Transforming Contemporary Criminal Sentencing: Introducing a Composite-Aims Restorative Justice Model

by

Andrew Moss
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Supervisory Committee

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ABSTRACT

One of the most important questions facing legal philosophers concerns the legitimacy of state institutions of legal punishment which visit citizens who have broken the law with condemnation and hard treatment. The purpose of this thesis is to attempt to answer the question of how we ought to respond to criminal offenders whose guilt has been established. The Canadian approach to criminal sentencing is evaluated, as are prominent restorative justice sentencing models. A novel composite-aims restorative justice model of responding to convicted offenders is introduced and the model's aims and limits are specified. The thesis attempts to establish that a composite-aims model which encompasses certain restorative justice values and processes can provide a desirable framework for responding to convicted offenders. The implication for Canadian criminal justice policy is that the practice of applying punitive sanctions that are proportional to the moral gravity of the criminal offence should be abandoned in favour of a model based on securing censure, amends, crime control and reformation.

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Introduction

One of the most pressing and morally important questions studied by legal philosophers today concerns the justification for state institutions of legal punishment. By legal punishment I mean generally an imposition by the state, which involves pain or unpleasantness, on an actual or supposed offender for an offence against legal rules. The question of how we can justify an institution of punishment is obviously pressing for moral philosophers. Punishment involves purposefully imposing pain or unpleasantness on other human beings against their will as response to wrongdoing. In most situations, coercively confining another human being is a serious moral offence. However, coercive confinement occurs regularly in prisons across the world. Those who endorse legal punishment must explain how the fact that a person has broken the law renders it morally permissible for the state to treat him in ways that it is impermissible to treat law-abiding citizens. A large body of literature is devoted to exactly this. Philosophers have posited a number of social aims and values fostered by punishment in attempts to justify the creation and maintenance of such a system.

Unfortunately, legal philosophers all too often ignore the fact that the problem of justifying punishment occurs only within the context of a larger question: How should the state respond to criminal offenders whose guilt has been established? This question subsumes the problem of punishment but also forces us to examine other important and possibly competing aims. Punishment could compose only part of a larger, complex response to criminal wrongdoing or it could play no role at all.

Canada has adopted a model of criminal sentencing where the judiciary applies punitive sanctions that are roughly proportional to the moral gravity of the criminal offence and the degree of responsibility of the offender. This is troublesome for a number of reasons: many offenders do not make amends for their crimes, many offenders are not reformed, many offenders are not properly censured, the system is a significant burden on societal resources, and sanctions are often arbitrary and overly intrusive from a crime control perspective.[1] In recent years a promising alternative to this type of criminal sentencing has been increasingly adopted by criminal justice systems internationally. The alternative model of criminal sentencing is based on a different conception of justice and uses a number of unconventional methods. This is the 'Restorative Justice' response to criminal wrongdoing. Restorative justice practitioners focus on having offenders make amends for their criminal wrongdoing, reform and reintegrate into society as law-abiding citizens. Restorative justice programs used in service of these aims often involve facilitated encounters between victims, offenders and other community members. However, restorative justice advocates are criticized for offering vague, incoherent models incapable of providing meaningful guidance.

My main purpose in writing this thesis is to attempt to answer the question of how we ought to respond to criminal offenders whose guilt has been established and to provide a model of restorative justice that offers meaningful guidance about how the state and society ought to respond to criminal conduct. Such a model can contribute to the restorative justice movement in Canada and can help to encourage reform of our treatment of convicted offenders. Of course, an exhaustive answer to this question would

[1] See Chapter 1.

require more thorough treatment than is permitted here. I aim to provide a framework that outlines a promising model along certain key dimensions. In order to provide a model that can offer meaningful guidance for policy I will address a number of key questions: Which goals ought to be pursued by the criminal justice system when dealing with a criminal offender whose guilt has been established? What criteria should we appeal to when multiple goals conflict? How might we, in practice, achieve the appropriate aims of criminal justice? What limiting principles, if any, should be applied to sentences? How should we respond to different types of offences and offenders? What should the sentencing process look like?

The composite-aims model I endorse posits four determining goals for our response to convicted offenders: censure, amends, reform and crime prevention. I argue that, properly understood, these goals are usually harmonious and can be pursued together. Restorative justice processes offer a method of achieving these aims that traditional criminal justice programs cannot. The state should pursue these aims in a suitably nuanced fashion: censure should be roughly proportionate to the offender's culpability, restitution should be made for damages actually incurred to victims, and restraints should be reserved for persistent and dangerous offenders. Instead of judicial imposition of punitive sanctions we should respond to criminal offenders by arranging a facilitated dialogue between victims and offenders where offenders are held accountable, compensation for harms caused by crime are identified, and measures for treatment of the offender are discussed. Various experts should: prepare the citizens participating in restorative justice conferences, determine restraints, assist in determining rehabilitative obligations, and monitor restitution agreements to ensure fairness.

The model I endorse is similar in some respects to popular restorative justice models. For example, a number of restorative justice theorists put forward multiple determining goals for the state's response to convicted offenders. Van Ness, Braithwaite and Brunk identify similar goals and my analysis builds on and complements their work in many respects. However, I provide a distinct, detailed account of those aims and the means, limits, scope of application and sentencing process. Moreover, I try to develop some ways of remedying defects that some critics claim to detect in existing models of restorative justice.

The first chapter begins by examining the Canadian response to convicted offenders and draws attention to serious problems the system generates. I briefly introduce the alternative composite-aims model which incorporates restorative justice values and processes. This model has not been fully implemented, but I present a number of studies that provide empirical support for the key dimensions of my favoured approach. The second chapter offers a detailed study of restorative justice theory and elaborates three prominent restorative justice models offered by contemporary theorists in the field. Important popular criticisms of restorative justice put forth by von Hirsh, Ashworth and Shearing are discussed. In the third and fourth chapters I construct the composite-aims model that I endorse. In the process of defining this model I attempt to show that it is superior to the three restorative justice models outlined in the second chapter, and that it can withstand von Hirsch, Ashworth and Shearing's critique.

This thesis attempts to establish that a composite-aims model which encompasses certain restorative justice values and processes can provide a desirable framework for responding to convicted offenders. The implication for Canadian criminal justice policy

is that conventional sentencing procedures should be abandoned in favour of a model in which the goals of censure, amends, crime control and reform are pursued through procedures that permit victims and offenders to engage one another directly and seek remedies to the damage done by criminal activity in a cooperative and constructive fashion.

Chapter 1: A Promising Alternative to Criminal Sentencing in Canada

1.1 - Criminal Sentencing in Canada

Currently in Canada, criminal offenders whose guilt has been established are generally sentenced by a member of the judiciary in criminal court. When sentencing a criminal offender the judiciary is guided by certain rules and principles. First and foremost, the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society (*Criminal Code*, s. 718). This purpose is met by imposing sanctions that serve one or more of the following objectives: denunciation of the offence, deterrence, separation of the offender from society, rehabilitation of the offender, providing reparations for harm done, and promoting a sense of responsibility in offenders (*Criminal Code*, s.718). No one of these sentencing objectives trumps another and judges have discretion to craft a sentence tailored to the circumstances of the offender and the nature of the offence (*R. v. Nasogaluk)*.

The Supreme Court of Canada has also explained that retribution is a legitimate and relevant consideration in the sentencing process. The Court explained that retributivism requires a system of punishment in which the only grounds for punishing someone is the blameworthiness of their conduct, and sanctions must be strictly proportionate to the culpability of the offender and to the seriousness of the offence (*R. v. M. (C.A.)* 78). Reference to retribution can be found in two places in the *Criminal Code*: s. 718 mandates just sanctions, and s. 718.1 establishes the principle of proportionality. The *Criminal Code* states that the fundamental principle governing criminal sentencing is that of proportionality: the severity of the sanction imposed must be proportionate to the

gravity of the offence and the degree of responsibility of the offender (s. 718.1). Whatever weight a judge may give to any of the other objectives, the resulting sentence must respect the principle of proportionality (*R. v. Nasogaluak* 40). The principle of proportionality in the context of Canadian sentencing requires that a sentence: [1] does not exceed what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence, and [2] properly reflects and condemns their role in the offence (*R. v. Nasogaluak* 42). So, although the judiciary is permitted to pursue objectives such as deterrence through criminal sanctions, the sanctions must be just and appropriate. The judges must also take into account a set of secondary principles that include: aggravating and mitigating circumstances, parity in sentencing for similar offenders and offences, and a requirement to examine sanctions other than imprisonment (*Criminal Code*, s. 718.2).

Judges are also limited to working within minimum and maximum sentences proscribed in the *Criminal Code*. All offences have prescribed maximum sentences. Mandatory minimum sentences are currently prescribed for about 40 offences under the *Criminal Code* (Raafluab). The offences with mandatory minimum sentences include: murder, offences involving firearms, sexual offences involving children, and impaired driving. In the past few years a number of Bills were introduced in order to amend current legislation to include further mandatory minimum sentences.[2]

Judges have a wealth of sentencing options regarding the form of disposition. Where it is in the best interests of the accused and not contrary to public interest the judge may discharge an offender (*Criminal Code*, s. 730). Judges may suspend an

[2] See for example, Bill C-26 and Bill C-15.

offender's sentence and release him on a probation order which may include a number of conditions such as community service orders or substance abuse treatment. Judges may impose fines on offenders with means to pay it (*Criminal Code*, s. 734). Judges may order offenders to pay victims for damages that are relatively concrete and easily ascertainable (*R. v. Groves*). Damages may include harm to property, lost income or wages, or medical treatment. Judges may send offenders to jail or prison. They may also direct offenders to serve their prison sentence in the community (known as 'conditional sentencing').

Judges may also, instead of proceeding with the prosecution, refer the offender to authorized programs of alternative measures (also known as diversions or extrajudicial measures) if the offender consents. Alternative measures dispositions may include, but are not limited to: restitution, apologies, community service, personal service to the victim, counselling, restorative justice processes, supervision, etc. The police and prosecutor may also divert offenders before they reach the judiciary. They may decide that a caution or warning is satisfactory, or they may determine that an offender is eligible for alternative measures and make a referral (Bell 229).

In the 1999 case of *R v. Gladue*, the Supreme Court of Canada separated the purposes of criminal sentencing into the categories of 'restorative' and 'punitive'. The new sentencing purposes which were added in 1996 (reparation for harm done, promoting responsibility in offenders) coupled with rehabilitation were defined as 'restorative' goals underpinned by the concept of restorative justice (par. 43). The Court stated that the establishment in the *Criminal Code* of these new sentencing purposes, and s. 718.2 (e), provided direction to the judiciary to reduce incarceration and

expand the use of the restorative goals (par. 43, 48). S. 718.2 (e) mandates that all available sanctions other than imprisonment be considered, and the judiciary pay particular attention to the unique circumstances of aboriginal offenders. This includes special consideration of aboriginal conceptions of sentencing which place primary emphasis on restorative justice principles (par. 70). The Court acknowledged that a restorative approach is not necessarily a lighter punishment, and can actually impose a greater burden on the offender than a custodial sentence (par. 72). In the 2000 case of *R v. Proulx* the Supreme Court stated that conditional sentences (and less severe dispositions generally) are better at achieving the restorative objectives of rehabilitation, reparation and promotion of a sense of responsibility in offenders (par. 127). However, incarceration is the generally preferable sanction where objectives such as denunciation or deterrence are pressing (par. 127).

Now that we know the principles upon which criminal sentencing operates, what kind of results are we likely to see? How many convicted offenders will be incarcerated? How many will receive probation sentences? How many will be diverted? According to Statistics Canada, in 2006/2007 adult criminal offenders were sentenced to: a term of probation in 43% of guilty cases, imprisonment in 34% of guilty cases, a fine in 30% of guilty cases, a conditional sentence in 4% of guilty cases, and restitution was ordered in 3% of guilty cases (Marth 15). Beattie reported that from 2001/2002 to 2003/2004: approximately 304,000 sentenced criminal offenders were admitted to community programs for probation or conditional sentencing (25), and approximately 249,000 sentenced criminal offenders were admitted to a provincial or territorial custodial facility (22). Approximately 22,000 sentenced criminal offenders were admitted to federal

custodial facilities during that time (Statistics Canada 44). Sentences served in provincial/territorial facilities range from 1 day to 2 years and sentences served in federal facilities range from 2 years to more than 20. Warrant of committal admissions to federal facilities during 2003/2004 included sentences for breaking and entering, drug trafficking, major assault, common assault, theft, arson, fraud, impaired driving, possession of stolen property, and a host of other offences (Statistics Canada 45). Of the total cases heard in adult criminal court in 2006/2007: crimes against the person composed 25%, crimes against property 24%, administration of justice 17%, traffic offences 14%, other offences (drugs, weapons, and prostitution) made up the last 20% (Marth 12). The most serious offences (homicide, attempted homicide, robbery, sexual assault) made up only 2% of the total cases heard.

Unfortunately, there is little quantitative data regarding the use of alternative measures in adult corrections. The only large-scale study on alternative measures was performed by Cheryl Engler and Shannon Crowe for Statistics Canada. Engler and Crowe's study reported that in 1998/1999, 6 provinces (PEI, NB, NS, AB, BC, and SK) reported 13,226 adults participated in alternative measures (12).

1.2 - Problems with the Canadian Response to Convicted Offenders

The Canadian criminal sentencing system metes out punitive sanctions to a large proportion of convicted offenders. Although the judiciary has some discretion to issue more constructive and creative dispositions, in practice the dominant response tends to be a punitive one. There are number of problems with the Canadian response to convicted offenders: (1) many offenders do not make amends for their crimes, (2) many offenders are not reformed, (3) many offenders are not properly censured or educated, (4) it is

economically inefficient, and (5) sentences are arbitrary and overly intrusive from a crime prevention perspective. This is the result of the judiciary prescribing ineffective means to realize its goals and inappropriately emphasizing certain goals. The principle of proportionality contributes to the problem by mandating that convicted offenders be sanctioned in accordance with the gravity of the crime, regardless of whether the resultant severity of the sanction is beneficial for achieving objectives. Not only are goals ineffectively pursued, one can only infer based on the sentences handed down, that the judiciary's conception of goals such as reparation are inadequate. If the judiciary had an appropriate conception of reparation they would realize the fundamental inadequacy of conventional practices to accomplish it. The Canadian sentencing scheme needs to reconceptualise and prioritize its goals, replace ineffective means for pursuing those goals, and rid itself of proportionate punitive sanctions. I will briefly highlight a few of the problems with Canadian sentencing.

Many offenders do not make amends for their crimes

It is a basic requirement of justice that an offender who wrongfully harms the legitimate interests of another citizen ought to, as best as he can, restore that victim to the level of well-being he previously enjoyed. In order to best restore victims a number of needs must be met. Victims may need to be compensated for any pecuniary damages (property, medical bills, etc), as well as pain and suffering. Victims should have the opportunity to meet their offenders and better understand the crime. Victims often suffer strong psychological reactions to being victimized and report the need for information (What happened? Why were they chosen as victim? Are they still in danger?). Criminal offenders also owe moral reparation which can be achieved through apology.

In Canada many offenders do not make amends for their crimes. Victims seldom have the opportunity to meet with their offenders in a safe, facilitated encounter. There is little information quantifying the use of restorative justice encounter programs in Canada. However, the compendiums and directories of Canadian restorative justice programs and services indicate their scarcity as do statistics on the use of alternative measures.[3] Second, offenders do not often provide restitution for their victims. For example, only 3% of guilty offenders sentenced were ordered to provide restitution during 2006/2007 and many fewer would have actually fulfilled that obligation. Although separate civil suits can be initiated they are relatively uncommon and can be expensive and time consuming. Even if more restitution orders were made many offenders are imprisoned and cannot access meaningful employment. Incarcerated offenders are paid only between $5.25 and $6.90 per day (Correctional Services Canada 16).

Many offenders are not reformed

The benefits of reforming offenders by changing their attitudes and inclinations and fostering law-abiding behaviour are obvious. Considering the number of offenders released back into society after offending (all but 5% of incarcerated offenders), a reduction in reoffending would benefit society greatly (Gibbons and Katzenbach 19). Unfortunately, criminal offenders in Canada reoffend at an alarming rate. For example, Sara Johnson's major study on recidivism in Canada that took place in Saskatchewan explored the rate at which criminal offenders released from all involvement in provincial correctional services became re-involved with provincial correctional services. The study looked at offenders involved in community programs, probation and custody but

[3] See for example the Inventory of Restorative Justice Programs on Correctional Services of Canada website: <http://www.csc-scc.gc.ca/text/rj/crg-eng.shtml>

excluded those in remand, temporary detention, or federal incarceration. In the first year of the study 5,496 offenders were released from all involvement in provincial correctional services in Saskatchewan. Among those released 47% were re-involved with Saskatchewan provincial corrections within 4 years ("Returning to Correctional Services" 24). This study also does not fully capture recidivism as it does not include offenders who reoffended but were either not apprehended, or were apprehended but discharged, fined, ordered to make restitution, sentenced to federal custody, or other measures not included in the study. The inefficiency of imprisonment in rehabilitating or reforming offenders has been recognized for some time in Canada.[4]

Many offenders are not properly censured or educated

Another important aim in a desirable response to convicted offenders is the communication of condemnation that they deserve for their crimes. The state ought to express an authoritative disapproval of criminal conduct in order to vindicate victims' moral status and reaffirm society's values. The condemnation must be addressed to the offender, who should be treated as a responsible moral agent deserving of blame. We want to call the offenders to account for their criminal actions, as any responsible agent should be prepared to do. We should also aim to persuade the offender to recognize and repent his wrongdoing. The state should educate offenders as to the consequences of the crime, and the factors that contributed to their criminal behaviour.

Conventional criminal justice proceedings hardly accomplish these aims when restorative justice processes are not used. Professional judges do not carry the social pressure and weight that can be harnessed by the condemnation of one's fellow citizens.

[4] For a good summary of Canadian reports evidencing the inefficiency of imprisonment see *R. v. Gladue* 50-60.

The offender has no responsibility to actively acknowledge the charges against him. He can easily neutralize the moral criticism without ever having to engage with those sitting in judgment. Without meeting the victim, the offender may never learn the full extent of the negative consequences of his criminal act or recognize the true character of his wrongdoing. The offender is not required to apologize and repudiate the offence which would provide a more complete vindication of the victim as being in the right. Furthermore, because offenders usually plead to a lesser charge, offences are not even named properly (Weigand).

Incarceration is expensive

Political philosophers are concerned with the question of how a state ought to distribute its resources. Imprisoning offenders is a substantial burden on societal resources. Incarcerating female inmates costs approximately $150,000 per year; incarcerating male inmates ranges from approximately $110,000 to $72,000 per year (Correctional Services Canada 8). Building a prison costs approximately 100 to 150 million (Basen). So, imprisoning a female offender for 6.7 years costs the state approximately $1,000,000. Decreasing incarceration where appropriate could save substantial resources. Instead, the Canadian government aims to increase incarceration with policies like the Truth in Sentencing Act which will raise total prison costs to $9.5 billion a year in 2015-2016 from $4.4 billion in 2010 (Levitz).

