New Wine and Old Wineskins: Four Challenges of Restorative Justice*

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And nobody puts new wine into old wineskins;
if he does, the wine will burst the skins,
and the wine is lost and the skins too.
No! New wine, fresh skins.

Mark 2:22

At the 1987 London conference on criminal law reform that led to the formation of the Society for the Reform of Criminal Law, Justice John Kelly of Australia delivered a remarkable address on the purpose of law.[1] Speaking to two hundred judges, legal scholars, and law reformers from common law countries, he laid aside his prepared comments and spoke with great feeling about the need for criminal law practitioners to see themselves as healers. A purpose of criminal law, he

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1 For a brief account of this conference, see Conference Report, *Reform of the Criminal Law,* 1 Crim. L.F. 91 (1989).

said, should be to heal the wounds caused by crime. Since "healing" is not a word frequently heard in legal gatherings, it was helpful that he illustrated what he meant.

Justice Kelly told of a case in which he had made a special effort to ensure that a rape victim felt vindicated. He had just sentenced the defendant to prison, but before calling the next case he asked the victim to approach the bench. Justice Kelly had watched the complainant throughout the proceedings, and it was clear that she was very distraught, even after the offender's conviction and sentencing. The justice spoke with her briefly and concluded with these words: "You understand that what I have done here demonstrates conclusively *that what happened was not your fault.*" The young woman began to weep as she left the courtroom. When Justice Kelly called the family several days later, he learned that his words had marked the beginning of psychological healing for the victim. Her tears had been tears of healing.

The view that justice should bring about healing is, in fact, an ancient concept, one that a growing number of commentators are developing for contemporary application under the rubric of "restorative justice." Advocates of restorative justice face legal and jurisprudential challenges, among these the challenge to abolish criminal law, the challenge to rank multiple goals, the challenge to determine harm rationally, and the challenge to structure community–government cooperation. This article will consider these four challenges in turn and suggest ways in which they might be addressed.

ROOTS

We are used to thinking of criminal law as the means through which government prohibits criminal behavior and punishes criminals.[2] We take for granted the distinction between private and public wrongs, which separates the law of torts from criminal law, a distinction

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[2] *See, e.g.,* Kenneth Mann, *Punitive Civil Sanctions,* 101 Yale L.J. 1795, 1807 (1992).

ingrained in our common law tradition.[3] But there is another, older understanding of law that resists this duality, affirming that no matter how we administer the law, one of the primary goals of justice should be to restore the parties injured by crime.[4]

Early legal systems that form the foundation of Western law emphasized the need for offenders and their families to settle with victims and their families. Although crime breached the common welfare, so that the community had an interest in, and a responsibility for, addressing the wrong and punishing the offender, the offense was not considered primarily a crime against the state, as it is today. Instead, a crime was viewed principally as an offense against the victim and the victim's family.[5] This understanding was reflected in ancient legal codes from the Middle East, the Roman empire, and later European polities.[6] Each of these diverse cultures responded to what we now call

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[3] *See, e.g.,* Atcheson v. Everitt, 98 Eng. Rep. 1142 (K.B. 1775), in which Lord Mansfield wrote: "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions." *Id.* at 1147.

[4] In his highly regarded book on what he calls "primitive law," E. Adamson Hoebel wrote:

> The job [of primitive law] is to clean the case up, to suppress or penalize the illegal behavior and to bring the relations of the disputants back into balance, so that life may resume its normal course. This type of law-work has frequently been compared to work of the medical practitioner. It is family doctor stuff, essential to keeping the social body on its feet.

E. Adamson Hoebel, *The Law of Primitive Man* 279 (1968).

[5] *E.g.,* Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence,* 50 Minn. L. Rev. 223 (1965).

[6] The Code of Hammurabi (c. 1700 B.C.) prescribed restitution for property offenses, as did the Code of Lipit-Ishtar (c. 1875 B.C.). Other Middle Eastern codes, such as the Sumerian Code of Ur-Nammu (c. 2050 B.C.) and the Code of Eshnunna (c. 1700 B.C.) required restitution even in the case of violent offenses. The Roman Law of the Twelve Tables (449 B.C.) required thieves to pay double restitution unless the property was found in their houses; in that case, treble damages were imposed; for resisting the search of their houses, they paid quadruple restitution. The Lex Salica (c. A.D. 496), the earliest existing collection of Germanic tribal laws, included restitution for

crime by requiring offenders and their families to make amends to victims and their families—not simply to insure that injured persons received restitution but also to restore community peace.[7]

This can be seen as well in the language of the Old Testament, where the word *shalom* is used to describe the ideal state in which the community should function.[8] This term signifies completeness, fulfillment, wholeness—the existence of right relationships between individuals, the community, and God.[9] Crime was understood to break *shalom,* destroying right relationships within the community and creating harmful ones. Ancient Hebrew justice, then, aimed to restore wholeness.[10] Restitution formed an essential part of this process, but restitution was not an end in itself. This is suggested by the Hebrew word for "restitution," *shillum,* which comes from the same root as *shalom* and likewise implies the reestablishment of community peace. Along with restitution came the notion of vindication of the victim and of the law itself. This concept was embodied in another word derived from the same root as both *shalom* and *shillum—shillem. Shillem* can be translated as "retribution" or "recompense," not in the sense of revenge (that word in Hebrew comes from an entirely different root) but in the sense of

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crimes ranging from theft to homicide. The Laws of Ethelbert (c. A.D. 600), promulgated by the ruler of Kent, contain detailed restitution schedules that distinguished the values, for example, of each finger and fingernail. Daniel W. Van Ness, *Restorative Justice,* in *Criminal Justice, Restitution, and Reconciliation* 7, 7 (Burt Galaway & Joe Hudson eds., 1990).

