Co-ordinating Canada's Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law

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I. Introduction:

Canada is far advanced in simultaneously implementing contrasting but complementary models of criminal justice as particpatory responses to the phenomenon of crime. That criminal justice institutions should be pursuing different, and possibly contradictory goals at the same time, is not new. But Canada's range of criminal justice models, and the manner in which they must be co-ordinated, pose important questions which highlight the complex nature of criminal justice in postmodern democratic states characterized by significant social, economic, cultural and ideological diversity. Reconciliation of these issues requires an appreciation of the reflexive dimensions of the rule of law, and demonstrates in the area of criminal justice, the valuable insights of contemporary theorists of democracy such as Habermas[1] and Kymlicka[2]. This paper is about fine-tuning the hybrid participatory process which currently exists, not about the introduction of some new system composed of unfamiliar elements.[3]

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[1] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Democracy*, MIT Press, Cambridge, 1998; or for a more accessible presentation of these ideas, J. Habermas, *The Inclusion of the Other*, MIT Press, Cambridge, 1998

[2] W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford U. Press, Oxford, 2001

[3] I have addressed this topic from different perspectives elsewhere: see Bruce P. Archibald, " La justice restaurative: conditions et fondements d'une transformation démocratique en droit pénal", in M. Jaccoud (ed.), *La justice réparatrice et la médiation: convergences ou divergences*, L'Harmattan, Paris, 2003; Bruce P. Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial' and 'Restorative' Models" in S. G. Coughlin and D. Russell, *Citizenship and Citizen Participation in the Administration of Justice*, Canadian Institute for the Administration of Justice/Les Editions Thémis, Montreal, 2001; and Bruce P. Archibald, "The Politics of Prosecutorial Discretion:Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (1998) 3 Can. Crim L. Rev. 69. On this topic see also: Kent Roach, *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice*, U. of T. Press, Toronto, 1999

The paper outlines the historical origins and current significance of traditional adversarial models of justice (punitive, rehabilitative and corrective), and explains how these have mutated into a model of criminal justice which is procedurally formal but inclusive of victims' interests. This formal inclusionary model is to be contrasted with the more flexible restorative model which has recently been adopted, in varying degrees and in various guises (for both youth and adult criminal justice), and which operates in tandem with the formal, inclusionary approach.

The paper then discusses the manner in which such a hybrid system requires careful professional attention to the exercise of discretion at all levels in order to ensure fairness, equality and effectiveness. Police, prosecutors, defence counsel, judges, correctional officials, various non-legal professionals and lay members of the community must be committed to, and integrated in different ways with, both the formal, inclusionary model and the restorative model in order to ensure these different approaches operate in a mutually supportive fashion rather than being at odds with one another. The full complexity of integrating these different models may not always be appreciated by all participants in the process, including the Supreme Court of Canada, as evidenced even in such otherwise progressive and innovative sentencing decisions as *R. v. Gladue*[4] and *R. v. Proulx*[5]. This situation provides new challenges for the legal profession.

The paper concludes with an assessment of the capacities of the new integrated system of hybrid criminal justice to meet the goals set for it in the relatively recent sentencing provisions of the *Criminal Code*[6]

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[4] [1999] 1 S.C.R. 688, 23 C.R.(5th) 197
[5] [2000] 1 S.C.R. 61; 30 C.R.(5th) 1
[6] R.S.C. 1985, c. C-46 as amended, hereafter referred to simply as "the *Criminal Code*".

and in the policies of the new *Youth Criminal Justice Act.*[7] It is argued that these pieces of legislation, and their procedural implementation, provide a reasonably appropriate, postmodern institutional response to a diverse Canadian population which is demanding differentiated, flexible, participatory structures capable of embodying the values of autonomy, equality and relationships of mutual respect in the maintenance of criminal justice. These systemically integrated criminal justice models, if properly balanced and administered, represent an advanced reflexive form of the rule of law, entirely consistent with the expectations of a deliberative understanding of democracy. Legal professionalism in the context of this postmodern hybrid model of criminal justice requires a flexible and responsive approach to the new participatory processes.

II. Traditional Adversarial Models of Criminal Justice

A. Pre-Modern Punitive Criminal Justice

The punitive model of criminal justice, with which we are all familiar, combines two intuitively attractive notions: (a) people who break the rules deserve punishment and (b) only this response will deter them and others from doing so in the future.[8] The significance of just desert can often be exaggerated: Sir James Fitzjames Stephen, drafter of the nineteenth century reform proposal upon which our Criminal Code of 1892 was based, opined that it was "right to hate criminals".[9] As a theory of punishment, the punitive model has its

[7] Stats.Can. 2002, c.7 as amended "the *Youth Criminal Justice Act"*.

[8] For an enlightened analysis of the origins of the punitive model in England, seeD. Hay, *Albions's Fatal Tree: Crime and Society in Eighteenth Century England,* A. Lane, London, 1975; also Hugues Parent, "Essai sur la notion de responsabilité pénale: analyse sociologique et historique de la fonction punitive"(2001), 6 *Can Crim L. Rev. 179*

[9] See J. F. Stephen, *A History of the Criminal Law of England,* Macmillan, London, 1883, p.80; G. Parker, " The Origins of the Canadian Criminal Code" in D. Flaherty (ed.), *Essays in the History of Canadian Law (Vol. I),* Osgoode Society/U. of T. Press, Toronto, 1981

roots in Judeo-Christian ideas about individual responsibility for one's actions,[10] although Immanuel Kant's philosophical justification of punishment as a categorical imperative[11] is revived by modern theorists who justify punishment for crime in notions of re-establishing equality thrown out of balance by the offender who has abused the rights of others by selfishly taking advantage of them through the commission of crime.[12] Some punishments, such as corporal punishment[13] or the fine,[14] have virtually no utility other than calling people to account in deterrent fashion and making them suffer for their legal transgressions. The punitive justification for punishment also underlies the idea that offenders who serve their sentences "pay their debt to society" thereby "righting the balance", and upon release can get on with their lives as now respectable citizens, potentially having their criminal records expunged under the *Criminal Records Act*.[15]

To the extent that the punitive model relies on a theory of deterrence, however, it is severely undermined by criminological research, which consistently indicates that tinkering with sentence severity to enhance general deterrence does not work as a strategy to control crime.[16] Generally, law abiding citizens are

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[10] J. Crawford and J. Quinn, *The Christian Foundations of Criminal Responsibility: A Philosophical Study of Legal Reasoning,* Edwin Mellen Press, New York, 1991; H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Harvard U. Press, Cambridge, Mass, 1983. There are, of course, different strains of Christian doctrine which impact on notions of criminal justice: see T. Richard Snyder, *The Protestant Ethic and the Spirit of Punishment,* Erdmans, Grand Rapids, 2001

[11] J. G. Murphy, "Does Kant have a Theory of Punishment?", (1987) 87 Columbia L. Rev. 509; Guyora Binder, "Punishment Theory: Moral or Political" (2002) 5 *Buffalo Crim. L. Rev* 321

[12] J. G. Murphy and J. Hampton, *Forgiveness and Mercy,* Cambridge U. Press, Cambridge, 1988

[13] On the history of corporal punishment, see Norval Morris and David Rothman (eds.), *The Oxford History of the Prison: The Practice of Punishment in Western Society,* Oxford U. Press, Oxford, 1995

[14] Gerhardt Grebing, *The Fine in Comparative Law: A Survey of 21 Countries,* University of Cambridge institute of Criminology, Cambridge, 1982. The fine may also off-set the state's costs in the enforcement of criminal justice, but fine levels are almost never established with this purpose in mind.

[15] *Criminal Records Act,* R.S.C. 1985, c. C-47 ; see also Murphy and Hampton, *supra,* footnote12

[16] S. Lab, *Crime Prevention: Approaches, Practices and Evaluations,* Anderson Publishing, Cincinnati, 1992; and D. Nagin,"Deterrence and Incapacitation" in M. Tonry (ed), *The Handbook of Crime and Punishment,* Oxford U. Press, Oxford, 1998; D. Cousineau, *Legal Sanctiona and Deterrence,* A Research Report for the Canadian Sentencing Commission, Minister of Supply and Services, Ottawa, 1988; E. Fattah, *Fear of Punishment -Deterrence,* Law Reform Commission of Canada, Ottawa, 1976

deterred simply by the denunciation of the prohibited behaviour as criminal and the concomitant potential for their getting caught, but raising levels of punishment actually has little effect on the criminally inclined.[17] To the extent that the punitive model relies on imprisonment for purposes of specific deterrence, faith in its efficacy is sapped by studies which demonstrate that lengthy terms of imprisonment are associated with higher, rather than lower, rates of recidivism.[18] The punitive model may also invoke in aid the notion of incapacitation - imprisonment and capital punishment may get offenders off the streets, temporarily or permanently, and these penalties are punitive![19] However, the utility of incapacitation is incidental to the punitive purpose. Despite the scientific information which undercuts the effectiveness of the pre-modern, punitive model of criminal justice, it retains a powerful hold on the popular imagination as evidenced by the entertainment and news media,[20] and continues to influence heavily the actions of politicians.[21]

Though retributive punishment as a purpose for the criminal sanction has been effectively criticized for more than a century[22], there is a fundamental sense in which any penal sanction imposed by the state can

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[17] The significance of communication in postmodern justifications for "punishment" is discussed, *infra*

[18] Paula Smith, Claire Goggin, and Paul Gendreau, *The Impact of Incarceration and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, Department of the Solicitor General, Ottawa, 2002; Canadian Centre for Justice Statistics, *Corrections Utilization Study: A Review of the National and International Literature and Recommendations for a National Study on Recidivism*, Ottawa , January 1997

[19] This notion, of course, muddies the conceptual purity of the models presented here, in that incapacitation, while justifiable on punitive grounds, is primarily a utilitarian justification for the criminal sanction.

[20] The *Daily News*, published in Halifax N.S. is typical. Hardly a day goes by without a story decrying the laxity of a criminal justice system which has given yet another offender something "less than" imprisonment as a sentence: the most recent example may be the headline in the *Daily News*, Monday, February 2, 2004: "Poll: Get Tough on Youth Crime. Exclusive: most metro residents want courts to clamp down, blame lax parenting for wild children". The story, based on an Omnifacts Research poll sponsored by the paper, has no coherent reporting or analysis of official crime data to counterbalance the reported reader opinions.

[21]The delicate balancing act choreographed by Anne MacLellan, the then Minister of Justice, in shepherding the *Youth Criminal Justice Act* through Parliament is typical. She had to respond to the "get tough on crime" lobby which advocated a largely punitive approach, while recognizing the policy requirements dictated by sober understanding of the criminological evidence which demonstrated the superiority of other approaches.

[22] This is the "modern" critique of punishment, see Part II B. *infra*

always be seen as a punitive burden from the perspective of an offender.[23] The political struggles of the eighteenth century for bills of rights and procedural due process were born out of harsh punitive justice systems being imposed by emerging nation-states.[24] Modern revivals of "just deserts" approaches to sentencing similarly are explicitly punitive in their justifications for the criminal sanction.[25] However, they have often adopted the stance of "limiting retributivism"; that is, regardless of its purpose, punishment is to be proportional to the harm caused by the crime and no more.[26] This is an ancient insight, of course, since the Talmudic *Lex Talionis* principle of "an eye for an eye and a tooth for a tooth" was meant not to promote revenge as a positive good, but rather to limit its excesses in a form of proportional retribution - you are not to take an eye for the mere loss of a tooth![27] The point is that the pre-modern, punitive model of criminal justice, discredited though it may be in the eyes of many, reactively spawned procedural protections which are of enduring importance.

B. Modern Rehabilitative Criminal Justice

The period of modernity for purposes of criminal justice can be said to have begun with the penal reform movement of the mid-nineteenth century[28] and to have continued until after the Second World War.[29]

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[23] R.A. Duff, *Punishment, Communication and Community,* Oxford U. Press, Oxford, 2001

[24]Maxwell and J. Friedberg (eds), *Human Rights in Western Civilization: 1600 to the Present,* Kendell/Hunt Publishing, Dubuque,1994; J. Shestack, "The Jurisprudence of Human Rights" in T. Meron, *Human Rights in International Law: Legal and Policy Issues,* Clarendon Press, Oxford, 1984

[25] Andrew Von Hirsch, *Censure and Sanctions,* Clarendon Press, Oxford, 1993

[26] N. D. Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice,* Barnes and Noble, Totawa, N.J., 1980 ; Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach,* Minister of Supply and Services, Ottawa, 1987

[27] H. Zehr, *Changing Lenses: A New Focus for Crime and Justice,* Herald Press, Waterloo, 1990

[28]Max Grunhut, *Penal Reform: A Comparative Study,* Patterson Smith, Montclair, N.J., 1972 (reprint of 1948 edition); Sir Leon Radzinowicz and Roger G. Hood, *A History of English Criminal Law and Its Administration since 1750 (Vol. 5): The Emergence of Penal Policy,* Stevens, London, 1986; M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution - 1750-1858,* Pantheon Books, New York, 1978

[29] 'See H..L.A. Hart, *Punishment and Responsibility,* Claredon Press, Oxford, 1964

The "backward" punitive model of criminal justice was challenged by successive waves of reformers committed to "forward-looking" utilitarian approaches to crime based on rehabilitation and treatment of offenders.[30] Social and medical sciences were harnessed to criminal justice policy so as to castigate the punitive model as a relic of a primitive era of barbarous revenge.[31] The new approach was most comprehensively adopted in relation to juvenile justice where punishment was rejected in favour of paternalistic education, rehabilitation and treatment of wayward children.[32] However, the rehabilitative ideal had a strong impact on adult justice as well. Punishment was even banished as a formal purpose of sentencing by some provincial courts of appeal.[33] The push toward rehabilitation was reinforced institutionally by the creation of the federal parole system, provincial probation systems and successive royal commissions which were strongly oriented to reducing crime through the rehabilitation of offenders.[34] During this period it was never clear that the general public was entirely convinced of the modern rehabilitative approach, and there were holdouts for the virtues of the punitive model among some prominent publicists.[35]

In its latter phases, the rehabilitative model of criminal justice was reinforced by the increased belief in

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[30]G. Vold, T. Bernard and J. Snipes, *Theoretical Criminology (4th ed)*, Oxford U. Press, Oxford, 1998

[31]B. Wootton, *Crime and the Criminal Law: Reflections of a Social Scientist,* (2nd ed.), Steven and Sons, London, 1981

[32] This was the theory of the *Juvenile Delinquents Act*, R.S.C. 1970, Chap. J-3

[33]In Nova Scotia, the leading case of sentencing *R. v. Grady* (1975), 10 N.S.R.(2d) 90 (N.S.S.C., App.Div.) held that the purpose of sentencing was the protection of the public, and that this purpose was to be attained by deterrence or rehabilitation or a combination of both. Retribution or punishment were no longer invoked. This was not the case in other jurisdictions where *R. v. Morrissette and Two Others* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.) was often cited as the leading case and which retained reference to retribution.