Sentences are arbitrary and overly intrusive

Since 2006 the Canadian Government has introduced a number of Bills with the aim of increasing incarceration in Canada. Bill C-26 proposed mandatory minimum sentencing for a number of drug related offences: production of 1-200 cannabis plants

would carry a minimum of 9 months and possession for the purpose of trafficking would carry a 1 year minimum. The government also introduced Bill C-9 which proposed the restriction of conditional sentences (allow for offenders to serve sentences of imprisonment in the community rather than in a correctional facility) for a number of offences including: assault causing bodily harm, theft over $5000, arson, and breaking and entering. This Act came into force in July of 2010. The problem is that the initiatives are both arbitrary and overly intrusive.

First, there is no evidence that minimum mandatory sentences for producing and trafficking marijuana would provide increased crime control. In 2002 Canada's Report of the Senate Special Committee on Illegal Drugs noted that although thousands have been incarcerated for cannabis related offences use trends remain totally unaffected (cannabis use is steadily increasing). Most countries with more liberal policies have rates of usage lower than ours (46). The committee reports that harsher sentences are unlikely to be an effective deterrent. The committee states, "Indeed, such a move should not even be considered… current approaches are ineffective and inefficient. Ultimately, their effect amounts to throwing taxpayers' money down the drain" (37-38). A second report produced by Thomas Gabor and Nicole Crutchner, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures" reported similar criticisms of mandatory minimum sentences for drug related offences. The authors reported that mandatory minimum sentences in the United States have imprisoned mostly low-level non-violent offenders, and that drug consumption and drug-related crime have been unaffected by severe minimum mandatory sentences (30).

Second, there is no evidence that a reduction in conditional sentences will provide increased crime control. In the Canadian Bar Association's comment on Bill C-9 the authors acknowledged that evidence shows that public security is often diminished rather than increased when we incarcerate individuals since offenders return to the streets unreformed, with an increased chance of reoffending (6). Harsher penalties have not been associated with reduced crime. The authors state that it is also important to allow some offenders to serve conditional sentences so that they can fulfill work and childcare responsibilities (6). A recent study by Britain's Ministry of Justice also shows that community sentences are proven to be more effective at reducing reoffending than short term prison sentences.

The increases in the severity of sentences in these examples are arbitrary from a crime control perspective: evidence shows that they do not decrease crime. These proposed penalties are also overly intrusive, as they infringe on the rights of convicted offenders in a way that is not necessary for achieving crime control. Criminological evidence overwhelmingly indicates the powerlessness of severe penalties to achieve crime control purposes.[5] Unfortunately, these two examples of arbitrary and overly intrusive crime control measures are unlikely isolated sentencing policies. Considering the ineffectiveness of the threat of incarceration to deter potential offenders and the failure of incarceration to reform offenders, it is unlikely that the popular use of incarceration in Canada can be justified from a crime control perspective.

[5] See especially Doob and Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," and Wicharaya's nation-wide study of harsh sentencing regimes in the United States.

1.3 - An Alternative Model

The main aim of this project is to offer an alternative model of responding to convicted offenders that incorporates a number of the values and processes associated with restorative justice. I will defend this model against other restorative justice models and the strongest critique facing restorative justice theorists. However, I will also convince the reader that this model is superior to Canada's current response to convicted offenders. In this section I will briefly explain the proposed alternative model and offer some preliminary evidence to support it.

What aims or purposes should the Canadian criminal justice system seek out when responding to criminal offenders whose guilt has been established? I propose that there are four important goals: moral communication, amends, crime control and reform. These four aims are quite similar to the stated objectives in the *Criminal Code*; however, they must be justified and pursued in an effective manner.

First, we ought to properly censure criminal offenders. I will argue that the state must authoritatively condemn the criminal offence in order to vindicate the moral status of the victim and reassert the societal norm. Censure should treat offenders as responsible agents by calling them to account for their actions. Censure ought to carry the social pressure and weight of the moral condemnation coming from the community so as not to depreciate the seriousness of the offence. The best way to achieve this is by having the victims themselves, their families, the families of the offenders and public representatives censure offenders in the context of restorative justice encounters. Restorative justice encounters in which these parties meet with a trained facilitator are proper forums for appropriate criminal censure. In restorative justice encounters

offenders actually confront the full consequences of their actions by engaging victims in dialogue.

Second, we ought to have offenders make amends from their crimes. Offenders need the opportunity to provide restitution for any pecuniary damages they have caused to their victims. Offenders can return, replace, or compensate victims for damaged or stolen property. Offenders should attempt to help heal any psychological harm to their victims by meeting with them to provide information and apologize. Offenders must also make amends for the moral wrong they did to their victims by acknowledging the wrongness of their actions, admitting their responsibility, expressing remorse and repudiating the offence. Offenders should commit to this repudiation by carrying out the duties imposed on them and actively taking steps to change their criminal behaviour. Offenders also need to make amends with the indirect victims of their crimes who were harmed and the law-abiding citizens in their community who were taken advantage of. These reparations can be achieved by compensating indirect victims, contributing to a more general fund, or community service work.

Third, we ought to try to reform offenders and reintegrate them into the community. The rationale for this is twofold. First, reforming offenders is valuable because it reduces criminal recidivism which is a serious problem for crime control. Second, and more controversially, reforming offenders is valuable because of the benefits it brings the offenders. The reform I envisage consists of morally educating offenders and having them take steps to change their criminal behaviour. Restorative justice encounters educate offenders by engaging them in an in-depth examination of the criminal offence. Victims confront offenders with the full consequences of their criminal

actions which otherwise may have remained unknown. Offenders should also be required to actively help seek out the root causes of their criminal behaviour and learn what contributed to their crime. Community service obligations can be used to focus offenders' attention on their wrongdoing and its implications so that they may develop a more complete repentant recognition of their crime. Offenders should also be required to take steps to change their behaviour. This might include avoiding certain people or places, committing to education or employment, or participating in counselling for substance abuse or psychological problems. The state should provide released offenders with the necessary supports to enable their transition into law-abiding productive members of the community.

Finally, we ought to prevent crime. The rationale for this aim is simply that crime is a serious social problem that causes harm to citizens. Without crime prevention we would lose the benefits that come with a juridical state. The benefits of preventing criminal conduct such as murder, rape, theft and assault are obvious. Aside from reforming offenders, how can we prevent crime while responding to convicted offenders?

One of the ways we might prevent crime is by deterring potential criminals. Although the Canadian government seems to believe crime prevention can be achieved by increasing the severity of criminal sanctions, evidence points to the contrary. The theory of deterrence seems common-sense; but its failings can be explained. The theory of deterrence holds that a human being will not pursue a course of action if he expects that the magnitude of pain will be greater than the magnitude of pleasure he expects to be the consequence of the act (Bentham 54). However, if we consider criminality, certain scenarios arise in which the threat of incarceration does not deter. Studies show that

offenders often believe that they can beat the system and rarely believe that they will be caught (Doob and Webster). Though the prospect of being caught may affect how offenders commit crimes, it doesn't seem to affect whether they commit crimes. Criminologists add that many criminals are desperate or are acting under the influence of drugs or alcohol (Siegal and McCormick 124). Some social scientists also posit that a significant percentage of crimes are committed by offenders suffering from psychopathy (Lykken 36). Skeem et al. estimate that approximately 15 to 30% of inmates in North America are classified as psychopaths. Psychopaths are characterized as impulsive (fail to plan ahead), and needing excitement (Oltmanns, Emery, and Taylor 326-328). Blair demonstrated that psychopaths are also impaired in their ability to learn based on stimulus-reinforcement. Re-stated, psychopaths are not strongly dissuaded from performing actions that were previously associated with punishment.

Studies show that increasing severity of sanctions does not provide additional deterrence, but it is still possible that the threat of some criminal sanction, as opposed to no criminal sanction at all, has a negative effect on criminality. However, less severe sanctions prove to work just as well as, and sometimes better than, severe sanctions.[6] On the model I propose the response will typically include burdensome reparations, community service, rehabilitative obligations, and meeting victims. In some cases restraints such as curfews, house arrest, monitoring and imprisonment will be applied. This response is accompanied by the unpleasant informal social sanctions, disapproval and shame that accompany criminal conviction. So, my model's response may provide some crime prevention by way of deterrence.

[6] A number of studies have demonstrated that capital punishment actually increases homicide rates. See for example, Bowers and Pierce.

We can incapacitate convicted offenders rendering them incapable, for a period of time, of offending again. Restraints should be effective, minimally intrusive and proportionate to the objective. This implies: [1] we shouldn't use incarceration where a less intrusive response is proven to be as likely to reduce recidivism, [2] we shouldn't use costly incapacitation measures for offences that cause minor harm, and [3] we should incarcerate only persistent and dangerous offenders.

This model differs significantly from the contemporary Canadian model where the judiciary applies punitive sanctions to offenders in proportion to the gravity of the offence and their degree of responsibility. Instead, the typical response will be a dialogical process between the different stakeholders and a public mediator where a number of goals will be pursued. The encounter serves to censure and educate the offender and provides a forum in which the offender can apologize and the victim can find out information about the crime. The encounter also allows stakeholders to determine how the offender can properly make amends for his crime. Experts are used to determine restraints and rehabilitative obligations, review restitution contracts, and keep morally educative community service within appropriate limits.

1.4 - Some Preliminary Evidence

I cannot offer direct evidence as to the efficacy of the model I propose as it has yet to be implemented. However, there is some preliminary evidence that can provide partial support for the alternative model.

1. Research suggests that offenders who participate in restorative justice programs undergo changes in their moral attitudes. A study by Feasey, Williams and Clarke on an international restorative justice program called the Sycamore Tree Program

boasted such results. The Sycamore Tree Program joins prisoners with surrogate victims to tell each other their stories about the crimes they were involved with and how the crime affected them. The Sycamore Tree Program has been used in over 50 different penal establishments. Researcher had over two thousand prisoners (mostly adult males) complete the Crime Pics II questionnaire before and after the intervention to measure the offenders' attitudes relating to criminal offending.[7] There was a statistically significant reduction on all the Crime Pics II scales indicating that the program reduced the attitudes conducive to offending behaviour (14). Attitudes measured included: general attitude toward offending, anticipation of future offending, victim empathy and evaluation of crime as worthwhile.

2. A number of studies have shown that participating in restorative justice programs such as victim offender mediation and family group conferencing has a positive effect on offenders' recidivism. In Canada, Latimer, Dowden and Muise performed a meta-analysis of restorative justice literature from the past 25 years in order to determine the effectiveness of restorative justice programs that involved encounters between victims and offenders. The meta-analysis included 22 different studies that examined 35 restorative justice programs. The researchers found that offenders who participated in the restorative programs reoffended significantly less compared to control groups (14).

A recent study by Nancy Rodriguez explored the effects of restorative justice programs on recidivism in youths while controlling for other variables like gender, race, age, type of offence, previous offences, etc. The subjects studied were youth offenders in Maricopa County, Arizona processed between 1999 and 2001. This group was compared

[7] The Crime Pics II questionnaire is a 35-item questionnaire designed to measure an individual's attitude to offending on a number of scales. It has been employed by a number of criminal justice agencies for the evaluation of probation/prison intervention programs.

against all other juvenile cases in the same jurisdiction that were diverted from formal proceedings to a juvenile probation officer during that time. The study showed that when controlling for legal and extralegal factors, after 24 months, juveniles in the restorative justice program were less likely to have reoffended as measured by formal court petitions (371).

Studies have also shown that those who do reoffend after participating in restorative justice encounters commit less serious crimes than similar offenders sentenced to conventional criminal justice sanctions. For example, Nugent and Paddock concluded in their 1995 study that youth criminals who participated in victim offender reconciliation programs reoffended less and with less severity than youths conventionally sentenced when controlling for age, gender, race, education, previous offenses, family size and family structure (365).

3. There is evidence showing that offenders who participated in restorative justice programs were more likely to fulfill their restitution obligations than offenders who were required to complete court ordered compensation. A model that incorporates restorative justice processes to a more significant degree might be more successful at securing amends.

Latimer, Dowden and Muise reported that restorative justice could be more effective in ensuring offender compliance with restitution agreements. In their meta-analysis, eight studies examined the impact of restorative justice programs on restitution obligations. The authors reported that "offenders who participated in restorative justice programs tended to have substantially higher compliance rates than offenders exposed to other arrangements" (12). A cross-site study of restorative justice programs for juveniles

in the United States completed by Umbreit and Coates also reported higher compliance completing restitution. The authors compared restitution compliance between offenders who participated in restorative justice programs in Albuquerque and Minneapolis and compared data against a sample of similar offenders from the same jurisdiction that were matched on age, race, sex, offense and amount of restitution. Restorative justice programs boasted 81% compliance compared to only 58% compliance in the comparison group (578).

4. Victims who participate in restorative justice processes report satisfaction and alleviation of emotional/psychological problems. This shows that the use of restorative justice processes can help better restore victims to the level of well-being they enjoyed prior to being wrongfully harmed.

Latimer, Dowden and Muise evaluated the correlation between victims' participation in restorative justice processes and self-reports of satisfaction. This part of the study examined 13 restorative justice programs. Participation in restorative justice programs resulted in higher victim satisfaction ratings when compared to a control group in all but one program (9). Umbreit and Coates' investigated victim satisfaction across four sites and found significantly higher satisfaction in restorative justice conditions than control groups: 79% compared to only 57% (575). The study also showed that fewer victims reported feeling upset about the crime or feeling afraid of being re-victimized after the process compared to before (575).

A recent study by Sarah Behtz analyzed data from an experimental restorative justice project in Bethlehem, Pennsylvania. The project selected 292 juvenile offenders who were arrested for committing violent crimes or property crimes and randomly

assigned them either to participate in a family group conference or to formal adjudication. If either the victim or the offender declined to participate in the conference the case got processed through conventional adjudication (they labelled this third group the 'decline' group). Behtz found that victims from the conference group showed a higher satisfaction rate than those in control and decline groups. When surveyed as to whether victims were satisfied with the way the criminal justice system handled their case 96.2% of the victims from the conference group expressed satisfaction compared to only 78.8% in the control group and 72.4% in the decline group (47).

5. New studies in Britain show that restorative justice processes can save millions of taxpayer's dollars. Britain's Knuutila recently released the report "Punishing Costs: How Locking up Children is Making Britain Less Safe". After an extensive study of Britain's youth criminal justice system the author concluded that by reducing custodial sentencing 13% and increasing use of restorative justice programs Britain could save over 60 million pounds per year (35). The study included the economic impact of unemployment and public benefits of reduced crime while youth criminals are serving their sentences.

Britain's House of Commons Justice Committee recently issued the report "Cutting Crime: the Case for Justice Reinvestment". The committee argued that reducing custody and taking measures to prevent crime and reduce reoffending will be cheaper, more effective, and more satisfying to citizens who want fewer crimes (10). The committee recommended immediate action to establish a fully funded restorative justice system for youth and adults with nationwide access (15). Another study, "An Economic Analysis of Interventions for Young Adult Offenders" was performed by Matrix

Evidence with the aim of securing a strong evidentiary analysis for the recommendations put forth by the 2009 report *A New Start: Young Adults in the Criminal Justice System*. Researchers found evidence that restorative justice interventions could provide dramatic economic benefits for Britain. The report concludes for all offenders aged 18-24 sentenced in a Magistrate's court for a non-violent offence in a given year that diversion to pre-court restorative justice conferencing schemes following police triage would produce a lifetime cost saving to society of almost £275 million (3). Implementing such a scheme would lead to a net benefit to society of over £1 billion in 10 years (3).

There are qualifications to keep in mind when using this research to estimate the effectiveness of the proposed model. A number of the programs studied used juvenile offenders rather than adults. The offenders in restorative justice processes were sometimes compared against control groups composed of individuals who were not appropriate for restorative justice processes. This self-selection bias could have affected the results. Finally, the alternative model I advocate uses somewhat different restorative justice processes than those studied (this will be clarified later). Ultimately, the effectiveness of my proposed model will need to be tested. However, current research strongly suggests that a response to convicted offenders that further incorporates restorative justice processes such as victim offender mediation, family group conferences, community circles and victim impact panels will better achieve certain aims.

1.5 - Summary

There are a number of problems with the Canadian response to criminal offenders whose guilt has been established, and we ought to adopt a model that better addresses these problems. On the Canadian model: many offenders are not reformed, many

offenders do not make amends, many offenders are not properly censured or morally educated, and many offenders are sentenced to arbitrary, overly intrusive punishment that is a substantial burden on Canadian resources. I propose an alternative model that aims to better achieve amends, reformation, censure, and crime control. Current research suggests that a response to convicted offenders that incorporates restorative justice processes to a greater extent can provide benefits such as: decreased recidivism, increased compliance with restitution orders, morally educated offenders, economic savings, and healing for victims.

Chapter 2: Restorative Justice Theory and the Internal Critique

In recent years restorative justice practices and scholarship have grown dramatically. Since the first victim-offender reconciliation programs were tested in Ontario, Canada in 1974 a number of countries have implemented restorative justice processes into their response to criminal offenders. The list of countries that have adopted restorative justice processes includes countries such as United States, Norway, Finland, England, Austria, Australia, Mexico, New Zealand, Brazil, China, Colombia, Uganda, Poland, Costa Rica and Belgium (Van Ness and Strong 38). Probably the biggest collection of restorative justice literature is assembled on the "Restorative Justice Online" website which contains almost ten thousand publications on restorative justice.

There is increasing discussion among lawyers, academicians and practitioners regarding the nature of restorative justice and the implementation of restorative justice processes and values. Restorative justice advocates have proposed competing models detailing how the state should respond to criminal offenders whose guilt has been established. Growth in restorative justice advocacy has been accompanied by an increase in criticism from proponents of conflicting philosophies of punishment. This chapter will discuss the concept of restorative justice and outline a few of the most prominent criminal justice models that incorporate restorative justice values and processes. The chapter will also explore recent criticisms of restorative justice put forth by prominent philosophers Andrew von Hirsch, Andrew Ashworth and Clifford Shearing. These critics argue that restorative justice models are not conceptually coherent and do not provide meaningful guidance for the treatment of offenders. The last chapter discussed how an alternative

model of responding to convicted offenders that incorporates restorative justice values and processes might be more desirable than the Canadian model. This chapter explores competing restorative justice models and the criticisms facing them.

2.1 - The Concept of Restorative Justice

So what exactly is 'restorative justice'? Unfortunately, there is no clear consensus on the definition. Like many philosophical concepts, restorative justice is deeply contested. The concept of restorative justice has undergone a significant change from the idea which was associated with early North American experiments in victim-offender mediation to today's broader conceptions of restorative justice encompassing a multitude of values and social practices from around the world. I will survey the different definitions offered in the literature and briefly examine a case-study that is representative of the kind of procedures employed in my approach.

First, it is important to narrow our focus. As Van Ness points out, the term restorative justice is used in multiple ways. The term may describe a whole new understanding of crime and justice, it may refer to a public policy for responding to crime, it may refer to a label used to describe particular kinds of programs that allow parties affected by crime to meet and it is often applied to reparative but judicially imposed sanctions (Van Ness, "Proposed Basic Principles" 157). The practices and values associated with the restorative justice response to crime are also applied in business and school settings. The best understanding of the concept of restorative justice must accommodate this breadth of meaning. My understanding is that the term "restorative justice" refers to a multitude of values and practices that traditionally concern criminal justice but which may be applied to any number of settings. I am concerned

only with how the state should respond to convicted offenders. Hence, I will only explore the restorative justice values and practices that interact with this response.

