Coordinating Canada’s Restorative and Inclusionary Models of Criminal Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law†

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Canadian criminal justice has moved to a hybrid system involving a formal but inclusionary criminal trial as the predominant model with an informal restorative justice model as an increasingly significant alternative. This system invokes traditional punitive, rehabilitative and corrective elements yet deploys them in new institutionalized contexts. The formal inclusionary model integrates victims’ concerns at all levels from policing and prosecution through the trial to sentencing and parole, while maintaining due process protections for the accused. The informal restorative model responds to criminal harms by bringing together victims, offenders, their respective families and community representatives in deliberative processes which can result in accountability, reparation and community-based solutions that go to the root of crime causation.

Both the formal inclusionary and restorative models have advantages and limitations which need to be assessed prior to the exercise of official discretion to bring either into play. However, the basic legislative frameworks for these models found in the Criminal Code and Youth Criminal Justice Act are of necessity supplemented by ministerial authorizations, programme protocols and flexible guidelines to assist offenders, victims, police, prosecutors, defence counsel, judges, correctional officials, various professionals and community organizations in choosing appropriate options for the circumstances of any particular case. The legal profession in partic-

† This is a revised version of a presentation on March 5, 2004, at the Colloquium on the Legal Profession Organized by the Chief Justice of Ontario’s Advisory Committee on Professionalism, in Toronto, Ontario.

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ular must respond creatively to the flexible requirements of this hybrid system. Moreover, well-meaning but insufficiently comprehensive conceptualizations of the institutional alternatives in such cases as Gladue and Proulx could limit the potential of this intricate system unless understood restrictively and in context.

These developments in Canadian criminal justice reflect the postmodern conditions of our regulatory or supervisory state. Such participatory processes, rejecting a purely hierarchical approach, are characteristic of what has been termed a reflexive rule of law in deliberative constitutional democracies, and are parallel to legal evolution in other domains. If properly co-ordinated, these models have great potential for enhancing criminal justice in current Canadian society which exhibits increasing structural complexity, social diversity and public alienation from legal institutions. However, members of the legal profession, including bench, bar and chair, must accept their responsibilities and new obligations in order to endure the new hybrid system functions effectively.

La justice pénale au Canada s’est transformée en un système hybride comportant, comme modèle prédominant, un processus pénal formel mais inclusif, et, comme alternative prenant de plus en plus d’importance, un modèle informel de justice restauratrice. Ce dernier fait appel aux éléments traditionnels que sont la position, la réhabilitation et la correction tout en les utilisant dans de nouveaux contextes institutionnalisés. Le modèle inclusif et formel incorpore à tous les niveaux les préoccupations des victimes, que ce soit au niveau du maintien de l’ordre, de la poursuite pendant le procès, de la détermination de la peine et de la libération conditionnelle, tout en maintenant l’application régulière des règles de protection pour l’accusé. Le modèle restaurateur informel aborde la question des préjudices subis par les victimes, les contrevenants, leurs familles respectives et les représentants des communautés à des processus de réflexion qui peuvent mener à des solutions fondées sur la responsabilité, la réparation et la communauté qui s’attaque aux causes mêmes de la criminalité.

Les modèles inclusif et restaurateur comportent tous deux des avantages et des limites qui doivent être évalués avant que ne soit exercé le pouvoir discrétionnaire officiel de choisir l’application de l’un ou l’autre de ces modèles. Cependant, les codes législatifs de base de ces modèles, qui se retrouvent dans le Code criminel dans la Loi sur le système de justice pénale pour les adolescents, sont parfois complexités des autorisations ministérielles, des protocoles de programmes et des lignes directrices flexibles. Ils visent tous à aider les contrevenants, les victimes, les policiers, les avocats de la poursuite et de la défense, les juges, les agents correctionnels, divers professionnels et organismes de la communauté à choisir les solutions les plus appropriées en fonction des circonstances de chaque cas. La profession juridique, en particulier, se doit de répondre de façon créative aux exigences flexibles de ce système hybride. De plus, des conceptualisations de solutions de rechange institutionnelles qui sont certes bien pensantes mais pas assez complètes, comme celles que l’on retrouve dans les affaires Gladue et Proulx, pourraient limiter le potentiel de ce système complexe, à moins qu’elles ne soient comprises de façon stricte et dans leur contexte.