[34]*Report of the Royal Commission to Investigate the Penal System of Canada* (The Archambault Report), Queen's Printer, Ottawa, 1938; *Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada* (The Fauteux Report), Queen's Printer, Ottawa, 1956

[35]C.S. Lewis, "The Humanitarian Theory of Punishment", 1953, being a bitingly ironic attack on the potential totalitarian distortions of the rehabilitative ideal.

the capacities of social engineering which accompanied the rise of the welfare state. Professionalization of the criminal justice system was not limited to correctional services dedicated to the rehabilitative ideal. Lay magistrates were everywhere replaced by legally trained provincial court judges,[36] and police prosecutors or private practitioners as Crown agents by full time prosecution services.[37] What is of interest here is that this professionalized, well-meaning, non-punitive, rehabilitative justice system was not necessarily conceived of as benign from the perspective of the accused. Moreover, criminal defendants were often viewed as victims of unjust social and economic circumstances and, more importantly, as hapless dependents in an unequal criminal justice system.[38] Welfare state principles extended to justice in the form of state-funded legal aid for at least some categories of criminal accused in some types of proceedings.[39] But dominant procedural paradigm of the modern era , like that of the pre-modern period, continued to pit the state against the accused in a struggle between the values of due process and crime control.[40]

By the 1970's the huge institutional edifice of the modern rehabilitative model of justice was falling into disrepute.[41] Institutionalization of offenders was not having the desired rehabilitative consequences.[42] Treating

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[36]For example, see R. Kimball, *The Bench: The History of Nova Scotia's Provincial Courts*, Province of Nova Scotia, Halifax, 1989

[37]P. Stenning, *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada*, Brown Legal Publications, Cowansville, 1986

[38]R. Ericson and P. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process*, U. of T. Press, Toronto, 1982

[39]D. Hoehne, *Legal Aid in Canada*, E. Mellon Press, Lewiston, N.Y., 1989

[40]H. Packer, *The Limits of the Criminal Sanction*, Stanford U. Press, Stanford, 1968

[41] An exception to this, however, was the system's response to mental disorder defences, where the rehabilitative ideal retained some semblance of vitality: see Marc E. Schiffer, *Mental Disorder and the Criminal Trial Process*, Butterworths, Toronto, 1978. A slightly different approach followed *R. v. Swain*, [1991] 1 S.C.R. 933, 5 C.R.(4th) 253 and the statutory reform precipitated by that case which introduced "Part XX.1 Mental Disorder" into the *Criminal Code*: S. C. 1991, c. 43

[42] This was recognized somewhat belatedly in Canada through the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Minister of Supply and Services, Ottawa, 1987

many offenders was difficult, expensive and often unsuccessful. Some frustrated practitioners of criminology proclaimed with credibility that "nothing works".[43] Others protest that things don't work unless properly funded.[44] However, the post-war welfare state was on its last legs, and the time was ripe for a paradigm shift in criminal justice.[45] Before moving to that paradigm shift, however, there is an important gap to be filled relating to victims and corrective justice.

C. Eclipsed Corrective or Compensatory Justice

The punitive and rehabilitative models of criminal justice have one very important thing in common: they are generally unconcerned with the plight of the victim. The state pursues the accused in criminal justice for either punitive or rehabilitative purposes to protect the public, and the victim has historically been limited to the status of witness for the Crown. Until recently, the issue of compensating victims of crime has been left to separate civil and administrative processes. This was not always the case. Prior to the emergence of the nation state or, at least in the common law tradition to the emergence of justice under the King's Peace, there was no distinction between civil and criminal wrongs,[46] and thus reparation of harm to victims was an aspect of Anglo-Saxon law . But unlike criminal justice systems in continental Europe,[47] there developed in modern common

[43] R. Martinson, "What Works: Questions and Answers about Prison Reform"(1974), 35 *The Public Interest* 22

[44] Paul Gendreau, "The Principles of Effective Intervention with Offenders", in A. T. Hartland (ed.) *Choosing Correctional Options that Work: Defining the Demand and Evaluating the Supply*, Sage Publications, Thousand Oaks, 1996

[45] On the general notion of paradigm shifts, see T.S.. Kuhn, *The Structure of Scientific Revolutions*, U. of Chicago Press, Chicago, 1970

[46] Sir Frederick Pollack, "English Law before the Norman Conquest", (1898) 14 Law Quarterly Review 291 Elmar Weitekamp, "The History of Restorative Justice" dans G. Bazemore and L. Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, Criminal Justice Press, Monsey, N.Y., 1999

[47] S. Guinchard et J. Buisson, *Procédure pénale*, Litec, Paris, 2000 , pp. 535-554; Michèle-Laure Rassat, *Procédure pénale*, Presses universitaires de France, Paris, 1990, p. 215- 251; M. Joutsen, "Listening to the Victim: The Victim's Role in European Justice Systems"(1987), 34 Wayne L. Rev.95; J. Larguier, "The Civil Action for Damages in French Criminal Procedure (1965), 39 Tulane L. Rev. 687; C. Howard, "Compensation in French Criminal

law states no general provision for full compensation to victims on the general principles of tort damages in the criminal trial. It is true that the Canadian *Criminal Code* has for many years contained provisions allowing for the restitution of easily ascertainable damages to victims of crime.[48] However, this procedure falls short of full compensation for general damages for such things as pain and suffering that one can recover in tort.[49] In recognition of the uncertainties of civil litigation, and the inadequacies of restitution orders against perpetrators of crime, there emerged during the heyday of the modern welfare state separate administrative systems for the compensation of victims of crime.[50]

Victims of crime were nonetheless unhappy with the manner in which they were treated in this modern criminal justice system.[51] Moreover victims were organizing against what they perceived as the system's inadequacies. Money was not all they wanted. Those offended by the manner in which rehabilitative justice seemed more solicitous toward offenders than victims sometimes sought a return to a more punitive model.[52] It was the women's movement, however, which extended the critique of the punitive and rehabilitative models beyond the substantive to its procedural aspects. [53] This sustained criticism contributed to a crisis of legitimacy for the Canadian criminal justice system and gave further impetus to the social and ideological pressures for a

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Procedure"(1958), 21 Mod. L. Rev.687

[48] Now found in *Criminal Code* section 738.

[49] See *R. v. Zelensky,* [1978] 2 S.C.R. 940 and *R. v. Fitzgibbon,* [1990] 1 S.C.R. 1005; also J. C. MacPherson, "The Constitutionality of the Compensation and Restitution Provisions of the Criminal Code: The Picture after *Regina v. Zelensky,* (1979) 11 *Ottawa L. R.* 713

[50] P. Burns, *Criminal Injuries Compensation (2nd ed.),* Butterworths, Toronto, 1992

[51] J. Hagan, *Victims before the Law: The Organizational Domination of Criminal Law,* Butterworths, Toronto, 1983; R. Zauberman, "Victims as Consumers of the Justice System?" in A. Crawford and J. Goodey, *Integrating a Victim Perspective within Criminal Justice,* Ashgate, Dartmouth,U.K., 2000

[52] See Roach, *supra,* note 1. "Mothers against Drunk Drivers" (MADD) has sometimes been cast, perhaps unfairly, in this role.

[53] C. Boyle, *Sexual Assault,* Carswell, Toronto, 1984; and I. Waller, *The Role of the Victim in Sentencing and Related Processes,* Department of Justice, Ottawa, 1988

paradigm shift.

D. Retreat from Punitive and Rehabilitative Adversarial Paradigms

The general perception of the traditional punitive and modern rehabilitative models in Canada by the end of the 1980's was a scepticism about the validity of their substantive and procedural characteristics on the part of many participants in the criminal justice system . A host of pressures led Crown and defence counsel to shy away from trials in favour of plea bargained outcomes, which may have been entirely comprehensible from the professional perspective but were often misunderstood by victims and the general public.[54] Negotiated pleas shifted attention to the sentencing process, and there was widespread dissatisfaction with uncertainty about sentencing purposes and disparities in sentencing outcomes.[55] Meanwhile, the Law Reform Commission of Canada, pursuant to a federal government "white paper",[56] was engaged in a wholesale review of Canadian substantive criminal law and criminal procedure which led to voluminous reports to Parliament[57] which were, for the most part, never acted upon.[58] The stage was set for a retreat from the punitive and rehabilitative models of criminal justice as clothed in their bi-partite adversarial trappings. However, the political process could not deliver the long- contemplated, wholesale criminal justice reform, which seemed a politically

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[54]See G.A.Ferguson and D.W.Roberts, "Plea Bargaining; Directions for Canadian Reform"(1974), 52 *Can. Bar. Rev.* 497; S.N. Verdun-Jones and F.D. Cousineau, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada"(1979), 17 *Osgoode Hall Law Journal* 227; and Law Commission of Canada, *Plea Discussions and Agreements (Working Paper 60)*, Ottawa, 1989

[55] Canadian Sentencing Commission Report, *supra*, note 42

[56] Government of Canada, *The Criminal Law in Canadian Society*, Ottawa, 1982

[57] The culmination of that work was two reports to Parliament: Law Reform Commission of Canada, *Recodifying Criminal Law*, (Revised and Enlarged Edition) Report # 31, Ottawa, 1987; and Law Reform Commission of Canada, *Recodifying Criminal Procedure, Vol I*, Report # 33, Ottawa, 1990

[58] There are still periodic calls for criminal law reform in Canada which acknowledge the problems in the criminal justice identified during that period: see D. Stuart, R. Delisle and A. Manson, *Towards a Clear and Just Criminal Law: A Criminal Reports Form*, Carswell, Toronto, 1999; Department of Justice of Canada, *Report of the Minister's Round Table on Criminal Law*, Toronto, November 1, 2002

explosive product. The result was an incremental shift toward a new inclusionary model of criminal justice.

III. A Formal Inclusionary Model of Criminal Justice

A. Victims and Postmodern Criminal Justice

The most significant influence for reform on Canadian criminal justice within the last twenty years has been the victims' rights movement. In part this has been driven by victims' lobby groups, test case litigation,[59] and rational policy development in response thereto.[60] However, there has been a broader cultural shift in relation to criminal harms to victims and the manner in which these are perceived. In an era of 20 second television sound bites, complex explanations of criminal justice do not make headlines while dramatic stories about victims get optimal coverage. Hans Boutellier argues convincingly that discussions about morality and criminal justice have become "victimalized".[61] That is, the only substantial question about crime in the public mind is "Are you suffering?", and the only broad public consensus about criminal justice is a negative one: "We cannot tolerate cruelty, inhumane treatment, humiliation and exclusion". This exchange is an emotive question with an emotive response, but criminal justice professionals in a technocratic justice system carry out their specific functions (as lawyers, judges, correctional officials and the like) and apply the rules dispassionately, while generally avoiding the emotive side in order to get through the day without controversy and to maintain their sanity. At the same time, the media plays up the emotive side and politicians repeatedly respond with an emotional flourish by piece-meal legislative action. Criminal justice professionals, perhaps with the exception of

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[59] The Women's Legal Education and Action Fund ("LEAF") was particularly prominent in this regard: see Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy before the Supreme Court of Canada*, Emond Montgomery, Toronto, 1996

[60] C.Boyle et al, *A Feminist Review of Criminal Law*, Minister of Supply and Services, Ottawa, 1985

[61] Hans Boutellier, *Crime and Morality: the Significance of Criminal Justice in Post-Modern Culture*, Kluwer Academic Publishers, Dordrecht, 2000

certain defence counsel, eschew the emotive media debate,[62] while victims entertain the public by speaking their mind without inhibition. It is thus not surprising that the effect of incremental legislative intervention has been to convert the dichotomized state/offender, adversarial justice system into a three-cornered, inclusive process involving prosecution, defence and victim, while judges referee in this new tri-partite, formal game.[63]

B. Formal Criminal Justice with Victim Participation

Victim-inclusive criminal justice now commences with policing and carries through to corrections and the appellate process. This has resulted in part from federal legislation in the areas of criminal law, criminal procedure and corrections,[64] and in part from the advent of "victims' bills of rights" which exist in all provinces and affect provincial authorities in their administration of criminal justice.[65] In the pre-trial context, police protocols now mandate consultation with victims on whether to lay charges.[66] The *Criminal Code* requires justices to take victims' interests into account in bail hearings.[67] Prosecution services across the country have virtually all adopted guidelines or directives encouraging consultation with victims prior to making key

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[62] A reluctance to engage which is rooted in prudence and ethical constraints: see for example, Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia*, Halifax, 1990, Ch, 22, "Public Appearances and Public Statements by Lawyers"

[63] The current culmination of this process was in recent amendments to the Criminal Code: S. C. 1999, c. 25 arising from the Report of the Parliamentary Committee on Justice and Human Rights, *Victims' Rights: A Voice not a Veto*, Ottawa, 1998

[64] See generally J. Barrett, *Balancing Charter Interests: Victims' Rights and Third Party Remedies*, Carswell, Toronto, 2001(loose-leaf); inclusion of victims is also characteristic of youth justice: see Kent Roach, "The Role of Crime Victims under the *Youth Criminal Justice Act*" (2003) 40 *Alberta L. Rev.* 965

[65] For a collection of these documents see, Barrett, *ibid*

[66]This a topic canvassed by the Report of the Ontario Attorney General's Advisory Committee, *Charge Screening, Disclosure and Resolution Discussions* (the Martin Committee), Queen's Printer, Toronto, 1993 and has been reinforced by the trend toward community policing: see J. Chako and S. Nancoo, *Community Policing in Canada*, Scholar's Press, Toronto, 1993

[67] section 518(1)(d.2)

decisions in relation to plea bargaining and sentencing submissions.[68] Establishing the victim's right to privacy of personal records, in the face of the accused's right to disclosure, involved a controversial balancing act which was finally stabilized by the Supreme Court's acceptance of Parliament's legitimating the position of its dissenting judges from a previous case.[69]

Rules of evidence and procedure at criminal trials have also been changed to make the process more victim friendly, particularly in cases of sexual assault. The rule requiring corroboration of a sexual assault complainant's testimony has been abrogated,[70] as has the rule based on the assumption that a woman sexually assaulted will immediately complain to others, failing which negative inferences may be drawn against her.[71] In addition, the rape shield provisions of the Criminal Code preventing unnecessary intrusion into the complainant's prior sexual activity have been held to be constitutional.[72] In a similar vein, relatively new Criminal Code provisions authorize exclusion of the public from the courtroom, allow the presence of support persons, regulate cross-examination of the complainant by certain persons, and allow bans on publication of information revealing the identity of the complainant.[73]

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[68]For example, Nova Scotia Public Prosecution Service, *Crown Attorney's Manual*, supra, "Spousal/Partner Violence Policy", *supra*, footnote 100; or *Federal Prosecution Service Deskbook*, Chapter 20, "Plea and Sentence Discussions and Issue Resolution", where under the heading "Openness and Fairness" one reads: "Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case – in particular, the victim and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel."

