithwaite, *supra* note 56, at 67.

⁶⁵ JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 30 (2002) (presenting the regulatory pyramid which has at its base the most restorative dialogue-based approach for securing compliance with the law; as we move up the pyramid more coercive methods are used to enforce the law).

⁶⁶ Braithwaite, *supra* note 56, at 53–56. Many abolitionists hold a similar view. See Jim Thomas & Sharon Boehlefeld, *Rethinking Abolitionism: "What Do We Do with Henry?"* *Review of de Haan*, THE POLITICS OF REDRESS, SOC. JUST., Fall 1991, at 239.

⁶⁷ ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 18 (6th ed. 2009).

identified. Moving beyond the traditional goals of punitive justice, expressive theories emphasize the negative message that the crime conveys and the condemning message that punishment communicates.⁶⁸ Punishment, from this perspective, is perceived as a way to express negative emotions held by the public at large.⁶⁹ Restorative justice processes attain the goal of social condemnation as well, when all those present express their sorrow, shame, or anger at what happened, provide details of the damage caused, and formulate a multidimensional reparation plan.⁷⁰ Such a message is arguably more credible and more effective than a sentence handed down by an unfamiliar judge.⁷¹ Moreover, offenders typically express remorse,⁷² thereby validating the denunciatory message even further. In fact, the distinction made in restorative justice processes between the denunciation of the crime and acceptance of the offender enables offenders and their supporters to condemn the criminal act wholeheartedly, by contrast to the criminal process, which incentivizes defendants to minimize their responsibility.

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

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

⁶⁸ See, e.g., FEINBERG, *supra* note 44, at 98–99; Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 441.

⁶⁹ See Kahan, *supra* note 16, at 1641 (discussing punishment having the function of reflecting the repugnance of the community, i.e., the “emotions of the community”).

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

⁷¹ Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J.L. & SOC’Y 237, 252 (1998) (emphasizing that the message is especially powerful when the reparation plan is backed by community and government services and supervised by the enforcement authorities).

⁷² Expressions of remorse and requests for forgiveness occur in many restorative processes. See SHERMAN & STRANG, *supra* note 2; STRANG, *supra* note 2, at 114–15.

⁷³ Braithwaite, *supra* note 56, at 37.

⁷⁴ See, e.g., Nadera Shalhoub-Kevorkian & Edna Erez, *Integrating a Victim Voice in Community Policing: A Feminist Critique*, 9 INT’L REV. VICTIMOLOGY 113 (2002) (describing the complexity of policing domestic violence in Arab communities); Julie Stubbs, *Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 42, 49 (Heather Strang & John Braithwaite eds., 2002) (discussing the problems in some restorative justice programs addressing family violence in indigenous communities where the safety of women was placed at the hands of local men, some of whom were themselves abusers).

“Traditional customs” such as female genital mutilation and violence against women and children may be overlooked or even justified, and the victims and their stories silenced.⁷⁵ It is important, therefore, to involve state authorities as “watchdogs” in community-based restorative processes, to warn against violations of basic human rights.⁷⁶ The question whether restorative processes are successful in resolving these problems depends largely on how they are practiced.⁷⁷

Beyond the utilitarian goals of punitive justice, the restorative approach has its own unique consequential objectives.⁷⁸ By contrast to the punitive approach, restorative justice focuses on victims, and the reparation of the harm done to them and to others constitutes its primary goal.⁷⁹ The restorative approach criticizes punitive justice for taking a high toll from victims in the promotion of societal goals. As an alternative, it offers processes that can empower victims, strengthen social bonds, and heal, irrespective of their outcomes.⁸⁰ In fact, findings have shown that victims who participated in restorative justice processes experienced a dramatic decrease in their post-trauma symptoms. The therapeutic effect was so dramatic that those processes were compared to cognitive-behavioral therapy, an effective psychological treatment method for reducing post-trauma symptoms.⁸¹ Victims’ rights reforms across the globe have brought the punitive approach closer to restorative justice in terms of empowering victims. But the gap between the two approaches is still significant; promoting the wellbeing of victims is not a primary goal of punitive justice.⁸²

⁷⁵ *But see* Braithwaite, *supra* note 19 at 564 (arguing that empirical evidence indicates that, in fact, women’s voices are heard more frequently than males’ in restorative justice processes, in contrast with the reality in formal courtrooms).

