

The Shape of Things to Come: A Framework for Thinking about A Restorative Justice System

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Last Spring, during the meeting of the United Nations Commission on Crime Prevention and Criminal Justice, 40 countries joined the government of Canada in sponsoring a resolution on restorative justice. The Commission adopted the resolution, as did the Economic and Social Council a few months later. The resolution directs the Secretary General to circulate its annex -- draft elements of a set of basic principles on the use of restorative justice -- and convene an expert committee to review responses concerning whether principles such as these should be adopted by the UN.

The sheer number of countries sponsoring this resolution was remarkable, suggesting substantial interest on the part of governments in the potential of restorative justice. This interest is also reflected in new domestic legislation and practices in both juvenile and adult justice systems. Sentencing reform legislation adopted in Canada five years ago has been interpreted by that nation's Supreme Court as having the purposes of "reducing the use of prison and expanding the use of restorative justice principles in sentencing."²

The Youth Justice Act, recently adopted by South Africa, incorporates restorative justice principles and practices in that country's response to juvenile crime. Provisions of Austria's Juvenile Justice Act of 1988 have been used to divert young offenders into mediation programs in that country. Its Criminal Procedural Law Amendment of 1999, which goes into effect this year, does the same for adult offenders.³ Young offenders appearing in English or Welsh youth courts for the first time will now receive a mandatory referral order under the Youth Justice and Criminal Evidence Act enacted in 1999. The legislation specifically mentions mediation as one possible outcome under the referral order, and the Labor government has described this an introduction of restorative justice into youth justice.⁴

What is happening here? Clearly there is significant governmental interest in restorative justice, and some are adopting reforms to implement restorative features. But what will those changes amount to? Can we look to Canada, South Africa, Austria or England and Wales and declare that they now have restorative systems? I suspect that restorative justice advocates in those

1 This paper is adapted from *Restoring Justice* (second edition) by Daniel W. Van Ness and Karen Heetderks Strong (Cincinnati, OH: Anderson Publishing Co, forthcoming 2001).

2 *R. v. Wells* (2000) S.C.J. No. 11 at 382.

3 See Christa Pelikan, *Victim-Offender Mediation in Austria*, in *The European forum for Victim-Offender Mediation and Restorative Justice*, ed, *Victim-Offender Mediation in Europe: Making Restorative Justice Work* (Leuven, Belgium: Leuven University Press, 2000) 125-152.

4 See Marian Liebmann and Guy Masters, *Victim-Offender Mediation in the UK*, in *The European forum for Victim-Offender Mediation and Restorative Justice*, ed, *Victim-Offender Mediation in Europe: Making Restorative Justice Work* (Leuven, Belgium: Leuven University Press, 2000) 337-369.

countries would be hesitant to do that. On the other hand those nations have taken significant and important moves in the direction of restorative justice.

For more than 10 years writers have speculated on how a restorative justice system might be configured. But with the growing activity by governments in incorporating restorative principles, this work has a new immediacy. What are the components of a restorative justice system? How might we assess the restorative character of a system that incorporates restorative as well as other values? These are questions I would like to begin exploring in this chapter.

To do that I will draw on three principles and four values of restorative justice that Karen Strong and I proposed several years ago.⁵ The three principles are:

1. Justice requires that we work to restore victims, offenders and communities who have been injured by crime.
2. Victims, offenders and communities should have opportunities for active involvement in the restorative justice process as early and as fully as possible.
3. In promoting justice, the government is responsible for preserving order and the community for establishing peace.

The four values are encounter, amends, reintegration and inclusion.

The values are logically related to the first two principles, since those address the purpose and participants in restorative justice processes. I will focus on those values in the discussion in the initial part of this chapter on the components of a restorative justice system. The third principle has to do with the construction of that system, and will be considered later in this chapter when I suggest models for a restorative system.

What are the Components of a Restorative Justice System?

In considering the components of a possible restorative system, it would be helpful to begin by examining the four values in more detail.

1. **Encounter.** Restorative justice theory developed out of the early experience of Howard Zehr and others with what they called victim offender reconciliation programs. These programs -- now usually called victim offender mediation programs -- have been joined by conferencing and circles as ways of bringing together the offender, the victim and community members who have been also been touched by the crime, the victim or the offender. While not all restorative programs involve encounters, the importance of this feature of restorative justice is substantial, and clearly influences restorative programs.