[69] *R. v. Mills*, [1999] 3 S.C.R.668 endorsing the constitutionality of Criminal Code sections 278.1 *et seq.*

[70] Criminal Code section 274. It must be said, however, that the full expectations of the proponents of this legislation may not have been met if one considers recent caselaw: see. *(R.v. S (F.)* (1997), 116 C.C.C. (3d) 435 (Ont.C.A.); *R. v. Stymiest* (1993), 79 C.C.C. (3d) 408 (B.C.C.A.), or *R. v. Saulnier* (1989), 48 C.C.C. (3d) 301 (N.S.C.A.)

[71] The results of the abrogation of the recent complaints rule are somewhat ambiguous: see *R. v. F.(J.E.)* (1993), 26 C.R. 220 (Ont. C.A.); *R. v. Ay* (1994), 93 C.C.C. (3rd) 456 (B.C.C.A.) and *R. v. M. (T.E.)* (1996), 110 C.C.C. (3rd) 179 (Alta. C.A) leave to appeal to S.C.C. refused 114 C.C.C. (3rd) vi.

[72] *Criminal Code* section 276 as approved on constitutional review in *R. v. Darrach*, [2000] 2 S.C.R. 443

[73] *Criminal Code* section 486

It is in relation to sentencing that greatest expansion of victim participation in the criminal process has occurred. Victim impact statements are the primary source of this change.[74] While such statements must be prepared in writing, they can be read by the victim at the sentencing hearing, creating what one court has described as "parity of identity" for victim and accused in the criminal process.[75] Prosecution and defence must now be prepared to respond not only to the sentencing submissions of one another, but also to those of the victim.[76] An additional change at this stage has been the introduction of the "victim fine surcharge," intended to increase the amount in the provincial coffers available for victims' services. Imposition of such surcharges is mandatory in relation to crimes found in the *Criminal Code* and *Controlled Drugs and Substances Act*, except for cases of undue hardship (in relation to which prosecutors must be prepared to argue).[77]

Finally, victim participation is now encouraged in the post-trial phases of criminal justice. Since 1992, victims have been entitled to information concerning offenders serving sentences in institutions, may submit victim impact statements for the consideration of the Parole Board, and may be granted the opportunity to attend Parole Board hearings.[78] Victims have been granted the possibility of participating in special jury hearings under the so-called "faint hope clause" of the Criminal Code[79] whereby offenders serving life sentences for murder may apply for early release on parole. In an analogous legislative development, victims

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[74] *Criminal Code* sections 722 to 722.2

[75] *R. v. Gabriel* (1999), 26 C.R. (5th) 364 (Ont. S.C.) per Hill, J.

[76] The Crown is sometimes in a difficult position, being required by the *Criminal Code* to introduce the victim impact statement, while not necessarily agreeing with its contents.

[77] *Criminal Code*, section 737

[78] Corrections and Conditional Release Act, S.C. 1992, c.20 sections 26, 101, 140, and 142.

[79] Criminal Code section 745.63 pursuant to S.C. 1995, c.22 and S.C. 1999, c. 25

may also participate in proceedings of Review Boards dealing with accused persons found not criminally responsible by reason of mental disorder.[80] An equally important category of victim participation is the possibility of being granted status as intervenor in appellate proceedings.[81]

The upshot of the foregoing developments is a formal criminal process characterized by substantial victim participation. The criminal trial is no longer simply a contest between state and accused where victims are mere witnesses. Victims are not yet full "parties" to the criminal proceeding, although they are sometimes treated as such.[82] Nonetheless, Canada no longer has a simple "bi-partite" criminal process, and the model which has emerged may properly be called a formal and inclusionary one.

C. Continuing Punitive, Rehabilitative and Corrective Elements

The formal inclusionary trial has not been entirely deprived of its older punitive, rehabilitative and corrective aspects. However, these aspects have been recast to a significant degree by the sentencing reforms which ran more or less parallel to the victim-driven procedural changes.[83] These changes, which finally became effective in 1997, formalized the utilitarian purposes of the criminal sanction,[84] while subjecting them to

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[80] Criminal Code sections 672.5, 672.54 and 672.541 following from S.C. 1999. c. 25

[81] See Gregory Hein, "Interest Group Litigation and Canadian Democracy", in P. Howe and P.H. Russell, *Judicial Power and Canadian Democracy*, Institute for Research on Public Policy, McGill/Queen's Press, Montreal and Kingston, 2001

[82] *R.v. Grant* (1989) 49 C.C.C. (3d) 410 (Man. C.A.) treated victim's statements as an admission for purposes of an exception to the hearsay rule!

[83] Unlike the Law Reform Commission of Canada's proposals for reform of substantive and procedural law, *supra*, which met a dead end, the proposals for reform of the Canadian Sentencing Commission became the subject of Parliamentary study which led to partial legislative implementation: Standing Committee on Justice and the Solicitor General, *Taking Responsibility*, Queen's Printer, Ottawa, 1988 (the Daubney Committee Report).

[84] Criminal Code section 718 states that the fundamental purpose of sentencing is to contribute, along with other crime prevention measures to the maintenance of a "just, peaceful and safe society" through sanctions which have one or more of the following objectives: denunciation, deterrence, incapacitation, rehabilitation, reparation of harm and promotion of a sense of responsibility among offenders. This despite the views of the Supreme Court in *R. v. C.(M.A.)*,[1996] 1 S.C.R. 500 which purported to recognize retribution as a formal purpose of the criminal sanction.

sentencing limitations based on the principle of proportionality.[85] Thus, Parliament has rejected a punitive *purpose* for criminal justice, while restricting its punitive *effects* through principles of limiting retributivism originally rooted in an assessment of the punitive impact of the criminal sanction.[86]

The closest Parliament now comes to endorsing a pre-modern punitive approach to crime is the recognition that among the objectives of sentencing are included denunciation of and accountability for unlawful conduct, deterrence of the offender and others, and separating offenders from society, where necessary.[87] This is a sanitized version of the punitive justification, based on communicative theories of action rather than retribution.[88] These objectives, of course, are also justifiable on utilitarian grounds. On the other hand, the modern treatment approach is specifically accepted in the subsection which says an objective of sentencing is "to assist in rehabilitating offenders",[89] and implicitly in the subsection which says it is also an objective "to promote a sense of responsibility in offenders, and acknowledgement of harm done to the victim and to the community".[90] This treatment orientation can be operationalized not only in carceral institutions but also through the possibility of voluntary treatment in probation orders[91] and mandatory treatment orders in conditional sentences of imprisonment to be served in the community.[92] Thus the formal inclusionary model maintains a strong commitment to modern utilitarianism while relegating the punitive notion to *limiting*

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[85] Criminal Code section 718.1states a fundamental limiting principle in sentencing: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718.2 sets out corollary principles of aggravation and mitigation, parity, totality, and restraint (in two guises).

[86] The extent to which this crucial distinction has not been appreciated by the Supreme Court of Canada in *R. v. Proulx, supra,* will be discussed below.

[87] *Criminal Code,* sub-sections 718(a), (b) and (c).

[88] R.A..Duff, *supra*, note 23

[89] ss. 718(d)

[90] ss 718(f) Some argue that accepting responsibility can be a crucial step in rehabilitation.

[91] section 732.2(3)

[92] section 742.3(2)(e)

retributivism.

The 1997 sentencing provisions break new substantive ground from the corrective and inclusionary perspectives. An explicit sentencing objective is "to provide reparations for harm done to victims or to the community"[93] in addition to the provision already mentioned which seeks "to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community."[94] Sentencing purposes are thus up front about compensating victims in contrast to the punitive and purely rehabilitative models of the past. Moreover, reference to "the community" rather than to "the public" seems to suggest a new orientation to smaller collectivities and self-identifying groups in a diverse and pluralistic Canadian society. However, the formal sentencing options do not make good on the promise of the general statement in the sentencing objectives. While the restitution provisions now allow for the registration of the criminal order as a judgment for civil enforcement,[95] the substantive scope for civil recovery in the criminal trial has not been expanded. The system is a long way from some European formal justice models which provide full tort recovery for individual victims[96] as well as payments to non-profit social organizations which represent classes of victims.[97]

D. Advantages and Limitations of the Formal Inclusionary Model

[93] ss. 718(e)

[94] S. 718(f)

[95] s. 741. Other civil remedies are not affected: s. 741.2 There are, of course, potential constitutional impediments to full civil recovery connected to federal criminal law. Property and civil rights, which in this country means civil law (and perhaps more significantly the Quebec Civil Code) is a matter of provincial legislative authority pesuant to section 92 of the Constitution Act of 1867.

[96] William T. Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It,* N.Y.U. Press, New York, 1999

[97] See M. Delmas-Marty and J.R, Spencer, *European Criminal Procedures,* Cambridge U. Press, Cambridge, 2002.

The major advantages of formal inclusionary justice reside in its capacity to include the interests of the victim while not substantially diminishing the due process protections of the accused. The full panoply of Charter protections[98] is available to the accused, although not in uncontested form, as the litigation over the rape shield and victim privacy provisions of the *Criminal Code* attests. When guilt is contested, formal criminal justice thus provides opportunities for full answer and defence which are essential in a democratic society. While we may acknowledge that statistically most criminal matters are resolved subsequent to a guilty plea,[99] the number of recent wrongful convictions in this country cannot permit us to be complacent about the importance of due process.[100] This may be particularly true where terrorism and attendant security concerns provide grounds in the minds of some to reduce vigilance on this score.[101]

The major disadvantages of the formal inclusionary model are also intimately connected to its due process characteristics. The formal trial is professionalized, putting offenders and victims alike at arms length from fashioning solutions which are in the hands of counsel and the judge.[102] Procedural protections and rules of evidence limit the scope of issues and evidence, such that the underlying causes of crime and its resolution cannot be fully explored.[103] While the inclusionary model expands participation for victims, the families of

[98] see generally Don Stuart, *Charter Justice in Canadian Criminal Law,(3rd ed)* Carswell, Toronto, 2001

[99] See Report of the Ontario Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, Queen's Printer, Toronto, 1993 (the Martin Report)

[100] Need one do more than to remind the Canadian reader of the names Truscott, Milgaard, Marshall, Morin, Johnson, Parsons, etc.?

[101] R.J. Daniels, P. Macklem, and K. Roach, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill,* U. of T. Press, Toronto, 2001, in particular the contributions by Kent Roach and Don Stuart.

[102] In a famous article Nils Christie speaking of lawyers having "stolen the conflict" from those affected: (1977) "Conflict as Property"17 *British Journal of Criminology* 1

[103] The underlying principle of evidence law is Thayer's enunciation of the notion of relevance: *all* relevant evidence is admissible but *only* relevant evidence is admissible: James Bradley Thayer, *Preliminary Treatise on the Law of Evidence at Common Law,* Little Brown, Boston, 1898. For the application of this principle in Canada see *Morris v. R* (1983) 36 C.R. (3d) 1 (S.C.C.). Relevance applies narrowly to offence elements and defence at the criminal trial, but may also be applied relatively strictly in the sentencing hearing, particularly in relation to contested facts:

victims and offenders as well as other members of the community are usually shut out of the process. These defects, among others, have given rise to pressures for a less formal and more broadly restorative model of criminal justice.

IV. A Flexible Restorative Model of Criminal Justice

A. Restorative Justice Goals and Principles

Restorative justice can be defined, in this context, as the restoration of relationships and reparation of criminal harms based on values of equality, mutual respect and concern, through deliberative processes involving victims, offenders and representatives of their respective communities under the guidance of skilled facilitators.[104] There are a number of aspects of this definition which warrant emphasis. Firstly, the offender and the victim are seen as embedded in a web of relationships which are disrupted by the occurrence of the crime.[105] Restorative justice is not just concerned with rehabilitating the offender as an isolated individual or improving the lot of an isolated victim, but rather using the offence as an opportunity to identify the community circumstances which contribute to crime causation and re-establishing healthy community relationships for

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see *Criminal Code* ss. 720-729.

[104] Defining restorative justice is a controversial undertaking. A definition of restorative process presently under consideration in U.N. circles reads: "...any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party", *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res.2000/14, adopted July 27, 2000. For discussion of the critical focus on transforming relationships, see J.Llewellyn and R. Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission", (1999) 49 U. of T L. J.355 - Lewellyn and Howse would regard this definition of restorative justice as related to *criminal harms* as inappropriately narrow. The literature on restorative justice is burgeoning. For a useful if somewhat dated bibliography, see Paul McCold, *Restorative Justice: An Annotated Bibliography*, Criminal Justice Press, Monsey, N.Y.,1997. For an important recent treatment of restorative justice, see Law Commission of Canada, *Transforming Relationships through Participatory Justice*, Minister of Public Works and Government Services, Ottawa, 2003

[105] Jennifer J. Llewellyn and Robert Howse, *Restorative Justice: A Conceptual Framework*, Law Commission of Canada, 1998; Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Herald Press,Waterloo, 1990

offenders and victims based on values of equality and mutual respect.[106] Secondly, restorative justice is here responding to violations of victims' *rights* occurring through criminal conduct contrary to norms established by a democratic legislature. In other words, restorative justice in the criminal realm is not merely about balancing *interests* between victim and offender, and restorative process is therefore *not* simply civil mediation[107] or ADR, the purpose of which is "getting to yes".[108] Thirdly, as a corollary to the last point, restorative justice in response to crime is a process in which offenders' and victims' rights must be protected through procedural standards applied by trained facilitators. This is an area for a supervisory, though not necessarily controlling, role for the state.[109] Finally, restorative process must be a broadly deliberative one, capable of embracing the participation not only of victims and offenders, but also of their families and those in the community either affected by the crime or capable of contributing to a restorative resolution.[110] Restorative justice cannot thus be uniquely the concern of criminal justice system professionals.