Probably the best attempt at reconciling the plenitude of definitions for restorative justice is Daniel Van Ness and Gerry Johnstone's article, "The Meaning of Restorative Justice". In the article the authors admit that there is not likely to ever be a single accepted conception of restorative justice. When defining restorative justice we ought to recognize the differing and competing ideas about its nature. The authors manage to identify three general elements that proposed definitions of restorative justice typically center around. In *Restoring Justice* Van Ness and Strong explain that most advocates endorse these key features to some degree, but when required to give an exact definition they will generally articulate an explanation that focuses primarily on one of the features or rank them in importance (42).

Conceptions of restorative justice emphasizing the encounter element focus on the importance of meetings between parties who have been affected by a crime. The United Nations defines a 'restorative process' as a process in which the victim, the offender, and where appropriate, other individuals or community members, participate together in the resolution of matters arising from the crime with the help of a trained facilitator (qtd. in Van Ness, "Proposed Basic Principles" 167). These processes provide an opportunity for the affected parties to meet each other in a safe environment where they can ask questions of each other, express their feelings, tell their personal stories, and gain a better understanding of each other, the offence and its aftermath.

Three of the most popular encounter processes are victim-offender mediation, family group conferencing and sentencing circles. Victim-offender mediation sessions

take the form of a meeting between victims and offenders with the assistance of trained facilitator. The purpose of the meeting is to allow victims and offenders the opportunity to talk about the crime and agree on a just resolution of their conflict. The process usually involves the following tasks: [a] the facilitator opens the session with introductions of participants and the process; [b] the parties talk about the crime and its impact from their points of view; [c] the offender apologizes for his actions and expresses remorse; [d] the parties discuss how the offender can repair the harm and make things right; [e] the process closes with a written disposition that may include financial payment, personal service, community service, counselling, or other measures (Schweigert 171). Family group conferencing is similar but includes the families and supporters of the involved parties in the meeting as well as representatives from the criminal justice system. These additional participants add their own thoughts and feelings and help come up with a comprehensive solution. Circles and community conferences include an even wider group of participants from throughout the community and may involve discussion of a wider range of issues regarding community concerns (Van Ness and Strong 67). These encounters are generally initiated upon confirming the offender's guilt, before any judicial sanctions are given. However, victim-offender mediation is also practiced with imprisoned offenders, although such encounters do not result in dispositions as offenders have already been sentenced.

Restorative justice theorists also typically endorse certain values and principles to guide these processes. For example, in Kay Pranis's article "Restorative Values" she highlights restorative justice values identified by a number of writers. The list includes

values such as: honesty, respect, mutual care, listening, humility, safety, compassion, inclusion, responsibility and empowerment (61-62).

On conceptions emphasizing encounter something would not be considered restorative if it did not involve the victim, offender and other parties meeting together. An example of a definition of restorative justice that embodies the encounter element is put forward by Tony Marshall: "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (qtd. in Harris 61).

The second element is reparation. Criminal acts harm a number of people and justice requires that offenders repair this. Conceptions of restorative justice emphasizing reparation focus on having offenders make amends for their criminal actions and restore their victims to their previous state of well-being. Restorative justice theorists typically envisage a broad notion of harm and encourage open and flexible means for making repairs. Restorative justice theorist Lode Walgrave characterizes the harm which restorative justice confronts as encompassing material damage, psychological suffering, social unrest and community indignation, as well as uncertainty about legal order and public safety (61). Mara Schiff explains that victims have a number of needs which the state's response to convicted offenders should fulfill. Victims need to be informed about the crime, reassured that they were not responsible, given an opportunity to understand their offenders and compensated for damages (234).

Restorative justice theorists typically allow offenders to use any variety of methods to repair the harm wrought by their criminal wrongdoing. Generally, they suggest having offenders apologize, recompense the victims for harm sustained and

change their behaviour. The apology might be simply verbal, but may also be expressed through the offender's actions and commitments. Offenders might make restitution in a number of ways: returning or replacing property, financial payment, performing direct services for victims, community service orders, etc. Strategies for changing offenders' behaviour might involve: attending psycho-therapy, substance abuse treatment, avoiding certain people or places, committing to education or employment, etc. Though these methods are more typical, different restorative justice theorists may advocate any number of ways in which an offender can repair damages. Reparation is not limited to restoring victims to their previous state of well-being; it includes restoring offenders into their communities. The encounter and rehabilitation programs may help to restore the offenders back into their communities as contributing citizens. Offenders may also need aides such as support groups, parole workers, or employment assistance.

Proponents emphasizing reparation would not describe something as restorative if it did not provide some sort of redress to victims (Van Ness and Strong 42). Prominent restorative justice advocates Lode Walgrave and Gordon Bazemore define restorative justice as being essentially reparative: "Restorative justice is every action that is primarily oriented towards doing justice by restoring the harms that have been caused by crime," (qtd. in Walgrave 61).

The third element Van Ness and Johnstone identify is transformation. Transformation concerns broken relationships throughout society. Restorative justice should aim to address not just individual instances of harm but also larger structural problems. Restorative justice addresses our relationships with other citizens by challenging societal injustices. Proponents of the transformative conception would not

describe something as restorative if it did not address structural impediments to healthy relationships in society (Van Ness and Strong 42). Proponents of the transformative element such as Ruth Morris argues that we need to focus on altering the conditions that contributed to the incident instead of seeking to restore victims, offenders and communities to their pre-crime status. Morris states that transformative justice "seeks to use crime as an opportunity for social transformation and transformation of the lives of those most affected by crime" (qtd. in Harris 60).

A case-study involving a restorative process and disposition may help to illustrate. Thomas Cavanagh recounts an interesting example of a family group conference that took place in the United States in 1998. The offender, Justin, while driving by an ice cream parlour on his way to play paintball, shot a paintball gun into a group of people. Although a paintball gunshot will usually sting and may cause a minor bruise, the paintball happened to strike someone in the crowd, Jorel, in the eye, permanently damaging it. Both Justin and Jorel wanted to meet each other and the parole officer set up a family group conference that included about 15 people. At the conference Jorel and her family and friends talked about the crime and all the harm that it had done to them. Justin was visibly moved by the discussion, cried, and expressed remorse. Justin and his family assumed financial responsibility for all the expenses that Jorel and her family had incurred as well as certain extra items and services. One of the conference participants arranged for Justin to work with a carpenter so that he could earn the money to pay Jorel. Justin apologized to all those at the conference for the harm he had caused everyone. In place of community service, the group decided they wanted Justin to talk to others about the dangers of paintball guns and write letters to local newspapers and magazines. Jorel

and her family stated that they did not want Justin to go to jail, but rather to help protect others from a similar fate. Shortly after, the local paper published a letter to the editor in which Justin described the dangers of paintball guns and apologized to the community for his crime.

In this case study the offender met his victims in an encounter process and made reparations by apologizing to his victims, providing restitution, and changing his behaviour. The offender also attempted to address, in part, the larger issue of paintball safety in society. The different elements of restorative justice often overlap, and different theorists endorse them to different degrees. Van Ness and Johnstone explain that most conceptions of restorative justice embrace encounter, repair and transformation but differ in emphasis (17). They argue that such advocates should be considered members of the same social movement.

2.2 - Restorative Justice Models: Van Ness, Duff, and Braithwaite

There are competing ideas about how restorative justice values and processes should be incorporated into a desirable response to convicted offenders. This section will highlight three prominent models. Duff's model is both retributive and restorative. Duff posits that our responses to crime should aim at restoration, and that the kind of restoration needed is best achieved by imposing retributive punishment. Braithwaite argues that we should adopt a consequentialist response to convicted offenders in which the state aims to maximize citizens' autonomy. Restorative justice processes play a large part in his scheme. Van Ness' model proposes the overall goal of restoring victims and offenders into their communities, with limiting goals of controlling crime and fairness.

Duff

Antony Duff is one of the most influential retributive punishment theorists. Duff first elucidated his theory of punishment in the 1986 text *Trial and Punishment*, in which he justified criminal trials and punishment as necessary tools for moral communication. The criminal trial should try to engage the offender and persuade him to accept the condemnation of the criminal conviction; hard treatment is the means through which the offender can express repentance and restore himself to the community (255). We should not punish offenders just for the sake of making them suffer, but rather because bringing criminal wrongdoers to suffer the punishment they deserve creates the type of restoration needed.

Duff explains in his article, "Restorative Punishment and Punitive Restoration" that the essence of restoration is the retrieval of an original favourable condition. Sometimes we can achieve restoration (property can be restored, as can health) and other times harm does not permit genuine restoration (damaged property) and we must compensate to make up the loss. Particular to crime is that the victim was not just harmed, but wronged. The victim did not just suffer injury in an accident, he was attacked. This type of wrongdoing damages normative relationships, which also need to be restored. We must ask what would adequately restore a relationship damaged by a criminal wrong. The paradigmatic way of repairing the moral wrong is apology. However, a purely verbal apology may not be adequate for a serious wrong; the apology must be strengthened. Apologies for serious wrongs should take the form of burdensome penances (90).

In his article, "Restoration and Retribution" Duff advocates the use of restorative justice processes in which victims and offenders discuss and explain the crime that occurred. The victim and the court appointed mediator (representing the public) should try to bring the offender to understand their perspectives and to fully grasp the character of the criminal wrong done. Duff states that censure and condemnation are integral to this process. Duff argues that restorative justice encounters and penances are necessary to bring offenders to suffer as they deserve. Offenders deserve to suffer two crucial burdens: first, they deserve to suffer the burden of remorse; second, they deserve to suffer the censure of others (49). The process should also aim to reconcile offenders and victims through apology (51).

In his text *Punishment, Communication and Community* Duff argues that we should require the offender to complete a burdensome penance which can help the offender repent, reform and reconcile himself with the political community. The imposition of the penance communicates to the offender the censure he deserves for his crimes and forces him to recognize his wrongdoing and suffer the pain of repentance and remorse (107). Repentance for serious wrongs must go deep with the wrongdoer and occupy his attention, thoughts and emotions for considerable time. The job of the penance is to induce, deepen, or strengthen the offender's repentance. A commitment to self-reform is part of this repentance; recognizing a wrong is also recognizing a need to avoid such behaviour (108). Probation and mediation should be designed to help offenders discover how they can reform. The penitential punishment constitutes a forceful apology that should reconcile the wrongdoer with those he has wronged.

The penance Duff envisages may take a variety of forms. Throughout his writing Duff mentions: service for the victims, service for the community, changing behaviour, providing financial compensation, contributing to a charity, probation, etc. Duff explains that an offender can offer a suitably forceful apology by undertaking or undergoing any sort of penance that adequately expresses his repentant recognition of the wrong done (*Punishment, Communication*, 110). He argues that this response to convicted offenders is appropriate for unrepentant offenders, already repentant offenders whose repentance must be deepened and strengthened and defiant offenders who complete their penances still unrepentant (115-125).

Van Ness

In Van Ness' 1993 article, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" he states that the overall purpose of our response to crime should be the successful restoration of both victims and offenders, who have resolved their conflicts, into safe communities. Van Ness explains that accomplishing this broad goal can be achieved only when multiple parties (victims, offenders, communities, government agencies) pursue multiple goals. When responding to particular convicted offenders, the determining goal in crafting an offender's disposition is the resolution of conflict. Van Ness explains that the cornerstones of this response are amends, reintegration, and encounter. However, the response to convicted offenders is also restricted by limiting goals which limit the nature and duration of measures taken to accomplish the determining goal of restoring victims and offenders. The limiting goal of fairness requires that victims and offenders be treated consistently and that restorative outcomes not be more burdensome for some than others for social or economic reasons.

To this end, we ought to establish guidelines outlining minimum and maximum amounts of restitution for particular offences. The second limiting goal of controlling crime requires that restitution would be presumed but that imprisonment, which precludes or delays restitution, would be used in cases of last resort.

Offenders can make amends by apologizing, changing behaviour and repairing the harms they caused (Van Ness and Strong 83). A proper apology consists in an acknowledgment of responsibility and an admission of norm violation. The apology must also express the offender's affect of shame and regret. It should make the offender vulnerable and give victims the power to accept or reject the apology. When offenders cannot make restitution to all affected victims those who have suffered the most direct and specific injuries should take priority (Van Ness and Strong 89). The state should assist offenders to reintegrate into the community after the crime as whole, contributing, productive persons. Offenders may feel outcast and stigmatized, even after making amends or serving a prison term, and they ought to be accepted back into the community. Offenders may require state assistance to reintegrate successfully. Van Ness endorses the use of support groups and parole personnel for offenders re-entering society.

Van Ness endorses the use of victim-offender mediation programs, family group conferencing, circles, victim-offender panels and other encounter programs. Through these processes victims and offenders can meet, tell the story of the crime from their perspective, express their emotions, understand each other and the crime, and come to an agreement on how to resolve the crime. Van Ness states that restorative processes should be guided by four central principles: all stakeholders should be included and invited to participate; processes should attempt to accommodate in a balanced manner the interests

of all parties involved; parties should participate because they assume responsibility and have chosen to do so (voluntary); finally, participants should adopt a problem-solving orientation instead of focusing on reprisals ("Creating Restorative Systems" 133-134). The mediator should not impose specific outcomes instead participants must arrive at an agreement voluntarily ("Proposed Basic Principles" 168).

Braithwaite and Pettit

Most of Braithwaite's theory of punishment is explained in the 1990 text *Not Just Deserts: A Republican Theory of Criminal Justice* which he co-authored with Phillip Pettit. The authors reject the retributive practice of sentencing criminal offenders proportionately to the gravity of offences, and propose an alternative republican theory of criminal justice. The authors are consequentialists who argue that our institution of punishment should further citizens' dominion (their freedom and sense of control over their own lives) (70). In a later article, "Not Just Deserts: Even in Sentencing" the authors explain that crime represents a denial of the victim's dominion. When an offender commits a crime he asserts the susceptibility of the victim to his will; he disregards the victim's dominion (229). Crime may also diminish a victim's dominion by reducing the range of activities in which he can exercise dominion, as in kidnap, murder, or theft. Every crime will also affect the community's dominion by causing fear.

In responding to convicted criminals then, we ought to try to promote the enjoyment of dominion overall. The limited job of the courts is to try to rectify the damage caused by crime; this is the proper contribution of a sentencing body to the consequentialist dominion project (Braithwaite and Pettit, "Not Just Desert: Even in Sentencing" 231). First, in order to address the disregard for dominion by the offender,

we ought to want the offender to recognize the dominion status of the victim and withdraw the implicit claim that the victim did not enjoy that dominion. Second, in order to rectify any damage to the victim's dominion, we ought to want the offender to recompense him for the diminution of dominion. Third, in order to respond to an offender who has undermined the feeling of safety in the community the court should seek measures against the offender to reassure the community. In practice rectifying criminal offences is not always possible. Recognizing dominion requires a mix of symbolic and substantial measures. This might involve an apology and a commitment against offending. Recompense generally consists in having offenders make restitution or compensate victims. Reassurance is sometimes thought to be best accomplished by removing offenders from the community. However, prison embitters offenders and introduces them to criminal values and skills, so reassurance is false and fleeting. The courts should be minimalist in their responses with the capacity to escalate to imprisonment only when offenders display an unyielding propensity to commit criminal behaviour. Crime control measures require maximum limits because citizens' knowledge that criminal courts could impose penalties of any degree of severity would undermine the dominion enjoyed by citizens, particularly those in minority groups who have a higher likelihood of being mistakenly convicted ("Not Just Deserts" 235).

In later works Braithwaite further defines the response to convicted offenders he and Pettit authored. Braithwaite goes on to explain how restorative justice processes fit into the model. Restorative justice processes can be appropriate for establishing recognition and recompense. In restorative justice processes the collective of stakeholders decides what disposition is just. The agreement that seems contextually just

to stakeholders may or may not include punishment, compensation, apology, community work, rehabilitation or other measures ("In Search of Restorative Juirsprudence" 158). Braithwaite puts forth three sets of restorative justice values. The first group contains procedural values: respectful listening, equal concern for stakeholders, accountability, empowerment, and respect for human rights. The second group of values contains those against which the success of restorative justice process should be evaluated: restoration of property loss, restoration of safety/injury, restoration of human relationships, restoration of communities, restoration of freedom, prevention of future injustice, etc. The third group of values contains those that should not be coerced, but rather promoted by creating a space where people can manifest them: remorse, apology, censure, forgiveness and mercy ("In Search of Restorative Jurisprudence" 164-165).

2.3 - The Internal Critique of Restorative Justice Theory

In their article, "Specifying Aims and Limits of Restorative Justice: A 'Making Amends' Model?" professors Andrew von Hirsch, Andrew Ashworth, and Clifford Shearing put forward an important critique of restorative justice theory as it applies to criminal offending. The authors argue that the restorative justice models commonly presented in the literature suffer from a number of serious problems. The authors explain that their critique is mostly 'internal', in the sense that their aim is to scrutinize restorative justice models on their own terms. The authors ask whether such models constitute coherent theories capable of providing meaningful guidance for criminal justice systems. In their critique the authors specifically reference Duff, Van Ness, and Braithwaite.

The first problem is that advocates of restorative justice often put forward multiple unclear goals. The authors argue that restorative justice theorists posit imprecise goals such as 'restoring relationships' or 'restoring the bonds of communities' without explaining exactly what is damaged and how this so-called 'restoration' is to take place. Restorative justice theorists propose a multitude of goals and values without providing any rule to appeal to when said goals or values conflict. For example, what do we do when our goal of recompensing victims conflicts with our goal of community safety? The authors argue that a theory that posits numerous imprecisely defined goals cannot provide the guidance our criminal justice system needs (22). Von Hirsch et al. specifically attack Van Ness and Braithewaite's proposed goals (22-23). I argue in Chapter 3 that both Van Ness and Braithwaite's aims are problematic.

The second problem is that advocates of restorative justice often fail to specify the means to be used for achieving their proposed objectives. When specific means are endorsed restorative justice advocates rarely explain how they purport to accomplish given objectives (23). Only certain kinds of processes and dispositions are likely to produce the goals restorative justice theorists endorse. How do we know in a particular case what kind of interventions to decide upon to achieve our goals? How exactly do restorative justice processes and their dispositions supposedly educate offenders and heal victims? Restorative justice theorists should provide guidance as to which means are appropriate for accomplishing given aims and how they allege to do so. I argue in Chapters 3 and 4 that Van Ness fails to specify what method of crime prevention he would pursue. Duff suggests a plethora of sanctions to satisfy his aim, but I will

demonstrate in Chapter 3 that his endorsement of restraints does not follow from the logic of his position.

A third problem von Hirsch et al. identify is that restorative justice advocates leave the responsibility of deciding on a fitting disposition up to conference group participants (33). This being the case, the participants in the conference may come up with any number of unusual obligations for the offender to carry out. Giving conference participants the freedom to pursue any aim they choose, and any means to achieve it, opens the door for inappropriate treatment of offenders. What if conference participants chose to pursue special deterrence by giving the harshest disposition they could come up with? What if they aimed to censure the offender but spent the conference degrading and humiliating him? The authors worry that nothing ties the process to the supposed aims restorative justice theorists endorse. I argue in Chapter 4 that both Van Ness and Braithwaite's models suffer this problem.