⁷⁶ An example is the involvement of judges in sentencing circles in Canada and in the United States. The judge is passive during the circle but it is within his (or her) authority to decide whether or not to accept the outcome plan as a part of the sentence or as a replacement to it. *See* Goel, *supra* note 10, at 64–65.

⁷⁷ *See* Barbara Hudson, *Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity*, 10 *THEORETICAL CRIMINOLOGY* 29, 29–30 (2006) (suggesting that restorative processes should meet the principles of discursiveness, relationalism and reflectiveness to address this concern).

⁷⁸ *See* BRAITHWAITE & PETTIT, *supra* note 17, at 25–53 (explaining why it is a consequential theory of justice).

⁷⁹ ZEHR, *supra* note 11, at 184; Fattah, *supra* note 62, at 104; Martin Wright, *The Court as Last Resort: Victim-Sensitive, Community-Based Responses to Crime*, 42 *BRIT. J. CRIMINOLOGY* 654 (2002).

⁸⁰ *See* BARTON, *supra* note 11, at 16, 21, 27 (explaining the notion of empowerment in restorative processes as therapeutic).

⁸¹ Angel, *supra* note 41.

⁸² Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 *MICH. J. GENDER & L.* 423 (2012).

An additional stated goal of restorative justice is to repair and strengthen community ties.⁸³ While the punitive approach focuses on offenders as individuals and considers the community a passive victim at most, the restorative approach places the community at the center of the process. Indeed, “community” is a vague, illusive concept in our modern urban society. A “community” in the restorative sense is not an entity defined by geography. Rather, it is a network of different social, familial, and professional ties.⁸⁴ Restorative justice processes awaken inactive ties and strengthen functioning ones by recruiting acquaintances of offenders and victims to sit together and discuss the crime and the appropriate reactions to it.⁸⁵ The community is perceived as (secondarily) responsible for the occurrence of the offense and as a (secondary) victim.⁸⁶ Community members, representing the shared responsibility of the community, are invited to restorative processes to take part in the design of the restoration plan. As a (secondary) victim, the community needs are strengthening social bonds, regaining residents’ sense of security, and reducing crime rates.⁸⁷ Community bonds are strengthened through the intensive discussion of the consequences of the offense, as well as by the active participation in, and supervision of, the reparation plan.⁸⁸

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

⁸³ Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. SOC. PHIL. 91, 96 (2004).

⁸⁴ Mimi Kim, *Alternative Interventions to Intimate Violence: Defining Political and Pragmatic Challenges*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 10, at 193, 195–96.

⁸⁵ See RANDALL COLLINS, INTERACTION RITUAL CHAINS (2004) (describing restorative justice processes as a “social ritual”). Collins explains how such rituals reinforce a sense of belonging among their participants, strengthen social norms, create “group energy” and reduce anger among the participants. *Id.*

⁸⁶ Bazemore, *supra* note 1.

⁸⁷ LODE WALGRAVE, RESTORATIVE JUSTICE, SELF-INTEREST AND RESPONSIBLE CITIZENSHIP 76 (2008) (portraying the community as both a means and an end).

⁸⁸ Robert White, *Social Justice, Community Building and Restorative Strategies*, 3 CONTEMP. JUSTICE REV. 55, 68 (2000) (demonstrating how community empowerment can be achieved through the assignment of voluntary activities to minors participating in restorative justice conferences).

to two additional distinct consequentialist objectives, namely the reparation of harm and community empowerment.

B. *Requital*

While the dispute between the restorative and the punitive approaches regarding the utilitarian purposes focuses on the ways to achieve them, the dispute around requital is fundamental to the very concept.⁸⁹ The theory of retribution is derived from the deontological moral philosophy,⁹⁰ which holds that, irrespective of the outcome of the penal sanction, it is morally necessary to ensure that the punishment is proportionate to the severity of the offense. Causing harm to a person who harmed societal values has intrinsic positive moral value.⁹¹