B. Restorative Justice Methods and Techniques

Consistent with the above definition, operationalization of restorative justice is primarily reliant on recent breakthroughs in restorative process variously called family group conferencing,[111] community

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[106] See Kay Pranis, "Restorative Justice, and the Empowerment of Communities" in Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice*, Anderson Publishing, Cincinnati, 2001

[107] See Jennifer J. Llewellyn, "Doing Justice to ADR", on file with author

[108] This is the mantra of the alternative dispute resolution (ADR) movement in the civil justice context: see R. Fisher and W. Ury,(2nd ed.with B. Patton),*Getting to Yes: Negotiating an Agreement without Giving In*, Random House, London, 1999

[109] Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice*, (2nd ed.), Anderson Publishing, Cincinnati, 2002. See also the discussion in Part V of this paper, *infra*

[110] Paul McCold, " Restorative Justice and the Role of the Community" in Burt Galaway and Joe Hudson, *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, 1996

[111] This is the original New Zealand term: see G. Maxwell and A. Morris, "Research on Family Group Conferences with Young Offenders" in J. Hudson, A. Morris, G. Maxwell and B. Galaway, *Family Group Conferences: Perspectives on Policy and Practice*, Federation Press, Annandale, 1996

conferencing,[112] community justice forums,[113]and circle decision-making.[114] Regardless of the label used, these restorative methods bring together victim, offender and significant other community players to discuss appropriate responses to the criminal behaviour. These processes can be compendiously referred to as *restorative conferencing*. This restorative conferencing is to be contrasted with "case conferencing" which is also encouraged now under the *Youth Criminal Justice Act.*[115] Case conferences often bring together professionals such as police officers, probation officers, social workers as well as the offender and his or her family members in order to discuss an appropriate resolution to a case. Case conferences can be an effective means to ensure counselling and treatment resources are helpfully focussed on an offender. However, they are essentially a product of the rehabilitative model of justice to the extent they rely predominantly on professionals seeking treatment for offenders, rather than on broadly deliberative processes involving victims and members of the community seeking consensus-based collective solutions. Case conferencing can be a useful adjunct to restorative processes insofar as a restorative conference may identify a need for a rehabilitative approach, but the two types of conference are different in their practices and proceed from different conceptual foundations.

I have previously described restorative conferencing in terms which bear virtual repetition here.[116] Restorative conferencing is a significant advance over what has been called "dyadic victim-offender

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[112]This rather neutral designation is gaining in currency: see Gordon Bazemore and Mara Schiff, *Restorative Community Justice: Reparing Harm and Transforming Communities,* Anderson Publishing, Cincinnati, 2001.

[113] This is the name preferred by the Royal Canadian Mounted Police: see Lenore Richards, "Restorative Justice and the RCMP: Definitions and Directions"(2000) 62 *RCMP Gazette* 8.

[114] See sources cited, *infra* at footnote 124 .

[115] *Stats. Can.* 2002, c. 7 (in force December 1, 2003), s. 19

[116] Bruce P. Archibald, "Citizen Participation in Canadian Criminal Justice: The Emergence of 'Inclusionary Adversarial' and 'Restorative' Models" in S. G. Coughlin and D. Russell, *Citizenship and Citizen Participation in the Administration of Justice,* Canadian Institute for the Administration of Justice/Les Editions Thémis,Montreal, 2001 at p. 174; see also P. McCold, "Primary Restorative Justice Practices" in Morris and Maxwell, *supra,* footnote

mediation".[117] A trained facilitator gathers together the victim and her supporters (family and/or friends), [118] the offender and his supporters (family and/or friends),[119] secondary victims, and members of the community (where possible known and respected by both victim and offender)[120]. Often, the justice system is represented by a police officer who is familiar with the facts of the incident.[121] Experience shows that the psychological "group dynamic" which occurs in a restorative conference can be very different than a simple mediation session.[122] Victims and their supporters are able graphically to bring home to offenders the impact that the harmful behaviour has had on their lives.[123] Offenders frequently offer heartfelt apologies which go well beyond the ritualized guilty plea of court process or the exculpatory claims of defence counsel in sentencing hearings.[124]

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[117] J. Braithwaite, "Restorative Justice and a Better Future"(1996), 76 *Dalhousie Rev*. 7. This is not to say that victim-offender mediation (VOM) is not a cost-effective technique which has a significant place in the range of restorative options. M. Bakker, "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System" (1994), 72 N.C.L. Rev.1479; and see the vast VOM literature, McCold, *supra*, footnote 99.

[118] There is a frequent issue as to whether victims should have a veto over the holding of a conference or whether it is appropriate to invite a "surrogate victim" when the personal victim of the offence is unavailable: see discussion, infra, concerning the Nova Scotia Restorative Justice Programme

[119] Care is obviously required in choosing offender supporters to prevent intimidation or "re-victimization" of victims in the process, or in preventing, through careful facilitation, a general sense on the part of victims that the process has been unhelpful: see Heather Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration" in Allison Morris and Gabrielle Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Hart Publishing, Oxford, 2001

[120] In heavily populated areas, where victim and offender may not know one another, choice of such persons may be difficult, but may have the potential for creating social bridges and building community where urban anonymity normally prevails: see J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", in M. Tonry (ed), *(1999) 25 Crime and Justice: A Review of Research 1-127*.

[121] Empirical studies suggest that some single parents of offenders who have been discipline problems particularly appreciate the support that the police presence can bring: Don Clairmont, *The Nova Scotia Restorative Justice Initiative: Year One Evaluation Report*, Pilot Research, Bedford, N.S., 2001 (available from the Nova Scotia Department of Justice), at pp.63-78.See also Clairmont's subsequent evaluations: *The Nova Scotia Restorative Justice Initiative: Core Outcomes - Year Two Evaluation Report*, Pilot Research, Bedford, 2002; and year three report which should be publicly available shortly.

[122] For a useful description of a conferences, see Braithwaite, *supra*, footnote 117

[123] M. S. Umbreit, R.B.Coates, and B. Vos, "Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation and Practice and Research" in Morris and Maxwell, *supra*, footnote 119.

[124] This is not to denigrate the role of defence counsel in a formal sentencing hearing, but merely to note that the focus there is to convince the sentencing judge of the client's position, not to respond in an effective and affective manner to the victim.

Supporters and community participants can make contributions that move offenders and victims from their initial entrenched perceptions.[125] Offenders can acknowledge the wrongfulness of their behaviour, while not being stigmatized as social outcasts.[126] Victims not only obtain reparation, but can often find psychological and emotional closure, while alleviating fears of further victimization.[127] Interestingly, victims, who in the restorative conference see offenders not as faceless monsters but rather fellow human beings with problems of their own, often suggest positive rehabilitative or reparative measures to assist offenders and reduce re-offending.[128] The open discussions, unconstrained by formal rules of evidence as in a sentencing hearing, frequently identify the causes of the offending behaviour and the existence of family or community resources capable of contributing to lasting solutions which can be missed by courts.[129] The emotional temperature typically rises with many participants sharing tears during the discussions which seem to cement consensus outcomes. Healing is a word commonly used to describe the results of restorative conferencing, and in the best of circumstances it is healing for victims, offenders and the community as well.[130]

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[125] Research on restorative justice shows that one of the most prevalent myths of criminal justice is that most victims seek revenge upon offenders: see M. Estrada-Hollenbeck, "Forgiving in the Face of Injustice: Victims' and Perpetrators' Perspectives" in B. Galoway and J. Hudson, *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, 1996

[126] John Braithwaite's theory of "re-integrative shaming rather than alienating stigmatization" in his *Crime, Shame and Re-Integration*, Cambridge U. Press, Cambridge, 1989, while not uncontroversial and often mis-understood, has been most influential in Canada and Britain with respect to police initiatives on restorative justice. The central idea is to condemn the harmful behaviour while re-affirming the offender's connections to the community and positive potential as a valued member of his family and society: see G. Masters "The Importance of Shame to Restorative Justice" in L. Walgrave (ed), *Restorative Justice for Juveniles: Potentialities, Risks and Problems*, Leuven U. Press, Leuven, 1998

[127] Security concerns of victims in restorative justice will be discussed below.

[128] D. Van Ness and K. Heetderks Strong, *Restoring Justice,(2nd ed)* Anderson Publishing, Cincinnati, 2002

[129] While good counsel will have prepared well for sentencing, and the court will usually have a pre-sentence report of greater or lesser value, restorative conferences present more flexibility in this regard.

[130] Van Ness, supra, note 128; Stuart, supra, note Kurki, & Braithwaite, supra

Restorative justice as seen through restorative conferencing is thus far more than "diversion"[131] which can be accomplished simply by a police caution or warning.[132] However, if restorative justice techniques are used at the pre-charge stage because of referral by the police or at the post-charge/ pre-trial stage through an exercise of prosecutorial discretion by a Crown attorney,[133] the restorative conference is an "alternative measure" to replace formal criminal proceedings and in this sense may be viewed as a form of diversion.[134] On the other hand, restorative conferencing is well known in Canadian aboriginal communities as "circle sentencing" which obviously takes place after a finding of guilt, either as a pre-sentence recommendation of an elders' panel or through a circle sentencing process presided over by the judge.[135] Such techniques are being used in non-aboriginal communities as well.[136] In addition, restorative conference is being used at the post-

[131]In the early 1970's, the insights of labelling theory led to programmes for diverting young/first time offenders from the justice system on the theory that stigmatization through criminal convictions led to increased recidivism. Law Reform Commission of Canada, *Working Paper 7, Diversion,* Department of Supply and Services , Ottawa, 1975; S. Moyer, *Diversion from the Juvenile Justice System and Its Impact on Children: A Review of the Literature,* Solicitor General of Canada/Research Division, Ottawa, 1980; and J Aubuchon, "Model for Community Diversion"(1978) 20 Can. J. of Criminology 296; although courts were not always accepting of the procedural implications: see, for example, *R. v. Jones* (1978), 40 C.C.C.(2d) 173 (B.C.S.C.)

[132] Both of these forms of diversion are encouraged in the new *Youth Criminal Justice Act, ss 6-9.* See Nicholas Bala, "Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders"(2003) 40 *Alberta Law Review* 991

[133]See prosecutorial policies of various provinces: British Columbia, Core Policies ALT 1 and ALT 1.1, October 1,1999; Alberta, Guideline 51 - Alternative Measures; Saskatchewan, Policy and Practice Directive YOU 1; Ontario, Poicy A-3 Alternative Measures, February 8, 1995; Quebec, Direction générale des affaires criminelles et pénales, "Document d'information sur le programme de traitement non-judiciare de certaines infractions criminelles commises par des adultes"; Nova Scotia, Attorney General's Directive "Alternative Measures for Adult Offenders", January, 1997; Newfoundland, Alternative Measures (Young Offenders), Topic 800

[134] This is the label used in *Criminal Code,* s. 717 as a generic term in the provisions which are used to establish adult restorative justice programmes.

[135] H. Lilles, "Circle Sentencing: Part of the Restorative Justice Continuum" in A. Morris and G. Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles,* Hart Publishing, Portland, 2001;See also B. Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System" (1996), 20 *Int. J. of Comp. and Applied Crim*. J. 291 and C. Griffiths, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" (1996), 20 *Int. J. of Comp. and Applied Crim. J*.197.

[136] One example is the Nova Scotia Restorative Justice Programme:on line at www. See also:B. Archibald, "A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures in Response to Crime" in D. Stuart, R.J. Delisle and A. Manson, *Toward a Clear and Just Criminal Law:*

sentence stage where victims and offenders wish to meet in a restorative conference to deal with issues which may be left unresolved following a criminal trial.[137] Restorative justice programmes in different jurisdictions intervene at different stages in the criminal justice process.[138] The Nova Scotia Restorative Justice Programme appears to be unique in common law jurisdictions in that it provides a co-ordinated approach to restorative justice at pre-charge, post-charge, post-conviction and post-sentence stages.[139]

C. Offenders, Victims, Communities and the State

If the formal inclusionary model of criminal justice can be described as essentially tri-partite, restorative conferencing turns criminal justice into a multi-faceted process. Offenders and their families or friends, victims and their families or friends, ordinary citizens of the community, professionals with helpful skills and resources, and representatives of the justice system may all be involved in restorative conferencing. The inter-relationships among these persons as participants in such a conference were outlined above. However, it is useful at this point to touch upon both the role of the state and the role of the community in greater detail. This is so because

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A Criminal Reports Forum, Carswell/Thomson Publishing, Toronto, 1999. A high profile example was afforded by the use of a restorative conference following a conviction for an offence where a young offender caused a major train wreck near Enfield, Nova Scotia.

[137] G. Bazemore and M. Schiff, "Community Justice/Restorative Justice: Prospects for a New Social Ecology for Community Corrections" (1996), 20 Int. J. of Comp. and Applied Crim. J. 311; Russ Immarigeon, "Prison-Based Victim-Offender Reconciliation Programmes", dans B. Galaway et J. Hudson, *Restorative Justice: International Perspectives*, Criminal Justice Press, Monsey, 1996; L. Walther and J. Perry, "The Vermont Reparative Probation Program" (1997), 8 *ICCA Journal on Community Corrections* 26. Law Commission of Canada, Video Tape entitled contains a moving sequence describing a restorative conference following a drunk driving accident between an offender convicted of homicide and the family of the victim. However, such processes are not without their conceptual and practical problems: see Ottmar Hagemann, "Restorative Justice in Prison?"in Lode Walgrave, *Repositioning Restorative Justice*, Willan Publishing, Portland, 2003

[138] The Church Council on Justice and Corrections, *Satisfying justice: Safe Community Options that Attempt to Repair Harm from Crime and Reduce the Use of Length of Imprisonment*, Correctional Services of Canada, Ottawa, 1996

[139] The procedural implications of this approach for the exercise of discretion are discussed below in Part V. Belgium is another jurisdiction which appears to be moving in this direction.

restorative justice purports to be responsive to diverse *community* interests, while the state is still involved as a representative of general *public* interests and as a protector of certain *individual* interests as well.