7 Hoebel, *supra* note 4, at 279.

8 We must distinguish *shalom* from the irrational belief that the world is safe and just. Psychologist Melvin Lerner has argued that human beings need to believe that people basically get what they deserve and that the world is both safe and just, even when events suggest otherwise. This self-delusion, Lerner argues, is necessary in order for people to function in their daily lives. Melvin J. Lerner, *The Belief in a Just World* 11–15 (1980). But the Hebrew word *shalom* does not imply a delusional belief that all is well. To hold healing and *shalom* as goals for society's response to crime is to recognize that hurt and injustice do exist and that they must be healed and rectified.

9 G. Lloyd Carr, *Shalom,* in *Theological Wordbook of the Old Testament* 931 (R.L. Harris et al. eds., 1980).

10 Van Ness, *supra* note 6, at 9.

satisfaction or vindication.[11] In short, the purpose of the justice process was, through restitution and vindication, to restore a community that had been sundered by crime.

This view of justice is not confined to the far distant past. Many precolonial African societies aimed not so much at punishing criminal offenders as at resolving the consequences to their victims. Sanctions were compensatory rather than punitive, intended to restore victims to their previous position.[12] Current Japanese experience demonstrates a similar emphasis on compensation to the victim and restoration of community peace.[13] The approach (as we will see later) emphasizes a process that has been referred to as "confession, repentance and absolution."[14]

For all of its tradition, the restorative approach to criminal justice is unfamiliar to most of us today. For common law jurisdictions, the Norman invasion of Britain marked a turning point away from this understanding of crime. William the Conqueror and his successors

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[11] How is it that a root word meaning "wholeness and unity, a restored relationship" could produce derivatives with such varied meanings?

> The apparent diversity of meanings . . . can be accounted for in terms of the concept of *peace being restored through payment* (of tribute to a conqueror, Joshua 10:1), *restitution* (to one wronged, Exodus 21:36), *or simple payment and completion* (of a business transaction, II Kings 4:7).
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> The payment of a vow (Psalms 50:14) completes an agreement so that both parties are in a state of *shalom.* Closely linked with this concept is the eschatological motif in some uses of the term. *Recompense for sin, either national or personal, must be given. Once that obligation has been met, wholeness is restored* (Isaiah 60:20, Joel 2:25).

Carr, *supra* note 9, at 931 (emphasis added).

[12] Daniel D.N. Nsereko, Compensating Victims of Crime in Botswana (paper presented at the Society for the Reform of Criminal Law Conference on "Reform of Sentencing, Parole, and Early Release," Ottawa, Ontario, Canada, Aug. 1–4, 1988).

[13] *See, e.g.,* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice,* 80 Cal. L. Rev. 317 (1992).

[14] John O. Haley, *Confession, Repentance, and Absolution,* in *Mediation and Criminal Justice* 195 (Martin Wright & Burt Galaway eds., 1989).

found the legal process an effective tool for establishing the preeminence of the king over the church in secular matters, and in replacing local systems of dispute resolution.[15] The Leges Henrici, written early in the twelfth century, asserted exclusive royal jurisdiction over offenses such as theft punishable by death, counterfeiting, arson, premeditated assault, robbery, rape, abduction, and "breach of the king's peace given by his hand or writ."[16] Breach of the king's peace gave the royal house an extensive claim to jurisdiction:

> [N]owadays we do not easily conceive how the peace which lawful men ought to keep can be any other than the queen's or the commonwealth's. But the king's justice . . . was at first not ordinary but exceptional, and his power was called to aid only when other means had failed. . . . Gradually the privileges of the king's house were extended to the precinct of his court, to the army, to the regular meetings of the shire and hundred, and to the great roads. Also the king might grant special personal protection to his officers and followers; and these two kinds of privilege spread until they coalesced and covered the whole ground.[17]

Thus, the king became the paramount victim, sustaining legally acknowledged, although symbolic, damages.

Over time, the actual victim was ousted from any meaningful place in the justice process, illustrated by the redirection of reparation from the victim to the king in the form of fines.[18] A new model of

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15 Harold J. Berman, *Law and Revolution* 255-56 (1983).

16 *Leges Henrici Primi* 109 (L.J. Downer ed. & trans., 1972).

17 Frederick Pollock, *English Law before the Norman Conquest,* 14 Law Q. Rev. 291, 301 (1898).

18 In the hands of the royal administrators after the Conquest [the king's peace] proved a dynamic concept, and, as Maitland once expressed it, eventually the King's peace swallowed up the peace of everyone else. . . . Already by the time of Bracton, in the thirteenth century, it had become common form to charge an accused in the following terms: "Whereas the said B was in the peace of

crime was emerging, with the government and the offender as the sole parties.

RESTORATION INTO SAFE COMMUNITIES OF VICTIMS AND OFFENDERS WHO HAVE RESOLVED THEIR CONFLICTS

Criminal justice policy today is preoccupied with maintaining security—public order—while trying to balance the offender's rights and the government's power. These are, of course, vital concerns, but a restorative perspective on justice suggests that fairness and order should be only part of society's response to crime.

And, in fact, other emphases have emerged. These include restitution,[19] victim's rights,[20] rehabilitation,[21] victim–offender reconciliation,[22] community crime prevention,[23] and volunteer-based services for offenders and victims.[24] Some of these movements incorporate proposals

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God and of our lord the King, there came the said N, feloniously as a felon," etc.

George W. Keeton, *The Norman Conquest and the Common Law* 175 (1966).

[19] *See* Charles F. Abel & Frank A. Marsh, *Punishment and Restitution* (1984); *Criminal Justice, Restitution, and Reconciliation, supra* note 6; Stephen Schafer, *Compensation and Restitution to Victims of Crime* (1970).