Restorativists differ about the deontological theory.⁹² Some utterly reject the notion of justifying punishment through requital⁹³ and hold that punishment can only be justified when it promotes the common good. The desire to revenge, although natural, is irrational and unworthy.⁹⁴ Consequently, if there is evidence that restorative justice is likely to reduce criminal behavior while severe punishment is not, it is preferable to take a pragmatic approach and waive the “primitive” urge for requital or revenge.⁹⁵ Another school of thought opposes the deontological approach on the grounds that the existence of a “public desire” to requite offenders is not supported by findings; rather, crime victims seek to achieve entirely different objectives—principally those of a fair and respectful process, compensation, acknowledgment of their suffering, and opportunities to influence the outcome of the process.⁹⁶

⁸⁹ By “requital” we mean both the goal of achieving proportionality in punishment (“just deserts”), and the goal of “making offenders pay” for their deeds (retribution).

⁹⁰ Deontological moral theories highlight the intrinsic value of actions and norms. See GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 198–99 (2007).

⁹¹ See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 5 (1955) (explaining that, according to the retributivist approach, “[t]he state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not”).

⁹² For a review of the various positions regarding retribution within restorative justice see MICHAEL KING ET AL., *NON-ADVERSARIAL JUSTICE* 44–45 (2009).

⁹³ See MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* 133–35 (Waterside Press 2d ed. 1996) (1991); Daniel Van Ness, *supra* note 1, at 251–52, 258–59.

⁹⁴ Lode Walgrave, *Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?*, 34 *HOW. J. CRIM. JUST.* 228, 233, 235, 242 (1995).

⁹⁵ *Id.*

⁹⁶ STRANG, *supra* note 2, at 9–23; Jo-Anne Wemmers, *The Meaning of Justice for Victims*, in *THE INTERNATIONAL HANDBOOK OF VICTIMOLOGY* 27 (Shlomo Giora Shoham, Paul Knepper & Martin Kett eds., 2010).

Indeed one could argue that retributivism is normative and should not be subjected to the influence of empirical arguments. Anyone who attributes at least some significance to empirical findings, however, will have difficulty ignoring the changes in the perception of justice by the public in general and by victims in particular.

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

The difficulty arising from this line of argument is that the tailor-made treatment produces highly distinct outcomes, violating the equality requirement.¹⁰¹ The restorativist response to the inequality concern is that referring every admitting offender to restorative justice processes according to known criteria represents equal treatment. Equality in its restorative meaning is followed through the respectful and fair treatment of all participants during the process, notwithstanding its outcomes. Furthermore, restorativists argue that by involving crime victims in various junctions of the criminal process it is

⁹⁷ See R.A. Duff, *Alternatives to Punishment—or Alternative Punishments?*, in *RETRIBUTIVISM AND ITS CRITICS* 43 (Wesley Cragg ed., 1992) (arguing that restorative justice processes do not offer alternatives to punishment but rather alternative forms of punishments); Luna, *supra* note 18, at 295, 299 (arguing that successful restorative justice processes may lead to agreed-upon resolutions that represent the participants' varying interests and punishment ideologies).

⁹⁸ See, e.g., ZEHR, *supra* note 11, at 210; Walgrave, *supra* note 1, at 558–59; Kathleen Daly, Professor, Griffith Univ., Address before the Australia and New Zealand Society of Criminology Annual Conference: Does Punishment Have a Place in Restorative Justice? (Sept. 28–30, 1999).

⁹⁹ JOANNA SHAPLAND ET AL., *RESTORATIVE JUSTICE: THE VIEWS OF VICTIMS AND OFFENDERS—THE THIRD REPORT FROM THE EVALUATION OF THREE SCHEMES* 44–45 (2007), available at http://www.restorativejustice.org.uk/resource/ministry_of_justice_evaluation_does_restorative_justice_affect_reconviction_the_fourth_report_from_the_evaluation_of_three_schemes/#.USeHUqVTEUU (stating that approximately three-quarters of victims and offenders found conference outcomes satisfying).

¹⁰⁰ Michael Wenzel et al., *Retributive and Restorative Justice*, 32 *LAW & HUM. BEHAV.* 375, 376–77 (2008).