The key elements of these encounters are:

- *meeting*: the parties often meet in person, although in some circumstance the meeting is conducted with a third party, a surrogate.
- *narrative*: the people who come talk about what happened, how it affected them, and how to address the harm done.

⁵ Van Ness and Strong, *Restoring Justice* (Cincinnati, OH: Anderson Publishing, 1997). The wording of the principles and values are changing somewhat in the second edition of the book; I am using the more recent wording.

- *emotion*: this interaction is different from court with its emphasis on rationality; in encounters emotion is viewed as contributing to understanding, rather than impeding it.

- *understanding*: the parties come to better understand each other, the crime, the harm caused by the crime, and how to make things right.

- *agreement*: when the parties have been able to explore the personal, material and moral/spiritual repercussions of the crime, they then design an agreement that is specific to their situation and practical.

These five elements are not all of the same kind. We might cluster the middle three into a category called *communication* and then prioritize the elements with this result: the three components of encounter are the meeting, the communication that takes place at the meeting, and the resulting agreement.

2. **Amends.** Encounter has to do with the most distinctive restorative process; amends has to do with its most distinctive outcome: the wrongdoer takes steps to make amends for his or her crime in tangible ways. Restitution is certainly one way that this can be done, but there are others as well. In fact, when we reflect on the agreements reached during encounters, we notice four key elements when offenders make amends to their victims.

- *apology*: a genuine apology, when offered by someone who has not been forced to do it, is a significant way of making amends. It is an acknowledgement of wrongdoing and places the offender in the powerless position of waiting to find out whether the victim will accept that apology.

- *changed behavior*: another way to make amends is to agree not to do it again, or to take steps that make it less likely that the offender will do it again. The changed behavior that emerges from encounters often involves things like returning to school, getting a job, receiving counseling for substance abuse problems, and so on.

- *restitution*: this is probably the most obvious way to make amends. It involves paying the victim, although it can also be done by returning property or by providing in-kind services.

- *generosity*: this element might seem surprising at first, but it is not all that rare. It involves the offender agreeing to go beyond a strictly proportionate response of restitution to something more. This might be expressed by offering to do free work for an agency selected by the victim, or in some other way.

I should note that these outcomes have been features of rehabilitative and retributive programs as well. However these become components of *amends* in a restorative program or system when they are the result of the parties' agreement about what the offender will do to make things right. In other words, the obligation is voluntarily undertaken by the offender rather than being imposed by a court.⁶

These elements might be consolidated by conflating "changed behavior" and "generosity" into a general component we could call "change." This would permit a ranking of the components as follows: restitution is followed by apology

⁶ The term "voluntary" must be used advisedly, since the offender's decision to undertake the responsibility may be made in the context of other more onerous alternatives. However, offenders do not have such choices in either retributive or rehabilitative systems, and it is because there is choice in a restorative system that I describe this as a voluntary assumption of the elements of amends.

and then by the change that reinforces and demonstrates that the apology was sincere.

3. Reintegration. A fundamental value of restorative justice is that both victim and offender be reintegrated into their communities as whole, contributing members of those communities. Both victims and offenders can suffer stigmatization, and reintegration is therefore necessary. This is important because of the restorative justice vision of building peaceful communities in the aftermath of crime. The reintegration process has three key elements.

- *respect*: when a person rejoins the community it should not be as a member of a lesser class of individuals, but as a member in full standing. The work of John Braithwaite on reintegrative shaming reminds us that the alternative to reintegration is stigmatization, when the shame is never lifted. Reintegration means that beyond -- and more profound than -- any shame the offender feels is a fundamental respect by others for the offender. This same respect needs to be shown to the victim.

- *material assistance*: crime produces real injuries, and sometimes the criminal justice process causes even more. Both victim and offender will experience these injuries, and they may need material assistance in overcoming those. For example, burglary victims may need help repairing a door or window, or in cleaning up the crime scene. Released prisoners often need help finding a place to live.

- *moral/spiritual direction*: but the assistance needed is often not simply material. Crime can produce emotional and moral or spiritual crises in both the victim and offender. A growing body of recent research from the US shows that offenders who become involved in religious programs have significantly lower recidivism rates than those who do not.⁷

Once again we might cluster the two forms of assistance, leaving the components of *respect* followed by *assistance*.