Not only is there a worry that restorative justice dispositions will not be rationally connected to proposed aims, Ashworth charges that these dispositions will be unfair. In his article "Responsibilities, Rights and Restorative Justice," Ashworth argues that the state must keep control of criminal sentencing to ensure a consistent response to offenders. In dispositions resulting from restorative justice proceedings two offenders who commit similar offences with similar degrees of blameworthiness may receive appreciably different sentences. A number of factors could produce such an outcome: conference members in different encounters may formulate different agreements due to their diverse attitudes, values, or beliefs; offenders may have significantly different harms

to repair (even though similarly culpable) and may differ in their capacity to make repairs.

Von Hirsch and Ashworth argue that criminal sentences must be in accordance with proportionality constraints because punishment expresses blame, and the severity of punishment conveys how much the conduct is disapproved of.[8] This expressive feature of criminal punishment demands that sentences reflect the degree of blameworthiness of the criminal conduct. Where proportionality is disregarded offenders may suffer more or less implicit censure than the reprehensibility of their conduct warrants. Although some restorative justice theorists advocate proportionality constraints (Duff does, Braithwaite does not, and Van Ness does for restitution payments), von Hirsch, Ashworth, and Shearing argue that the grounds for such limits within the restorative justice paradigm are rarely addressed. How do proportionality constraints on restorative justice dispositions follow from the purpose of the interventions? Should we create proportionality limits for compensation, labour, lifestyle changes, restraints? Ashworth criticizes Van Ness' use of proportionality limits. I argue in Chapter 4 that Van Ness' proportionality constraints are problematic.

Finally, von Hirsch, Ashworth and Shearing explore restorative justice theorists' proposed scope of application. In order to implement restorative justice we must know which situations call for a restorative process and which situations require more traditional criminal justice sanctions. Different states of affairs may pose challenges for restorative justice theorists: a victim unwilling to participate; an offender unwilling to participate; a crime with no direct victim; a serious crime like murder; etc. The authors

[8] This is argued in many of their works. For example, Von Hirsch and Ashworth (92).

argue that even if restorative justice processes are worth implementing they should serve only a limited role within the larger structure of a retributive sentencing system (28). I argue in Chapters 4 that Duff does not provide meaningful guidance as to what sanctions are to be used for given offences or offenders.

Von Hirsch, Ashworth and Shearing suggest that restorative justice advocates need to try to specify aims and limits better. Restorative justice advocates should: prioritize goals, specify means-ends relationships, provide guidance for deciding individual cases and make fairness constraints on severity of sentences (40). Only when restorative justice theorists provide conceptually coherent models will they be taken seriously. In order to have a sensible debate about the pros and cons of an alternative model of criminal justice clear and consistent criteria for implementation needs to be provided. The authors claim that proponents' accounts of restorative justice have failed to provide that.

2.4 - Gerry Johnstone's Reply to the Internal Critique

In his article, "Critical Perspectives on Restorative Justice" Gerry Johnstone responds to von Hirsch, Ashworth and Shearing's critique. Johnstone explains that the critique is not aimed at restorative justice per se, but rather at advocates for failing to provide a conceptually coherent model of restorative justice. There are three avenues open for restorative justice proponents: they might disagree with the critique and claim that a more aspirational approach is desirable, they might accept the critique concerning what restorative justice models require but argue that they have already provided it, or they might grant the criticism and proceed to construct such a model (600).

The ‘aspirational’ model that Johnstone refers to is simply a model of restorative justice that presents a range of ideals that proponents think we should aspire to in responding to criminal offenders (599). Such a model of restorative justice would provide criminal justice officials with desirable values and objectives but would not provide any precise guidelines as to how they should be implemented. It is hard to see the value in such a model, except for its potential to be transformed into the conceptually coherent model. A loose aspirational model can only have its goals and values realized if they are adopted in criminal justice policy. A comprehensive list of restorative justice values does not serve much purpose faced with judiciary mandated to follow a retributivist sentencing scheme. In order to change policy restorative justice theorists will need to propose a detailed model, the best of which will provide guidance along each of the dimensions that von Hirsch, Ashworth and Shearing identify. The aspirational model is not an alternative model of restorative justice at all, but rather the first step in the process of creating a conceptually coherent model.

The second option that Johnstone presents is that restorative justice theorists might reply by claiming that they have already presented conceptually coherent models. Some restorative justice theorists have created quite comprehensive models. Duff, Van Ness and Braithwaite are perhaps the best examples. Ultimately however, I will argue that none of their models are completely acceptable. The composite-aims model provides a more desirable response to convicted offenders for reasons that will be articulated in chapters three and four.

The third option is to acquiesce and proceed to construct a coherent model along the dimensions outlined by the von Hirsch, Ashworth and Shearing. Such a model would

provide a more developed answer to the question of how the criminal justice system ought to treat guilty criminal offenders. This model could then take on a bigger role in current debate over criminal justice, and hopefully affect the implementation of restorative justice today. I aim to do this. In the next chapter I will attempt to construct a model for the state's response to convicted offenders. I will construct the model along the dimensions outlined by von Hirsch, Ashworth, and Shearing and address their criticisms. Along the way I will highlight problems with the models proposed by Duff, Van Ness and Braithwaite. I will answer a number of questions: Which aims ought to be pursued by the criminal justice system when dealing with a criminal offender whose guilt has been established? What criteria should we appeal to when multiple goals conflict? How do restorative justice processes propose to accomplish these aims? Which types of offences/offenders ought to be dealt with using restorative processes? What limiting principles, if any, should be applied to restorative dispositions and restraints? What should the decision-making process in restorative conferences look like?

2.5 - Summary

In this chapter I demonstrated a number of different conceptions of restorative justice and diverse models describing how restorative justice values and processes should be incorporated into a desirable response to convicted offenders. Duff, Van Ness, and Braithwaite endorse different models. Probably the most prominent critique of contemporary restorative justice advocates was recently put forth by von Hirsch, Ashworth, and Shearing. These critics argue that restorative justice advocates fail to adequately specify the aims, means, and scope of application for their models. The authors also argue that restorative justice advocates fail to include proportionality

constraints on dispositions, and where they do, it is not explained how such constraints follow logically from their model. I argued that we ought to construct a model that better specifies aims and limits, and in the next chapter I attempt to do just that.

Chapter 3: The Composite-Aims Restorative Justice Model

In the next two chapters, I will develop the composite-aims model for responding to convicted offenders I endorse. I will attempt to specify aims and limits, and respond to von Hirsch, Ashworth and Shearing's criticisms. I will also show that Duff, Van Ness and Braithwaite's restorative justice models are problematic. This chapter will elaborate on my composite-aims model's goals. Chapter four will address the means, limits, scope of application and sentencing procedure favoured by my approach.

3.1 - Aims

What aims or purposes should the criminal justice system seek out with regard to the treatment of criminal offenders upon adjudication of guilt? On my composite-aims model four aims are proposed: crime control, moral communication, reform and amends. Models with a plurality of aims are not uncommon among restorative justice theorists. Both Van Ness and Brunk endorse a plurality of aims similar to mine. However, neither of these authors justifies their aims in the manner I do, and neither endorses the means, scope, and limits that I do.

Crime Prevention

When responding to convicted offenders we need to take measures to help prevent future crimes by those who would commit them. Crime causes serious harm to society and its members; the thesis that crime is a serious social problem is rarely disputed. Legal philosopher Donald Scheid explains that every human society seeks to control crime (452). The benefits of preventing criminal conduct such as murder, theft, rape and assault are obvious. Without an effective means to enforce crime control and protect

citizens' basic human rights and freedoms we will lose the benefits that come with government and a juridical state. In his "Prolegomenon to the Principles of Punishment" pre-eminent legal philosopher Herbert Hart explains that the purpose of designating certain actions as 'criminal' and forbidden by law is to announce to society that these actions are not to be done and to secure that fewer of the actions are done (6). It makes sense to respond to violations of the criminal law in a way that prevents further breaches.

Moral Communication

The second social aim we should pursue when responding to criminal offenders is moral communication. Legal philosophers such as Duff, von Hirsch, and Narayan hold that the state should communicate to criminal offenders the condemnation that they deserve for their crimes. The state ought to express disapprobation of the offender's criminal wrong. Philosophers have argued that this is important for a number of reasons. First, censuring institutions are required in order to respond in a morally appropriate way to victims of crime. Victims have suffered moral wrongs and a community that refuses to censure offenders would fail to vindicate the victims' moral status and would suggest that violating citizens' rights is acceptable. Censuring offenders conveys to victims the acknowledgment that they were wronged: their rights were wrongly infringed upon. It is important for victims to know, and have demonstrated, that what happened was not their fault.[9] Second, wrongdoings must be recognized by the public if the rule of law and the values that have been infringed are to be taken seriously. Censuring offenders for their criminal wrongs expresses society's condemnation of the conduct and recognizes the importance of rights in the political community and the rule of law. Third, Narayan

[9] See for example, Van Ness and Strong (3).

explains that treating individuals as moral agents requires that we make critical moral judgments against them and inform them of those judgments (172). If I contravene the norms of my community, it is appropriate that I should be held responsible for my actions. This is an essential part of what it is to treat someone as a moral agent: to judge their actions as being worthy of praise or blame (Duff et al. 5). Failing to acknowledge that a person's actions are worthy of praise or blame treats them like a deterministic robot or a sleepwalker. Narayan argues that criminal offenders have an interest in being informed about the nature of critical moral judgments made against them. Offenders should be given the opportunity to respond to criticism by apologizing or trying to give reasons why the conduct was not actually wrong (172).

Reform

The third social aim for the criminal justice systems' response to guilty criminal offenders is reform. Admittedly, reform is valued because it contributes to crime prevention, but I discuss it separately as it is also valued for the beneficial effects it has on offenders. After offenders have been held accountable and have made amends for their crimes we should help them reform and rejoin society. The goal of reform can generally be divided into three separate aims: moral education, changing behaviour, and reintegration. The goal of educating criminals is generally to cultivate in them: emotions of guilt and remorse, empathy for those who have been victimized, comprehension of moral standards and a commitment to reformation. The goal is not only the development of these moral dispositions on the part of the criminal, but also to develop them through means that respect them as autonomous agents. Jean Hampton explains that we ought to try to convince offenders to reflect on the moral reasons for our criminal laws so that next

time they will decide not to perform the prohibited action for moral reasons (212). This theory offers society another method of dissuading potential criminals from offending and reduces our reliance on ineffective threats to criminals' self-interest.

Changing behaviour may be motivated by moral education. The aim of changing behaviour seeks to have offenders change not just their values, but also their ability to successfully pursue those values and make law-abiding behaviour habitual. It would be poor planning to convince an offender that theft is immoral without addressing his capacity to satisfy the basic needs of food and shelter. In the same respect, it would be poor planning to convince an offender bar fights are unacceptable without addressing his alcoholism. The aim here is to have offenders take steps to change their behaviour not just their values. Reintegration is the rejoining of offenders back into society as full contributing members after they have been held accountable for their crimes. Moral education and changing behaviour are part of this, but it also may require additional assistance from the political community.

Amends

The fourth and final aim is amends. This echoes the values in the reparative conception of restorative justice. Amends are achieved when criminal offenders make reparations for the criminal wrong they have committed and the resulting harms. This subsumes both moral and material repairs as the overall aim is to restore victims to their previously enjoyed level of well-being.

We can justify an institution of making amends in response to criminal wrongdoing by making reference to the tort principle of corrective justice. The corrective justice theory of tort law developed by Jules Coleman provides a useful notion of

reparation that I argue should also be applied to the criminal justice context. Coleman explains that a tort has three basic elements: the breach of a duty of care towards the victim, harm to the legitimate interests of the victim and an appropriate causal relationship between the injurer's breach of duty and the harm to the victim. Coleman states that we may be harmed by others in various ways (eg. in business competition), but in order to claim reparations those who harmed us must have violated a specific duty not to harm us. Tort law is composed of rules that impose 'strict liability' and 'fault liability'; they differ in the content of the underlying duty of care. Strict liability rules such as those concerning blasting (using explosive charges) impose duties-not-to-harm. Fault liability rules such as those concerning motoring impose duties-not-to-harm-by-*faulty*-motoring. These duties have different contents: the blaster can satisfy his obligations only by not harming anyone, the motorist can satisfy his obligations either by not harming anyone, or if he did harm someone, by not having done so negligently, recklessly or intentionally (Coleman). The underlying notion behind fault liability is that citizens are bound to make occasional messes in other peoples' lives; however, we should all take reasonable precautions not to harm the interests of other citizens. Coleman explains that it is a matter of ordinary morality that our duties to others vary as a result of certain factors. Where the magnitude of harm that might occur is great we might favour a duty not to harm, and where the magnitude of harm that might occur is generally less we might favour only a duty to take particular precautions. A defendant judged liable in torts incurs a duty to make good the full costs of the harms that result from his wrong (Coleman).

Coleman explains that tort law is justified by reference to the principle of corrective justice: individuals who breach their duties of care ought to repair losses occasioned by their actions. Coleman states that moral agents have a sort of ownership of the outcomes of actions for which they are responsible. If an agent fails to perform his duty to take into account the interests of others in his conduct and causes harm to another, the agent ought to repair that harm for which he is responsible. An everyday example of this principle is the common belief that if I recklessly spill a drink on my friend's carpet (perhaps by trying to balance an open bottle on my forehead) I am responsible for repairing the damage (though my friend might choose not to collect restitution). Corrective justice grounds duties of repair when justifiable standards of care are breached (Coleman). Both strict liability torts and fault liability torts involve a breach of duty for which corrective justice obliges repair. Corrective justice itself does not explain the content of our duties not to harm others. It grounds duties of repair, but the task of identifying our duties of care belongs to others. Whereas principles of distributive justice concern the underlying distribution of resources in society, corrective justice governs *ex post facto* duties to repair losses that support legitimate institutions of distribution (Coleman).

This notion of corrective justice also grounds my demand that convicted offenders make amends for their criminal actions. Criminals too violate a duty to their fellow citizens and owe reparations for any damages they are responsible for. Citizens have a duty to do, or abstain from, certain actions as mandated by the criminal law. Where tort violators generally harm others by failing to take adequate precautions, criminal offenders generally harm others intentionally, knowingly, recklessly or negligently.

When criminals harm their fellow citizens in a manner prohibited by the criminal law, corrective justice requires that they repair the harms for which they are responsible.

Although he does not acknowledge the principle of corrective justice explicitly, Pat Boonin takes a similar stance in his book "The Problem of Punishment". Boonin explains that criminal offenders cause wrongful harms to their victims when they break the law and this generates a debt (220). Offenders owe their victims adequate compensation to restore them to the level of well-being that they rightfully enjoyed prior to being wrongfully harmed (220). Wrongful acts are those that are prohibited by criminal laws which are just and reasonable (222).

Brunk also articulated a similar position. For Brunk offenders ought to be treated as morally responsible agents and should be made to take responsibility for their actions (48). Brunk argues that the restorative justice approach offers a desirable method for offenders to take responsibility by restoring through their own actions what the victims have lost in financial, psychological and spiritual terms (48).

It is important to acknowledge, as restorative justice theorists do, that criminal behaviour may cause a variety of harms that need to be repaired, and victims of crime have different needs compared to victims of non-criminal tortuous injury. First of all, victims of crime often suffer strong psychological reactions to being victimized and may suffer from a range of emotional problems such as depression, anxiety, panic, confusion, embarrassment, anger, helplessness and a sense of loss of control (Gatts 10). Second, as Duff rightly recognizes, with criminal offences property is not just lost or accidently damaged. Property is stolen or maliciously destroyed or damaged ("Restorative Punishment and Punitive Restoration" 85). Victims are not just harmed in an accident

they are attacked (85). Victims are not simply harmed, they are wronged, and any attempt at making reparations ought to acknowledge that. So, the general aim of amends is to have offenders repair material and psychological damages as well as the moral wrong that was done.

The problem with Duff's view is that it ignores an important goal of criminal justice. Duff recognizes that some offenders will not be persuaded by the normative appeal of the criminal law and the prospect or experience of criminal conviction and censure ("Punishment and the Morality of Law" 136). However, using penal hard treatment as a deterrent or incapacitation strategy is unsatisfactory for Duff. Duff rejects deterrence because it says to criminals "we can no longer address you as fellow citizens of a normative community; we will instead address you as an amoral being who can understand only the language of threats and self-interest" (137). Duff rejects incapacitating offenders because it portrays criminals as dangerous beasts to be caged, as opposed to fellow citizens and community members (127). Duff states that we ought not to restrain convicted offenders; rather we should respect their autonomy and leave them free to decide for themselves whether or not to commit crimes (*Punishment, Communication,* 77-78). We should address citizens with moral reasons instead of using the brute language of self-interest (79). Duff proclaims that criminal penances constitute an apology and so must communicate the seriousness of the crime ("Restoration and Retribution" 57). To accomplish this we assign the onerousness of the penance by reference to the seriousness of the crime (57). For Duff, hard treatment can be justified only as part of his two-way moral communication. Even offenders who are not apologetic should undergo the same sorts of burdensome penances, although Duff allows

that they should be given the opportunity to state their dissent (*Punishment, Communication,* 115).

Duff's model excludes the use of restraints when dealing with persistent dangerous offenders. Although Duff attempts to sneak restraints into his model as potential penitential measures it is clear that we could just as easily imagine adequate penitential measures without the use of such restraints. Duff states that dangerous offenders such as terrorists, Mafioso, hardened gang members and sexual predators would likely serve relatively long terms of imprisonment and possibly also some special supervision thereafter (*Punishment, Communication,* 165). He states that residential or attendance requirements can be justified if they communicate the message that the offender has shown by his crime that he cannot be trusted to live a law-abiding life (102).

Nothing in Duff's position justifies imprisonment and criminal supervision as proper penances. Duff provides no reason why a pedophile could not properly serve his penance in the community by providing financial compensation, working for a charity, attending counselling, etc. The use of an expensive institution like prison can be justified only by appealing to its facility to prevent offenders from committing further crimes against citizens. Furthermore, incarceration is probably the worst form of penance for accomplishing Duff's proposed aims of deepening repentance and reconciling the offender with his community. Narayan explains that deprivations such as imprisonment often have the effect of focusing our thoughts and attention onto our own suffering, and result in anger and hardening of the heart (177). It is also difficult to see how imprisonment is supposed to garner the community's forgiveness. Shafer-Landau states that this sort of forgiveness is generally shown to those who have demonstrated a change

of heart, not those who have undergone punishment and emerged unchanged (203). Unlike actively making amends and reforming, having imprisonment imposed on an offender does not demonstrate any commitment to change or repentance. A response to convicted offenders that refuses to acknowledge the need to apply crime control restraints to the most dangerous criminals is unacceptable to those who value public safety and the welfare of law-abiding citizens.

Braithwaite lists twenty-two values that should guide restorative justice processes. Regrettably, a number of the values against which Braithwaite states we should judge the success of restorative justice processes are vague and overly broad. For example: restoration of the environment, restoration of communities, restoration of freedom, emotional restoration, etc. (164). The values need to be more specific to provide meaningful guidance. Braithwaite states that specificity of values could later come from swapping stories about implementing values ("Principles of Restorative Justice" 13). The problem here is that in order to specify the values Braithwaite requires that a vast number of conferences are performed without any specific aims. It is also quite possible that well-defined and consistent goals will not actually emerge from this type of inductive process (von Hirsch, Ashworth and Shearing, "Specifying Aims and Limits" 23).