¹⁰¹ Andrew Von Hirsch & Andrew Ashworth, *Not Just Deserts: A Response to Braithwaite and Pettit*, 12 *OXFORD J. LEGAL STUD.* 83, 92–94 (1992). But see Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 *BUFF. CRIM. L. REV.* 65, 77 (1999) (explaining why victims' wishes regarding the appropriate punishment should not be considered according to retribution theory).

the punitive approach that has moved away from the strictly just desert ideology.¹⁰²

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

III. INTEGRATION

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

¹⁰² Cf. Moore, *supra* 101, at 77 (arguing that the involvement of victims in the criminal process contradicts the principles of just desert).

¹⁰³ Wenzel et al., *supra* note 100, at 377.

¹⁰⁴ Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 317 (explaining that punishment is the way for offenders to right the wrongs they have committed, and that restorative justice transforms punishment into penance).

¹⁰⁵ See *id.* at 315.

¹⁰⁶ See *id.*

¹⁰⁷ Bibas & Bierschbach, *supra* note 3, at 87–92.

justice—through which socially desirable values may be injected into criminal law. The restorative justice tool is capable of promoting societal and therapeutic objectives; but it can, at least to some extent, also achieve requit in its restorative sense. This means that both approaches may find shelter under the wings of the criminal law system. In other words, in appropriate cases, criminal justice *is* restorative justice.

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

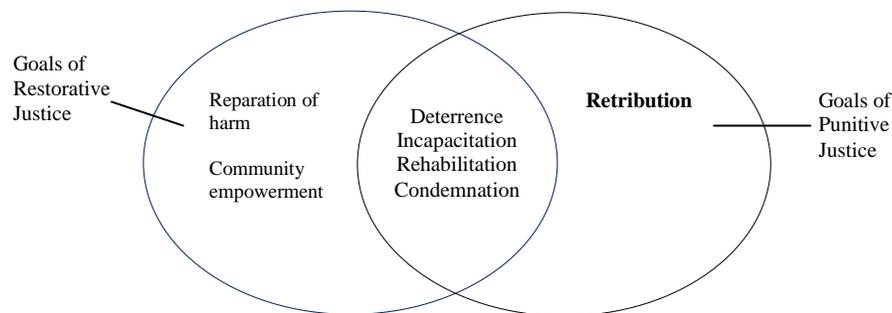
A. *Synergizing Punitive and Restorative Approaches*

Given the ambivalence displayed by restorative justice proponents to requit, the relationship between the two paradigms—punitive and restorative—may be described in two alternative ways. The first is in terms of two equal, partially intersecting circles (see Figure 1). The intersecting area reflects the goals that both approaches can potentially achieve. The separate areas reflect the distinct goals of each paradigm.¹⁰⁸ This version seems preferable for anyone who remains faithful to requit in its strict retributive meaning, which only the punitive approach seeks to promote. The second alternative portrays the relationship in two concentric circles. The smaller circle, which represents the goals of the punitive approach, is encompassed by the larger, which represents the goals of the restorative approach (see Figure 2). According to this description, restorative justice can potentially attain the objectives of punitive justice in their entirety, including that of requit in its restorative sense, as well as its own. This version may seem appealing for those who assign a broad, “positive” meaning to

¹⁰⁸ We chose “retribution” in the part representing the distinct goals of punitive justice to clarify its purely retributive meaning, in contrast with “requit,” which can enclose the different restorative meanings of punishment. We return to the broader word “requit” in Figure 2, below, to emphasize its capacity to include both retributivist and restorativist meanings of deontological reactions to crime.

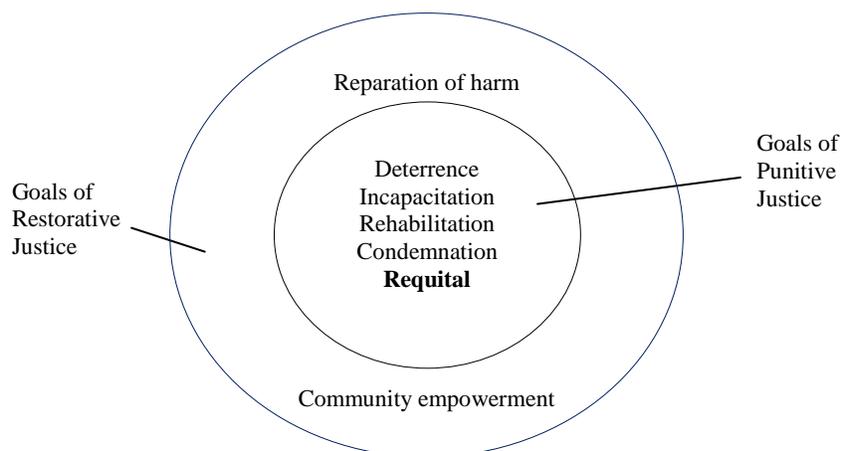
requital. Punitive justice, by contrast, assigns little or no weight to the reparation of harm.¹⁰⁹ Although it does not object to the promotion of victims' wellbeing, this goal is relegated when in conflict with others. Community empowerment is likewise not one of the goals of punitive justice, which considers the community as a passive victim. Accordingly, it is the restorative justice circle that encompasses the punitive justice circle, and not the opposite.