[20] *See From Crime Policy to Victim Policy* (Ezzat A. Fattah ed., 1983); President's Task Force on Victims of Crime, *Final Report* (1982); Steven Rathgeb Smith & Susan Freinkel, *Adjusting the Balance: Federal Policy and Victim Services* (1988).

[21] *See* Francis T. Cullen & Karen E. Gilbert, *Reaffirming Rehabilitation* (1982).

[22] *See Criminal Justice, Restitution, and Reconciliation, supra* note 6; *Criminology as Peacemaking* (Harold E. Pepinsky & Richard Quinney eds., 1991); *Mediation and Criminal Justice, supra* note 14.

[23] *See* Judith Feins et al., *Partnerships for Neighborhood Crime Prevention* (1983); Richard Neely, *Take Back Your Neighborhood* (1990); Wesley G. Skogan & Michael G. Maxfield, *Coping with Crime* (1981).

[24] *See* Marie Buckley, *Breaking into Prison: A Citizen Guide to Volunteer Action* (1974); M.L. Gill & R.I. Mawby, *Volunteers in the Criminal Justice System: A*

for systemic change, but for others the criminal justice system is basically irrelevant other than to provide a framework in which (or around which) the programs can function. In any event, the current system's limitations of vision and of participants have begun to be addressed at least in piecemeal fashion.

Some writers have suggested a more comprehensive approach that combines many of these alternatives and that not only recognizes the wisdom of the ancient model but also seeks to apply that wisdom to the present realities of criminal justice. This effort has been championed by legal scholars and criminologists,[25] victim-offender reconciliation practitioners,[26] and adherents of various philosophical, political, and religious perspectives.[27] Several have called this approach "restorative justice"[28]—the overall purpose of which is the restoration into safe communities of victims and offenders who have resolved their conflicts.[29]

Comparative Study of Probation, Police, and Victim Support (1990); R.I. Mawby & M.L. Gill, *Crime Victims* (1987).

[25] *E.g.,* Haley, *supra* note 14, at 195; Martin Wright, *Justice for Victims and Offenders* (1991).

[26] *E.g., Mediation and Criminal Justice, supra* note 14; Mark Umbreit, *Crime and Reconciliation* (1985); Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990).

[27] *E.g.,* Wesley Cragg, *The Practice of Punishment* (1992); Daniel W. Van Ness, *Crime and Its Victims* (1986); M. Kay Harris, *Moving into the New Millennium: Toward a Feminist Vision of Justice,* 67(2) Prison J. 27 (1987); Virginia Mackey, Restorative Justice (discussion paper available from the Presbyterian Criminal Justice Program, Lexington, Kentucky, United States, 1990).

[28] The term "restorative justice" was probably coined by Albert Eglash, *Beyond Restitution,* in *Restitution in Criminal Justice* 91, 92 (Joe Hudson & Burt Galaway eds., 1977), where he suggested that there are three types of criminal justice: retributive justice based on punishment, distributive justice based on therapeutic treatment of offenders, and restorative justice based on restitution. Both the punishment and the treatment model, he noted, focus on the actions of offenders, deny victim participation in the justice process, and require merely passive participation by the offender. Restorative justice focuses instead on the harmful effects of offenders' actions and actively involves victims and offenders in the process of reparation and rehabilitation.

[29] They have expressed this in different ways. Zehr, *supra* note 26, at 178-81, analogizes to a camera lens and suggests that there are two alternative lenses: retributive

The restorative model seeks to respond to crime at both the macro and the micro level—addressing the need for building safe communities as well as the need for resolving specific crimes.

How might a system of restorative justice achieve its goals? In what ways would such a system differ from current criminal justice practice? While this article is not intended to explore these questions exhaustively, several general comments can be made. First, restorative justice advocates view crime as more than simply lawbreaking, an offense against governmental authority; crime is understood also to cause multiple injuries to victims, the community, and even the offender.[30] Second, proponents argue that the overarching purpose of the criminal justice *process* should be to repair those injuries.[31] Third, restorative justice advocates protest the civil government's apparent monopoly over society's response to crime. Victims, offenders, and their communities also must be involved at the earliest point and to the fullest extent possible. This suggests a collaborative effort, with civil government responsible for maintaining a basic framework of order, and the other parties responsible for restoring community peace and harmony. The work of civil government must be done in such a way that community

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justice and restorative justice. With regard to restorative justice, he explains that "[c]rime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance." *Id.* at 181.

Cragg, *supra* note 27, at 203, describes restorative justice as a process of "resolving conflicts in a manner that reduces recourse to the justified use of force."

Wright, *supra* note 25, agrees. The new model is one

> in which the response to crime would be, not to add to the harm caused, by imposing further harm on the offender, but to do as much as possible to restore the situation. The community offers aid to the victim; the offender is held accountable and required to make reparation. Attention would be given not only to the *outcome,* but also to evolving a *process* that respected the feelings and humanity of both the victim and the offender.

Id. at 112.

30 *See, e.g.,* Zehr, *supra* note 26, at 181–86.

31 *See, e.g.,* Wright, *supra* note 25, at 114–17 (proposing a system with the primary aim of restoring—or even improving—the victim's prior condition).

building is enhanced, or at least not hampered.[32]

The focus of restorative justice, then, is intentionally holistic. In a restorative paradigm, criminal justice is not merely a contest between the defendant and the state. Criminal justice must take into account, too, the rights and responsibilities of the victim and the community, as well as the injuries sustained by victim, offender, and community.