Ces développements au sein de la justice pénale au Canada reflètent les conditions post-modernes de notre état de type réglementaire ou de surveillance. De 1

A. Introduction

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

The article outlines the historical origins and current significance of traditional adversarial models of justice (punitive, rehabilitative and corrective), and explains how these have mutated into a model of criminal justice

1 J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Democracy (Cambridge, Mass.: MIT Press, 1998); or, for a more accessible presentation of these ideas, J. Habermas, The Inclusion of the Other (Cambridge, Mass.: MIT Press, 1998).
which is procedurally formal but inclusive of victims’ interests. This formal
inclusionary model is to be contrasted with the more flexible restorative
model which has recently been adopted, in varying degrees and in various
guises (for both youth and adult criminal justice), and which operates in
tandem with the formal, inclusionary approach.

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

The article concludes with an assessment of the capacities of the new,
inTEGRATED system of hybrid criminal justice to meet the goals set for it in the
relatively recent sentencing provisions of the Criminal Code and in the poli-
cies of the new Youth Criminal Justice Act. It is argued that these pieces
of legislation, and their procedural implementation, provide a reasonably
appropriate, postmodern institutional response to a diverse Canadian popu-
lation which is demanding differentiated, flexible, participatory structures
capable of embodying the values of autonomy, equality and relationships of
mutual respect in the maintenance of criminal justice. These systemically
integrated criminal justice models, if properly balanced and administered,
represent an advanced reflexive form of the rule of law, entirely consistent
with the expectations of a deliberative understanding of democracy. Legal
professionalism in the context of this postmodern hybrid model of criminal
justice requires a flexible and responsive approach to the new participatory
processes.

B. Traditional Adversarial Models of Criminal Justice

1. Pre-Modern Punitive Criminal Justice

The punitive model of criminal justice, with which we are all familiar,
combines two intuitively attractive notions: (a) people who break the rules

deserve punishment and (b) only this response will deter them and others
from doing so in the future. The significance of just desert can often be
exaggerated; Sir James Fitzjames Stephen, drafter of the 19th century reform
proposal upon which our Criminal Code of 1892 was based, opined that it
was “right to hate criminals.” As a theory of punishment, the punitive model
has its roots in Judeo-Christian ideas about individual responsibility for one’s
actions, although Immanuel Kant’s philosophical justification of punish-
ment as a categorical imperative is revived by modern theorists who justify
punishment for crime in notions of re-establishing equality thrown out of
balance by the offender who has abused the rights of others by selfishly
taking advantage of them through the commission of crime. Some punish-
ments, such as corporal punishment or the fine, have virtually no utility
other than calling people to account in deterrent fashion and making them
suffer for their legal transgressions. The punitive justification for punishment
also underlies the idea that offenders who serve their sentences “pay their
debt to society” thereby “righting the balance,” and upon release can get on
with their lives as now respectable citizens, potentially having their criminal
records expunged under the Criminal Records Act.

To the extent that the punitive model relies on a theory of deterrence,
however, it is severely undermined by criminological research, which con-
sistently indicates that tinkering with sentence severity to enhance general