4. Inclusion. The most important restorative value, I suggest, is inclusion. By inclusion I mean giving the victim, offender and affected community the opportunity to participate meaningfully in the subsequent justice process. This means more than a token offer to observe or to make a statement. It means giving those parties the opportunity to participate as fully as they wish. There are three key elements:

- *invitation*: whoever is responsible for the justice process issues an invitation to the affected parties to participate

- *acknowledgement of interests*: the kind of participation offered in contemporary criminal justice processes essentially involves serving the interests of the prosecution or defense. The victim may participate, but as a witness for the prosecution. The offender may participate, but that involvement will be limited by her lawyer's trial strategies. These individuals have their own interests, and genuine inclusion invites them to pursue those interests as part of the process.

⁷ See for example, Byron R. Johnson, David B. Larson and Timothy C. Pitts, 'Religious Programs, Institutional adjustment, and recidivism among former inmates in Prison Fellowship Programs', *Justice Quarterly*, Vol.14 No. 1, March 1997, 1997 Academy of Criminal Justice Sciences.

- acceptance of alternative approaches: this means that different approaches may be needed than those offered by contemporary criminal justice - approaches like mediation, conferencing, circles and other forms of encounter, or restitution, apology and the other forms of amends. The willingness to accept or adopt new approaches to responding to crime demonstrates that the invitation to participate was genuine and deep.

The reason for suggesting that inclusion is the most important of the four values has to do with Nils Christie's observation that the State has stolen their crime from the victim and offender.⁸ Inclusion reminds us that this theft is always a possibility, one that can be perpetrated even by restorative justice advocates who may feel that they know best what the parties need. Inclusion is the way that we make sure that whatever legitimate interests the State may have in the crime, and it does have some, those do not become the only focus of the processes established. It reminds us that in spite of our motivations in creating processes, those processes may serve to exclude even when that was not our intention.

For that reason, I propose that we think of all the elements of encounter as a bundle of equally important components. All need to be present in a restorative response.

These, then, would be the components of a restorative system:

Meeting of the parties

Communication between the parties

Agreement by the parties

Restitution to the victim

Apology by the offender

Change in the offender's behavior

Respect shown all the parties

Assistance provided to any party that needs it

Inclusion of the parties

Assessing the Restorative Character of a System

If for sake of argument we accept these values and elements as the components of a restorative system, it is obvious that a system that includes all the components would be considered fully restorative.

If none of them were present, then we would have no problem in saying that the system was not restorative. But what if some of those values are reflected but not others? Or they are only partially present? Or present in only part of the system? We certainly cannot label the system "restorative" because certain restorative values, practices or programs are present, but by the same token we cannot say that it is not restorative in any way.

Perhaps we need to think of a range of options in describing the restorative character of a system. For example, we could call a system "fully restorative" when these components are sufficiently predominant and competing values are sufficiently subordinate that the processes and outcomes of the system are highly restorative. A system in which these values and components are less predominant will be less restorative.

⁸ Nils Christie, "Conflict as Property," *British Journal of Criminology*, 17/1 (1977):1-14.

It seems clear that an encounter that yields only an agreement (say, through a form of shuttle diplomacy) will be less restorative than one that involves a meeting and an agreement. An encounter with a meeting and agreement will have a more restorative character than an encounter that involves only communication (by exchange of letters, for example) but no meeting or agreement.

In fact, we could construct a series of options related to the value of encounter that would not only include these elements, but elements of criminal justice that run counter to this value. (See Table 1) The most complete encounter is one that involves all the elements. The next most complete is one in which there is both a meeting as well as communication. This is a situation in

Encounter
Meeting, Communication & Agreement
Meeting & Agreement
Meeting & Communication
Agreement & Communication
Agreement
Communication
No encounter
Separation

which the parties are not able to agree on a response, but in which each has been able to tell their stories, express emotion and come to understand one another. The third cell addresses situations in which there is a meeting but the discussion focuses on negotiation of an agreement. This meeting will probably be relatively short, and the more relational effects of the crime

will not be addressed. The fourth cell describes situations in which the parties do not meet directly, but communicate indirectly their stories and emotions and as a result come to understanding and an agreement. In some cases of incest, for example, any interaction between the victim and offender is conducted through writing rather than in person, due to the victim's vulnerability to the offender. The next cell covers the situation in which an agreement is reached, but no other elements of encounter are reached. This possibility will arise in situations where a probation officer or other person contacts both parties to negotiate an agreement. Little else about the crime and its effects will be exchanged. The next cell describes such an indirect encounter that fails to reach an agreement, but in which the parties are able to tell their stories, express emotion and achieve a degree of understanding. The next cell describes situations in which neither party has any contact, which is the most likely circumstance under contemporary criminal justice processes. The final category addresses situations in which the parties are kept apart, either for reasons of individual or public safety or to serve the trial interests of the prosecution or defense.