CHALLENGES

Ultimately, whole new institutional structures are likely to emerge from the restorative approach, just as the rehabilitation model gave birth to penitentiaries, probation and parole systems, and juvenile courts,[33] and as the just deserts model of fairness in sentencing gave rise to determinate sentences and sentencing guidelines.[34] One such initiative is victim–offender reconciliation, which permits these two parties to meet with a trained mediator to discuss the crime and its aftermath and to develop a strategy to "make things right."[35]

There is great value in model programs such as victim–offender reconciliation: they explore new horizons in criminal justice theory, and they provide data with which to evaluate and modify not only the programs but the theory behind them as well.[36] But more than models is needed—there is a continuing need for analytical precision in understanding the new vision, articulating purposes and outcomes, developing

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32 *See* section *infra* entitled "The Challenge to Structure Community–Government Cooperation."

33 *See* Edgardo Rotman, *Beyond Punishment* 21–57 (1990).

34 *See* Dean J. Spader, *Megatrends in Criminal Justice Theory,* 13 Am. J. Crim. L. 157, 180–95 (1986).

35 For an excellent description of victim–offender reconciliation programs, see Zehr, *supra* note 26, at 158–74.

36 This phenomenon has been aptly described as "theory overtaking practice" in Wright, *supra* note 25, at 41–45.

strategies for accomplishing those purposes, and evaluating results.[37]

Legal scholars and jurists can offer an invaluable service here, since a number of legal and jurisprudential challenges to criminal law and procedure are raised by the suggestion that a fundamental purpose of criminal justice should be to promote restoration of those touched by crime. This article examines four such challenges: (1) the challenge to abolish criminal law, (2) the challenge to rank multiple goals, (3) the challenge to determine harm rationally, and (4) the challenge to structure community-government cooperation.

The Challenge to Abolish Criminal Law

Currently, both the criminal law and the civil law of torts deal with intentional behavior by one person that violates the rights of another. In criminal cases, the offender is prosecuted by an agent of the government and punished; to convict, the prosecutor must prove the offender guilty beyond a reasonable doubt. In tort cases, the defendant-offender is sued by the plaintiff-victim and is required to pay damages or otherwise make right the harm done; the plaintiff must prove the defendant liable by a preponderance of the evidence.[38] But since the underlying harmful action is basically the same in criminal and tort cases, why are the two treated differently? The answer most often given is that while civil cases are concerned with the violation of individual rights, criminal cases are concerned with broader societal rights; criminal cases should not be initiated by victims, since vindication of public policy should not depend on an individual victim's decision to institute legal proceedings.[39]

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[37] It must be remembered that criminal justice history is filled with visionary people whose visions failed to be realized because they neglected to engage in the requisite analytical work. This phenomenon is neatly summarized in the title of Blake McKelvey's *American Prisons: A History of Good Intentions* (1977).

[38] For an excellent discussion of the distinctions between what he calls the criminal justice and the civil justice "paradigm," see Mann, *supra* note 2, at 1803-13.

[39] *But see id.* at 1812 n.61, where Mann argues that while this is the conventional argument for the paradigmatic distinction between criminal and civil justice, the practical

But as we have seen, excluding victims' interests from criminal cases is a relatively recent development. How does the emphasis in restorative justice on repairing the damage caused by crime affect our understanding of criminal law? Should a separate criminal law be maintained?

Randy Barnett and John Hagel, early proponents of restitution as a new paradigm of criminal justice, have argued for what would effectively be the end of criminal law, replacing it with the civil law of torts:

> A specific action is defined as criminal within the context of this theory only if it violates the right of one or more identifiable individuals to person and property. These individuals are the victims of the criminal act, and only the victims, by virtue of the past infringement of their rights, acquire the right to demand restitution from the criminal.
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> This is not to deny that criminal acts frequently have harmful effects upon other individuals besides the actual victims. All that is denied is that a harmful "effect," absent a specific infringement of rights, may vest rights in a third party.[40]

Barnett and Hagel define crime by examining not the offender's behavior but the victim's rights, particularly "the fundamental right of all individuals to be free in their person and property from the initiated use of force by others."[41] They agree that there may be broader social goals but argue that settling the private dispute will "vindicate the rights of the aggrieved party and thereby vindicate the rights of all persons."[42] Barnett and Hagel conclude that, among other things, this means there can be

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distinction is blurred by RICO statutes, which authorize private prosecution, and by SEC actions, in which the government is authorized to seek compensation for private individuals.

40 Randy E. Barnett & John Hagel, *Assessing the Criminal,* in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 1, 15 (Randy E. Barnett & John Hagel eds., 1977).

41 *Id.* at 11.

42 *Id.* at 25.

no "victimless crimes."

But vindicating the rights of direct victims does not vindicate the rights of all other persons. Though the injuries are not easy to quantify, *secondary victims* are also injured by crime:

> [C]rime imposes three distinct kinds of costs on its indirect victims. There are, first, the *avoidance costs* that are incurred by anyone who takes steps to minimize his chances of becoming the direct victim of crime. Installing locks and burglar alarms, avoiding unsafe areas, and paying for police protection, whether private or public, all fall into this category. Indirect victims may also have to pay *insurance costs*—costs that increase as the rate of crime in an area increases. And, finally, "as crime gives rise to fear, apprehension, insecurity, and social divisiveness," indirect victims are forced to bear the *attitudinal costs* of crime.[43]

Interestingly, these costs directly affect the right to be free in person and property that Barnett and Hagel espouse. This suggests that the first rationale for maintaining criminal law is that civil law fails adequately to vindicate the rights of secondary victims.

Second, criminal law offers more than vindication of individual rights. It also provides a controlled mechanism for dealing with those accused of crossing the boundaries of socially tolerable behavior. In a thoughtful and disturbing essay entitled "Retributive Hatred," Jeffrie Murphy notes that crime arouses "feelings of anger, resentment, and even hatred . . . toward wrongdoers."[44] He argues that criminal justice should restrain these feelings. "Rational and moral beings . . . want a world, not utterly free of retributive hatred, but one where this passion is both respected and seen as potentially dangerous, as in great need of reflective

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[43] Richard Dagger, *Restitution, Punishment, and Debts to Society,* in *Victims, Offenders, and Alternative Sanctions* 3, 4 (Joe Hudson & Burt Galaway eds., 1980) (citations omitted).