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CrawfordBC 779 (S.C.C.).
7 S.C. 2002, c. 1, as amended.
8 For an enlightened analysis of the origins of the punitive model in England, see D. Hay,
Albin’s Fatal Tree: Crime and Society in Eighteenth Century England (London: A. Lane, 1975); also Hugues Parent, “Essai sur la notion de responsabilité pénale : analyse sociolo-
at 80; G. Parker, “The Origins of the Canadian Criminal Code” in D. Flaherty, ed., Essays in
10 J. Crawford and J. Quinn, The Christian Foundations of Criminal Responsibility: A Philo-
osophical Study of Legal Reasoning (N.Y.: Edwin Mellen Press, 1991); H. Berman, Law
and Revolution: The Formation of the Western Legal Tradition (Cambridge, Mass.: Har-
dard U. Press, 1983). There are, of course, different strains of Christian doctrine which
impact on notions of criminal justice; see T. Richard Snyder, The Protestant Ethic and the
Spirit of Punishment (Grand Rapids: Eerdmans, 2000).
509; Guyora Binder, “Punishment Theory: Moral or Political?” (2002) 5 Buffalo Crim. L.
Rev. 321.
12 J. G. Murphy and J. Hampton, Forgiveness and Mercy (Cambridge: Cambridge U. Press,
1988).
13 On the history of corporal punishment, see Norval Morris and David Rothman, eds., The
with this purpose in mind.
15 Criminal Records Act, R.S.C. 1985, c. C-47; see also, Murphy and Hampton, supra, note
deterrence does not work as a strategy to control crime.16 Generally, law abiding citizens are deterred simply by the denunciation of the prohibited behaviour as criminal and the concomitant potential for their getting caught, but raising levels of punishment actually has little effect on the criminally inclined.17 To the extent that the punitive model relies on imprisonment for purposes of specific deterrence, faith in its efficacy is sapped by studies which demonstrate that lengthy terms of imprisonment are associated with higher, rather than lower, rates of recidivism.18 The punitive model may also invoke in aid the notion of incapacitation—imprisonment and capital punishment may get offenders off the streets, temporarily or permanently, and these penalties are punitive!19 However, the utility of incapacitation is incidental to the punitive purpose. Despite the scientific information which undercuts the effectiveness of the pre-modern, punitive model of criminal justice, it retains a powerful hold on the popular imagination as evidenced by the entertainment and news media,20 and continues to influence heavily the actions of politicians.21

Though retributive punishment as a purpose for the criminal sanction has been effectively criticized for more than a century,22 there is a fundamental sense in which any penal sanction imposed by the state can always be seen as a punitive burden from the perspective of an offender.23 The political struggles of the 18th century for bills of rights and procedural due process were born out of harsh punitive justice systems being imposed by emerging nation-states.24 Modern revivals of "just deserts" approaches to sentencing similarly are explicitly punitive in their justifications for the criminal sanction.25 However, they have often adopted the stance of "limiting retributivism", that is, regardless of its purpose, punishment is to be proportional to the harm caused by the crime and no more.26 This is an ancient insight, of course, since the Talmudic Lex Talionis principle of "an eye for an eye and a tooth for a tooth" was meant not to promote revenge as a positive good, but rather to limit its excesses in a form of proportional retribution—you are not to take an eye for the mere loss of a tooth.27 The point is that the pre-modern, punitive model of criminal justice, discredited though it may be in the eyes of many, reactively spawned procedural protections which are of enduring importance.

2. Modern Rehabilitative Criminal Justice

The period of modernity for purposes of criminal justice can be said to have begun with the penal reform movement of the mid-19th century28 and to have continued until after the Second World War.29 The "backward" punitive model of criminal justice was challenged by successive waves of reformers committed to "forward-looking" utilitarian approaches to crime based on rehabilitation and treatment of offenders.30 Social and medical sciences were harnessed to criminal justice policy so as to castigate the punitive model as a relic of a primitive era of barbarous revenge.31 The new approach was most comprehensively adopted in relation to juvenile justice

17 The significance of communication in postmodern justifications for "punishment" is discussed, infra.
18 Paula Smith, Claire Goggin, and Paul Gendreau, The Impact of Incarceration and Intermediate Sanctions on Recidivism: General Effects and Individual Differences, (Ottawa; Dept. of the Solicitor General, 2002); Canadian Centre for Justice Statistics, Corrections Utilization Study: A Review of the National and International Literature and Recommendations for a National Study on Recidivism (Ottawa, January 1997).
19 This notion, of course, muddies the conceptual purity of the models presented here, in that incapacitation, while justifiable on punitive grounds, is primarily a utilitarian justification for the criminal sanction.
20 The Daily News, published in Halifax N.S. is typical. Hardly a day goes by without a story decrying the laxity of a criminal justice system which has given yet another offender something "less than" imprisonment as a sentence. The most recent example may be the headline in the Daily News, Monday, February 2, 2004: "Poll: Get Tough on Youth Crime. Exclusive: most metro residents want courts to clamp down, blanc lax parenting for wild children". The story, based on an Omnifacts Research poll sponsored by the paper, has no coherent reporting or analysis of official crime data to counter the reported reader opinions.
21 The delicate balancing act choreographed by Anne MacLellan, the then Minister of Justice, in shepherding the Youth Criminal Justice Act through Parliament is typical. She had to respond to the "get tough on crime" lobby which advocated a largely punitive approach, while recognizing the policy requirements dictated by sober understanding of the criminological evidence which demonstrated the superiority of other approaches.
22 This is the "modern" critique of punishment, see Part B. 2., infra.
where punishment was rejected in favour of paternalistic education, rehabilitation and treatment of wayward children. However, the rehabilitative ideal had a strong impact on adult justice as well. Punishment was even banished as a formal purpose of sentencing by some provincial courts of appeal. The push toward rehabilitation was reinforced institutionally by the creation of the federal parole system, provincial probation systems and successive royal commissions which were strongly oriented to reducing crime through the rehabilitation of offenders. During this period it was never clear that the general public was entirely convinced of the modern rehabilitative approach, and there were holdouts for the virtues of the punitive model among some prominent publicists.