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



¹⁰⁹ Bruce J. Winick, *Therapeutic Jurisprudence and Victims of Crime*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 3 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011) (explaining the tension between the needs of the criminal justice system and victims' needs). In the last decades states have introduced far-reaching reforms providing legal and constitutional rights to crime victims concerning their participation in the legal process, their privacy and safety. Nevertheless, despite the substantial "softening" of the pure adversarial criminal process it is still far from being victim-oriented. See generally DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINAL PROCEDURE (3d ed. 2010); Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229 (2005) (describing recent developments in victims' rights); Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237 (2008) (arguing that despite victims' reforms the adversarial process is not victim-centered).

Figure 2
Relationship between the goals of the restorative and the
punitive approaches: concentric circles



Emphasizing the retributiveness in requital distances restorative justice from that purpose while emphasizing the component of proportionality (just deserts) or of “justice” in its positive sense brings it closer. Generally speaking, in most offenses, reparative measures may be considered as the infliction of pain on the offender in proportion with the severity of the offense. Reparative measures may also be considered steps for “righting the wrong” or rebalancing the imbalance created by the offense. This tool is distinct from punishment, but its purpose is similar—the restoration of justice. Emphasizing the punitiveness of requital accentuates the gap between punitive and restorative tools, in light of the fundamental objection to considerations of revenge which is inherent to the restorative philosophy.

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

¹¹⁰ Cf. Luna, *supra* note 18 (presenting a holistic perception of restorative justice processes, according to which participants holding different punishment theories, including that of just desert, may be satisfied with the process outcomes once its core procedural principles have

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

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

B. *Practical Implications*

Our model highlights that restorative justice is suitable for systemic use not only in jurisdictions that prioritize victim empowerment and offender rehabilitation; it can equally fulfill criminal law objectives in legal systems that assign prominence to deterrence and incapacitation. Many states in America, therefore, might find restorative justice at least as (if not more) suitable for achieving these goals as the punitive justice approach.¹¹¹ Moreover, even jurisdictions that explicitly construct

been met). We agree that the individual stakeholders in a certain case might indeed hold conflicting punishment ideologies and still share similar levels of satisfaction with the process and its outcomes. Other community members, however, and the public in general, may object to the use of restorative justice processes in cases of crimes of the most serious nature even when these processes yield satisfactory results for their participants.

¹¹¹ See, e.g., Umbreit et al., *supra* note 10, at 551–54 (reviewing the range and types of legislative provisions relating to victim-offender mediation in the United States). According to the review, as of 2005, statutes in twenty-nine states have at least a reference to victim-offender mediation or a similar program. *Id.* Seven of these states provide comprehensive guidelines for

retribution as their primary punitive goal in their sentencing guidelines¹¹² can re-construct the definition of their “just desert” policies to include both the restorative and the punitive meanings.¹¹³ Such a broadened understanding enables a synergy between the restorative and retributive philosophies and thus extends the achievable goals beyond their traditional scope to include socially beneficial outcomes such as victim healing and community empowerment.