The Parliament of Canada represents the whole polity where normative prescriptions concerning criminal law and procedure are at issue.[140] The substantive content of criminal offences and the manner in which they are to be dealt with procedurally are matters for political debate and democratic decision making at the federal level.[141] Thus participants in restorative conferences are not to determine what is criminal and what is not, nor whether an accused should be accorded due process protections. However, the administration of criminal justice, including the control of police and prosecutorial discretion respecting crimes, is largely a matter of provincial jurisdiction.[142] While it has been held that provinces need not necessarily introduce alternative justice schemes where authorized to do so under federal legislation,[143] once a province has exercised its authority to do so, the structure of, say, a restorative justice programme is a matter for determination by the provincial government.[144] Restorative conferences are not in a position to simply take the administration of justice into their own hands, even where pre-charge proceedings may never be reviewed by a court (unlike the situation in circle sentencing). It is not surprising, therefore that the federal legislation authorizing the creation of restorative justice regimes establishes minimum procedural safeguards for their operation.[145] Nor is it surprising

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[140] *Constitution Act 1867*, section 91(27). This approach must bracket issues relating to aboriginal treaty rights in the area of criminal justice: see Melissa S. Williams, "Criminal Justice, Democratic Fairness and Cultural Pluralism: The Case of Aboriginal Peoples in Canada", (2002) 5 *Buffalo Criminal L. Rev*. 451

[141] Of course, provinces may create quasi-criminal statutory offences: *Constitution Act*, section 92

[142] *Constitution Act 1867*, section 92(14)

[143] *R. v. S.(S.)*, [1990] 2 S.C.R. 254.

[144] This situation has led to considerable variation in use of alternative measures by different provinces, with the most populous province, Ontario, being the most reluctant to use such programmes: see C. Engler and S. Crowe, "Alternative Measures in Canada" (2000) 20 *Juristat* 6

[145] *Criminal Code* section 717 concerning "alternative measures" for adults, and *Youth Criminal Justice Act* section 10 concerning "extrajudicial sanctions" for young persons. This is a necessity for *Charter* compliance.

that within this framework, provincial governments have elaborated protocols which further structure the exercise of discretion by those conducting restorative processes.[146] Provincial authorities are establishing practice standards for training of facilitators and others in the community involved in the provision of restorative conferencing.[147] Thus, while restorative justice ought to be a community centred process, it is not one which is outside the ambit of state supervision in the interests of ensuring basic programme uniformity and equality of service, as well as protection of minimum standards of procedural justice.

While the normative force of federal law in criminal matters has been the formal rule since Confederation in 1867, recent developments in Canada have been acclimatizing legal professionals, politicians and the general public to the notion that cultural diversity can be recognized appropriately in some criminal justice contexts.[148] The injustices suffered by Canada's aboriginal peoples in relation to criminal law have not only raised awareness of problems,[149] but pointed to culturally sensitive solutions to criminal justice issues.[150]

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[146]See, for example, *"Getting Smart about Getting Tough": Saskatchewan's Restorative Justice Initiative,* Department of Justice of Saskatchewan, 1997; or *Restorative Justice: A Programme for Nova Scotia,* Nova Scotia Department of Justice, Halifax, June 1998. This document was adopted in a "Programme Authorization" signed by Nova Scotia Attorney General Robert Harrison, June 15, 1999 and published in the Royal Gazette of the Province on August 11, 1999, and effective as an authorization under section 717 of the Criminal Code and section 4 of the Young Offenders Act, as guidelines to prosecutors under section 6(a) of the Public Prosecutions Act, and as an authorization constituting police officers as agents of the Attorney General for the purposes of the programme under the Criminal Code and the Young Offenders Act. It also authorized those involved with the programme to elaborate protocols for implementation not inconsistent with the programme authorization. The authorization and protocols have since been updated in relation to the *Youth Criminal Justice Act.*

[147] This is occurring presently in Nova Scotia under the guidance of the Restorative Justice Programme Management Committee; see also Minnesota Department of Corrections, *Facilitating Restorative Group Conferences,* with Assistance from the National Institute of Corrections, 2000

[148] For interesting examples of judicial willingness to take race and racism into account in sentencing, see *R. v. Borde* (2003), 8 C.R. (6th) 203 (Ont. C.A.) and *R. v. Hill* (2003) 8 C.R. (6th) 215 Ont. S.C.J.(per Hill, J.) and the ensuing case comments: Archie Kaiser, "*Borde* and *Hamilton:* Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence" (at p. 289); Michael Plaxton, "Nagging Doubts about the Use of Race (and Racism) in Sentencing"(at p. 299), and Jennifer Llewellyn, "Restorative Justice in *Borde* and *Hamilton* - A Systemic Problem?" (at p. 308).

[149] Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada,* Ottawa, 1996; A.C. Hamilton and C.M.Sinclair, *The Justice System and*

Not the least of these have been circle sentencing initiatives which have gained prominence world-wide in the literature on restorative justice.[151] A critical question is whether analogous restorative conferencing, which is based on community participation, can be as successful in large, socially stratified, culturally diverse urban centres as in relatively homogeneous and geographically discrete rural or aboriginal communities. The harnessing of conflict resolution mechanisms within established urban subcultures seems an obvious possibility for restorative justice programmes.[152] Indeed, practitioners of restorative justice claim with some credibility, that the criminal harms which are brought to the attention of the justice system can be opportunities for community building despite cultural differences[153] and that the process of restorative conferencing in the hands of a skilled facilitator can recognize and strengthen communities of harm across erstwhile cultural barriers.[154] The point is that restorative justice principles and techniques provide the where-with-all to recognize collectivities which mediate between individuals and the system at large, and which form a legitimate way-station between abstract "public interest" and partisan "self-interest". Within the context of general criminal

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Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba, Winnipeg, 1991

[150] Williams, *supra*, footnote 140; and A.C. Hamilton, *A Feather not a Gavel: Working towards Aboriginal Justice*, 2001. Some of these solutions have caused controversy, such as Criminal code section 718.2(e) which states: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. See Philip Stenning and Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court and the Sentencing of Aboriginal Offenders"(2001) 64 *Sask. L. Rev 137* and the ensuing debate: Jonathan Rudin and Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'"(2002) 65 *Sask. L. Rev.* 3 and Julian V. Roberts and Philip Stenning, "The Sentencing of Aboriginal Offenders in Canada: A Rejoinder"(2002) 65 *Sask. L. Rev*.75

[151] See Lilles and Stuart, *supra*, footnote 135; or M. Jaccoud, "Les cercles de guérison et les cercles de sentence autochtones au Canada" (1999) 32 *Criminoligie* 79; M. Jaccoud, "Restoring Justice in Native Communities in Canada" in L Walgrave (ed), *Restorative Justice for Juveniles: Potentialities*, *Risks and Problems*, Leuven University Press, Leuven, 1998

[152] Kay Pranis, " Restorative Justice, Social Justice and the Empowerment of Marginalized Populations" in Gordon Bazemore and Mara Schiff, *Restorative Community Justice*, Anderson Publishing, Cincinnati, 2002

[153] Gerry Johnstone "Mediation, Participation and the Role of Community" being Chapter 7 in his *Restorative Justice: Ideas, Values and Debates*, Willan Publishing, Cullompton, 2002; and Mark S. Umbreit and Robert B. Coates, "Multicultural Implications for Restorative Juvenile Justice" (1999) 63 *Fed. Probation* 44

[154] John Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford U. Press, Oxford, 2002

justice structures erected by the democratic institutions of the state, there is room for recognition of community interests, in urban as well as rural settings, which can be culturally specific.

D. The Pros and Cons of Restorative Justice

As to the advantages of restorative justice, there is a growing body of empirical research which evaluates programmes along four significant dimensions. Firstly, the literature is virtually unanimous that those affected by crime, whether offenders, victims or others, find greater satisfaction in restorative justice processes than in formal criminal proceedings.[155] Secondly, rates of offender compliance with agreed restorative outcomes are higher than rates of compliance with court imposed outcomes in such dispositions as probation orders and conditional discharges.[156] Thirdly, where restorative justice outcomes replace standard sentencing outcomes rather than widening the net of criminal justice control over those who might heretofore received only a police caution or warning, restorative justice is more economically efficient than the regular court process.[157] Finally, there is mounting evidence that restorative justice processes reduce recidivism rates more effectively than formal criminal justice outcomes when other variables are statistically controlled in an appropriate

[155]For a broad empirical assessment satisfaction with of restorative justice outcomes see: J Latimer, C. Dowden and D. Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis", Research and Statistics Division, Department of Justice of Canada, April 2001; see also Paul McCold, "A Survey of Assessment Research on Mediation and Conferencing" in L. Walgrave, *Repositioning Restorative Justice*, Willan Publishing, Portland, 2003 and Leena Kurki, "Restorative and Community Justice in the United States"(2000) 26 *Crime and Justice: A Review of Research* 235 (M. Tonry (ed.), U of Chicago Press, Chicago); as well as Don Clairmont, *The Nova Scotia Restorative Justice Initiative*, reports for years one, two and three, supra, note 121.

[156] see: J Latimer, C. Dowden and D. Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis", Research and Statistics Division, Department of Justice of Canada, April 2001

[157] G. Maxwell and A. Morris, "Restorative Justice Re-Offending"in H. Strang and J. Braithewaite, *Restorative Justice: Philosophy to Practice*, Dartmouth, Aldershot, 2000; a recent empirical study on net widening in Canada, however, gives some cause for concern: see Julian V. Roberts and Thomas Gabor, "The Impact of Conditional Sentencing: Decarceration and Widening of the Net"(2003) 8 *Can. Crim L. Rev*. 33

manner.[158] These are not inconsiderable advantages, and they should go some distance toward calming the fears of restorative justice sceptics.

The "cons" of restorative justice are a number of concerns at levels of both principle and formal implementation.[159] Firstly, there is the matter of proportionality in responses to crime. Among those who emphasize the punitive value in criminal sanctions,[160] there is a concern that restorative justice methods are "soft on crime".[161] Those personally familiar with restorative conferencing are often concerned that the process and its outcomes are far more harsh than criminal dispositions, such as absolute or conditional discharges or probation, often meted out in similar circumstances.[162] From either perspective, the question of fairness and proportionality of sanctions is problematic. Secondly, and related to the first concern, there is one of equality. That some cases may be the subject of restorative process while others may proceed through a formal trial, is a potential disparity which appropriately attracts scrutiny.[163] Is it a sufficient response to suggest that all offenders may have access to restorative process under appropriate circumstances?[164] Assuming equal access to restorative process, is the flexible form of the restorative conference likely to give similar results in similar

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[158] A. Morris and G. Maxwell, "Family Group Conferences and Reoffending" in their *Restorative Justice for Juveniles: Conferencing, Mediation and Circles,* Hart Publishing, Portland, 2001

[159] See John Braithwaite, "Worries about Restorative Justice" being Chapter 5 in his *Restorative Justice and Responsive Regulation,* Oxford U. Press, Oxford, 2002 for a broader catalogue of concerns than those discussed here. See also, Jennifer G. Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique"(1994) 43 Emory L. J. 1247, although this article deals with victim-offender mediation and not full-fledged restorative conferencing.

[160] R. A. Duff, "Penal Communications: Recent Work in the Philosophy of Punishment" in M. Tonry (ed.) 21 *Crime and Justice: A Review of Research,* U. of Chicago Press, Chicago Press, 1996

[161] This sentiment may underlie some of the discussion in *R. v. Proulx, infra,*

[162] J. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", in M. Tonry (ed), *(1999) 25 Crime and Justice: A Review of Research 1-127.*

[163] Andrew Ashworth, "Is Restorative Justice the Way to Go Forward for Criminal Justice?"(2001) 54 *Current Legal Problems* 347

[164] This claim can be made plausibly in Nova Scotia, but in few, if any, other Canadian jurisdictions.

cases? The answer to this question is also uncertain, of course, in relation to sentencing outcomes following formal criminal trials.[165] Should one be more concerned in the context of restorative justice, or be willing to trade-off the risks of inequality against the gains to be made in terms of participant satisfaction, reduced recidivism, increased compliance rates and cost cuts? While empirical evidence might be helpful in relation to these questions, their resolution may equally be a matter for normative policy determination. Thirdly, and perhaps most importantly, there is a concern about the security of potentially vulnerable victims.[166] Around the world, women's groups are split about weighing the positive potential as opposed to the risks of restorative justice processes, particularly in the context of family violence.[167] Some victims and many prosecutors, however, advocate the use of restorative conferencing in these cases.[168] The challenge is to find appropriate ways to render restorative process safe and secure which can satisfy apprehensive victims. Alternatively, solutions may lie in finding mechanisms by which one can integrate the new formal inclusionary and restorative models of justice in a manner which is responsive to these concerns.

V. Functional Integration of Formal Inclusionary and Restorative Models of Justice

A. The Legislative Framework: *Criminal Code* and *Youth Criminal Justice Act*

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[165] The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Department of Supply and Services, Ottawa, 1987

[166] T. Grillo, "The Mediation Alternative: Process Dangers for Women"(1991) 100 *Yale L. J.* 1545; et L. G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolutionon Women"(1984), 7 *Har. Women's L. J.* 57

[167] See Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" and Ruth Busch, "Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong" in Heather Strang and John Braithwaite, *Restorative Justice and Family Violence*, Cambridge U. Press, Cambridge, 2002. In Nova Scotia, there is a moratorium on the use of restorative justice in family violence cases, and the matter is currently the subject of delicately structured public consultation process.

[168] Many prosecutors see restorative justice as a partial solution to the "recanting complainant" phenomenon which they encounter in many family violence related trials.

The first step toward a functional integration of formal inclusionary and restorative justice models is a formal legislative framework which appropriately recognizes their inter-relationship. This has been done in both the *Criminal Code* and the *Youth Criminal Justice Act*. However, the precise mechanisms for invoking the application of one model rather than another and the procedural protections involved in each bear closer scrutiny. The first and most important point to make is that the formal process with its procedural protections for offenders and victims remains the default paradigm.[169] In other words, flexible restorative practices are voluntary - the informed consent of the offender is required and cannot go ahead where the offender is unwilling to "accept responsibility" for the offence.[170] Moreover, the victim need not participate in restorative processes.[171] This approach is a critical safeguard for the rule of law in our criminal justice system, while enabling flexible restorative alternatives.