Table 2 presents a similar range of options related to amends. The most expansive way of making amends will involve restitution, apology and the constellation of changed behavior and generosity. The next most complete form involves restitution and an apology. In this situation the offender was able to address the past, but not the future. The next cell describes those situations in which the offender makes restitution and exhibits changed behavior/generosity. A common example of this would be when the offender and victim negotiate both restitution payments and community service by the offender at an agency selected by the victim. The fourth cell depicts a situation where there is no

restitution but there is apology and changed behavior/generosity. This might

Amends
Restitution, Apology & Change
Restitution & Apology
Restitution & Change
Apology & Change
Restitution
Apology
Change
No Amends

occur when there is no actual damage to the victim, when the victim's damages are covered in some other way (such as through insurance) or when the offender is unable to pay restitution. The next cell describes the times when restitution is the only amends made. The next cell describes those situations in which an apology is all that is offered by the offender. It may be all that the victim

wants, or it could be that for some reason the offender is unable -- or fails -- to do more. The seventh cell depicts situations in which the offender changes behavior and/or engages in acts of generosity, but there is no apology or restitution. The final cell describes situations in which nothing related to amends takes place, a common result in contemporary criminal justice.

Table 3 reviews different ways in which parties might be reintegrated into the community. The optimal response is for them to be shown respect and given the material, moral and spiritual assistance they need. The next cell describes situations in which they are shown respect but do not receive the assistance that

Reintegration
Respect & Assistance
Respect
Assistance
Indifference to either victim/offender
Indifference to both
Stigmatisation of either victim/offender
Stigmatisation of both
Separation

they need. This might be done, for example, in removal of legal impediments on the offender following conviction, such as giving the offender the right to vote. The third cell describes a situation in which assistance is offered, but the process is not respectful; it may be degrading or dehumanizing to the individual. The fourth and fifth cells describe a community response of neglect --

indifference to the needs of one or both of the parties. The sixth and seventh cells move to a community posture that stigmatizes or alienates one or both of the parties. This might be done through formal procedures or more likely through informal communication of shame and rejection. The final cell describes those times when an offender is removed from the community entirely, making reintegration impossible in the short run and more difficult in the future.

Table 4 shows the range of responses to the value of inclusion. I suggested

earlier that only the first cell is acceptable in a restorative system. It involves an invitation, acknowledgment of the interests of the parties and acceptance of alternative approaches to the parties' involvement. This is preferable to an invitation to participate in a process that does not acknowledge their interests or permit alternatives. It is also preferable to a kind of paternalistic response in which experts determine the party's interests and create ways to address those, but the parties themselves are not invited

Inclusion
Invitation, Interests & Alternatives
Invitation
Interests & Alternatives
Permission
Disinterest
Participating not allowed
Observing not allowed
Coerced to serve another's interests

to that discussion. The next cell describes situations where parties are allowed to participate if they wish, but it is not at all clear why their participation is relevant in the context. An example is the victim impact statement offered at sentencing when there is no clarity about how judges should use the statement. Lesser options are listed below that, with the least inclusive posture being to coerce involvement in a process that serves interests of the prosecution or defense.

These continuums, when consolidated as they are in Table 5, suggest a way of assessing the restorative character of a particular case, a program or a system. When evaluating the handling of a particular case or of a program the

Encounter	Amends	Reintegration	Inclusion
Meeting, Communication & Agreement	Restitution, Apology & Change	Respect & Assistance	Invitation, Interests & Alternatives
Meeting & Agreement	Restitution & Apology	Respect	Invitation
Meeting & Communication	Restitution & Change	Assistance	Interests & Alternatives
Agreement & Communication	Apology & Change	Indifference to either victim/offender	Permission
Agreement	Restitution	Indifference to both	Disinterest
Communication	Apology	Stigmatisation of either victim/offender	Participating not allowed
No encounter	Change	Stigmatisation of both	Observing not allowed
Separation	No Amends	Separation	Coerced to serve another's interests

question will be whether the response was as restorative as possible under the circumstances. It may be, for example, that the particular offender has never been identified. This means that a meeting is not possible, although it may be possible for the victim to meet with surrogate offenders and thereby tell her story, express emotion and gain some understanding of the offender. Furthermore, the

victim will not receive amends from the offender. However, a restorative response will ensure that there is sufficient material, moral and spiritual support to help the victim recover her losses.