The composite-aims model includes each of the important goals of criminal justice and clearly defines its aims and means. Braithwaite fails to clearly define his model's aims and means. Duff fails to include the important goal of crime prevention.

3.2 - Conflicting Goals

A widely accepted view among prominent legal philosophers (eg: Hart, von Hirsch, Scheid, Husak, Brunk, etc.) is that theories of punishment must incorporate a

plurality of moral principles and purposes[10]. Crime is a complex social problem and an adequate response to crime should attempt to accomplish a number of goals. Limiting our treatment of criminal offenders to serve only one purpose will needlessly neglect other important social purposes. In much the same way, common moral assessment requires us to display sensitivity to a variety of moral considerations such as fairness, dignity, respect for autonomy, and concern for well being. I argue that we ought to pursue a composite aims approach in which each of the aforesaid legitimate aims are combined so as to produce a result influenced in part by as many of the principles as possible.

Von Hirsch, Ashworth and Shearing criticize restorative justice theorists for proposing a multitude of goals and values without providing a rule to appeal to when these goals or values conflict. I emphasize, however, that it will be a rare occasion when the endorsed goals of the composite-aims model conflict. The goals of crime control, moral communication, reform and amends can typically be pursued together without interfering with each other in any significant way. This claim will be evidenced in the later section on scope in which I explain how my model will deal with a number of difficult offences and offender types. There will however be circumstances where our interests in crime prevention and amends must be weighed against each other. For example, some offenders who are motivated to earn money for restitution may have to be restrained in a way that limits their ability to make amends. Though we might generally assume that offenders who truly wish to make amends would also be dedicated to reform, we can imagine a dangerous criminal (eg. a mass murderer) who truly feels he owes

[10] See for example Duff, "Legal Punishment".

victims amends but who is too dangerous to release from custody. In such a case we would have to weigh the value of public safety against the value of having the offender (as opposed to a societal fund) make restitution to the victim.

The proper way to deal with this dilemma is to weigh the goals against one another based on their importance and then choose the lesser of two evils or the greater of the competing goods. This echoes the deontological pluralism theory of ethics proposed by David Ross for dealing with conflicts between the pluralistic and irreducible moral duties he argues we have. Ross argued that there is a plurality of moral principles that specify prima facie duties which we must fulfill, unless we are also subject to another competing prima facie duty of greater weight (qtd. in Waluchow 192). I propose that the value of crime prevention will typically be accepted by citizens as more important than having offenders make restitution to victims, especially where we can establish a societal fund to provide victims with necessary compensation. If amends were assumed to have priority over crime prevention then dangerous offenders might be encouraged to damage further property as an attempt to get released from restraints.

On my model restraints are only used for specific types of offenders and offences which are predetermined: seriously harmful offences (murder, aggravated sexual assault, etc.), and persistent offenders. When dealing with these types of cases the judiciary should assume crime prevention as the most important determining goal. However, their judgment does not need to be completely restricted when dealing with restraint-appropriate situations. The judiciary should be permitted to favour amends where exceptional circumstances demand it so long as they justify deviating from the assumed norm. In Canada we already entrust the judiciary to balance society's interests and act on

behalf of the political community they represent. For example, when it is found that a provision of the *Criminal Code* is in violation of citizens' rights provided under the *Canadian Charter of Rights and Freedoms* the Court is required to evaluate whether the infringement can be justified under s. 1 of the *Charter*. The Court determines whether the aim of the *Criminal Code* provision is of 'sufficient importance' to justify limitations of *Charter* rights (*R. v. Oakes)*. The judiciary is practiced at weighing the importance of competing goals.

Van Ness' exposition of his models' aims is problematic: he is mistaken in the goals he identifies and he fails to explain in which situations crime prevention is to replace restitution as the determining goal of sentencing. Van Ness argues that the aims of criminal sentencing ought to be organized into goals which determine the sentence, and goals which simply limit the nature or duration of the sentence ("New Wine" 265). He states that the determining goal should be the resolution of the criminal conflict while community safety and fairness would limit that goal (265). He explains that this set-up means restitution should be presumed and that imprisonment, which precludes or delays restitution, should be used only as a last resort. It is important to note that Van Ness has miscategorised his model's aims. Van Ness admits he is willing to sentence criminal offenders to imprisonment for the purposes of crime control, which means that crime control is a determining goal and not merely a limiting one. Were crime control merely a limiting goal it could only affect the nature and severity of processes aimed at restitution.

So, Van Ness' model actually has two determining goals: crime control and resolution of conflict (amends, encounter and reintegration). Van Ness states that resolution of conflict is the primary determining sentencing goal, except in certain cases

where crime prevention takes. The problem is that Van Ness fails to provide any method or rule as to when this take-over should occur: he never indicates which types of offenders to incarcerate.[11] Van Ness' model is similar to mine but I provide rules regarding which offenders need to be restrained (Chapter 4), and I explain (albeit briefly) why I think crime prevention ought to operate as the primary determining goal in such situations.

3.3 – Retributivism

In the previous section I attempted to elucidate and justify the four aims of my composite-aims model. However, I did not mention one of the major aims traditionally posited by philosophers of punishment: retribution. Retributive theorists argue that we ought to create and maintain a criminal justice system that distributes legal punishment to criminal offenders in accordance with their desert. The composite-aims model justifies censure partly by reference to the retributive aim of treating offenders as they deserve. However, contemporary retributive theorists typically attempt to justify a system of legal punishment including not just censure, but hard treatment (non-verbal sanctions such as fines, community service, incarceration, etc.). I will argue in this section that none of the prominent retributive theories can justify an institution of legal punishment that metes out incarceration. Incarcerating convicted offenders can only be justified by reference to the value of separating persistent and dangerous offenders from society.

Defining Retributivism

Unfortunately, the term 'retributivism', has been defined quite differently by various philosophers. For the purpose of this thesis I will adopt an operational definition

[11] See for example Van Ness and Strong's discussion of restorative justice processes and serious crimes (195).

of the term based on leading philosophers' attempts to define it, and my experience with the use of the concept in the literature.

In their article "Desert", von Hirsch, Ashworth and Roberts claim that retributive theorists are those who claim that the quantum of punishment for crimes should, on grounds of justice, be proportionate to their seriousness (102). When asked, "Who should we punish, and how much?" the retributivist responds that we should only punish those who have been proved to have committed an offence, and punishment should be proportionate in severity to the seriousness of the criminal conduct (104).

Duff, a preeminent penal theorist, explains that retributivists are characterized by their position that criminal offenders' desert is a sufficient reason for punishing them ("Legal Punishment"). When asked, "Why punish?" the retributivist responds that the offender deserves punishment; there is value in treating criminal offenders as they deserve. So, on my operational definition 'retributivists' are those who think criminal offenders should be punished because they deserve it, and punishment should be proportionate in severity to the seriousness of the crime.

Cottingham adds one further feature to the definition of retributivism: retributivists make the specific claim that punishment is the deserved response to criminal wrong-doing (239). He explains that not any social system that allocates to citizens what they deserve qualifies as 'retributive'. For example, we generally believe that university scholarships are awarded to those who deserve them (students who are highly accomplished), but we do not say that we have a retributive theory of scholarship-awarding (239).

Retributive theories of punishment come in a variety of different forms. Each theory provides its own account as to why convicted offenders deserve to suffer punishment, and what form and severity of punishment they deserve to suffer. Retributivists also have to prove that [1] that no other moral considerations or costs involved with a retributive system of punishment outweigh the value of securing the criminals' desert, and [2] that we can reliably determine what form and amount of punishment offenders deserve (Bedau).

The label of 'retributivism' is most generally applied to theories of punishment that try to justify both components of contemporary legal punishment: censure and hard treatment. However, a response to convicted offenders that censures offenders because it is a morally appropriate response could still be considered retributive.

We should also distinguish 'positive' and 'negative' retribution. Positive retribution concerns the general justifying aim of a system of punishment (Why punish?). Negative retribution comes from Herbert Hart's neologism 'retribution in distribution'. Hart explains that even if the practice of a system of punishment is justified by its beneficial consequences, we might still answer questions about the distribution of punishment (Who should be punished and how much?) by reference to retributive principles limiting the pursuit of those beneficial consequences (8-12). For example, both Hart and Scheid argue that the general goal of state punishment is to prevent crime, but they restrict this pursuit with the desert rule that only those who commit crimes deserve punishment. Scheid explains that vicarious punishment of an offender's family members is unjust and must be rejected, even if it contributes to crime prevention (471). My discussion of limiting principles is reserved for chapter four.

There are three different approaches among modern theorists that have been classified (albeit controversially) as positive retributivist theories: fair play, censure and intuitive desert.[12] Each of these three approaches has been used to justify the use of hard treatment in response to convicted offenders. Fair play theorist Dagger claims that criminals deserve to suffer a loss of the unfair advantage they gained by breaking the law because it is unfair for them to have that advantage. For von Hirsch the purpose of punishment is to communicate to offenders the condemnation they deserve for their crimes. Moore attempts to justify hard treatment by appealing to our intuitive judgments that serious wrongdoers deserve it. I will argue that none of these theories can justify an institution of retributive incarceration. First, I will explain the sense in which my model could be referred to as 'retributive'.

The Composite-Aims Model and Retributivism

The composite-aims model's response to convicted offenders censures and burdens them. Convicted offenders are required to repair the harms they have caused which will be taxing on their resources. They are required to take steps to reform their attitudes and behaviour which monopolizes their time. Encounter programs and morally educative community service forces offenders to face up to condemnation and an informed understanding of the criminal offence and its consequences. Duff explains that this treatment aims to have offenders recognize what they have done and suffer the painful burdens of remorse, repentance, and the disapproval of fellow citizens. Offenders also consistently report stress and anxiety before and during encounter programs (Coates and Gehm 254). I endorse the use of restraints for controlling persistent and dangerous

[12] See for example: Boonin (86); Duff, "Legal Punishment"; von Hirsch, Ashworth, and Roberts.

criminals. Restraints necessarily interfere with the liberty of convicted offenders and will typically be perceived as burdensome. The burdens are not imposed for the purpose of burdening the offender but rather because the methods used in pursuit of amends, education and crime prevention happen to be burdensome.

Censure is one of the four main aims of my model. I justify censuring offenders by reference to a number of values that it achieves: censure vindicates the moral status of victims, it expresses society's commitment to the rule of law and the values imbued in the criminal code, it morally educates offenders, and it gives responsible agents the criticism they deserve. So, the composite-aims model is partly justified by reference to retribution. However, I think it is the significant benefits that accompany censure that provide the most justificatory force. Censure is valuable because it vindicates victims, educates offenders and expresses society's values, not simply because it gives offenders what they deserve. If we imagine a dystopian society that decided all criminals must be immediately executed for crime prevention purposes, I doubt that citizens would find it worthwhile to set up a system in which the state discretely censures offenders on their deathbeds. The other benefits of censure justify its institution more so than the value of the offenders receiving their desert.

Fair Play

On fair play theory, legal punishment of criminal offenders is justified because the offenders have gained an unfair advantage over the law-abiding citizens who practice self-restraint and respect the rights of others (Cottingham 242). In his influential article "Persons and Punishment" Herbert Morris explains that the criminal law provides rules that prohibit citizens from interfering with others and acting violently towards them.

These rules benefit all citizens by securing valued ends such as life, bodily security and property. Citizens can obtain this mutual benefit only if citizens assume the burden of restraining behaviours that interfere or risk interfering with others in the proscribed ways. When criminals break the law they refuse this burden and take advantage of lawful citizens. Criminals owe something to other citizens because they have an advantage that does not rightfully belong to them. Justice requires that this balance be restored. Morris argues that punishing criminals (or pardoning them[13]) restores the equilibrium of benefits and burdens by exacting the criminals' debt to the other citizens (478). Fair play advocate Richard Dagger explains that when a thief steals goods from a store simply returning the goods does not balance the books because the law breaker has yet to restore the balance between him and other law-abiding citizens. The thief gained not only whatever he stole, but also the double advantage of not obeying the law while enjoying the advantages of the rule of law provided by law-abiding citizens (Dagger 478). Dagger states that punishing the offenders to take away the advantage gained by their unfairness is a proper response and that there is no entirely suitable substitute for punishment (485-486).

There are a number of criticisms which are generally believed to have established the failure of fair play theory to provide a complete justification for the state's treatment of convicted offenders.[14] However, Dagger explains that fair play theory can justify part of the state's response to convicted offenders. Dagger recognizes that crimes like murder or rape are wrong in a way that cannot be explained in terms of fair play. Such crimes

[13] Morris claims that forgiveness (pardon) of the criminal offender's debt can also restore the equilibrium. He analogizes pardoning with giving the offender a gift, erasing his debt.

[14] See for example, Dagger "Playing Fair with Punishment".

may be more than crimes of unfairness, but Dagger argues they are at least crimes of unfairness (479). Crimes are more than just an injury to one person they are an offense against the rule of law and the citizens who support it. Dagger also concedes that there are laws that provide no benefit to some citizens and laws that impose no burden on some citizens. For example, rapists and murderers will find compliance with prohibitions burdensome, but some citizens will never be tempted to commit murder or rape and will not be burdened by these laws (480). Dagger explains that this is true of particular laws, but not of the cooperative practice of a system of laws. Everyone who lives under the rule of law is free to enjoy his or her rights with security that would otherwise be impossible (481). Lawbreakers typically want the advantages of the rule of law, but are unwilling to accept the burden of self-restraint. Finally, Dagger admits that fair-play cannot tell us how, or to what extent various offenders should be punished. Offenders ought to suffer two punishments: one to discharge their debt to society for breaching the rule of law, the second must be justified on other grounds such as deterrence, moral education, etc. (484).

Dagger explains that punishment is necessary to remove the unfair advantage, and to affirm the belief that it is wrong to take advantage (486). However, it is important to recognize that Dagger is not committed to an institution of incarceration. Dagger explicitly acknowledges that punitive restitution and punitive community service can be appropriate (485). In his article, "Restitution: Pure or Punitive?" Dagger argues that restitution or community service can be considered a legitimate form of punishment. However, as punishment it must be painful. Dagger explains that we can force offenders to make restitution in ways they ordinarily regard as unpleasant, or we might simply use

restitution as a supplement to forms of punishment that are clearly painful (37). Dagger states that punitive restitution must go beyond restitution to the specific victims, by adding jail time or a fine, and this will express the necessary societal condemnation (37).

Incarceration is not an appropriate way to accomplish Dagger's aim. Direct victims who have suffered a loss are poorly compensated in incarceration schemes as the offenders cannot access employment to pay compensation. Victims have a number of other needs: apology, information about the crime, the opportunity to meet their offenders, etc. that can only be met through a restorative justice encounter. Law-abiding citizens who have been taken advantage of do not have their benefits restored when an offender is imprisoned. Instead, citizens are even further burdened by the expensive incarceration they must pay for. Furthermore victims do not even receive more satisfaction from seeing offenders incarcerated when compared with restorative dispositions, as was evidenced in chapter one.

The obvious way of taking away the offender's unfair advantage is to have him make restitution to law-abiding citizens by performing community service or contributing to a more general fund. Censure of the offender is the appropriate means of affirming society's stance that it is wrong to take advantage of other citizens, but this does not require the imposition of punitive sanctions. On the composite-aims model the offender's illegitimate benefit of shirking his responsibility to obey the law is taken away by imposing on him the debt of repaying law abiding citizens. However, there is no reason why we should directly aim to make this sort of repayment unpleasant for offenders. Community service is unpleasant on the composite-aims model but the aim is to morally educate offenders. The painful feelings of remorse and repentance that

accompany understanding of one's crime are part of moral education; pain is not sought out for its own sake. Fair-play theory does not justify a system of incarceration or any other pain or burden imposed for its own sake. It, in fact, justifies a system of restorative justice.[15]

Although I stated that fair play theory is traditionally classified as 'retributive' this classification has been disputed.[16] Whether or not fair play theory fits the definition of retribution is not crucial to the purposes of this thesis. What is important is that fair-play theory identifies a legitimate aim for the state's response to convicted offenders, and the composite-aims model best satisfies that aim.

Censure/Deterrent Hybrid

A second retributive theory is proposed by von Hirsch. Like me, von Hirsch argues that the state ought to express disapprobation of criminal conduct and offenders. Von Hirsch also argues for an institution of legal punishment that provides a disincentive against engaging in crime. So, von Hirsch proposes a hybrid theory: an institution in which punishments express censure and deter offenders. Criminal sanctions, unlike taxes, should convey disapproval and censure. Von Hirsch argues that we should use hard treatment as a vehicle through which to express our censure. The reason for expressing this disapproval through hard treatment (as opposed to merely censuring), has to do with minimizing predatory behaviour (121). Punishment provides an additional reason against offending for those tempted to disobey the law.

The primary basis for deciding the severity of sentences is the principle of proportionality which requires the severity of the penalties to be proportionate to the

[15] The ability of restorative justice to satisfy demands of fair play theory was earlier articulated by Brunk (48).

[16] See for example, Cottingham.

gravity of the offender's criminal conduct. Since punishment embodies blame, the severity of punishments in a system must be arrayed according to the gravity of the offences. Von Hirsch states that any other set up would be unfair because offenders would be censured more or less than the blameworthiness of their conduct warrants (119). Von Hirsch argues that although we cannot discover exactly what severity of sentence is appropriate for what type of offense based on intuition, we must ensure ordinal proportionality: persons convicted of similar crimes should receive similar punishments. The anchoring of this scale should be lower rather than higher, so that the penalties do not 'drown out' the moral message and become a system of bare threats (121).

This theory of punishment suffers a number of problems which echo those outlined in chapter one regarding Canadian criminal sentencing policy. Von Hirsch endorses censure as the principle aim of the state's response to convicted offenders, but I have argued in chapter one that a restorative justice model such as mine better accomplishes moral communication than does punitive sanctions. Von Hirsch endorses the use of proportionate deterrent sanctions for the purpose of crime control. I showed in chapter one that the threat of criminal sanctions do not often deter criminal offenders. An effective crime control response would focus instead mainly on reform and incapacitation. Von Hirsch's model fails to accomplish either of the aims that he endorses in any satisfactory way. Von Hirsch's model fails to justify a system of punitive sanctions. Like von Hirsch, I support the use of limits on dispositions; this is explained in chapter four.

Intuitive Desert

Proponents of the third account, which I will call the 'intuitive desert' theory of punishment, claim that criminal offenders deserve to be punished (censure and hard treatment) directly for their wrongdoing. This justification for hard treatment is independent from its ability to secure other aims like fair play, censure or crime prevention. On this view hard treatment is justified because it is itself deserved. The rationale for this view is found in our intuitive reactions to particular crimes and the response that strikes us as merited. Proponents of this theory argue that there is an intuitive connection between crime and punishment (von Hirsch, Ashworth, and Roberts 102). Boonin explains that this type of desert theory is made using an argument from particular cases. The proponent of this theory focuses on specific examples of wrongdoing to which he assumes readers will have an intuitive response, and then argues that retributive theory best explains these moral judgments. Advocates typically appeal to our reactions to horrendous atrocities, and then attempt to generalize from such cases in order to justify a general institution of punishment.