A second aspect of this legislative co-ordination is the establishment of minimum legislative standards for the restorative process, also mentioned above. The details are instructive and include: discretionary consideration of the needs of offender, victim and society; the implementation of the offender's right to counsel; the offender's "taking of responsibility" for the offence; the sufficiency of the evidence to proceed to a trial if

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[169] *Criminal Code*, section 717(2) states that alternative measures are not to be used if the alleged offender "(a) denies participation or involvement in the commission of the offence; or (b) expresses the wish to have any charge...dealt with by the court". See also *YCJA* s.10.

[170] *Criminal Code* s. 717(1) and *YCJA* s. 10(2)

[171] This latter point has necessitated a response to the question of whether victims can have a veto over restorative processes. The general answer has been no, and while actual victims may refuse to participate in a restorative conference, procedures in some jurisdictions allow for participation of surrogate victims or representatives of appropriate victim organizations: see Richard Young, "Integrating a Multi-Victim Perspective into Criminal Justice through Restorative Justice Conferences" in Adam Crawford and Jo Goodey (eds.) *Integrating a Victim Perspective within Criminal Justice: International Debates*, Ashgate, Dartmouth, 2000; and Mary Achilles and Howard Zehr, "Restorative Justice for Crime Victims: The Promises and the Challenge" in Gordon Bazemore and Mara Schiff (eds.), *Restorative Community Justice*, Anderson Publishing, Cincinnati, 2001

need be; an evidential privilege against use of admissions or confessions in subsequent civil or criminal proceedings; a double jeopardy rule against subsequent punishment where a restorative agreement has been fulfilled; and the mitigation of punishment in a subsequent proceeding if a previous restorative agreement is partially fulfilled.[172] Thus, informed consent with advice from counsel, and protection from adverse consequences should the restorative process fail and require a formal proceeding, are the hallmarks of the legislative protection of the relationship between the two models.

B. Protocols to Structure Discretion for Multiple Entry Ports between Models

As noted previously, the *Criminal Code* and *Youth Criminal Justice Act* establish the statutory framework for formal inclusionary and restorative models of criminal justice, but the implementation of this hybrid system lies primarily with provincial attorneys general. Those provinces, such as Saskatchewan[173] and Nova Scotia,[174] which have implemented comprehensive programmes for restorative justice have established rigorous and relatively detailed protocols which define the nature of the alternative measures within the province.[175] These protocols[176] may be supplemented by guidelines and service contracts with community restorative justice agencies which put more flesh on the meagre bones of the federal statutory framework. The Nova Scotia Restorative Justice Programme Authorization, for example, sets four broad and ambitious goals. It aims to (i) reduce recidivism; (ii) increase victim satisfaction; (iii) strengthen communities; and (iv) increase

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[172] *Criminal Code*, subsections 717(1) to (4) and *YCJA* subsections 10(2) to (5)

[173] *"Getting Smart about Getting Tough": Saskatchewan's Restorative Justice Initiative,* Department of Justice of Saskatchewan, 1997

[174] supra footnote

[175] Other provinces have implemented alternative measures programmes which are not so comprehensive: see Ontario, *Alternative Measures Programme: Policy and Procedures Manual*, Queen's Printer, Toronto, 1995

[176] For example, see Nova Scotia Department of Justice, *Restorative Justice Programme Protocols*, Halifax, March 31, 2000. These protocols are also available on line, but are currently under revision.

public confidence in the justice system[177]. The Nova Scotia Restorative Justice Protocol then describes how the programme is to provide a voice and involvement for the victim and the community by such means as early involvement, victim support, victim and community participation, updates on processes and outcomes, and input in programme decision making. Next the protocol describes the processes by which offenders, with input from victims and community, may repair the harm caused by the offence, be re-integrated in positive ways into the community, and be held accountable in meaningful ways. The Nova Scotia protocol also sets out requirements for restorative justice agencies, the community partners,[178] with respect to assessing victim needs and willingness to participate, assessing offenders and their acceptance of responsibility, assessing community needs and capacities for participation, exploring possible restorative options, preparing potential participants for restorative conferences, facilitating the restorative processes, and providing follow-up services, including monitoring compliance with conference outcomes.

Critical to the practical exercise of discretion by justice officials under the Nova Scotia Restorative Justice Programme, taking it as a comprehensive example of the genre, are the continuum of options under the protocol, and the eligibility criteria for invoking the restorative model. The range of options is interesting because it recognizes a need to distinguish among different procedural possibilities in accordance with the circumstances of the individual case. Thus police and Crown cautions are the least liberty-intrusive and least costly option. Cautions are included in the programme protocol for minor cases, not because they are thought to be "restorative" in the true sense of the definition of restorative justice given above, but in order to avoid the

[177] Supra, footnote 144

[178] There are currently nine such agencies in the province with which the Nova Scotia Department of Justice has service contracts. Eight cover geographical areas which divide up the whole of the province. One deals with aboriginal offenders, regardless of where they reside in the province.

problem of "widening the net", needlessly stigmatizing young people, and unnecessarily increasing the costs and administrative burdens of the programme.[179] The next set of options are called "restoratively oriented" processes and really consist of individual and group "accountability sessions". These are usually meetings between police or justice officials on the one hand and the offender and his parents or family on the other to work out a mechanism by which the offender can be properly held accountable. While often helpful and cost effective, the absence of the both the victim and his or her supporters and other concerned members of the community prevents accountability sessions from having the full characteristics and advantages of restorative conferencing.[180] The final group in the continuum of options under the Nova Scotia protocol is designated as "restorative justice processes" and includes victim-offender conferences, restorative conferences and sentencing circles. As discussed previously, sentencing circles and restorative conferences can clearly be seen as full restorative options. On the other hand, victim-offender conferences (essentially mediation) are certainly more restorative than accountability sessions, but would not be included under the rubric of restorative justice processes by those who see community participation and community interests as an integral part of restorative

[179] There are legitimate criminal justice policy reasons for this "diversion based" option. The diversion literature cited above provides justification for avoiding the negative, stigmatizing impact of needless use of criminal justice processes (including increased recidivism): see footnote, *supra*. However, while cautioning may be helpful for offenders and critical to the effective operation of the Restorative Justice Programme, it should not be thought a full blown "restorative process". Police and Crown cautions, of course, are now formally recognized in *YCJA* ss 6 through 9 but were used in Nova Scotia prior to the advent of that legislation, and can be used in relation to adult offenders under the *Criminal Code* as an exercise of common law police and prosecutorial discretion.

[180] These sessions may be compared with police warning sessions in certain jurisdictions which are sometimes linked to John Braithwaite's controversial theory of restorative justice based on "re-integrative" as opposed to "stigmatizing" shaming: see Richard Young, "Just Cops Doing Shameful Business: Police-Led Restorative Justice and the Lessons of Research" in Allison Morris and Gabrielle Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Hart Publishing, Oxford, 2001; these accountability sessions also share characteristics with the case conferences described above.

justice.[181] The general point to be made, however, is that a provincially promulgated restorative model under the federal statutory framework can structure official discretion in relation to a complex number of alternatives. Doing this in a fair manner is a critical concern in for a justice system under a *Charter* requirement to adhere to principles of fundamental justice.[182]

Knowing that a restorative model of justice is available and that there are a number of options within it, how are police, prosecutors or correctional officials to exercise their discretion in routing offenders via one direction or another? The federal statutory frameworks provide some guidance for these discretionary decisions; however, provincial programmes may contain additional eligibility criteria. The Nova Scotia protocol speaks of: the co-operation of the youth; the harm done to the victim, and her willingness to participate; the desire or need of the community to achieve a restorative result; the seriousness of the offence and the motive behind its commission; the relationship between offender and victim prior to the offence and prospects for a continued relationship; the potential for an agreement which would be meaningful to the victim; whether the offender has participated in such a programme in the past; whether other government or

[181] Jennifer Llewellyn's work puts her among those who see victim/offender mediation as outside the strict boundaries of restorative process: *supra,* note 105. Likewise, see the discussion of "ADR dystopia" and other "pathologies of ADR" in John Braithwaite, *Restorative Justice and Responsive Regulation,* Oxford University Press, Oxford, 2002. For a concurring European view see: J. Deklerk et A. Depuydt: " Au-dela de la méthode de la médiation, vers une culture de reliance", Seminario internacional sobre de los ninos y mediacion, Buenos Aires, 10-12 de Mayo de 2001. On the other hand, many proponents of restorative justice in the United States and Europe would put mediation under the heading of restorative justice without a second thought: see Mark Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research,* Jossey-Bass, San Francisco, 2001; Martin Wright and Burt Galaway, *Mediation and Criminal Justice: Victims, Offenders and the Community,* Sage, Newbury Park, 1989; Comité des ministres du Conseil de l'Europe, *Médiation en matière pénale,* Editions du Conseil de l'Europe, Strasbourg, 2000; J.-P. Bonafé-Schmitt, J. Dahan, J. Salzer, M. Souquet et J.-P. Vouche, *Les mediations, la médiation,* Editions Erès, Ramonville Saint-Agne, 1999; R. Cario, *La médiation pénale: entre répression et réparation,* l'Harmattan, Paris, 1997; et J. Faget, *La médiation: essai de politique pénale,* Editions Erès, Ramonville Saint-Agne, 1997

[182] See Archibald, "The Politics of Prosecutorial Discretion...", *supra,* note 3

prosecutorial policies conflict with a restorative justice referral; and any other reasonable factors deemed to be exceptional and worthy of consideration. With respect to the operationalization of the exercise of discretion in relation to such factors, there must be institutional rewards or pressures to advert seriously to the choice between formal and restorative models in such a hybrid system. In Nova Scotia, the approach taken in relation to youth crime is to require a "restorative justice check-list" to be filled out prior to the laying of a charge and for the police service to indicate why the restorative model has been rejected if formal charges are to be laid.[183]

As mentioned previously, the Nova Scotia restorative justice programme encourages use of restorative processes at four junctures in the criminal justice process: pre-charge, post-charge, post-conviction and post-sentence. Just because the restorative model was rejected at an earlier phase in the process does not mean that it cannot be invoked at a later one. Participants may change attitudes or assessments of the situation. Moreover, for certain serious offences a restorative process is only to be invoked at the post-conviction and post-sentence stages.[184] The basic statutory frameworks and the provincial protocol just described structure the exercise of discretion at these four critical moments. The rule of law requires that broad discretion of the type involved here be subject to protocols or guidelines to structure its exercise in order to avoid, to the extent possible, problems in relation to proportionality, equality and security referred to above as some of the "cons" of restorative justice. However, discretion is still a matter of professional judgement even when official guidance

[183] Police compliance with procedure in the early days was quite variable: see Don Clairmont, *Nova Scotia Restorative Justice Programme Evaluation*, *supra*, note 121

[184]These offences are fraud and theft over $20,000, robbery, sexual offences, kidnapping, abduction and confinement, spousal/partner violence, criminal negligence/dangerous driving causing death, impaired driving and related offences, and manslaughter. For murder, restorative process is only available at the post-sentence correctional stage.

is provided. This raises the question of responsive professionalism.

C. Participatory Process and Responsive Professionalism

What is the fit between these new particpatory processes (whether it be the formal inclusionary model or the flexible restorative model) and a responsive approach by legal professionals? Firstly, in the hybrid criminal justice system under discussion here, there are particular concerns about institutional and professional competence in relation to the new restorative model. We go to great lengths to ensure that those in charge of the formal criminal justice system, whether lawyers, judges or others, are trained and sufficiently experienced to carry out their responsibilities. What assurances must there be that the facilitators and community members involved in restorative processes have adequate levels of competence? There are practice standards emerging.[185] It is recognized that certain facilitative techniques work while others do not. A cottage industry is developing in facilitator training. Restorative justice is now on the curriculum in undergraduate criminology departments in Canada.[186] The restorative model is gradually being placed on a sound institutional footing in so far as personnel development is concerned.

There is evidence, however, of a certain recalcitrance on the part of legal professionals to embrace particpatory processes. Don Clairmont in his first evaluation of the Nova Scotia restorative justice programme

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[185] see Law Commission of Canada, *Transforming Relationships through Participatory Justice*, Ottawa, Minister of Public Works and Government Services, 2003; David B. Moore and John MacDonald, *Community Conferencing Kit*, Transformative Justice Australia, Sydney, (undated, on file with the author and available "on line"); P. McCold and B. Wachtel,*Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project*, U.S. Department of Justice/National Institutue of Justice, Washington DC, 1998 (also at the International Institute for Restorative Justice Practices website: www.restorative practice.org including "Community Group Conferencing Evaluation Forms"); and Barry Stuart, "Guiding Principles for Peace Making Circles" in Gordon Bazemore and Mara Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities*, Anderson Publishing, Cincinnati, 2001

[186] Simon Fraser University in Vancouver, B.C. has a Restorative Justice Institute located in its Criminology Department and others are teaching about restorative justice in variety of courses in many universities.

talked of the programme "hitting a wall", like a marathon runner, when it encountered prosecutors, defence lawyers, judges and correctional officials. Professor Clairmont's empirical data demonstrated that police were making large numbers of restorative justice referrals, while there were comparatively few from prosecutors, judges and correctional personnel.[187] Moreover, in interviews with stakeholders, it was members of the legal profession, including defence counsel who tended to express the most scepticism about the new restorative model of justice.[188] Perhaps this should not be surprising. Law schools and professional continuing education have long been dedicated to ensuring professional competence rooted in traditional adversarial proceedings. While mediation and ADR have been making inroads in the practice of civil litigators[189] and among certain practitioners of administrative law,[190] the traditional appeal of the adversarial model of criminal justice has been harder to overcome. However, restorative justice is now on the curriculum in at least one Canadian law school.[191]

In this context, a professionalism which is responsive to the new participatory forms of criminal justice is required. The agenda for continuing education with respect the formal inclusionary model of criminal justice is relatively straight forward. The *Criminal Code* lays out with considerable clarity the various opportunities for

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[187] *supra*, note 12, "Year One Evaluation"1

[188] *supra* note 121. This is true for all three years of evaluation.

[189] See Law Commission of Canada, *Transforming Relationships through Participatory Justice*, *supra*, note 185 referring to the practice standards of the ADR Institute of Canada.. Reference could also be made to the Collaborative Family Law Association of Canada. ADR hass been on the curriculum of most Canadian Law Schools as a specialized subject for more than a decade, and civil procedure courses are now including segments on settlement and ADR in addition to the adversarial rules.