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

The level of commitment of the local community to address crime is a useful parameter in deciding which of the paradigms is more likely to achieve the various criminal law objectives. The community’s ability to provide active assistance for the parties involved affects the level of success of restorative processes in attaining victim healing and preventing the future perpetration of crime by the offender. Without the active involvement of the community in the fulfillment of the reparation

victim-offender mediation programs in their statutes. *Id.* Seven additional states have a clear statutory authority for victim-offender mediation with fewer detailed requirements. *Id.* In nine states, victim-offender mediation is included as one among a list of options for courts to consider. *Id.* Finally, seven states have statutes that allow the establishment of victim-offender mediation programs and reflect strong commitment to restorative justice principles, but do not explicitly discuss victim-offender mediation. *Id.*

¹¹² In California, for instance, sentencing policies were altered in 1976 with the enactment of article 1170 of the Penal Code, reflecting preference to retributive considerations. CAL. PENAL CODE § 1170 (West 2013). The most recent legislation we are aware of concerning sentencing policy is amendment no. 113 of the Israeli Penal Code, enacted in January 2012, which makes proportionality the guiding principle for determining sentencing. Penal Law (Amendment No. 113), 5737-1977, 2337 LSI 170 (Isr. 2012).

¹¹³ In Israel, for instance, just desert is the guiding principle in sentencing policy as was stated in the recent criminal code amendment of 2012. *See* Penal Law (Amendment No. 113), 5737-1977, 2337 LSI 170.

¹¹⁴ Although restorative justice processes are held in cases without a direct victim (such as drunk driving, drug related, and vandalism offenses), there is far less empirical evidence that they actually achieve the goals of criminal law. *See* SHERMAN & STRANG, *supra* note 2, at 70 (showing that restorative justice had no effect on offenders’ recidivism in drunk driving and shoplifting offenses). Victim safety might be seen as an additional precondition for restorative justice. When a restorative process puts the victim at risk of violence or in a threat thereof, safety measures must be taken to minimize that risk before the process takes place. Punitive justice, however, might increase the risk of re-victimization of victims as well. *See* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 160 (2003) (explaining that beyond the psychological risks, legal processes also place victims at risk of retaliation by the perpetrator).

plan restorative justice may fail to achieve rehabilitation and incapacitation. Similarly, the attainment of a clear norm-setting depends, among other things, on the willingness of community members to condemn the crime expressly. Without a wall-to-wall agreement on the wrongfulness of the act expressed by community members, restorative justice is less likely to achieve the goals of denunciation of the crime and victim healing. Without the willingness of at least some community members to condemn the crime and take part in fulfilling the restorative outcomes many of the advantages of restorative justice are lost.¹¹⁵ The centrality of the State as the sole decision-maker in punitive justice becomes virtuous in these cases.

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

The seriousness of the crime is another factor for selecting the preferable philosophy in concrete cases. The more serious the offense, the greater the difficulty in achieving requital through the restorative approach alone. At the same time, the level of emotional harm caused to the victim is a predictor for the success of restorative justice processes.¹¹⁹ In other words, when the crime is heinous in nature and has caused significant harm to the victim, restorative justice has the most to offer in terms of victim healing—but has the least to offer in terms of retribution. In these cases there would be a need for a value-based

¹¹⁵ The concern regarding community involvement is particularly salient in cases of gendered violence. See, e.g., Loretta Frederick & Kristine Lizdas, *The Role of Restorative Justice in the Battered Women's Movement*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN, *supra* note 10, at 39, 50 (discussing concerns related to community members excusing violence against women as private or as deserved by the victim); Stubbs, *supra* note 74, at 54–55 (considering “the community” as both source of the problem and its solution).

¹¹⁶ See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 28 (presenting findings from the RISE experiments showing that in the vast majority of conferences victims received apologies from their offenders and many of the recipients later forgave the offenders).

¹¹⁷ This is common in many domestic violence cases. See, e.g., Stubbs, *supra* note 74, at 51 (“[W]hile restorative justice literature emphasizes participation, apology and reparation, victims of domestic violence have emphasized safety and external validation of their attempts to stop the abuse, together with deterrence and rehabilitation, over other possible outcomes.”).

¹¹⁸ This is common in victimless shoplifting offenses. See SHERMAN & STRANG, *supra* note 2, at 69–70 (showing that restorative justice did not reduce recidivism rates following victimless shoplifting offenses in Canberra, Australia).