In his important essay "The Moral Worth of Retribution", Michael Moore attempts to justify a retributive institution of punishment by showing that it best accounts for a number of particular moral judgments that we believe to be true. Moore claims that most people react to atrocious crimes with an intuitive judgment that punishment is warranted. Moore states:

> Imagine that crimes are being done, but that there is no utilitarian or rehabilitative reason to punish. The murderer has truly found Christ, for example, so that he or she does not need to be reformed; he or she is not dangerous for the same reason; and the crime can go undetected so that general deterrence does not demand punishment. In such a situation, should the criminal still be punished? My hypothesis is that most of us still feel some inclination, no matter how tentative, to punish.

[Moore proposes some particularly horrific crimes we might imagine such as the true case of a man who raped and murdered a stranded motorist and drowned her three children.] (184)

So, if the reader is confronted with examples of brutal crimes about which he intuitively judges that punishment is appropriate, he should be willing to go all the way and demand that justice be done for all other less serious crimes as well. Boonin explains that intuitive-desert retributivists use these extreme cases where many people agree that punishment is morally permissible to establish a general principle that wrongdoers should be punished (88). This argument fails to establish that the state's response to convicted offenders ought to be aimed at delivering retributive punishment to offenders.

Admittedly, Moore is likely correct that some readers will feel an intuitive urge to punish such an offender. However, it is far from clear how this establishes that we should set up a system of retributive punishment. When setting up a response to convicted offenders there are a number of valuable aims we may want to accomplish, and Moore has not shown that retribution is more important than the rest. Moore tries to make his point by setting up a false dichotomy. Moore gives the reader the choice between inflicting pain on the offender and doing nothing (the offender is reformed and the crime unnoticed). It may be true that some would choose to punish the offender rather than doing nothing. However, alternative models of responding to convicted offenders, such as mine, would not respond by doing nothing.

On my model the offender would be called to account and censured by the public and the victims. The offender would be required to make amends as best as he can by compensating victims, apologizing, and reforming. The offender would be required to

perform morally educative community service (as Duff explains repentance cannot be achieved and completed in a moment, nor can private reformation reconcile the offender with the political community without the offender submitting himself to the public criminal process (*Punishment, Communication* 119)). On the composite aims model, offenders who persistently commit crimes or who commit the most abhorrent crimes are subject to restraints. In the real world we cannot access knowledge that an offender has truly reformed, and mass murderers should not be left unrestrained. What if, by miracle, the criminal justice system could access knowledge of offenders' recidivism and this indicated the mass-murderer would not reoffend? Imprisonment would then be inappropriate. Why should we want the state to expend substantial resources restraining a harmless offender when we could instead give that offender an opportunity to make restitution to his victims for his wrongdoing?

In order for Moore's example to function as he needs it to, Moore needs to show not just that people have an intuition to punish offenders instead of letting them off scot-free, but that people have an intuition to punish offenders rather than some other response. Evidence shows that the response proposed by my model is intuitively acceptable to some. A number of surveys produced by Hough and Roberts in Britain compared public reactions to retributive responses against more restorative responses. One study had the participants read a scenario involving a 17-year-old convicted of burglary (*Understanding Public Attitudes*). Half the participants read a more retributive response while the other half read a more restorative response. The retributive response was that Magistrates imposed a brief term of custody in prison followed by six months community supervision. The restorative response was that the offender admitted to the

crime, acknowledged he was responsible, apologized to the owner, agreed to pay back the money within three months, and agreed to perform 200 hours of community service for a local charity. There was significantly greater public satisfaction with the more restorative approach: 81% compared to 66% judged the response to be 'about right' (135). A second survey asked respondents to imagine that their homes had been burgled and approximately $1200 worth of property was stolen. The offender was a recidivist with a previous conviction of burglary. Participants were asked to choose between: (a) four months' probation plus four months' jail, and (b) four months' probation plus repayment of the $1200. Three times as many participants chose option (b), instead of the more retributive option (a) (*Understanding Public Attitudes* 139). Finally, a study showed that the public is even less concerned with retribution when they realize the economic implications. In a third survey respondents considered a case of theft involving a large sum of money by a 17 year old repeat offender with three previous convictions. Respondents were given two options: (a) three months in prison plus three months community supervision, or (b) six months intensive community supervision using electronic tagging and police checks. More than half (54%) favoured the community sanction. In another group that was told that option (a) would cost $10,000 and option (b) $5,000, almost two-thirds (63%) favoured the community sanction over the more retributive option (Hough and Roberts, "Sentencing Young Offenders" 227). Similar evidence of citizens' preference for more restorative responses to convicted offenders can be found in the studies on victim satisfaction with restorative encounters cited in chapter one.

As Douglas Husak articulates in his article "Why Punish the Deserving?", even if we did have reason to accept that criminals deserve punishment, the decision to treat them as they deserve and punish them, must be made by the state (448). Husak explains that our desert judgments do not obligate us to ensure that others receive what they deserve (449). For example, a hard-working self-employed farmer may deserve to succeed but this hardly entails that I have a duty to ensure the farmer's success, especially when taking steps to provide it come at significant cost to me (449). Husak argues that because legal punishment is administered by the state there are a number of drawbacks (see Chapter One, this thesis), and there is a point at which any reasonable person would concede that drawbacks of punishing a deserved offender are too high: "In light of the formidable drawbacks… any prima facie rightness in repaying evil with evil may well be outweighed (451)". I hope to have shown that the composite-aims model offers significant advantages over retributive sentencing schemes like those used in Canada.

The second problem with Moore's argument is that if we are required by justice to institute a system of retributive punishment this hardly establishes that a system of incarceration is the proper response. As we have seen, it is tremendously expensive. There are much more efficient ways of inflicting pain and unpleasantness on offenders. Imprisonment can restrain dangerous criminals, but it is certainly unjustifiable as a method of imposing retributive punishment. A system in which offenders receive a predetermined number of whippings or electric shocks for offences would be a far cheaper way to achieve comparable amounts of pain and suffering. For example, in Saudi Arabia courts still order convicted offenders to have their eyes gouged out (Human

Rights Watch), and sentence offenders to hundreds of lashings with whips and canes (Jamjoom).

It might be objected that corporal punishment necessarily violates certain moral limits that imprisonment does not. This line of argument is unpersuasive. Although a system that meets out predetermined electric shocks infringes on an offender's bodily security, incarceration infringes on an offender's privacy, freedom of movement, freedom of association, ability to own and use property, ability to choose meaningful employment, etc. Incarceration infringes on more of the offender's fundamental rights and freedoms than does electric shock. The argument could at least be made that offenders ought to have the choice (perhaps with an incentive) of substituting incarceration for an equivalent retributive punishment in electric shocks, or perhaps a shorter period of incarceration in solitary. This way society would be able to save valuable resources and offenders would receive their deserved punishment. In any case, we could come up with some form of punishment that does not drain societal resources to the degree that imprisonment does.

This idea of matching one's retributive burden to different forms of punishment is exemplified in Carl Frederick's short story, "Great Theme Prisons of the World". In the story, future criminal offenders choose their punishment from a whole host of themed prisons around the world; the more comfortable prisons require the offender to serve more time and the less comfortable prisons (those involving labour, solitary confinement, etc.) allow the offender to go free in shorter time. Though the story is science fiction there is nothing on Moore's view that would disallow it. I think few Canadians would favour such a system over the composite-aims model. I would not want serial murderers roaming the streets no matter how horrid their punishment.

The third problem with Moore's position is that it depends on the epistemic reliability of certain emotions. Moore notes Nietzche's famous argument that the retributive urge is based in emotions that have no moral worth, or further are wicked. Nietzsche argued that people who inflicted pain or unpleasantness on others in the name of justice or desert were actually motivated by wicked emotions such as: resentment, fear, hatred, cowardice, aggression, cruelty, sadism, jealousy, envy, etc. and were engaged in further vices of self-deception and hypocrisy (qtd. in Moore 190-197). In an attempt to escape this objection, Moore argues that retributive judgments are not inevitably linked to non-virtuous emotions but can be motivated by the virtuous emotions of guilt and fellow feeling (209). Our concern for retributive justice might be motivated by the feelings of guilt we would have if we did the kinds of acts that criminals do (212). Moore asks the reader what it would feel like to commit a terrible crime. He replies, "My own response, I hope, would be that I would feel guilty unto death... Such deep feelings of guilt seem to me to be the only tolerable response of a moral being," (213). Moore claims that such guilty feelings engender the judgment we ought to be punished and suffer (215).

In his article "Moral Epistemology, the Retributive Emotions, and the 'Clumsy Moral Philosophy' of Jesus Christ", Jeffrie Murphy rightly argues that guilt is hardly epistemicly reliable. Our guilt feelings are often neurotic and misplaced. Murphy explains that given a certain upbringing a person might use his own guilt feelings to demand serious punishment for conduct that is trivial or unobjectionable such as masturbation, substance use, or homosexuality (152). Moore may also be wrong to suppose that our guilt feelings somehow motivate in us a desire to be punished. When feeling guilty I am motivated to take accountability for my actions and to try to make

amends. My feelings of guilt are best alleviated when I have apologized and made amends with those I have wronged, not when I have endured punishment.

3.4 - Summary

There are four crucial goals which the state's response to convicted offenders ought to pursue: censure, amends, reform, and crime prevention. These four aims can generally be pursued together without causing significant interference, but when there is a conflict they must be weighed against one another. Competing models of restorative justice in criminal justice literature suffer problems: [1] Van Ness posits determining goals of crime prevention and restoration but fails to explain when crime control is to take over as the determining goal and why; [2] Duff omits to include the important goals of crime prevention in his model; and [3] Braithwaite puts forth vague aims that do not provide meaningful guidance. A number of prominent philosophers attempt to justify the creation and maintenance of an institution of legal punishment by reference to retribution. Retribution provides partial support for a response to convicted offenders that includes censure. Retributive theories fail to justify an institution of incarceration; for that only reference to crime prevention will suffice.

Chapter 4: Applying the Composite-Aims Model

In the last chapter I established the aims that the state ought to pursue when responding to convicted offenders. This chapter focuses on the methods for pursuing those aims, the constraining principles governing the pursuit of those aims, the scope of application and the process of constructing dispositions. I cannot here develop these dimensions of the composite-aims model thoroughly. However, I will define the model in a way that is conceptually coherent and that will provide the structure necessary for further development by policy makers.

The central process following the conviction of the offender is the restorative justice encounter. Typically, the participants will include: the victims, the offender, a facilitator/mediator who coordinates the proceedings, the victims' support group (may be composed of friends, family members, co-workers, etc.), the offender's support group, and experts in rehabilitation and restraints. The participants censure the offender and educate him. The offender apologizes to all those he has harmed. The victims and offender decide on appropriate restitution with the help of the facilitator. Together, the participants determine the offender's community service requirements, rehabilitation requirements, and restraints (though the experts will guide these discussions and make recommendations). This process allows for censure, amends, crime prevention and reform to be secured.

4.1 - Means

Censure

I will begin with the aim of moral communication. How best can we communicate censure to offenders in a way that achieves our goals of calling the offender to account, denouncing unlawful conduct, vindicating victims' moral statuses and expressing society's commitment to the rule of law? Restorative justice processes such as Family Group Conferencing provide a mechanism that can be used to achieve precisely these aims.

In restorative processes the whole group denounces the criminal conduct: the victim; the victim's friends, family or co-workers; the offender; the offender's friends, family or co-workers; and the criminal mediator who represents the public. This type of group denunciation carries more weight and authority than that pronounced by a single professional judge. It is a basic tenet of social psychology that social pressure from groups is more likely to secure conformity than social pressure from an individual (Milgram, Bickman, and Berkowitz). This collective denunciation is more powerful than that achieved in conventional criminal justice processes. This type of denunciation will also provide more complete vindication for the victim than censure coming from only one side of a conflict. The victim is more likely to accept that he was not at fault if the offender and offender's support group also acknowledge it.

Restorative processes also provide a proper forum for calling the offender to account for his actions. The dialogical nature of restorative encounters ensures that offenders are treated as responsible agents who must account for their behaviour. Unlike in conventional criminal justice processes, offenders who admit guilt must apologize and

answer questions from those they have harmed. This process prevents offenders from denying their responsibility, denying the wrongfulness of the act, or denying the authority behind the condemnation. Offenders cannot get away with the standard excuses that allow criminals to commit crime without troubling their conscience. Standard excuses include: "I didn't mean to," "They had it coming to them," "I didn't do it for myself," etc (Sykes and Matza).

Amends

Restorative processes help achieve amends. Restorative justice dispositions offer offenders a number of avenues for making restitution for harms to victims' property such as earning money for financial compensation, returning or replacing property, or performing direct services or repairs. Victims can also secure compensation for pain and suffering related to injuries or time lost without property. Restorative justice processes allow victims to encounter their offenders and seek out answers to the questions that plague them. Restorative justice practitioners report that encountering their offenders can provide considerable healing for victims and release them from fears and compulsions (Cayley 227). This should not be surprising as there is evidence that forgiveness can result in psychological healing (Garvey 315). Restorative justice encounters probably also work in a similar manner to exposure therapy. In traditional exposure therapy patients are forced to confront what they fear so that they will realize their fear is exaggerated or unjustified (Oltmanns et al. 219). In restorative justice encounters the victim is exposed to the offender and forced to see him as he truly is. This will hopefully rid the victim of any nightmarish caricaturing of the offender that might be producing

anxiety. Victims even report that meeting the offender is the most satisfying part of the criminal justice process, even more than receiving restitution (Van Ness and Strong 75).

Criminal offenders must also make moral reparations for the wrong they have done. Like Duff, Van Ness and Braithwaite, I hold that apology is crucial to this and propose a similar method. The verbal apology should generally include: acknowledgment of wrongdoing, recognition of moral responsibility, expression of guilt and remorse and repudiation of behaviour. To properly repudiate the wrongdoing, the offender must also commit to reform. Many scholars of the subject accept this conception of apology (O'Hara and Yarn 1121).

Duff and Van Ness note that an apology for serious wrongdoing requires more than just words. For Van Ness apology requires changed values represented by changed behaviour, for Duff apology requires the fulfillment of a secular penance. The general idea that these authors are articulating is that criminal offenders must apologize through their actions, not just their words. Offenders need to demonstrate to their victims and the public that they are committed to adopting a law-abiding lifestyle and that they are committed to restoring victims to their previously enjoyed state of wellbeing. For example, a verbal apology from an alcoholic who has repeatedly stolen money to feed his addiction would not typically be satisfying to his victims. However, if the offender apologized, committed to a rehabilitation program and found employment to make restitution, a different picture emerges. The offender's commitment to change makes us more likely to accept his apology. There are a number of ways in which criminal offenders can demonstrate their commitment: meeting with victims and their support groups, fulfilling their reparative duties (not neglecting compensation payments, etc.),

fulfilling their reformative duties (attending, and taking seriously, counselling sessions, etc.). Admittedly, it is difficult for offenders to demonstrate their active commitment to change when they are effectively coerced into performing these duties. However, offenders who participate in restorative justice processes at least demonstrate their repentance in the encounter, and actively make amends, rather than simply enduring imposed constraints.

Restorative justice processes also provide the best setting for the offender to make his verbal apology. Victims scrutinize all aspects of apologies: context, word choice, eye contact, body posture, pace of speech, etc. (O'Hara and Yarn 1139). A setting in which victims can engage offenders in an active dialogue provides ample opportunity for the victims to assess sincerity. It is well established in the literature that face-to-face apologies are much more effective than more distant apologies (eg. written) at convincing victims of sincerity and of eliciting forgiveness (Tavuchis 22).

The state should also seek amends for the indirect or 'secondary victims'. This concerns the other members of the political community in which the offender resides. When a criminal offender breaks the law (by stealing for example) he takes advantage of the law abiding citizens who follow the law and do not steal from him. He fails to shoulder his part of the burden a system of law entails. For this reason, the offender must rebalance the unfair distribution of benefits and burdens that he has caused. Indirect victims also include those who although not directly involved with the offender, experience secondary harms. Boonin gives an excellent example:

> If a gunman robs my neighbour as he is about to enter his home, for example, then the gunman has wrongfully harmed my neighbour. But by robbing my neighbour, he may also wrongfully cause various harms to me. I may suffer from anxiety and lost sleep as a result. I may feel forced to incur the added expense of installing and maintaining a

security system in my house or of buying a gun. The value of my property may go down. My insurance rates may go up. I may incur various opportunity costs, forfeiting whatever I would have enjoyed with the time and money that I have instead been forced to devote to responding to the offence against my neighbour. (225)

Providing amends for secondary victims is more difficult because of the complexity of the network of relationships disrupted by crime. Secondary victims are owed reparations for the same reasons that direct victims are, even if attempts to accomplish the aim are impractical. The state should do its best to approximate this. In Boonin's gunman example he suggests that the state might attempt to approximate the restitution by compelling the robber to pay a lump sum to the city which would be used to increase security in the neighbourhood (228). Secondary victims can receive some of the same benefits as primary victims such as the chance to meet the offender, tell their stories, come to better understand the crime and receive an apology. Members of the community could also be involved in determining what the lump sum should be used for, or what type of community service might be meaningful to the community.

My conception of amends is slightly different than Van Ness'. I claim that victims should be compensated for pain and suffering associated with a criminal offence. Van Ness does not include this in his account of making amends. However, if we are to take corrective justice seriously; then we must pursue compensation for pain and suffering. The aim is to restore victims, as close as possible, to their previous level of well-being. Although there may be no way the offender can directly do so, the fundamental tort principle of substitutability holds that a person who cannot pay another precisely what is owed is still obligated to fulfill the debt by substituting something of comparable value (Boonin 241). This is how our system of torts operates. Due to the nature of pain and suffering damages, there is no objective method of placing a dollar

value on a victim's loss. However, the clumsiness of the tool should not stop us from using it until something better is discovered.

Reform

Restorative justice processes morally educate offenders in a number of ways. First, they educate the offender about the norms that he violated and the reasoning behind the norms. Restorative processes have participants examine the incident in-depth. Victims, community members, the offender's support group, or the facilitator can explain why the offending behaviour cannot be tolerated. Offenders are called upon to acknowledge the wrongness of their actions, and by publicly articulating their values and personal convictions the values are clarified and made available to be challenged by the other participants (Schweigert 35).

In restorative justice processes offenders are also confronted with the consequences of their criminal actions which otherwise may have remained unknown. Offenders are often unaware of how seriously their actions have affected their victims. For example, in one case of post-incarceration victim-offender mediation, a twenty one year old criminal offender who had robbed a convenience store met the young woman working during the robbery (Cayley 233). The young woman explained to the offender that: she had wet herself from the fear of his death threats which resulted in her peers teasing and insulting her; she lost her job for failing to immediately call the cops; she began to suffer from recurrent nightmares and insomnia; and she had to undergo psychological therapy for her anxiety. The offender who robbed her had no idea that the clerk was so strongly affected by his actions. Criminal offenders may know even less about the harms they caused to secondary victims whom they never met.