[190] David Mullan, Read Lecture, Dalhousie Law School, Halifax, January 15, 2004

[191] "Restorative Justice Theory and Practice" has been added to the curriculum at Dalhousie Law School, Halifax, Nova Scotia and is currently a teaching responsibility of Professor Jennifer J. Llewellyn. An introduction to restorative justice is contained in the first year teaching materials used at Dalhousie: B. Archibald, S. Coughlan and R.L. Evans (eds.), *Criminal Justice: The Individual and the Stat - Cases and Materials*, Dalhousie Law School, Halifax, 2003

victim participation as outlined above. Standard programmes for learning the new rules in the enlarged formal process which accommodates victims' interests are within familiar formats of continuing legal education. The rules of the inclusionary trial are learned in the usual way and judges will enforce them in the normal fashion, to the embarrassment of counsel if they don't know the new ropes. However, restorative justice poses different challenges to continuing legal education and requires a creative and more responsive professionalism.

Restorative conferencing is very much different from a inclusionary trial or sentencing hearing. Legal professionals are not in control. Defence counsel are understandably apprehensive about a restorative process which is predicated on potentially far reaching admissions about critical events and their causes which can be avoided in the formal process.[192] Some defence counsel have expressed open hostility to restorative conferencing, such that some restorative justice advocates are concerned about appropriate methods by which to include them in conferences.[193] Other defence counsel, however, have been more open to the positive prospects for restorative justice from their clients' perspective and have been supportive of the move to the hybrid model.[194] While some Crown prosecutors have been very enthusiastic about restorative justice from the outset,[195] there are others who still believe that restorative justice is "soft on crime".[196] Counsel who may be

[192] For an academic rehearsal of similar arguments, often based on confusing mediation with restorative justice, see S. Levrant, F. Cullen, B. Fulton and J. Wozniak. "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?"(1999), 45 Crime and Delinquency 3; and J. Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique"(1994) 43 Emory L. Rev.1247

[193] Fred McElrea, "Taking Responsibility in Being Accountable" in Helen Bowen and Jim Consedine, *Restorative Justice: Contemporary Themes and Practices*, Ploughshares Publications, Lyttleton N.Z., 1999

[194] Danny Graham, former leader of the Nova Scotia Liberal Party, was one of the prime movers behind the Nova Scotia Restorative Justice Programme in its initial phases while he was a prominent member of the Nova Scotia defence bar and before he entered politics.

[195] The author encountered such enthusiasm when conducting early sessions on the topic for the Nova Scotia Public Prosecution Service, and there are prominent Crowns from across Canada who have embraced restorative justice whole heartedly.

[196] For an academic view on the topic, see B. Archibald, "The Politics of Prosecutorial Discretion: Tensions between Punitive and Restorative Paradigms of Justice"(1998) 3 *Can. Crim L. Rev*. 69;

called upon to give advice to crime victims may be most anxious about the restorative model, and be particularly apprehensive if they proceed from assumptions derived from the civil ADR model.[197] Nevertheless it appears that the more experience counsel have with restorative justice, the more positive they are about its potential in the right contexts.[198] However, professional training for restorative justice cannot be adequately conducted in the traditional conference setting where one gets lectured about rules. Lectures can usefully be given about restorative justice values and processes, its successes and failures. But role playing in restorative justice conference simulations appears to be the best method for acquainting the uninitiated with the potential and the pitfalls of restorative justice. Such teaching techniques can give those steeped in adversarial justice a sense of the powerful dynamics of the restorative conference and the significance of their place in Canada's dual system of criminal justice. It is also important to make sure that such hands-on training demonstrate the distinctions between the mediation that may be familiar to many from the civil ADR context and the full restorative conferencing which works best in the criminal context. This sort of training for a responsive professionalism, open to the possibilities of restorative justice, is essential if lawyers representing victims, offenders and the prosecution are to be able to exploit the real opportunities presented by Canada's dual system of inclusionary and restorative models of justice.[199]

Continuing judicial education faces similar needs. In fact, in order to enhance prospects for restorative process beyond "diversion" at the front end of the justice system, the need for judicial training in the area may

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[197] R. Delgado, "Prosecuting Violence: A Colloquy on Race,Community and Justice" (2000) 52 Stanford L. Rev.751

[198] Don Clairmont, *supra*, note 121

[199] See generally, Carrie Menkel-Meadow, " Ethics and Professionalism in Non-Adversarial Lawyering", (1999) 27 *Florida State University Law Review 153*

be the most critical. After all, attorneys-general can promulgate guidelines to bring prosecutors on board (more or less) with the requirements of the hybrid model. However, without legislative change mandating the use of restorative conferencing in the post-conviction stages, judicial education may be one of the few tools available to advance the potential of the restorative model. This. of course, is because circle sentencing, the use of advisory elders panels, or referral to community led restorative conferencing is a matter of the exercise of sentencing discretion. There are celebrated examples of judges taking the initiative with circle sentencing[200] and circle sentencing has become significant in some Canadian jurisdictions.[201] However, there is clear reticence among some trial court judges to leap into the waters of restorative justice without some instruction in swimming and practice in controlled aquatic conditions. Once again, the simulation of circle sentencing or restorative conferencing, supplemented by lecture and discussions about their values and techniques, would seem to be the best manner in which to encourage responsive judicial professionalism with respect to hybrid models of justice.[202] Moreover, the dangers of having the judiciary set unfortunate examples with respect to the relationship between the formal inclusionary and flexible restorative models may be particularly far reaching. Judicial misconceptions can take on the mantle of precedent.

D. Interpreting Problematic Precedents: *Gladue and Proulx*

It might seem ungrateful for a jurist open to a restorative model of justice to take critical aim on the Supreme Court of Canada over its pioneering decisions of *R. v. Gladue*[203] and *R. v. Proulx*[204] After all, in

[200] *R. v. Moses* (1992) 71 C.C.C. (3d) 347 (Stuart, J., Yukon Terr. Ct)
[201] See Lillies, *supra,* note 135 and Stuart, *supra*, note 135
[202] Nova Scotia Provincial Court Judges have prepared a training video on restorative justice.
[203] (1999) 23 C.R. (5th) 197 (S.C.C.)
[204] (2000) 30 C.R. (5th) 254 (S.C.C.)

Gladue the Court gives its imprimatur to the phrase "restorative justice" for the first time, providing an initiation to restorative justice for many practitioners of criminal law, with the added weight of the Court's prestige. Moreover, *Gladue* demands that the concept of restorative justice be taken seriously, especially in the context of the sentencing of aboriginal offenders.[205] In this sense, it is true that *Gladue* was thought to hold out great promise concerning the integration of restorative and inclusionary models of justice.[206] Similarly, *Proulx* takes up the label of restorative justice once again, and strongly asserts the potential of the new conditional sentence of imprisonment[207] (essentially house arrest subject to conditions) in the attainment of desirable sentencing objectives: "while incarceration may provide for more denunciation and deterrence than a conditional sentence, a conditional sentence is generally better suited to achieving the restorative objectives of rehabilitation, reparations and promotion of a sense of responsibility in the offender."[208] In this regard, the Court was most conscious of Parliament's intention in introducing the conditional sentence of imprisonment, to reduce Canada's high incarceration rates and the negative influences that unnecessary incarceration can have on offenders and the justice system.[209] Thus, both *Gladue* and *Proulx* appear on the surface to be salutary decisions from the perspective of Canada's new hybrid system based on integrating different models of justice.

There is, however, from the restorative justice perspective, the character of a regressive intellectual Trojan Horse about both the *Gladue* and *Proulx* decisions. The latter, in particular, involves an unnecessary

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[205] See on this point the debate in response to Roberts and Stenning, *supra*, footnote

[206] See Kent Roach and Jonathan Rudin, " *Gladue:* The Judicial and Political Reception of a Promising Decision"(2000), 42 Can. J. of Criminology 355

[207] *Criminal Code*, section 742.1 For one of the latest assessments of conditional sentencing see, Julian V. Roberts and Thomas Gabor, "The Impact of Conditional Sentencing: Decarceration and Widening of the Net"(2003) 8 Can. Crim L.R. 33

[208] *R. v. Proulx, supra* at p. 40.

[209] ibid, p.14

resurrection of the punitive paradigm and an undervaluation of restorative justice. The Court's undermining of the notion of *limiting* as opposed to *punitive* retributivism actually began with the case of *R.v.M.(C.A.)*[210] where the court endorsed the idea that punishment was a purpose of sentencing in Canada. This was at the same time when Parliament was enacting a statutory statement of the purposes and objectives of sentencing which eschews any reference to the concept of punishment. Section 718 of the *Criminal Code* now sets out utilitarian purposes and objectives for sentencing, subject to the limiting principle of proportionality in section 718.1, and its corollaries in section 718.2. The problem with *Gladue* and *Proulx* that they set up a false dichotomy, implicit in *Gladue* and explicit in *Proulx*, between punitive and restorative justice, and ascribe to each a substantive and procedural content which renders more difficult the task of integrating the formal inclusionary and restorative justice models as they have emerged from Parliamentary and governmental policy.

Proulx identifies denunciation, deterrence and separation as "punitive objectives" of sentencing to be achieved primarily by incarceration, and identifies rehabilitation, reparation and promotion of a sense of responsibility as "restorative objectives" of sentencing, to be achieved primarily by less coercive dispositions such as probation and conditional discharges. Conditional sentences of imprisonment are a sort of half-way house since "a conditional sentence can achieve both punitive and restorative objectives."[211] This is an over simplified classification at a substantive level which does not recognize the potential rehabilitative aspects of certain carceral options, nor does it recognize the denunciatory, deterrent and incapacitative aspects of some restoratively achieved outcomes. Moreover, The Court in *Proulx* clearly associates restorative justice with

[210] (1996) 46 C.R. (4th) 269 (S.C.C.)
[211] *Proulx, supra,* p. 37

being "soft on crime" and incarceration with being "tough where it counts".[212] In procedural terms, restorative justice is associated with lenient and largely rehabilitative *sentencing* options and punitive justice with incarceration as a *sentencing* option - aspects of a formal process only. There is no hint that the restorative model is a theory of justice exemplified by a broad, flexible range of restorative conferencing practices that can be usefully invoked at pre-charge, pre-trial, sentencing and correctional stages of the criminal justice system. Not surprisingly, *Gladue*, since it is a case of an aboriginal offender unlike *Proulx*, does make reference to "healing and sentencing circles" in the context of a discussion about restorative justice.[213] The court might, then, have been expected to advert in *Proulx* to the broader procedural aspects of restorative justice derivable from *Gladue*. However, both cases are sentencing appeals, and the prominent brandishing of "punitive objectives" combined with a rather distortive discussion of restorative justice in this limited sentencing context, inhibit a systemic analysis of the integration of formal inclusionary and restorative models of justice in the larger framework established by Parliament.[214] Unless restrictively interpreted and applied, these precedents from the Supreme Court of Canada could form an impediment to a broadly conceived professional response to the participatory justice processes with which we must all now cope.

VI. Criminal Justice under Reflexive Rule of Law in a Deliberative Democracy

A. Deliberative Democracy and a Reflexive Rule of Law

There is a fundamental sense in which the Canadian shift away from punitive and rehabilitative

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[212] On the unfortunate nature of this sort of exercise, see Marc Mauer, "Why are Tough on Crime Policies So Popular?" (1999) 11 Stan. L. & Policy Rev. 9

[213] *Gladue*, *supra*, *p. 224*

[214] See Jennifer Llewellyn, "Restorative Justice in *Borde* and *Hamilton* - A Systemic Problem?" (2003), 8 C.R. (6th) 308.

paradigms of criminal justice toward the inclusionary adversarial and restorative models is reflective of, and explained by, contemporary theories of deliberative democracy.[215] The insufficiencies of the minimalist, liberal, *laissez-faire* capitalist state of the nineteenth century gave way to the regulatory, republican or social democratic model of the mid- twentieth century.[216] The basic legal and political human rights of the eighteenth and nineteenth centuries[217] were overtaken by an uneven implementation of social and economic rights[218] through social democratic governments or centrist governments under pressure from the left.[219] As mentioned above, the ebbing fortunes of the punitive criminal justice in the face of rising confidence in the rehabilitate capacities of the modern welfare state tracked these broader political developments. However, public confidence in the capacities of the state to provide cradle to grave well-being was greatly undermined, for better or for worse, in much of the western democratic world.[220] In the late twentieth century, much of the alienation from the welfare state, however, was rooted not just in criticism from the economic right that governments could not run efficient economic enterprises, but also in a popular antagonism to the over-bearing bureaucratic tendencies of big government, even when it distributed some degree of largesse. Thus a confluence of pressures from both right and left have contributed to the movement of western governments in the last decade to abandon public ownership of economic enterprises, to down-size government, reduce

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[215] See especially the work of Habermas and of Kymlicka, *supra*, footnotes 1 and 2

[216] R. Cranston, *The Legal Foundations of the Welfare State,* Weidenfield &Nicholson, London, 1985

[217] Encapsulated in the United Nations *International Covenant on Civil and Political Rights,* December 19, 1966, 999 U.N.T.S. 171; 6 I.L.M. 368

[218] Enumerated in the United Nations *International Covenant on Social and Economic Rights*, December 16, 1966, December 16, 1966, 993 U.N.T.S 3; 6 I.L.M. 360

[219] Keynsian economics can be stretched in different directions: see Robert E. Goodin (ed.), *The Real Worlds of Welfare Capitalism,* Cambridge U. Press, New York, 1999

[220] J Keane, *Democracy and Civil society: On the Predicaments of European Socialism, the Prospects for Democracy and the Problem of Controlling Social and Political Power,* London, 1988

deficits that emerged from mis-managed Keynsianism, and generally to dismantle the institutions of the welfare state.[221]But what emerges in the twenty-first century is not a simple return to the minimalist liberal state of the nineteenth century and its raw capitalism, but rather a conversion of the welfare state into what is being called the supervisory or regulatory state.[222] The latter attempts to maintain some capacity to influence economic, social and cultural policy, even in hostile international conditions of economic, social and cultural globalization.[223] Canadian citizens of the postmodern era seem to demand it.