The restorative character of a *system* seems to reflect two features. The first has to do with its aspirations as reflected in programs and resources. How far up these charts does the system aspire to go? Or to ask a somewhat different question, at what level is it willing to settle? The second evaluation criterion has to do with the number of people given access to the restorative system: is this approach offered to every person or to a select few. The more people given access to the restorative approach, the more restorative the system will be.

The following three slides deal with the first factor, the level to which the system aspires. Table 6 shows a fully restorative system in which all elements of each of the four values are available. Not all parties will avail themselves of these

Encounter	Amends	Reintegration	Inclusion
Meeting, Communication & Agreement	Restitution, Apology & Change	Respect & Assistance	Invitation, Interests & Alternatives
Meeting & Agreement	Restitution & Apology	Respect	Invitation
Meeting & Communication	Restitution & Change	Assistance	Interests & Alternatives
Agreement & Communication	Apology & Change	Indifference to either victim/offender	Permission
Agreement	Restitution	Indifference to both	Disinterest
Communication	Apology	Stigmatisation of either victim/offender	Participating not allowed
No encounter	Change	Stigmatisation of both	Observing not allowed
Separation	No Amends	Separation	Coerced to serve another's interests

features because particular circumstances may make that unnecessary or impossible. But all features are offered. If such a system makes this offer to all parties, there is no difficulty with describing the system as fully restorative.

Table 7 describes a system that aspires to something less. In this system the relational elements of crime and justice are reflected in its commitment to offering parties the opportunity to meet, the expectation that amends involve something more than restitution or community service, and the recognition that the parties deserve respect as they reintegrate. This system would not accept, for example, a streamlined negotiation process conducted by probation officers to reach restitution agreements quickly without giving the victim and offender the chance to meet. Provided that these services are offered to all victims and offenders, we would call this a moderately restorative system.

Encounter	Amends	Reintegration	Inclusion
Meeting, Communication & Agreement	Restitution, Apology & Change	Respect & Assistance	Invitation, Interests & Alternatives
Meeting & Agreement	Restitution & Apology	Respect	Invitation
Meeting & Communication	Restitution & Change	Assistance	Interests & Alternatives
Agreement & Communication	Apology & Change	Indifference to either victim/offender	Permission
Agreement	Restitution	Indifference to both	Disinterest
Communication	Apology	Stigmatisation of either victim/offender	Participating not allowed
No encounter	Change	Stigmatisation of both	Observing not allowed
Separation	No Amends	Separation	Coerced to serve another's interests

Table 8 depicts the minimum to which a system could aspire and still claim to be restorative in any way. In this approach the relational elements of crime are not pursued, but material and financial costs of crime are taken seriously. This system is reparative in nature, but its respect for the value of inclusion moves it into the category of “restorative”.

Encounter	Amends	Reintegration	Inclusion
Meeting, Communication & Agreement	Restitution, Apology & Change	Respect & Assistance	Invitation, Interests & Alternatives
Meeting & Agreement	Restitution & Apology	Respect	Invitation
Meeting & Communication	Restitution & Change	Assistance	Interests & Alternatives
Agreement & Communication	Apology & Change	Indifference to either victim/offender	Permission
Agreement	Restitution	Indifference to both	Disinterest
Communication	Apology	Stigmatisation of either victim/offender	Participating not allowed
No encounter	Change	Stigmatisation of both	Observing not allowed
Separation	No Amends	Separation	Coerced to serve another's interests

Models of Restorative Justice Systems

What might a restorative justice system look like, particularly as it would relate to the contemporary criminal justice system? One way of thinking about this question is to consider ways that restorative programs have intersected with the justice system.