I agree with Duff that offenders should be required to undergo something that serves to get the offender to recognize and focus on the wrongdoing to induce repentance. The penance Duff describes is used to help deepen or strengthen the offender's repentant understanding of the wrongdoing by providing a structure that keeps the offender's attention focused on his wrongdoing and its consequences ("Penance, Punishment" 300). Duff states that it is often tempting to distract ourselves from our wrongdoing and avoid seriously thinking about it. Serious wrongs should occupy our attention, thoughts and emotions for some time (*Punishment, Communication* 108). Duff explains that when offenders make reparations through community service they add depth to their feelings. This is comparable to the way that overt rituals of grief and mourning do not only evidence fully formed feelings, but help the feelings develop ("Penance, Punishment" 299). Although this might take different forms, contextual community service is one choice. For example: having drunk drivers talk about drinking and driving to teenagers, having spousal abusers provide services for women's shelters, etc.

The rehabilitative steps will vary for different offenders and will generally be based on social and psychological problems that might have contributed to the offender's criminality. I am not committed to any particular rehabilitative programs, and propose only programs that are proven effective. Rehabilitative measures might include: substance abuse treatment, treatment of mental health problems, family counselling, avoiding deviant peers and gangs, commitment to employment or education, etc.

Making amends with fellow citizens also helps convicted offenders successfully reintegrate back into society. Studies have shown that those who confess their wrongs and apologize produce more forgiveness than those who do not (Weiner et al. 283).

Research also shows that offenders who confess to their crimes and apologize will be met with less hostility than those who do not (Weiner et al. 283). Those who have been convicted of a crime may have a variety of needs that must be met in order for the offender to successfully reintegrate as a law-abiding citizen. Van Ness and Strong explain that barriers can include: hostility, violence, discrimination, unemployment, lack of money for food and shelter, peer pressure, distrust of community members, weak social skills, etc (100). On the composite-aims model the state should do the best it can to accommodate ex-convicts and help them successfully reintegrate.

Crime Control

Finally, we need to take measures to control crime aside from purely reformatory means. Two prominent ways are general deterrence and incapacitation. Although evidence supporting the efficacy of conventional criminal justice sanctions to deter criminals is weak, whatever effect they might have could also be achieved using restorative justice processes. Convicted offenders will necessarily suffer a number of burdens (outlined earlier in section on retribution) as well as informal sanctions of social disapproval, shame and embarrassment.

The state will have to incapacitate certain convicted offenders to make them incapable, for a period of time, of offending again. A number of measures can stop people from carrying out criminal activities. Although the most prominent method is imprisonment, other techniques like curfew orders, electronic monitoring and house arrest are available. Other restraints may be as simple as revoking a reckless driver's license or taking his car. These types of restraints are appropriate only for certain

offenders (to be discussed in 'Scope of Application' section) and must be limited (to be discussed in 'Proportionality Limits' section).

The character of the restraints endorsed on my model is different from conventional criminal justice restraints. Because the infliction of pain is not an aim of my model, the prisons in which convicted offenders would be confined would be reminiscent of prisons in Netherlands. In Dutch prisons the inmates' rooms may include beds, sinks, toilets, wardrobes, TVs, coffee makers, desks, chairs, posters, etc. (Schinkel). Prisoner routines involve work, trips to the library, sports and recreation, visitation periods, watching TV and therapy (Schinkel). Repugnant conditions like those in American prisons could not be justifiably maintained on the model I propose. I refer to the horrific epidemic of violence, sexual assault, and disease that characterize American prisons today.[17] (I am unaware of any large scale studies of safety and abuse in Canadian prisons).

4.2 - Scope of Application

This section contains probably the toughest challenge for restorative justice models: defining the scope of application for restorative justice processes. When should restorative justice processes and dispositions be used? When should restraints be applied? How should we respond to the types of cases that von Hirsch, Ashworth and Shearing claim are "less well suited to this kind of response" (28)? In this section I will clarify my model's scope by addressing how I would respond to a number of scenarios that prove troublesome for popular restorative justice models.[18]

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[17] See for example, Gibbons and Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, and Human Rights Watch, *No Escape: Male Rape in US Prisons*.

[18] Most of the non-ideal scenarios I introduce were explained in Boonin's *The Problem of Punishment*. Boonin tries to address how his pure-restitution system might respond to difficult situations.

Ideal Case

I will begin with an ideal case in which a number of factors present: material damages can be repaired or compensated for, offenders are repentant and willing to make amends, victims are willing to encounter their offenders, and the moral wrongdoing is relatively minor. For example, a burglar steals electronics from a victim's unoccupied house. The offender is apprehended and his guilt established. On the proposed model, what would be the proper response?

A restorative justice encounter would be held in which the offender, the victim, their support groups, and a criminal mediator participate. The participants would tell their stories about the crime and ask questions of each other. The group would censure the offender, denounce his criminal behaviour, and vindicate the victim. The offender would be required to provide restitution by returning or replacing stolen property. The victim would be compensated for pain and suffering and repaid for any extra expenses incurred. The offender would perform community service as an attempt to repair the harm done to the community and his fellow law-abiding citizens. The community service requirements would also be designed to focus the offender's attention on the crime. The offender would apologize, and commit to changing his behaviour (eg. drug treatment if addiction contributed to the burglary).

Unwilling Victim

How should the state respond when the victim is unable or unwilling to participate in the restorative conference? Without victims and their support groups to denounce the offence, who will censure and educate the offender? To avoid this problem we can arrange a victim-offender panel to take the place of an encounter between the

offender and their direct victim. Panels are typically made up of a group of victims and offenders who are linked by a common type of offence, but the victims were not directly victimized by the particular offenders. Using a panel of burglary victims, the offence can be meaningfully denounced by those who can explain to the offender the full consequences of such theft. The victim-offender panel can also be used to play the direct victim's role in moral education of the offender by explaining the impacts of the offence. Although the offender cannot make a direct apology to the victim, he can fulfill all other components of amends. Studies have shown that, when compared with control groups, victim-offender panels provide: offenders who better understand the offence, reduced recidivism, change in attitudes and criminogenic thinking of offenders, and victim participants reported it helped their healing (Van Ness and Strong 70).

Unwilling Offender

How should the state respond when the offender is unable or unwilling to participate in a restorative process? There are two scenarios I will discuss here. The first, in which the offender is unwilling to perform any of the duties required of him (pay compensation, etc.). The second, in which the offender is willing to fulfill most of the duties required of him but is unfit to meet the victims.

An offender who is completely unwilling to cooperate and will not perform his reparative or rehabilitative duties will have to be restrained from further infringing on citizens rights. The state can secure censure through traditional means. The judiciary should be educated and instructed to properly censure offenders and vindicate victims. An offender that refuses to recognize a breach of the criminal law as wrongdoing, and refuses to make reparations for the harm he caused is certainly a danger to the public.

Unfortunately, there will be offenders willing to attend restorative justice processes and fulfill reparative and reformative obligations, but who are unfit to do so. Psychologists or restorative justice experts might judge certain offenders to be unfit for a number of reasons: they might judge that the offender is not psychologically ready for such an intense encounter, or they might judge there is an unacceptable risk that the offender would influence or re-victimize other participants. In this scenario, a state actor representing the public can perform the moral communication. Victims can censure and educate the offender by making victim impact statements. The offender could also apologize and answer victims' questions in written form or on video. These techniques are already in place in certain locations across Canada.

Serious Wrongdoing

The third non-ideal case is one in which the offender is willing to apologize and encounter his victims, but the offender has committed a truly serious crime such as murder. With regards to moral communication, the murder victim is deceased and cannot participate in a restorative process. However, his family and friends can attend in his stead. The victim's support group can help provide censure. These indirect victims can help explain the full range of negative consequences that have resulted from the murder. By meeting with the family and friends of the victim, and detailing all the different harms he will be required to repair, the offender may develop a painful understanding of the tragic consequences his actions have brought upon others. Restorative conferences between murderers and victims' families have been successfully carried out for some time (*Facing the Demons*).

Unfortunately, the offender cannot make full amends for murder. The offender has harmed the direct victim in a way that cannot be restored. Nothing the offender does can provide repayment to the deceased. However, according to the tort principles of comparability, substitutability and pricing the offender can make restitution to the victim's family. This practice is already embedded in the contemporary legal systems under the tort of 'wrongful death' (Frederick). There are a number of harms that might befall those close to the victim, which the offender will be responsible for compensating: medical expenses, funeral expenses, potential economic support, grief, companionship, psychological counselling, time away from work, etc. The offender will also need to compensate his fellow law-abiding citizens.

The state would secure crime control by imprisoning the murderer. This will be explained in the section on proportionality limits. Incapacitation should not be indefinite but rather should serve to shorten the span of opportunities the offender has to commit crime and contribute to his reform.

Victimless Crimes

A fourth non-ideal situation is when an offender commits what is commonly called a victimless crime or a public order offence: a crime in which it is commonly believed that the offender's act harms no one or only the offender himself. The main types of offenses characterized as public order offences involve illegal sexuality (prostitution, pornography, paraphilea) and substance related offences (abuse or trafficking of illicit drugs).[19] I will briefly argue two points: actions that do not seriously

[19] See for example, Siegal and McCormick.

offend or harm other citizens should not be criminalized, and so-called victimless crimes usually do harm other citizens and so my model is appropriate for responding to them.

If a crime does not harm anyone, then the offence simply should not be criminalized. I expect my model of punishment to function only in a system where criminal legislation is used to prevent individuals from causing harm or serious offence to other citizens. This position is largely consistent with Canadian criminal law. The Canadian Charter of Rights and Freedoms protects the state from interfering with citizens' liberties and individual autonomy except where their exercise would be inimical to the realization of collective goals of fundamental importance (*R. v. Oakes*). The crown must establish that the goal of criminal legislation is pressing and substantial if it infringes on citizens' freedom to pursue their chosen lifestyle.

Boonin points out that there are widespread and contentious debates about the appropriateness of forbidding sexuality and substance abuse but those who favour criminalization do so in part because they deny that the behaviour is truly victimless (246). Boonin explains that those who favour laws criminalizing so-called victimless offenses like gambling, prostitution, pornography and polygamy maintain that the offences are harmful to women, people's families, society in general, etc (247). This sentiment is echoed in Canadian jurisprudence. For example, prohibitions against assisted suicide were upheld in large part based on worries about proper safeguards rather than moral or religious reasons (*Rodriguez v. Attorney-General of British Columbia)*, and restrictions on pornography were upheld because of their potential to predispose viewers to mistreat women, not their inherent immorality (*R. v. Butler*).

Attempted Crimes

The fifth non-ideal scenario concerns crimes in which the offender unlawfully exposes other citizens to the risk of harm, or attempts to harm them, but does not actually directly harm them.

In the case of an attempted murder, the state's response to the convicted offender will be slightly different than for murder. The victim of the attempted murder will actually be able to participate in the restorative justice process if it is appropriate. The offender will not have to make the same reparations (funeral expenses, grief counselling, lost earnings, etc.). However, the offender may still owe the victim for the anxiety his criminal attempt caused. Crime control, censure and reform are largely the same.

An offender convicted of operating a motor vehicle while impaired who did not harm anyone will not have the same restitution requirements as an offender who did. However, the offender still must compensate the members of his political community whom he took advantage of. The offender also owes an apology for putting his fellow citizens in danger. Victim offender panels allow for an encounter experience. Victims can censure and educate the offenders concerning the harms that can result from driving under the influence. The offender's community service requirement could include a work assignment for the Mothers against Drunk Driving organization. Rehabilitative duties could include substance abuse counselling. A repeat offender would have his driver's license and car taken away, and a persistent offender would suffer further restraints.

Rich and Poor Offenders

It is a common objection to Boonin's Pure Restitution Theory of punishment that it cannot properly accommodate for rich or poor offenders. It is objected that the theory would be too easy on wealthy offenders. Two offenders who have committed equally serious crimes may be burdened differently by paying the same compensation. This may be a serious hardship for lower and middle class offenders, but easy for a wealthy offender. Critics claim that such a theory is undesirable because the disparity in felt hardship between the offenders is unfair, and the response will not deter rich offenders (Boonin 256).

It is true that on my composite-aims model wealthy offenders will have an easier time making restitution. However, this problem exists within any political system that accepts capitalism and private property. The rich will always have an easier time repaying those whom they have injured. As Boonin notes, even on a just deserts scheme the wealthy may suffer less because the typical less well off offenders often have serious difficulties finding work after spending years in prison, whereas the wealthy are not burdened in this way (261). Offenders are also affected differently during imprisonment. For example, Human Rights Watch points out that convicted offenders who are: young, small, white, gay, or possessing feminine characteristics such as long hair or a high pitched voice face a significantly increased risk of being sexually abused in prison (sect. 4). On my model wealthy offenders will still have to undergo burdens of: community service, rehabilitation, restraints (where appropriate), as well as the burden of suffering censure by fellow citizens and the pain of focussed repentance.

Critics also object to the pure restitution system because many criminals are poor and will be unable to make restitution to their victims. We can imagine a case in which a poor offender vandalizes the home of a rich citizen and has no means to pay for the damages. This scenario is a problem for my model as well. However, it is not reason enough to reject the model. Should we abolish our system of tort law? It suffers from the same defect. As Boonin points out, a retributive model of punishment will run into cases where it cannot inflict as much suffering on the offender as is desired (262). For example, elderly or ill criminals may not be able to serve their full prison sentences. On the composite-aims model poor offenders will still be required to meet their victims and apologize, undergo censure, perform community service and reform. Poor offenders who are persistent and dangerous will be restrained.

On the model I propose there is a better chance of victims receiving restitution than in contemporary criminal and civil actions because offenders are generally given more alternatives for repayment. Offenders are also more likely to earn the money for restitution on my model because there is a focus on reform and rehabilitation, and fewer offenders are imprisoned. I also advocate a state-funded victim compensation account which would serve to top-up a victim's compensation where the offender cannot fully repay his debt.

White-Collar Criminals

White-collar crimes represent some of the most grievous criminal wrongs. The nature of white-collar crime is controversial, but I refer here to illegal acts that violate public trust committed by individuals or organizations, usually members of the upper socio-economic class, typically during the course of legitimate occupational activity

(Helmkamp, Ball and Townsend 351). Aside from Braithwaite, prominent restorative justice theorists rarely address white-collar crime. White-collar crimes present a number of unique conditions that differentiate them from some of the more common street crimes. Large scale white-collar crimes involving major political and economic players may victimize considerable numbers across large geographical areas. White-collar criminals are more often wealthy and perceived as being motivated to commit crime by greed rather than need, addiction, or other social circumstances (Seigal and McCormick 348). Due to their economic positions, white-collar criminals may be capable of causing such serious financial damage to victims that they cannot make restitution. However, white-collar criminals may also possess the talents and resources to provide great benefits to society.

How might the composite-aims model improve on conventional treatment of convicted white-collar offenders? I will explore the infamous Jim Bakker swindle to illustrate.

In the 1970's and 80's James Bakker worked as a televangelist for the PTL ('Praise the Lord' or 'People that Love') corporation which he formed. Bakker and PTL also constructed a massive Christian retreat center called 'Heritage USA' and had plans to add a vacation park with hotels, bunkhouses and other facilities called 'Heritage Village'. Bakker broadcast on the PTL Television Network to solicit lifetime partnership packages ranging from $500 to $10000 in order to finance Heritage Village. Bakker oversold the partnerships and failed even to complete the promised premises. Bakker used the funds to pay operating expenses for PTL and to support his lavish lifestyle which included numerous mansions, a Rolls Royce, transportation in private jets and

limousines, and an air-conditioned dog house for his pets. Bakker resigned from PTL in 1987 after admitting to using almost $363,700 of the Network's money to buy the silence of a former church secretary about a sexual encounter (Nowell). Bakker was charged and convicted of mail fraud and wire fraud and was sentenced to 45 years of imprisonment and a $500,000 fine, but his jail time was later reduced to 8 years and he was paroled after serving 5 (Jones). PTL went bankrupt and none of his followers' $150 million was returned. Bakker claimed that he only acted in good faith and did not intend to defraud his followers. After being paroled Bakker wrote a book confessing to a sinfully lavish lifestyle, though not to defrauding his followers. Bakker is now back on television, has a church, and is building a new Christian community (Latham). Bakker has also returned to selling merchandise including small granite monuments, other 'love gifts' like post-apocalyptic survival kits and thousand dollar memberships to his church and special events (Latham).

On the composite-aims model someone like Bakker would be imprisoned if he refused to admit his wrongdoing, although I think it likely that the offender would face up to his responsibility when faced with the alternative of imprisonment. If the offender was willing to be held accountable then restorative justice encounters would be held so that the victims of fraud could meet with him, tell their stories of how the fraud affected them, and condemn the offender's criminal behaviour. Victims would be able to directly engage the offender in dialogue forcing him to confront the consequences of his actions and acknowledge his responsibility to his followers. The victims would receive a proper apology from the offender, rather than the excuses and denials Bakker tried to pass off. Being a non-dangerous first-time offender, he would not be sent to prison as he poses no

threat to the physical safety of other citizens. However, the gravity of his crime (theft of millions of dollars) would require that he be restrained from ever having unsupervised control of such a significant quantity of other peoples' money. The offender would owe significant financial restitution to his victims, likely more than he could ever repay. However, rather than simply enduring an incarcerated life paid for by taxpayers, the offender could perform community service and re-enter the workforce under Christian or charitable organizations. If, like Bakker, the offender returned to a profitable career of televangelism then his income could be garnished in order to compensate his victims.

The composite-aims model's response is superior to the sentence that was imposed by the American judiciary. The conventional response: cost taxpayers money; restricted the offender's earning time; failed to secure a legitimate apology for victims; failed to call the offender to account for his actions as a responsible agent; failed to educate the offender as to the abhorrent consequences of his criminal behaviour; failed to reform the offender; and failed to ensure that offender was not in the position to perpetrate such a serious offence again. The composite-aims model could have secured the important goals that were neglected by the American response to convicted offenders.

4.3 - Limits

Von Hirsch, Ashworth and Shearing explain that in traditional punishment systems the sanctions involve censure. On von Hirsch's retributive sentencing scheme the severity of the sanctions signifies the level of condemnation that the offender deserves. Giving an offender a prison sentence that is lengthier than the seriousness of his conduct deserves is undesirable because it unfairly censures him where censure is not due. To punish him with disproportionate severity or leniency communicates more or

less condemnation than is deserved. This would be dishonest and unjust. What kinds of limits are needed for the model I have proposed? Is the composite-aims model fair?

Here I discuss the constraining principles earlier mentioned when discussing 'retribution in distribution'. I should first mention that I agree with Cottingham's rejection of Hart's neologism. Cottingham argues that the labelling of constraints as 'retributivist' is unfitting because they can be accounted for as principles of simple justice or utilitarian secondary rules (241). Cottingham rightly states that there is nothing distinctly retributive [the notion that punishment is due repayment for crime] about constraining principles (241).

The moral communication component of my model includes censure of the offender by encounter participants and a criminal mediator. The censure must be honest and take into account all relevant factors. Those censuring should not over-state the offender's moral culpability by charging him with a more serious offence than he did commit or by detailing harmful consequences that never actually occurred. Nor should those censuring ignore relevant mitigating factors. The mediator can help control such problems by thoroughly preparing the parties ahead of the encounter and controlling the dialogue if problems occur. The offender should not be required to overstate his degree of responsibility in the crime or the harm resulting from his criminal conduct. Censure must represent accurately the actual criminal wrongdoing and its consequences. It would be unjust and dishonest to visit a convicted offender with censure that didn't accord to the facts of the crime. It is important to ensure that condemnation is guided by the truth because the offender would be unlikely to perceive the process as legitimate if it

overstates his degree of fault. Understating the offender's responsibility could result in a failure to vindicate the victim's moral status.