Jurgen Habermas brilliantly encapsulates the deficiencies of traditional liberal and social democratic visions of the state in *Between Facts and Norms:*

> " ...both paradigms share the productivist image of capital industrial society. In the liberal view, the private pursuit of personal interests is what allows capitalist society to satisfy the expectations of social justice, whereas in the social welfare view, this is precisely what shatters the expectation of justice. Both views are fixated on how a legally protected negative status functions in a given social context."(pp. 407-408)

> "After the formal guarantee of private autonomy has proven insufficient, and after social intervention through law also threatens the very private autonomy it means to restore, the only solution consists in thematizing the connections between forms of communication that simultaneously guarantee private and public autonomy in the very conditions from which they emerge."(p.409)

In a deliberative democracy the "thematized connections between private and public spheres", or relations between civil society (in its various individual or collective components) and the state (in its various constituent

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[221] Margaret Thatcher and Ronald Reagan were only the beginning...See Michael Taggart, "The Nature and Functions of the State" in P. Cane and M. Tushnet, *The Oxford Handbook of Legal Studies*, Oxford U. Press, Oxford, 2003; or Paul Pierson, *Dismantling the Welfare State?*, Cambridge University Press, Cambridge, 1995

[222] Habermas in translation uses the term "supervisory state" in *Facts and Norms* (passim), whereas John Braithwaite speaks of a "responsive regulatory state"in *Restorative Justice and Responsive Regulation*, *supra*, note 154. See also, Christine Parker and John Braithwaite, "Regulation" in P.Cane and M. Tushnet, *The Oxford Handbook of Legal Studies, ibid*

[223] See generally, W. Twining, *Globalization and Legal Theory*, Butterworths, London, 2000; and Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, Routledge, New York, 1995

parts or agencies), become participatory, reciprocal, self-reflective, and mutually regenerative or "reflexive". [224] Or to cite Habermas once again: "The supervisory state looks to non-hierarchical bargaining for an attunement among sociofunctional systems"[225] and to relational programmes which "...induce and enable systems causing dangers to steer themselves in new safer directions."[226] In other words, in a decentralizing and partially privatizing deliberative democracy, the supervisory or regulatory state supplements centralized electoral, party politics with consultation, participation and supervised self-regulation for affected individuals, corporate and collective entities, and communities as a means to ameliorate the alienating, top-down politics of both the traditional liberal and welfare states. This is a procedural theory of democracy involving general norm creation and law making at the legislative level and structured supplementary rule-making and application at local and functional levels.

Essential characteristics of politics in postmodern democracies, however, are an absence of universal values, cultural pluralism and great social and economic diversity among the citizenry.[227] As the "sacred canopy" of religious, social and cultural homogeneity (if it ever existed) is definitively torn asunder,[228] deliberative democracy becomes an exercise in articulating values which can be shared, and gathering disparate individuals and communities together in an inclusive manner, which enable the society to function at

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[224] This view of reflexivity, based on Habermas, is not exactly the same as G. Teubner's, of which Habermas is critical. See G. Teubner, *Law as an Autopoietic System,* Blackwell, Oxford, 1993. A more approachable presentation may be G. Teubner, "Substantive and Reflexive Elements in Modern Law"(1983), 17 *Law and Soc. Rev.* 239 and an ensuing dialogue: Erhard Blankenburg "The Poverty of Evolutionism: a Critique of Teubner's Case for Reflexive Law" (1984), 18 *Law and Soc. Rev.* 273 and Gunther Teubner, "Autopoiesis in Law and Society: A Rejoinder to Blankenburg" (1984) 18 *Law and Soc. Rev. 291*.

[225] *Facts and Norms*, p. 344

[226] ibid, p. 344

[227] A fact long recognized in Canadian society: John Porter, *The Vertical Mosaic,* U of T. Press, Toronto, 1965

[228] P. Berger, *The Sacred Canopy: The Social Reality of Religion,* Faber, London, 1969

national, provincial and local levels.[229] As other institutions in civil society increasingly represent partial economic, cultural and social interests, law and legal institutions take on increasingly important roles in communicating common ground and mediating or adjudicating among conflicting individual and collective claims. As Habermas says, postmodern societies are integrated "...not only through values norms and mutual understanding, but also systemically through markets [including labour] and the administrative [lawful] use of power."[230] Law is linked to all these integrative mechanisms and, when all else fails, law is the coercive glue holding society/the state together.

B. The Supervisory State and Reflexive Criminal Law in Context

John Austin originated the powerful phrase "law is the command of the sovereign".[231] This is in some measure the mantra of the positivist tradition in legal thinking which has been so influential in the common law world.[232] Criminal law, particularly in its punitive and rehabilitative guises, seems the paradigmatic example of this hierarchical vision of law: the sovereign commands thou shalt not do certain things on pain of punishment or forced rehabilitation. That participatory models of criminal justice should now be emerging in Canada may seem at odds with that traditional intuition. However, reflexive modes of state supervision have emerged in many other areas of Canadian law. Brief mention of a few of these reflexively regulated areas may serve to put

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[229] See A. Cairns, J. Courtney, P. MacKinnon, H. Michelmann, and D. Smith, *Citizenship, Diversity and Pluralism*, McGill/Queen's U. Press, Kingston & Montreal, 1999: I. Young, *Inclusion and Democracy*, Oxford U. Press, Oxford, 2000; and W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, *supra*, footnote 2

[230] *Facts and Norms*, p. 39

[231] See John Austin, *Lectures on Jurisprudence*, 1861-1863 and W. Jethro Brown, *The Austinian Theory of Law*, London, 1906

[232] See W. Friedman, *Legal Theory* (5th ed.),Columbia U. Press, New York, 1967, especially Chaps. 21-25

the criminal justice developments in broader context.

Regulation of labour markets may be one of the first examples of reflexive law in Canada. Early employment law displayed the characteristics of hierarchical, direct regulation by the state in the form of such things as child labour laws and maximum hours of work legislation.[233] This direct, top-down approach to legal regulation of the labour market is still evident in the various Canadian labour standards codes which govern almost exclusively (with human rights legislation) in the non-unionized sectors.[234] However, during and after the Second World War, Canadian jurisdictions adopted trade union acts on the American "Wagner Act" model which granted effective rights to employees to unionize in systems as supervised by specialized public labour relations boards,[235] but largely self-regulating through the mechanisms of collective bargaining and private arbitration as between unions and individual employers.[236] This is a paradigmatic example of reflexive law in action (labour law) in tandem with hierarchical, state law as the default paradigm (employment law).[237] What is interesting from the perspective of participatory justice is the fact that the practices of labour boards and labour arbitrators became so formalized over time that they took on the characteristics of court adjudication and have

[233] see O. Kahn-Freund, "A Note on Status and Contract in British Labour Law"(1967) 30 Mod. L. Rev 635

[234] see G. England, I. Christie and M. Christie, *Employment Law in Canada* (3rd ed.), Butterworths, Toronto (loose-leaf), 1993

[235] see D. Carter, G. England, B. Etherington and G. Trudeau, *Labour Law in Canada* (5th ed.), Kluwer Law International/Butterworths, Markham, 2002. The predominant, atomized and decentralized system of collective bargaining with individual employers is supplement in some jurisdictions such as Quebec and Nova Scotia with sector bargaining (in industries like construction), which is reminiscent of the general European approach to sector bargaining.

[236] See D.J.M. Brown and D. Beatty, *Canadian Labour Arbitration* (3rd ed.) with C. E. Deacon, Canada Law Book, Aurora, (loose-leaf), 1991.

[237] European labour law writing explicitly recognizes the reflexive characteristics of the system.See Joanne Conaghan, Richard Michael Fischl, and Karl Klare.(eds.), *Labour Law in an Era of Globalization : Transformative Practices and Possibilities*, Oxford U. Press, Oxford, 2002

had to be rejuvenated of late by a move toward informal mediation.[238] These later developments, however, do not detract from the general characterization of labour law as one of Canada's first examples of reflexive law in action. It is interesting that the economic and political forces at the time of labour law's post-war emergence forced the adoption of this reflexive approach during the hey-day of the welfare state.

Other examples of reflexive law in Canada are evident in diverse domains. One can point to family law. Rigid and archaic state imposed rules of matrimonial property law gave rise to matrimonial property legislation which again tends to provide a default statutory regime (of shared matrimonial property) and various contractual options based on spousal choice, which provide participatory flexibility.[239] Another candidate to exemplify a particpatory and reflexive approach to regulation is environmental law. The top-down, regulatory model of environmental management is now supplemented by environmental impact studies which invite the participation of those to be affected by regulatory decisions.[240] Perhaps the most dramatic recent example of Canadian reflexive law is in the area of aboriginal rights, where courts have recently recognized a far reaching duty to consult with aboriginal communities before engaging in actions which may affect them.[241]

The point here is a simple but important one: participatory decision making and state supervised but largely self-regulating areas of reflexive law are common in Canada. The emergence of formal inclusionary and flexible restorative models of criminal justice are part of a familiar pattern of reflexive law in postmodern

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[238] The new med/arb system is very popular, particularly in high volume jurisdictions such as Ontario.

[239] This, of course, was a adaptation by the supervisory state of pre-modern forms of matrimonial property familiar to Europe and introduced into modern continental civil codes of the nineteenth century: see Alistair Bissett-Johnson and Winnifred Holland (eds. with J. MacLeod and A. Mamo), *Matrimonial Property Law in Canada,* Carswell, Scarborough, 1980 (with current loose-leaf)

[240] See E. Hughes, A. Lucas, and W. Tilleman, *Environmental Law and Policy*, Emond Montgomery Toronto, 1993

[241] See R. Devlin and R. Murphy, "Contextualizing the Duty to Consult: Clarification or Transformation?" (2003) 14 *National Journal of Constitutional Law* 168

deliberative democracy.[242] Just as in other areas of law straight forward hierarchical regulation has given way to more complex, participatory forms of state administration, so too with criminal justice.[243]

C. Co-ordinated Participatory Models and Criminal Justice Policy Objectives

The reflexive criminal justice system which the co-ordinated formal inclusionary and flexible restorative models provide is a formidable engine for the attainment of criminal justice policy objectives. As noted above in the discussion of *Gladue* and *Proulx,* the conflation of the formal model with "tough punitive justice" and the restorative model with "being soft on crime" is a serious mis-apprehension of the current hybrid system. Such a misapprehension fails to appreciate the manner in which each model is capable of achieving the objectives and embodying the principles of the criminal justice system in different ways appropriate to different cases with different circumstances.[244]

Both models "contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society."[245] Both models can be used to "denounce unlawful conduct",[246] even if the symbolic denunciatory power of restorative justice is more easily undermined by a news media which does not have the time or the interest to explain its subtleties. Both models can be used to "deter the offender and other persons from committing offences",[247] to the extent that deterrence is effective at

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[242] See John Braithwaite and Philip Petit, *Not Just Deserts: A Republican Theory of Criminal Justice,* Clarendon Press, Oxford, 1990

[243] See George C. Pavlich, *Justice Fragmented: Mediating Community Disputes under Postmodern Conditions,* Routledge, New York, 1996

[244]On this point see generally, John Braithwaite "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", *supra*, note 162

[245] *Criminal Code*, s. 718

[246] *ibid,* section 718(a)

[247] *ibid,* section 718(b)

all. Both models may be used in conjunction with "separating offenders from society",[248] as long as one understands that restorative justice can be used at sentencing and correctional stages of justice and is not merely relevant as a matter of pre-trial diversion. Both models are relevant "to assisting in rehabilitating offenders"[249] if one appreciates that skilful classification of offenders in accordance with their needs and identification of relevant treatment resources can be an outcome of restorative conferencing as well as an adversarial sentencing disposition. Both models may "provide reparations for harm done to victims or to the community",[250] although restorative conferencing has been shown to do this in a more satisfying way for participants than formal sentencing hearings. Both models may, "promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community",[251] even if this is often more difficult to do effectively in a formal sentencing hearing. All of the objectives of the imposition of the criminal sanction can be attained to one degree or another by either the formal inclusionary model or the flexible restorative model, the trick is to determine which model is best for the circumstances of each case and to exercise discretion appropriately to steer it in the most useful direction. The statutory rules and programme guidelines discussed above provide the basis for making such decisions in a just and fair manner.

In a like manner, the sanctions resulting from both formal and restorative process can and ought, when properly invoked, to meet the principles of limiting retributivism established in the *Criminal Code* and analogous provisions of the *Youth Criminal Justice Act*. There is no reason to fear that the outcomes of either

[248] *ibid*, section 718(c)
[249] *ibid*, section 718(d)
[250] *ibid*, section 718(e)
[251] *ibid*, section 718(f)

model fail to be proportional to the gravity of the offence or degree of responsibility of the offender.[252] Moreover, an offender believes that he or she is being treated in a disproportionately harsh manner by a restorative conference, the offender can seek the protections of the formal model. Similarly, there is no reason to believe that judges alone, as opposed to participants in a restorative conference, are likely to be uniquely sensitive to aggravating or mitigating circumstances of offences.[253] While it may be true that professional judges may have a better handle on principles of parity and totality,[254] than members of a restorative conference, the common knowledge of the latter in this regard ought not to be discounted out of hand. Finally, to the extent that the principle of restraint in the use of liberty intrusive sanctions, and in particular imprisonment, are concerned,[255] these will chiefly be in the hands of professional judges, even if they have had the benefit of advice from a sentencing circle or restorative conference. The safeguards of limiting retributivism are relevant equally to the processes of the formal inclusionary and restorative models of justice.

D. Diversity, Complexity and Professionalism in a Hybrid System of Criminal Justice

The legal profession has the opportunity to respond positively and creatively to Canada's hybrid, participatory system of criminal justice. It is a system characterized by considerable intricacy.[256] The formal

[252] *Criminal Code*, section 718.1
[253] *Criminal Code*, section 718.2(a)
[254] *Criminal Code*, sub-sections 718.2(b) and (c)
[255] *Criminal Code*, sub-sections 718.2(d) and (e)
[256] On issues of complexity in postmodern legal systems, see W. A. Bogart, *Consequences: The Impact of Law and Its Complexity*, U. of T. Press, Toronto, 2002; and Peter H. Schuck, "Legal Complexity: Some Causes, Consequences and Cures" (1992) 42 *Duke L. J.* 1

inclusionary model provides due process benchmarks for the provision of criminal justice across the country, while the flexible restorative model enables the criminal justice system to respond to the various needs of victims, offenders, their families and communities. The hybrid system is a sophisticated response to diversity through a reflexive rule of law in a deliberative democracy functioning under sometimes confusing postmodern conditions. However, we are no longer in the experimental stages of this hybrid system, but relatively far advanced in the process of its implementation. The legal profession in Canada must accept its responsibilities and understand its full potential as a key component in this complex yet robust new set of criminal processes. Participatory criminal justice is with us to stay and much is to be done in perfecting its details.