One way has been to find discrete problems or opportunities that cannot be adequately addressed by contemporary criminal justice, and use that occasion to fashion a restorative response.⁹ One example of this is the work of Dennis Wittman and others in Genesee County, New York. This program operates out of the sheriff's office and organizes community service, community reparations, reconciliation, victim assistance, pre-sentence diversion, intervention in child abuse situations, victim-directed sentencing and other programs. It has grown to this scale only after years of operation; it started in 1980 as a relatively modest diversion program. By asking questions about larger dimensions of justice, by recognizing the needs of the particular victims, offenders and community members in that county, and by being willing to take responsible risks, the program has become an intriguing and stimulating model of a restorative response to crime.¹⁰

A second approach has been to create restorative programs that are essentially outside the criminal justice system. This is the approach adopted by Ron Claassen and his colleagues involved with the Fresno Victim-Offender Reconciliation Program in California. For nearly twenty years Fresno VORP has administered an entirely community-based and funded encounter program. The only connection with the justice system on these cases was that it accepted referrals from juvenile and adult justice officials. After demonstrating the effectiveness of this approach over many years, officials in the justice system became interested in learning more about restorative justice principles and values. In conjunction with the Center for Peacemaking and Conflict Studies and Fresno Pacific University, Ron has designed a series of training sessions called "Implementing Restorative Justice Principles In Your Agency." The sessions include basic and advanced courses in restorative justice as well as a course in implementation strategies.¹¹

⁹ Martin Wright has proposed a similar approach:

In the transitional phase there would, as we have seen, be tension with the traditional retributive philosophy of the courts. A vital key to progress would be to remove this dichotomy by encouraging the courts to move towards a restorative philosophy. Initially this might be done in relation to juvenile offenders; it could be extended to adults whose crime arose out of a relationship, and then to crimes by adult strangers. Finally the legislature could set the seal on the changeover. There would then no longer be two or even three principles pulling in different directions.

Martin Wright, "Victim-Offender Mediation as a Step Towards a Restorative System of Justice," in Heinz Messmer and Hans-Uwe Otto, eds., *Restorative Justice on Trial* (Dordrecht, The Netherlands: Kluwer Academic Publisher, 1992) 535.

¹⁰ For more information, contact Dennis Wittman, Genesee Sheriff's Office, County Building 1, Batavia, NY 14020.

¹¹ For more information on this and other projects, see <http://www.fresno.edu/pacs/rjp.html> (as of August 31, 2000).

A third relationship involves identifying stages or decision-points in the criminal justice process that, because of their history or structure, may be amenable to restorative practices. There are a number of possibilities here. For example, when they were developed, juries were intended to be a community voice in the criminal justice process.¹² Their conduct and deliberations might be made more restorative by having them hold their discussion in the presence of the victim and defendant,¹³ seeking ways to increase the diversity of the persons on the jury,¹⁴ and encouraging juries to ask questions of witnesses, lawyers and the judge.¹⁵

Terry O'Connell took this approach in Wagga Wagga, New South Wales. Because of community-oriented police leadership there, O'Connell (who was a sergeant in the police force) was permitted to adapt the family group conferencing model from New Zealand for use by police officers dealing with juvenile offenders. Typically, officers decided whether to warn the young person (called "cautioning") or send them to juvenile courts. O'Connell used this window of discretion to devise an approach to cautioning that could be conducted by police, rather than social welfare workers or community volunteers. Restorative practices were incorporated directly into a particular point in the formal justice system.¹⁶

A fourth relationship involves adding restorative outcomes (as opposed to processes) to the justice system itself. Restitution would become a sentencing option for judges, for example, as could community service. Paroling authorities and probation agencies could assume responsibility for collecting restitution or overseeing community service. While this approach has none of the benefits of restorative processes (such as the opportunity for encounter and all the aspects of amends aside from restitution), it would provide reparative benefits to the victim and community.

This is the approach taken by some community service programs in Belgium. There an organization called BAS!¹⁷ accepts referrals of minors the juvenile court has sentenced to do community service. The rationale is that only an adjudication process adequately protects the legal rights of the minor and overcomes the problem of disparity, but that at the conclusion of that process restorative outcomes should be available. Community service becomes another judicial sentencing option, considered restorative because its focus is on having the offender repair the harm (in this case symbolically) rather than on punishment or rehabilitation of the minor. This approach is used in other parts of continental Europe as well.¹⁸

¹² Daniel W. Van Ness, "Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases," *John Marshall Law Review* 28 (1998):1.

¹³ Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Bloomington: Indiana University Press, 1994), 96.

¹⁴ Van Ness, *supra* note 12.