[44] Jeffrie G. Murphy, Retributive Hatred: An Essay on Criminal Liability and the Emotions 2 (paper presented at a conference on "Liability in Law and Morals," Bowling Green State University, Bowling Green, Ohio, United States, Apr. 15–17, 1988).

and institutional restraint."[45] While one may argue with his description of the desires of "rational and moral beings," few would dispute that the retributive impulse must be restrained.

Third, there are procedural advantages to governmentally prosecuted criminal cases. The experience of European countries that permit varying degrees of victim participation in the prosecution of criminal cases bears this out.[46] The victim typically lacks the expertise, financial resources, and time to prosecute. Furthermore, the goals of consistency, fairness, and efficiency can best be pursued by coordinated governmental action, since public prosecutors can weigh decisions in light of stated policies and rely on the help of investigatory agencies. Moreover, prosecutors are presumably less influenced than are victims by personal motivations such as revenge.[47]

In summary, maintaining the criminal law is desirable inasmuch as it provides an effective method of vindicating the rights of secondary victims, it restrains and channels in acceptable ways retributive emotions in society, and it offers procedural efficiencies in enforcing public values.

The Challenge to Rank Multiple Goals

Given that the overall purpose of restorative justice is to resist crime by building safe and strong communities, this goal can be achieved only when multiple parties (victims, offenders, communities, and governments) pursue multiple goals (recompense, vindication, reconciliation, reintegration, atonement, and so forth). Is it possible for so many parties

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45 *Id.* at 31.

46 *See, e.g.,* Matti Joutsen, *Listening to the Victim: The Victim's Role in European Criminal Justice Systems,* 34 Wayne L. Rev. 95 (1987).

47 *But see* Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution,* 52 Miss. L.J. 515, 555 (1982). Governmental prosecution of offenses also has its limitations: the prosecutor administers an agency of government with its own administrative, political, investigative, and adjudicative objectives, any of which can lead prosecutors to focus less on a just resolution of the particular case and more on the effective use of limited resources. In addition, political forces may lead prosecutors to cater to, rather than restrain, retributive impulses in the community.

to pursue so many goals in such a way as to achieve restoration?

The current criminal justice system faces the challenge of balancing multiple goals,[48] usually expressed as deterrence, incapacitation, rehabilitation, and retribution (desert). The first two can be classified as utilitarian, with the focus on crime control. The third can either be similarly classified or be justified as a social value in and of itself. The last limits the nature and extent of the sentence, emphasizing proportionality. Paul Robinson has suggested that the attempt to pursue these four goals raises questions at two levels. First, does any one of them (such as crime control or proportionality) take precedence as an overarching goal of criminal justice? Second, which of the goals have priority when they cannot all be accommodated (when, for example, rehabilitation is prevented by a sentence sufficiently harsh to deter others)?[49]

At first glance, this confusion appears to grow geometrically under the restorative justice model, which adds such goals as recompense and vindication. But, in fact, the more holistic perspective of restorative justice may actually help society successfully manage multiple goals because it identifies restoration as the overarching goal of criminal justice.

How can the goals of deterrence, incapacitation, rehabilitation, and retribution be organized so that they help achieve the overarching purpose of restoration? Robinson, a former member of the U.S. Sentencing Commission, has explored approaches that permit multiple goals to interact with each other in a principled and consistent way. He proposes that a first step is to clarify which goals *determine* the sentence and which simply *limit* the nature or duration of the sentence.[50] A "determining goal" requires that certain features be included in the sentence; it recommends a sentence. A "limiting goal," in contrast, requires that certain features be excluded.[51] So, for example, rehabilitation as a determining goal might produce a recommendation of an indefinite period of treatment, whereas desert as a limiting goal would

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48 Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions,* 82 Nw. U. L. Rev. 19 (1987).

49 *Id.* at 25–28.

50 *Id.* at 29–31.

51 *Id.*

establish maximum and minimum periods of time.

Although this approach was designed to rank sentencing purposes under the current paradigm, it could be adapted by restorative justice advocates. For example, with regard to specific crimes, the determining goal of the criminal justice process would be resolution of the conflict; community safety would be a limiting goal only. This means that restitution would be presumed and that sentences providing for incarceration, which effectively precludes or substantially delays restitution (since most offenders are impoverished and few prison industry programs exist), should be used solely as a last resort. Any social controls imposed on the offender should not unduly obstruct the determining goal of resolution.

Likewise, with reference to crime as a community phenomenon, the determining goal of the community and the government would be safety, with specific strategies limited by the need appropriately to resolve individual crimes when they occur. Similar analysis is needed in considering the other subsidiary goals: recompense and redress through the formal criminal justice system; rehabilitation and reconciliation through community-based programs. The challenge is to prioritize restorative outcomes over procedural goals. The test of any response to crime must be whether it is helping to restore the injured parties.

The Challenge to Determine Harm Rationally

The current paradigm of criminal justice gives scant attention to the harm resulting from the offense and focuses instead on the offender's actions and state of mind. The extent of harm to victims and their neighbors is, with some exceptions, ignored. When this form of injury is considered in offenses such as theft, it is only to establish the seriousness of the crime (misdemeanor versus felony), and the inquiry is typically limited to whether the property was worth more or less than a specific statutory amount.[52] Under recent sentencing and parole guidelines, the extent of harm also has been considered to determine the

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[52] *See, e.g.*, Ill. Ann. Stat. ch. 720, § 5/16-1(b) (1993) (providing that theft of property under $300 is a misdemeanor, and over that amount a felony).

length or severity of the sentence,[53] but again the categories are broad and general, and typically they are used to determine the amount of punishment as opposed to the amount of reparation.