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

decision in selecting between retribution and healing. In practice, this means that, for major offenses, three possibilities exist: 1) the restorative approach will not be used, reflecting a preference for retribution over the therapeutic goals of restorative justice; 2) only the restorative process will take place, and the goal of retribution will be relinquished for the benefit of the other goals; and 3) the criminal process and the restorative process will be combined, in order to achieve both retribution and victim healing.¹²⁰

Admittedly, integrating restorative processes into the formal punitive system may not always resolve the tension between retribution and victim healing. A prime example for that tension is the *Clotworthy* case of the Supreme Court of New Zealand. In that case the victim and the offender participated in a mediation process following a violent attack. The parties reached an agreement, according to which the offender took it upon himself to pay a significant amount of money to the victim in order to finance a cosmetic surgery that would have treated the scars the attack left on him. The Auckland District Court accepted the agreement.¹²¹ The Supreme Court, however, decided, following an appeal by the prosecution, that the public interest for a deterring sentence overrides the victim's individual interest for reparation. The offender was sentenced to three years of incarceration and the restitution amount was significantly reduced.¹²²

Notwithstanding the potential tension between the various social goals, synergizing the restorative and retributive perspective may achieve a different—and a socially beneficial blend—of criminal law objectives. The recent trial of *State v. Ravi*¹²³ provides a useful example of a formal criminal process leading to lose-lose outcomes. In this high-profile case, Rutgers University student Dharun Ravi was convicted of fifteen counts of second degree bias intimidation and invasion of privacy after placing a webcam that documented his dormitory

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

¹²¹ *R. v Clotworthy* (unreported) District Court, Auckland, T 971545, 24 April 1998.

¹²² *R. v Clotworthy* (1998) 15 CRNZ 651 (CA) (delivering the sentence, Justice Tipping explained: "We record that Mr. Cowan was present at the hearing. We gave him the opportunity to address us. He reiterated his previous stance, emphasising his wish to obtain funds for the necessary cosmetic surgery and his view that imprisonment would achieve nothing either for Mr. Clotworthy or for himself. We can understand Mr. Cowan's stance. He is to be commended for having forgiven Mr. Clotworthy and for the sympathetic way he has approached the matter. It must be said, however, that a wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity of the criminal justice system and deterrence of others are factors of major importance.")

¹²³ N.J. Super. No. 11-04-00596, 2012 N.J. Super. Unpub. LEXIS 1757 (App. Div. May 21, 2012). For an overview of the case, see Ian Parker, *The Story of a Suicide*, NEW YORKER, Feb. 6, 2012, at 36–51, available at http://nobetty.net/lab/readings/TylerClementi_TheNewYorker.pdf.

roommate Tyler Clementi during an intimate encounter with a man. Ravi consequently tweeted about what he saw and invited others to watch a planned second encounter. A few days later, the victim committed suicide by jumping off the Washington Bridge. Ravi was not charged with causing Clementi's death. After his jury convictions and facing up to ten years in prison for second degree hate crimes, Superior Court Judge Glenn Berman sentenced him to only thirty days in the county jail, three years probation, 300 hours of community service, and a \$10,000 fine and counseling.

In this case, the criminal process failed to provide healing for the victims, provided no space for a sincere apology, and sent a mixed message to the public. The victim's parents stated early during the process that Ravi did not deserve harsh punishment.¹²⁴ The other victim, the man who visited Clementi (and remained anonymous throughout the trial), submitted a victim impact statement stating that he had not wanted Ravi to go to prison, only that he had wanted him to take responsibility.¹²⁵ The defendant, however, threatened by the risk of being found guilty for committing hate crimes, refused to confess, denied any responsibility for the outcomes, and opted to remain silent at the sentencing hearing. His "letter of apology" released publicly just before the sentencing hearing was accepted with distrust and anger by the victims as it did not mention either of them.¹²⁶ The public interest was particularly strong in this precedential case as it was an opportunity to convey a clear message of norm-setting regarding gay rights, hate crimes and cyber-bullying. Nevertheless, the lenient thirty days sentence handed by the judge mocked the jury's decision to convict Ravi in all bias intimidation counts.

Could restorative justice provide a better legal reaction in this case? And if so, what goals would it have achieved? Surely, victim healing was not achieved in this litigation. Apologies granted within the criminal process are suspect of insincerity, as this case vividly illustrates.¹²⁷ More broadly, this lawsuit illustrates that despite the far-reaching reforms

¹²⁴ Lisa W. Foderaro, *Parents of Rutgers Student in Suicide Say No "Harsh" Penalty Is Needed*, N.Y. TIMES, Mar. 23, 2011, at A24.