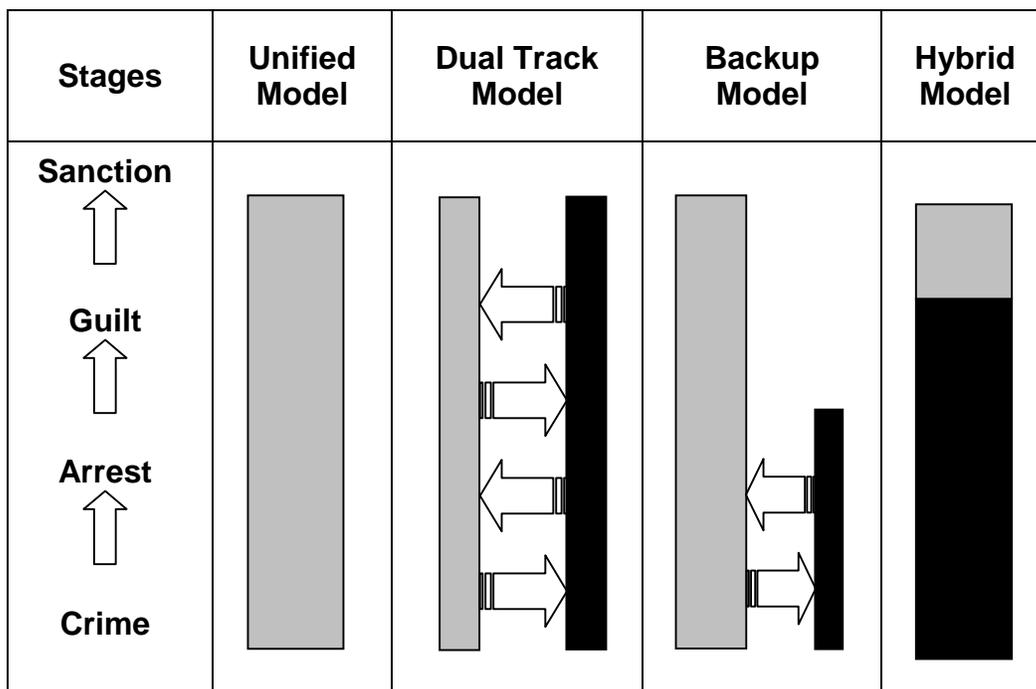
¹⁵ George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (New York: Addison-Wesley Publishing Company, 1995): 250-251.

¹⁶ Terry O'Connell, "From Wagga Wagga to Minnesota," paper presented at a conference, "Conferencing: A New Response to Wrongdoing," August 6-8, 1988 in Minneapolis, Minnesota. Paper available at http://www.realjustice.org/Pages/mn98papers/nacc_oco.html (as of August 31, 2000).

¹⁷ BAS! stands for Begeleidingskienst voor Alternatieve Sancties or Counselling Service for Alternative Sanctions. In addition to its community service program, BAS! also runs a mediation program. Christian Eliaerts, Els Dumortier and Rachel Vanderhaegen, "Critical Assessment of Community Service and

These four approaches may reflect diverse intermediate strategies for achieving a system model or they may stem from different conceptions of what a restorative system will look like. For example, the first three relationships could be part of a strategy to achieve a unified system that is fully restorative. The strategy would be to demonstrate the superiority of restorative justice by developing restorative programs in discrete parts of the justice system, or operating outside it and hence influence the criminal justice system to become restorative

But a unified, fully restorative system is only one system model. Table 9 presents four basic models, the first of which is a unified, fully restorative system, which would be brought about either by the conversion of criminal justice to restorative purposes and values, or by its replacement by a restorative system.



A second model is what has been called the dual-track model, in which the criminal justice and restorative justice systems operate side-by-side with occasional cooperation.¹⁹ This model assumes that both approaches are necessary for practical if not theoretical reasons. Independence of restorative programs from the criminal justice system would be seen as normative and not merely strategic.

Mediation for Juvenile Offenders in Brussels: A Discussion of the Project BAS!" in Lode Walgrave, ed., Restorative Justice for Juveniles: Potentialities, Risks and Problems (Leuven, Belgium: Leuven University Press, 1998), 351-356.

¹⁸ See for example the description of Italian practice in Carlo Enrico Paliero and Grazia Mannozi, "Criminal Conflicts Involving Minors: Problems and perspectives of Victim-Offender Mediation," in Lode Walgrave, ed., Restorative Justice for Juveniles: Potentialities, Risks and Problems (Leuven, Belgium: Leuven University Press, 1998), 317-334.