Restitution payments should be determined based on what is required to restore the victim to his previous level of well being. The offender must take responsibility for the harms he caused. The criminal mediator can help guide this process like a civil mediator guiding parties disputing a tort settlement, though it might be prudent to set some basic standards for pain and suffering damages (dissatisfied parties would be free to withdraw and pursue traditional civil proceedings). Compensation for harm to secondary victims and law-abiding citizens might also be set roughly according to predetermined standards. This lump sum can then be allocated to a state fund designed to rectify the harm to society.

Community service orders aim to morally educate the offender and contribute to his repentance, as well as serving as a means for offenders to make restitution to secondary victims and law-abiding citizens. An offender's moral education requirements should be distributed according to a scheme governed by relative proportionality: those who committed comparably serious offences should have more severe moral education requirements than those who committed less serious offences. This requirement follows from the logic of moral education: we should spend more time focusing on our more serious wrongdoings. We do not judge it appropriate to spend 200 hours focusing on a minor wrongdoing (recklessly stepping on a friend's toe) and 10 hours focusing on a more serious wrongdoing (serious vandalism). I cannot think of any absolute measure by which we can judge the appropriateness of contextual community service for the purpose of successful moral education. Perhaps criminologists could at some point determine an

approximate length for community service that is most efficient for reducing recidivism. For now I would assume only that we follow existing penal practices that have been determined by a host of historical contingencies. The maximum limit in Canada of assigning 240 hours of community service over 18 months might well be an appropriate limit. Because the restorative justice encounter and the work done to prepare for it focus the offender's attention on his wrongdoing, time spent on this should count towards the moral education requirement. The community service requirement should also count towards the offender's reparative obligations. If the offender completes his reparative obligations before he is finished with community service he can be paid for the work he does.

An offender's obligations with respect to rehabilitation and changing behaviour also ought to be limited by consequential considerations. These duties are not a means of expressing censure, but rather a means of helping the offender reform and demonstrate to others his commitment to lawful behaviour. Because they are not a means of expressing censure, giving one offender more rehabilitative obligations than another offender who has committed a similar offence does not visit him with an undeserved amount of censure. It is also important to note that although two equally culpable offenders might be required to fulfill different rehabilitative obligations, each offender is treated in a way that is contextually just. Each offender is doing what is necessary to satisfy corrective justice and make amends to his victims and community. Repudiating the criminal offence and committing to rehabilitation and a law-abiding lifestyle are crucial to making amends. However, a system in which criminal justice officials have the power to assign unlimited burdensome rehabilitative obligations is unsatisfactory. Braithwaite explains

that citizens' recognition that in the event of coming before a criminal court they would be reduced to a condition of utter vulnerability would be a severe breach in the citizens' dominion ("Not Just Deserts" 231). In order to counteract this negative impact on the enjoyment of citizens' dominion we institute limits on the rehabilitative obligations that can be imposed. Rehabilitative obligations, such as attending group therapy are burdensome and ought to be limited. Accessibility to the programs, however, should not be withdrawn from an offender that voluntarily chooses to continue.

Restraints will need limits for the same reason. We do not want to establish a system in which law abiding citizens fear a future of lifetime imprisonment if they commit a minor offence. We also want to give offenders the opportunity to demonstrate that they can reform and live a law-abiding lifestyle. Coercive restriction of convicted offenders should have a more limited role than the one it plays in Canada's current sentencing scheme. The aim of incapacitation measures is to restrain offenders from committing crime by taking steps to ensure they have fewer opportunities to do so. The type and duration of restraints will be determined by the following factors.

First, restraints must be reasonable and demonstrably justified, not arbitrary or irrational. Restraints should impair the offender's rights as little as possible. The beneficial effects of the restraints should also be proportional to the costs. So, restraints must be effective at reducing crime, they must be the least intrusive method of doing so, and the costs associated must not outweigh the benefits of preventing recidivism.

Second, only persistent and dangerous offenders should have restraints applied to them. Reform should generally be attempted before coercive restraints like imprisonment are applied as we don't want to restrain those who could be reformed and reintegrate into

society as full participating members. Were we to simply restrain all offenders, many would not have the opportunity to make amends, our system would be tremendously expensive, and we would risk unnecessarily imposing serious burdens on those who could reform and lead a law-abiding life.

Persistent offenders demonstrate their unwillingness to reform by refusing to abide by the law, even after the state has made its best efforts to educate, rehabilitate and reintegrate them. Offenders who commit serious criminal offences like murder or aggravated sexual assault demonstrate their willingness and capacity to commit seriously harmful and morally abhorrent acts. Though reform is a crucial aim the state is justified in protecting law-abiding citizens from those who have demonstrated persistent and seriously dangerous criminal behaviour. Reform, censure and amends should still be pursued as far as restraints will allow.

Advocates of selective incapacitation have traditionally determined sentence severity based on predictions of an offender's likelihood of recidivism (von Hirsch and Kazemian 96). Unfortunately these predictions are often made based on an offender's non-criminal behaviour such as his employment history or substance abuse history. In *R. v. Proulx* Canadian judges explained that relevant considerations when estimating an offender's likelihood of reoffending should include the offender's: occupation, lifestyle, family situation and mental state (para. 70). This type of incapacitation strategy implicitly criminalizes non-criminal behaviour. Were this common practice, law-abiding citizens might rightly come to avoid substance use, certain family dynamics, and periods of unemployment solely for fear of restraints being applied should they ever be arrested. One can also imagine a scenario in which experts rely on aspects of an offender's history

that the offender was not in any way responsible for (for example, whether an offender was sexually abused as a child). But this would likely decrease the number of sexual abuse victims who come forward about their victimization. The only factors which can rightly be used for determining severity of restraints are offenders' culpable conduct: their criminal behaviour.

So why is it that factors like substance abuse problems are taken into account for rehabilitation but not restraints? Rehabilitation is part of an offender's making amends, restraints are not. Restraints are imposed solely for the purpose of crime prevention on offenders who may not be committed to adopting a law-abiding lifestyle. We may be justified in restraining dangerous offenders from harming others, but we should not criminalize behaviours that are not condemnable and harmful.

Life-long prison sentences should be imposed only on criminal offenders who have demonstrated a willingness and capacity to engage in numerous seriously harmful criminal behaviours. I refer to criminals who engage in crimes like mass murder, serial rape, serial murder, etc. Offenders who have committed a serious crime or repeated less-serious offences should at some point be given the opportunity to demonstrate that they have reformed and can be trusted to maintain a law-abiding lifestyle. Restraining such offenders for a period of time and reducing their opportunities to commit crime is beneficial, but we should also acknowledge that evidence indicates a significant, continuing decline in criminal offending from late-teenage years through to old age (Moffitt 675).

So, what of the worry that offenders committing equally serious crimes will not receive equal punishment? The censure of both offenders will be guided by the truth.

Reparation requirements may differ if the similarly culpable offenders have caused different harms but this is in accordance with the justifying principle of corrective justice. Two first-time offenders will submit to roughly the same restraints because limits on restraints are mandated by the consequential concerns listed above. Although the two offenders might not be equally dangerous according to some theorists (eg: offender A is homeless and unemployed, offender B lives in an upper-class neighbourhood) they will receive the same restraints because such factors are not taken into consideration in criminal sentencing. Two offenders convicted of a crime (offender A is a repeat offender, offender B is first-time) will have different restraints imposed on them. But this is not unjust. Offender A has committed multiple crimes and was aware that doing so would result in a period of restraint. If offender B commits the same multiple crimes he too will be treated to those restraints. There is nothing unjust in considering the entirety of an offender's criminal wrongdoings when determining his sentence so long as the same procedure is applied to all.

In their article "Desert and the Three R's," von Hirsch and Ashworth attack Braithwaite and Pettit by trying to highlight an implication of their restorative theory which they hope readers will find objectionable:

> "Consider two offenders, one of whom (X) commits a minor crime and the other (Y) a more serious one. Suppose, however, that Y is quick to acknowledge the wrongfulness of his actions (or at least to seem to do so), has a victim willing to be reconciled, has ample funds with which to pay compensation, and appears to have a low risk of future offending. X has a defiant attitude, has a vindictive victim, has few means with which to pay compensation, and presents a poor risk of future law-abidance. All three Rs [recognition, recompense, and reassurance] would point to a much harsher response to X than to Y – even though X's original offence was much less serious. This seems to trample on elementary notions of fairness." (12)

Though this might be problematic for Braithwaite and Pettit, the composite-aims model is not affected by this criticism: the vindictiveness of the victim does not affect the offender's rehabilitation or restraints; censure in encounters is controlled; reparation contracts are mediated and monitored; and only criminal acts can be taken into consideration when determining the severity of restraints. Though offenders may incur different rehabilitative obligations they are [1] limited, [2] not a form of censure, and so do not visit the offender with an unfair amount of censure, and [3] contextually just. It is also important to note that the offender's substance problems will be acknowledged in the censure portion of the restorative encounter. Imagine two offenders who have assaulted a fellow citizen: offender (C) is an alcoholic and was severely intoxicated during the commission of the offence, and offender (D) does not have substance abuse problems and was sober during the commission of the offence. Though C may have to undergo more burdensome rehabilitative obligations, D will undergo more burdensome censure having committed his crime with malicious intent. D will also have to perform more morally educative community service than C, since C's intoxication was a mitigating factor.

Van Ness suggests proportionality limits but recommends they be applied to offenders' restitution payments. On his model, offenders are required to pay a set amount of restitution that would be matched to guidelines outlining minimum and maximum amounts of restitution for particular offenses ("New Wine" 270). These guidelines would be related to typical losses so that offenders with similar culpability would suffer the same reparative burdens even if the damages caused were not equal (271). The implication is that some offenders would owe financial payments even once restitution was made. This requirement blatantly violates the principle of corrective justice which

justifies having the offender make amends in the first place. As Ashworth rightly remarks in his article "Some Doubts about Restorative Justice," compensation for victims should be for harm done; guidelines related to typical losses are irrelevant for this goal (290). Without acknowledging it, Van Ness implicitly accepts a retributive scheme for offenders' reparative obligations: they match an offender's culpability not the damages he caused. Van Ness' goal of meting out deserved sanctions is problematic. The only way he can justify these additional sanctions is with intuitive desert theory, or with von Hirsch's condemnation based sanctioning. Both of these theories have been refuted in chapter three.

Duff's model also prescribes hard treatment based on retributive notions of desert. Duff argues that punishment must communicate the censure that offenders deserve for their crimes and constitute adequate penitential apologies, so they must be proportionate to those crimes (*Punishment, Communication* 142). Punishment must not be disproportionately severe or lenient (140). We can judge that certain sentences are absolutely disproportionate to offences, but a rough penalty scale will have to be worked out relative from those in existing penal practice (134). For Duff it is necessary that offenders who committed comparably serious offences be punished with comparable severity (133).

The difficulty with retributive sentencing is that it results in undesirable dispositions. The first problem is that offences committed may not be 'severe' enough to require the offender to pay the full amount of restitution he owes. Duff admits that the amount or cost of harm is only relevant if it bears on the seriousness of wrongdoing ("Restoration and Retribution" 57), but surely the offender should be required to make

restitution. Why should the victim of the crime be required to suffer the burden of fixing damages culpably caused by a well-to-do criminal offender? A second problem is that dangerous offenders' crimes may not be serious enough to mandate their being restrained effectively. An offender's 'deserved' punishment for committing serious crimes like murder or aggravated sexual assault is not necessarily going to restrain them effectively. A third problem is that a proportionate sentencing scheme may require offenders to suffer burdens when it would be detrimental to the offenders and the public. For example, in Canada many criminal offenders are sentenced to short periods of custody. These short periods of custody do not effectively prevent crime when compared to restorative justice programs and require more of society's resources. The only reasoning that could support such an undesirable sentencing policy is retribution.

4.4 – Constructing Dispositions

Von Hirsch, Ashworth and Shearing argue that restorative justice proceedings' discretionary character is a serious problem. The authors claim that within such wide bounds restorative justice conferences could pursue any number of aims, and choose nearly any means to achieve them (23). Von Hirsch, Ashworth and Shearing confidently state, "Leaving [sentencing] purely to the discretion of the particular group conference is likely to lead to dispositions which, if capable of being rationalized at all, would be so on grounds having little or nothing to do with the making of amends" (28).

In his article "Rights, Responsibilities and Restorative Justice" Ashworth voices further doubts about victim involvement in restorative justice conferences. Ashworth argues that although victims certainly have legitimate interests in amends, they have no interests greater than other citizens concerning an offender's punishment (585). The fact

that an offender has committed an offence against me does not privilege my interests over the interest of the general public when it comes to an offender's rehabilitation or punishment (585). Ashworth explains that citizens have a right to the state's protection which they are owed in exchange for giving up certain freedoms and submitting to the rule of law (585). He adds that victims cannot be expected to be impartial or to know about the available range of orders at their disposition (587).

Unfortunately for restorative justice advocates like Van Ness and Braithwaite these criticisms highlight serious problems. If restorative justice advocates cannot ensure that the general justifying aims of their proposed response to convicted offenders actually get realized in practice then their response is no longer justified. Van Ness and Braithwaite's models have this short-coming. Braithwaite in fact states that conference participants should be empowered to ignore the values upon which the success of restorative processes must be evaluated; values such as: restoration of property loss, emotional restoration, restoration of damaged relationships, etc (164). Braithwaite further states that the aims of remorse, censure, and apology should not even be encouraged but rather promoted only by providing a space in which they might be manifested (165). Van Ness states that the facilitator's role is to maintain the dignity and respect owed to each party, assist with the facts of the case, and address needs of the parties; however, the resulting agreements from the conference must be the result of the parties' efforts, not a facilitator's proposals (173). Duff does not address this dilemma at all.

Luckily, there is a solution to the problem: educate participants, and involve experts and impartial arbitrators where appropriate. As I mentioned earlier, victims and

their support groups need to be prepared for the censuring portion of the encounter, and condemnation needs to be kept within limits by the mediator. The victims have a crucial role in determining damages, but the mediator will need to ensure that offenders aren't coerced into over-paying. Professional oversight of restitution contracts can ensure fair play. Rehabilitative obligations ought to be guided by experts, but there is no reason that conference participants should not contribute. The offender's support group will often play a crucial role in the offender's reform. The support group can help experts gain valuable insights into factors that have been affecting the offender and help support the offender through his rehabilitation.[20] Offenders' support groups might even make promises to help with treatment, or the support groups might threaten offenders with informal sanctions (eg. ending relationships) if the offender does not try to reform. This is currently a common practice in interventions for citizens with substance abuse problems. Though the offender's support group should be invited to participate and work with rehabilitation experts, the mediator should have the ultimate authority on rehabilitation obligations as it is his job to ensure constraints are respected and the conference is appropriately conducted. The mediator will also be needed to set rough limits on community service requirements.

Ashworth is certainly right to suggest that participants may not have the necessary skill-set to determine fitting restraints. There are at least two ways this problem could be dealt with. First, we could have restraints determined by experts before the restorative justice encounter takes place. Because restraints are only used for dangerous and persistent offenders this would only occur in a minority of cases. A second possibility is

[20] Family centered interventions for adults are considered to be among the most effective treatments for mental health problems. See for example, Alan Carr "The Effectiveness of Family Therapy and Systemic Interventions for Adult-Focused Problems".

that, like rehabilitation experts, restraints experts could be directly involved in the encounter and would make recommendations while considering the input of conference participants. The offender's support group may have valuable insights about the appropriateness of the restraints for the particular offender. Again, the mediator will have an important role to play because it is his responsibility to ensure that limits on restraints are respected.

Admittedly, including experts in processes in the manner I have described results in a justice process that is quasi-judicial. What is important is that the response is still dialogical where appropriate, and that experts are involved only where beneficial. Victims play a necessary role in educating and censuring the offender as well as determining amends. However, victims should not be expected to be knowledgeable regarding effective methods for rehabilitating and restraining convicted offenders.

Conclusion

The composite-aims model introduced in this essay which aims to secure censure, amends, crime control and reform provides a desirable framework upon which Canada's response to convicted offenders could be developed. This conclusion is supported by the four central premises established in the thesis.

The first major premise is that Canada's current response to offenders whose guilt has been established is problematic. To support this claim I provided evidence that contemporary legal punishment in Canada suffers a number of defects: (1) it is tremendously expensive, (2) many offenders are not reformed, (3) many offenders do not make amends, (4) many offenders are not properly censured or morally educated, and (5) dispositions are often arbitrary and overly intrusive. The second major premise is that current research provides support for the effectiveness of the restorative justice processes that are endorsed by the composite-aims model. To establish this premise I provided evidence that restorative justice processes, when compared with conventional criminal justice methods: (1) are financially advantageous, (2) educate offenders, (3) better secure restitution, (4) decrease recidivism, and (5) help alleviate victims' distress and emotional problems.

The third key premise is that the composite-aims model presented is conceptually coherent, specifies aims and limits, and is capable of providing meaningful guidance for a new direction in criminal justice policy. In order to show this, I constructed and defined the composite-aims model by answering a number of key questions: Which aims ought to be pursued by the criminal justice system when dealing with a criminal offender whose

guilt has been established? What rule should we appeal to when multiple goals conflict? How might we accomplish said aims? What limiting principles, if any, should be applied to dispositions? How should we respond to different types of offences and offenders? What should the sentencing process look like? I attempted to address the criticisms of von Hirsch, Ashworth and Shearing who stated that restorative justice models: (1) posit several vaguely formulated goals without priority among them specified, (2) have underspecified means and modalities, (3) contain few or no dispositional criteria, and (4) lack adequate fairness constraints on severity of dispositions.

The fourth chief premise is that the composite-aims model provides a more desirable framework than do models advocated by prominent restorative justice theorists Duff, Van Ness and Braithwaite. The logic of Duff's position does not provide grounds for the application of restraints to dangerous and persistent offenders who pose a serious threat to the safety and welfare of citizens. Duff's model also relies upon a troubling conception of retributive sentencing. Although Van Ness defines his model's aims he does not explain in which circumstances crime control is to take over as the determining goal and omits to specify which type of crime control policy he would pursue. Van Ness' account of amends excludes restitution for pain and suffering without explaining why this type of restitution would not help restore victims to their previous level of well-being. Van Ness argues that compensation payments are to be determined in relation to an offender's desert which runs into the problems that plague retributive theories of legal punishment. Finally, Van Ness fails to provide satisfactory guidance for the construction of dispositions by conference parties. Braithwaite too fails to provide satisfactory

guidance for conference agreements. Braithwaite also endorses multiple under-specified goals which take away from his ability to direct criminal justice policy.

There are important restrictions on my claim that the composite-aims model provides a desirable framework upon which Canada's response to convicted offenders could be developed. The value of the composite-aims model is largely dependent on the support of the empirical evidence currently available. If a greater part of future research contradicts current data supporting the effectiveness of methods advocated, then such methods should be rejected. A similar restriction concerns goals: they may be justifiably abandoned if relevant circumstances change. If, for example, it became the case that the goal of moral education was simply not feasible (imagine a society in which all criminals are irreversibly brainwashed) then it might be appropriate to abandon our aim of moral education. At present, the composite-aims model presents a desirable alternative to Canada's problematic response to convicted offenders.

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