In a restorative justice model, however, victim reparation is a determining goal. Consequently, calculating the amount of loss sustained by victims assumes great importance; to do such calculations, there must first be clarity about the kinds and extent of harms to be considered. This means that three categories of issue will need to be addressed: the kinds of victim to be reimbursed, how harms should be quantified, and how questions of disparity should be addressed.

WHAT KINDS OF VICTIMS SHOULD BE REIMBURSED?

Most people would intuitively define the victim as the person directly harmed by the offense—the person whose house was burglarized, for example. That person is certainly the primary victim. But others are also affected adversely by crime. Family members and neighbors may suffer increased fear, as well as direct and indirect financial costs. The criminal justice system (and the community as well) may be called on to expend resources. An employer may lose money because of the absence of a victim who is at court or in the hospital. And so on.

Which victims should be considered for reparation? The answer to this question may vary depending on the offense. For example, immediate family members of a homicide victim might be made eligible to recover the costs of psychiatric counseling, while members of a theft victim's family might not. But at a minimum, two groups of victims should always be eligible for restitution: the direct victim and the community, with the direct victim having priority over all secondary victims, including the community.

Alan Harland and Cathryn Rosen have made an excellent case for differentiating direct victims from their communities and, therefore, for treating restitution differently from community service:

> [U]nlike victim restitution that is based upon (and limited by) a case-by-case determination of victim injuries, the "harms" on

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[53] *E.g.*, Albert W. Alschuler, *The Failure of Sentencing Guidelines*, 58 U. Chi. L. Rev. 901, 908–15 (1991).

> which the offender's community service liability is predicated are far less specific, and the metric against which the amount of service owed is assessed tends to be no less arbitrary than the amount of a fine, probation, incarceration, or any other penal rather than compensatory sanction . . . . [I]t is perhaps not unreasonable to question whether community service has any claim at all to be part of the presumptive norm of restitution, and to ask why it is useful to continue to treat the two sanctions as merely different examples of a uniform concept.[54]

Harland and Rosen are right on all counts. But while this does not necessarily preclude the use of community service as a form of reparative sanction, it does require that we clarify the nature and extent of the harm done to the community, as well as the most appropriate means for the offender to repair that harm.

HOW DO WE QUANTIFY THE HARM THAT SHOULD BE REPAIRED?

While society incurs indirect costs as a result of crime, it is impossible to quantify with absolute accuracy the indirect costs related to a particular crime. But it is reasonable and necessary to make an effort at approximating these costs. Here the concept of "rough equivalences" developed by Norval Morris and Michael Tonry might be helpful.[55] They argue that pure equivalence between similar offenders is neither possible nor desirable. Instead, Morris and Tonry propose that the ideal should be to achieve "a rough equivalence of punishment that will allow room for the principled distribution of punishments on utilitarian grounds, unfettered by the miserable aim of making suffering equally painful."[56]

A similar approach could be taken in relating reparative sentences to levels of harm. While Harland and Rosen are right that such a system

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[54] Alan T. Harland & Cathryn J. Rosen, *Impediments to the Recovery of Restitution by Crime Victims,* 5(2) Violence & Victims 127, 132 (1990).

[55] Norval Morris & Michael H. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (1990).

[56] *Id.* at 31.

is more arbitrary than case-by-case restitution, it is certainly less arbitrary than current, entirely punitive sanctions. Criteria must be established and applied uniformly throughout the entire sentencing structure within a jurisdiction. Great Britain did this several years ago by devising guidelines for restitution. Ironically, they look a great deal like the Anglo-Saxon King Ethelbert's restitution schedules promulgated fourteen hundred years ago:

> Under guidelines sent to the country's 27,710 magistrates, attackers can be forced . . . to compensate their victims by the punch. Sample penalties: $84 for a simple graze, $168 for a black eye, $1,428 for a broken nose, $2,940 for a fractured jaw, and as much as $13,440 for a serious facial scar. Said Home Office Minister John Patten: "I am anxious that the victims get a better deal."[57]

Two things should be noted about the modern British approach: it restricts compensable harms to direct victims and it uses rough equivalences for the amount of restitution to be ordered.

While it is neither feasible nor, perhaps, desirable to attach monetary values to every conceivable type of harm, a serious effort to grapple with the issue is necessary. Otherwise, types and amounts of reparation may be simply arbitrary and no different in nature from the abstract "fine," except for who receives the money. If victims are to be paid back, and if offenders are to see their reparation as linked to the specific harm done, then restitution, like community service, should be as closely related to the particular injury as possible.

How Do We Avoid Unwarranted Disparity?

This leads us directly into the question of disparity—whether particular offenders or victims will receive orders for restitution that are not comparable to those given to other offenders or victims. Disparity can happen in several ways.

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[57] *World Notes: Socking It to the Bad Guys,* Time, Oct. 3, 1988, at 43; *see* Home Office Circ. No. 85/1988; Magistrates' Ass'n of England and Wales, *Sentencing Guidelines* at iv (1992).

First, if each offender is sentenced according to the type of offense alone, the restitution order may fail to reflect the actual harm caused, because similar offenders committing similar crimes can bring about dramatically different injuries. Consider two burglaries in which a vase is stolen—if one is from a five-and-ten-cent store while the other is an authentic Ming, treating the offenders alike because their actions were similar would have a disparate effect on the two victims.

Second, if each offender is sentenced according only to the actual harm caused, then similar illegal conduct may result in dramatically different sentences. In the preceding example, the offender who stole the Ming vase could take years to repay the victim, while replacing the dime-store vase would be a matter of days or hours. Both victims and offenders would therefore receive significantly different treatment.