¹⁹ Herman Bianchi commends having two tracks (although he does not distinguish between what we are calling the dual track model and the backup model) for two reasons. First, it will reassure those who fear violence that the familiar criminal justice process is available and hence it undercuts one objection to the development of a more restorative process. Second, the existence of two systems, side by side, increases

A third model is a variation on those two, oriented toward a unified system but concluding that vestiges of the criminal justice system will also be needed as a backup when the restorative approach cannot work (for example, when guilt is an issue).²⁰

The fourth model is a hybrid model, with parts of the system exhibiting strong restorative values and other parts reflecting contemporary criminal justice values. An example of this is when the typical adversarial process applies until sentencing, and then a restorative approach is taken. In this hybrid model, both restorative and contemporary features make up part of the normative process.²¹

The unified model is simple: the restorative system is the only option. It is capable of handling all eventualities, including for example situations in which parties refuse to participate voluntarily. The dual track model incorporates both a restorative and criminal justice system, each operationally independent of the other. There may be bridges between them in order to permit participants to move from one to the other when they choose. There could also be other more permanent forms of cooperation such as joint projects around particular areas of interest or concern. The backup model assumes that the restorative response will predominate, but that a significant (although smaller) criminal justice response will also be needed for such matters as determining guilt when that is disputed. The hybrid model limits restorative justice to the sanctioning phase and therefore does not include restorative features at other junctures.

Each of these models has significant theoretical implications that need to be developed further. It will be important to explore the political philosophy underlying them, and the cultural contexts that might lead proponents to advocate one or the other. However, we might gain direction from the third principle of restorative justice, mentioned earlier in this article: "In promoting justice, the government is responsible for preserving order and the community for establishing peace." *Order* in the context of a restorative system has two applications. First, it involves ensuring order within communities, which means that coercive power; to the extent it is needed, would be applied or overseen

the likelihood that each will limit the power of the other. He observes that the presence of conflict resolution mechanisms will not prevent individuals from attempting to abuse power: "One of the disputing parties, either plaintiff or defendant, might, if motivated by human malice, consider the abuse of power as a workable reality If two systems keep an eye on one another, they can keep each other in order." (Bianchi, *supra* note 13) Martin Wright adds that this permits opportunities for experimentation in the restorative track with the possibility of adoption later by the criminal justice system. (Wright, *supra* note 4, at 535.)

²⁰ *Ibid.*

²¹ Martin Wright frames the issue somewhat differently. He suggests that there is an "authoritarian" restorative justice, which is characterized by decision-making by courts and other criminal justice authorities. The restorative features are incorporated into the justice system, and probably feature restitution, with mediation seen (if at all) as a way to arrive at restitution. "Restorative" sanctions such as restitution and community service are likely to be viewed as punitive, and it is not likely to be important whether the offender offers reparation or provides it because of an order to do so. This authoritarian restorative justice is essentially the hybrid model presented here.

The alternative is "democratic" restorative justice, which is located in the community as much as possible, not in the justice system. The victim, offender and community members make the decisions. Persuasion and empowerment are used as alternatives to coercion (although coercion may be needed as a last resort. Mediation will be administered by non-profit organizations rather than government agencies. The focus will be on benefiting both the victim and the offender, not one party alone. Democratic restorative justice would lend itself to any of the other three models I have described. Martin Wright, "Restorative Justice: For Whose Benefit?" in *The European Forum for Victim-Offender Mediation and Restorative Justice*, ed., *Victim-Offender Mediation in Europe: Making Restorative Justice Work* (Leuven, Belgium: Leuven University Press, 2000).

closely by the government. Second, it implies responsibility for maintaining an orderly system. This would entail oversight of the entire process to ensure effective coordination between formal and informal, community and justice system, efforts. Oversight, however, is not the same as determination. The decision about how the system will operate must, in a restorative framework, be a mutual decision involving all the parties. Once that decision is made, the coordination of it might be a governmental responsibility.

Conclusion

Restorative justice programs and thinking have now expanded throughout the world. This expansion shows no sign of letting up, and while there is always need for caution in making claims about a restorative future, there does seem to be evidence that the future of justice will at least include restorative elements.

One way of tracking the progress of restorative justice within a system is to use a framework such as the one we have proposed to assess the restorative character of the system. The availability of restorative programs is only one indicator; far more important is the importance given to those programs in actual usage. In restorative systems, the values and principles of restorative justice sufficiently predominate and competing values and principles are sufficiently subordinate that the system's processes and outcomes are highly restorative.