¹²⁵ Kathleen O'Brien, *Dharun Ravi Sentencing: Clementi Visitor M.B.'s Victim Impact Statement*, STAR-LEDGER (May 21, 2012), http://www.nj.com/news/index.ssf/2012/05/dharun_ravi_sentencing_clement.html.

¹²⁶ Karen Sudol, *Clementis Dismiss Apology from Dharun Ravi, Say His Jail Sentence Should Be Longer*, NORTHJERSEY.COM (May 31, 2012), http://www.northjersey.com/news/Ex-Rutgers_student_Dharun_ravi_reports_for_jail_in_webcam_case.html?c=y&page=1.

¹²⁷ See Bibas & Bierschbach, *supra* note 3, at 98 (explaining that, for most defendants, the sentencing hearing is their first chance to apologize, and therefore, it is "no wonder that, when apologies do occur at sentencing, they often are stilted, forced, or 'not enough.' Many defendants simply read from a piece of paper." (citations omitted)).

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

Had restorative justice been used sometime along the criminal process, in contrast, all of the parties involved—the defendant, the victims, and the community—could have potentially benefitted from its outcomes. The victims could have confronted the offender, talked about their loss and engaged in an emotional dialogue. The offender, liberated from the threat of imprisonment and granted an opportunity to explain his deeds, could have taken responsibility for his actions and freely apologized. Members of the gay community and the public in general could have benefitted from a constructive discussion regarding the devastating outcomes of intimidating acts against people belonging to minority groups even when they are not knowingly intended to bias the victim. A meaningful reparation plan and a public apology could have overcome the legal questions arising in this case, providing a more suitable platform for condemning hate crimes even in disputed cases such as this. In other words, a restorative process could have provided a tailor-made, multifaceted reaction to the specific offense promoting both victims' needs, community interests, and offender accountability. Analyzing this example through our proposed model, it becomes clear that once retribution cannot, or should not be pursued in its conventional form, alternative approaches should be considered, promoting the goals of victim healing and community empowerment. Moreover, instead of compromising criminal law goals, we see that restorative justice can promote these goals in addition to its own stated objectives. Restorative justice, therefore, does not replace criminal justice nor does it abandon its traditional goals;¹²⁸ it is used *within* the criminal justice system.

¹²⁸ *Contra* Bibas & Bierschbach, *supra* note 3, at 123 (arguing against the ability of restorative justice to address punitive justice goals that “[r]estorative justice requires no amends to right the imbalanced scales of justice and no bite to underscore society’s condemnation of the crime”).

CONCLUSION

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

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

Methodologically, the proposed model describes the relationship between the two paradigms focusing on their shared and distinct objectives under the framework of criminal law. This type of analysis opens the door for integrating other non-adversarial processes as part of the toolbox of criminal law and for developing new ones.¹²⁹ Just as it is possible to envision a restorative criminal justice, perhaps one could think of other platforms for achieving criminal law goals. Perhaps it is possible to expand the aspirations of criminal law beyond its traditional goals to include other socially beneficial outcomes.¹³⁰ The proposed

¹²⁹ See KING ET AL., *supra* note 92 (gathering different nonadversarial reforms such as restorative justice, therapeutic jurisprudence, alternative dispute resolution, managerial justice, preventive law, problem-solving courts, and holistic law under the roof of “nonadversarial justice,” and outlining the diversities and commonalities between them).

¹³⁰ See David B. Wexler & Bruce J. Winick, *Introduction* to LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds.,

model can assist in the development of guiding parameters for identifying the preferred approach in various circumstances and in accordance with the various criminal law objectives. Empirical studies may be helpful in providing insights toward the identification of additional parameters for choosing between the two paradigms. For instance, it would be interesting to see whether the reason for committing a crime—be it expressionist or instrumentalist—is a predictor of the success of either paradigm. Notwithstanding the need for empirical examinations of “what works,” in what circumstances, and under which conditions, our analysis envisions an eclectic use of values and procedures within a pluralistic criminal law framework.

1996) (explaining that therapeutic jurisprudence seeks ways to promote therapeutic consequences of the law without trumping other goals).