Finally, differing circumstances on the part of victims and offenders may lead to a disparate effect even when the offense and the financial loss are the same. Wealthy offenders may be able to complete their sentences simply by writing a check, while impoverished offenders may have to work long and hard to satisfy the judgment. Similarly, wealthy victims may have far less trouble recovering from crime than those who are without adequate financial resources.

Of course, not all disparity is wrong, nor is it possible to avoid it entirely. However, justice requires that victims and offenders be treated consistently, and that as much as possible outcomes not fall more heavily on some than on others for social, economic, or political reasons.

The earlier discussion on balancing multiple goals may offer guidance here. Should the emphasis be on *consistency* in dealing with offenders' actions or on victims' *harms?* This question calls for a prioritization of goals. Since restoration is the determining goal, the issue of fairness becomes a limiting goal.[58] Therefore, in a restorative justice system, guidelines outlining minimum and maximum amounts of restitution might be established for particular offenses. These would be related to typical losses of primary and secondary victims. If an agreement were not reached through negotiation, victims would present evidence of their actual losses to the sentencing judge, who would then

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[58] In the United States, it is likely that constitutional provisions requiring equal protection and prohibiting cruel and unusual punishment would yield this result.

set an amount within the pertinent range.[59] If the actual loss were less than the minimum established, the victim would receive only the actual loss, and the balance would be set aside into a victim compensation fund for those victims whose loss exceeded the range.

A similar approach might help address the issue of economic imbalance between otherwise comparable offenders. The Swedish "day fine" approach, which bases the sanction on the offender's daily wages, multiplied by a figure that represents the seriousness of the offense, could be adopted here as well.[60] Once again, the determining goal would be reparation to the victim, and fairness would be a limiting goal. Under this approach, one offender might actually be ordered to pay less than the indicated amount of restitution, with the balance made up from a compensation fund; another offender might be required to pay more, with the excess going into that fund.

The Challenge to Structure Community-Government Cooperation

Under restorative justice, it is argued, civil government and the community cooperate both in enabling the victim and the offender to resolve the crime successfully and in building safe communities. Is this kind of cooperation feasible? Two concerns have been raised in this connection.

First, can community-based programs be linked with agencies of the criminal system without losing their restorative values? This concern has been sparked by the experience of some reconciliation and mediation programs in the United States and England, which started with visionary objectives and then found those goals being redirected by a much larger criminal justice system with its own—and different—vision. For example, a reconciliation program may begin to be measured by the *number* of offenders it diverts from prison, rather than by the peacemak-

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[59] "[G]iving offenders opportunities to demonstrate a willingness to accept responsibility for their offences is not incompatible with treating like cases alike and assuring that sentences arrived at reflect in appropriate ways the gravity of the offences committed." Cragg, *supra* note 27, at 216.

[60] Martin Wright, *Making Good: Prisons, Punishment, and Beyond* 87-88 (1982).

ing results of the mediation.[61]

Howard Zehr, a pioneer in reconciliation program development, has suggested three reasons that dependence on the criminal justice system can distort the vision of such programs: the criminal justice system's interests are retributive not restorative; its orientation is with the offender not the victim; and its inclination when challenged is self-preservation.[62] To these could be added the observation that the procedures of traditional criminal justice systems are coercive, which tends to mitigate against reconciliation or mediation.[63]

A second concern is that community–government collaboration will result in expanded state control. This is the well-known problem of net widening, and it happens in subtle ways.[64] Suppose, for example, that to develop credibility a community-based diversion program agrees to accept referrals of minor offenses from the local court. The court may respond by referring cases that are so minor they would have been dismissed otherwise. If offenders who fail to comply with the reconciliation agreement are then brought back before the judge and sentenced to jail or prison, the unintended effect of this arrangement, which was designed to be an *alternative* to incarceration, may actually be that more offenders are locked up.[65]

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61 Zehr, *supra* note 26, at 232–36.

62 Dependence on the criminal justice system is one of three forces that Zehr argues can lead to distortion of vision; the other two are nongovernmental. They include the "dynamics of institutionalization"—such as the need for easily quantified and achieved administrative goals and measurements to justify the organization's existence; the tendency for programs to take on the values of their funding sources; differences between the goals of leaders and staff; and the difficulty of building "prophetic" functions into the organization's structure. The second of these is the design and operation of the program. If goal conflicts are not identified and resolved early on, they carry the potential of diverting the organization from a visionary mission. A succession of seemingly small policy decisions may change the long-range direction of the organization. *Id.* at 233–35.

63 Cragg, *supra* note 27, at 199.

64 *See, e.g.,* Thomas G. Blomberg, *Widening the Net: An Anomaly in the Evaluation of Diversion Programs,* in *Handbook of Criminal Justice Evaluation* 572 (Malcolm W. Klein & Katherine S. Teilmann eds., 1980).

65 *See, e.g.,* Christa Pelikan, *Conflict Resolution between Victims and Offenders in Austria and in the Federal Republic of Germany,* in *Crime in Europe* 151, 164–65 (Frances

But government does not exist apart from society; it is part of society, with specific powers and interests. This observation suggests that community–government cooperation must be fluid and dynamic in keeping with the nature of society itself. And it permits us to draw certain conclusions about what can make the cooperation effective. First, such an undertaking requires that both parties share the same overarching goal, and not just *any* goal. It is likely even now that government and community share the common goal of security. If the mutual goal is to be restoration of the victim, as well as of community safety, then a significant political and public education campaign lies ahead. This is true in the community, as well as in the governmental sphere.

Second, influence flows both ways. Thus, community programs themselves have affected the structure and the goals of the criminal justice system. Peter Kratcoski has outlined a pattern of evolving volunteer activity in criminal justice. At the outset, private groups set up new programs. These programs then have to turn to government assistance when services outstrip existing private resources. At some point, however, the government begins to underwrite the program fully, using volunteers to fill in gaps.[66] An example is the probation system, which grew out of a volunteer program initiated by John Augustus in 1842. Eventually the program was absorbed into the criminal justice system, but with a continuing mission to help offenders.[67]

Third, although government and community must seek the same overarching goal, they also play different roles not only in responding to individual offenders and victims but also in establishing community safety. Both of these objectives must be pursued with equal vigor.

Heidensohn & Martin Farrell eds., 1991). Pelikan describes a pilot program in which prosecutors were granted discretionary authority to divert juvenile offenders into a mediation program, as well as the steps taken to avoid net widening.

[66] Peter C. Kratcoski, *Volunteers in Corrections,* 46(2) Fed. Probation 30 (1982).

[67] A report several years ago from the Missouri Probation and Parole Department stated that it viewed its mission as helping the community determine its goals for offenders under supervision and then helping the community achieve them. On this program, see Steve German, *Knowledge Is Not Enough: Addressing Client Needs in Probation and Parole,* in *Community Corrections* 15, 17 (Amer. Correctional Ass'n 1981).

While the obstacles to accomplishing this collaboration are daunting, we can be encouraged by reports from Japan. According to John Haley, criminal justice in that nation operates on two tracks. One is similar to the formal criminal justice system found in Western nations:

> Paralleling the formal process, however, is a second track to which there is no Western analogue. A pattern of confession, repentance and absolution dominates each stage of law enforcement in Japan. The players in the process include not only the authorities in new roles but also the offender and the victim. From the initial police interrogation to the final judicial hearing on sentencing, the vast majority of those accused of criminal offenses confess, display repentance, negotiate for their victims' pardon and submit to the mercy of the authorities. In return they are treated with extraordinary leniency; they gain at least the prospect of absolution by being dropped from the formal process altogether.[68]

To illustrate this leniency, Haley notes that prosecutors proceed in only about 5 percent of all prosecutable cases. The vast majority of such cases are handled in uncontested summary proceedings in which the maximum penalty is a fine of $1,000–1,350. By the time cases have reached this point, the offender has demonstrated remorse, paid restitution, and secured the victim's pardon. Haley concludes:

> In this respect the West, not Japan, should be considered remarkable. The moral imperative of forgiveness as a response to repentance is surely as much a part of the Judeo-Christian heritage as the East Asian tradition. . . . Whatever the reason, unlike Japan Western societies failed to develop institutional props for implementing such moral commands. Instead the legal institutions and processes of Western law both reflect and reinforce societal demands for retribution and revenge.[69]

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[68] Haley, *supra* note 14, at 195 (citation omitted).

[69] *Id.* at 204. Other observers have written about the distinctive role of apology and settlement in how the Japanese respond to crime. *See, e.g.,* Foote, *supra* note 13;

For a pattern like Japan's to develop in Western justice systems, victims and offenders (as well as the formal criminal justice system) will need to work together. But what if they fail to interact in the cooperative and voluntary way Haley describes? Clearly they cannot be forced to participate in community-based, informal mechanisms for repairing injuries; only the government is authorized to use this kind of force to secure participation in the criminal justice system.

Current criminal justice procedures are highly coercive for both victims and offenders. They are built on the reasonable assumption that not all defendants will willingly take part in the trial process or voluntarily complete their sentences. But they are also predicated on the assumption that not all *victims* will cooperate in the prosecution of their offenders; unwilling victims may have to be subpoenaed to testify at trial.

Restorative justice, with its emphasis on full and early participation of the parties in addressing the injuries caused by crime, places a premium on *voluntary* involvement. For offenders, this demonstrates willingness to assume responsibility for their actions. For victims, it reduces the likelihood that they will be victimized a second time by the formal or informal responses to crime. When such involvement is not forthcoming, however, what should happen? How this question is answered depends to a certain extent on whether the uncooperative party is the victim or the offender.

An uncooperative offender will need to have sufficient coercion applied to ensure participation in the criminal justice system. However, it should be the least amount of coercion necessary, and voluntary assumption of responsibility should be encouraged. Of course, there is no such thing as completely voluntary action in a coercive environment (as when an offender agrees to restitution during a victim-offender reconciliation meeting conducted before sentencing). But assumption of responsibility by the offender should be encouraged.

Victims may also choose to participate or not in the process. If they choose not to, they should be permitted to waive any rights they may have to pursue restitution as a part of the criminal case. The offender should then be required to make compensation payments to the

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Hiroshi Wagatsuma & Arthur Rosett, *The Implication of Apology: Law and Culture in Japan and the United States,* 20 Law & Soc'y Rev. 461 (1986).

victim compensation fund. However, there may be situations in which the actual and potential injuries to the community may necessitate the victim's involvement in order to secure a conviction. Under such circumstances, the government should have the authority (as it does today) to subpoena the victim as a witness. Yet even this should be done in a context that will be as protective and supportive as possible, in order that the victim's participation, though coerced, will still contribute to a measure of restoration.

CONCLUSION

Dissatisfaction with the current paradigm of criminal justice is leading to new programs with different visions. Some, such as restitution, can be incorporated into existing structures. Others, such as victim-offender reconciliation, point to a possible new approach to criminal justice—restorative justice. In some ways, restorative justice is simply a new application of an ancient vision. It is new wine from old vines. But those of us who celebrate the harvest are advised to remember the parable of new wine and old wineskins. Before we begin to pour—before we insert restorative features into familiar responses to crime—we would do well to reflect on what the consequences may be.

This article has considered four likely consequences: the challenge to abolish criminal law, the challenge to rank multiple goals, the challenge to determine harm rationally, and the challenge to structure community-government cooperation. Although each challenge is significant, I have argued that all can be effectively addressed. Indeed, they must be if criminal justice is to become—using Justice John Kelly's image—a means of healing the wounds of crime.