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

By the 1970s the huge institutional edifice of the modern rehabilitative model of justice was falling into disrepute. Institutionalization of offenders was not having the desired rehabilitative consequences. Treating many offenders was difficult, expensive and often unsuccessful. Some frustrated practitioners of criminology proclaimed with credibility that "nothing works". Others protest that things don’t work unless properly funded. However, the postwar welfare state was on its last legs, and the time was ripe for a paradigm shift in criminal justice. Before moving to that paradigm shift, however, there is an important gap to be filled relating to victims and corrective justice.

3. Eclipsed Corrective or Compensatory Justice

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

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32 This was the theory of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3.
33 In Nova Scotia, the leading case of sentencing, R. v. Grady (1974), 10 N.S.R. (2d) 90, 1974 CarwellNS 175 (N.S. C.A.), held that the purpose of sentencing was the protection of the public, and that this purpose was to be attained by deterrence or rehabilitation or a combination of both. Retribution or punishment were no longer invoked. This was not the case in other jurisdictions where R. v. Morris et al. (1970), 1 C.C.C. (2d) 317, 12 C.R.N.S. 302, 1970 CarwellSask 117 (Sask. C.A.), was often cited as the leading case and which retained reference to retribution.
35 C.S. Lewis, "The Humanitarian Theory of Punishment", 1953, being a bitingly ironic attack on the potential totalitarian distortions of the rehabilitative ideal.
41 An exception to this, however, was the system’s response to mental disorder defence, where the rehabilitative ideal retained some semblance of validity: see Marc E. Schiffer, Mental Disorder and the Criminal Trial Process (Toronto: Butterworths, 1978). A slightly different approach followed in R. v. Swan, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 63 C.C.C. (3d) 481, 1991 CarwellOn 93, 1991 CarwellOn 106 (S.C.C.), and the statutory reform precipitated by that case, which introduced “Part XX:1 Mental Disorder” into the Criminal Code: S.C. 1991, c. 43.
42 This was recognized somewhat belatedly in Canada through the Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Minister of Supply and Services, 1987).
continental Europe, there developed in modern common law states no general provision for full compensation to victims on the general principles of tort damages in the criminal trial. It is true that the Canadian Criminal Code has for many years contained provisions allowing for the restitution of easily ascertainable damages to victims of crime. However, this procedure falls short of full compensation for general damages for such things as pain and suffering that one can recover in tort. In recognition of the uncertainties of civil litigation, and the inadequacies of restitution orders against perpetrators of crime, there emerged during the heyday of the modern welfare state separate administrative systems for the compensation of victims of crime.

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

4. Retreat from Punitive and Rehabilitative Adversarial Paradigms

The general perception of the traditional punitive and modern rehabilitative models in Canada by the end of the 1980's was a scepticism about

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48 Now found in Criminal Code, s. 738.


52 See Roach, supra, note 3. "Mothers against Drunk Drivers" (MADD) has sometimes been cast, perhaps unfairly, in this role.


the validity of their substantive and procedural characteristics on the part of many participants in the criminal justice system. A host of pressures led Crown and defense counsel to shy away from trials in favour of plea bargained outcomes, which may have been entirely comprehensible from the professional perspective but were often misunderstood by victims and the general public. Negotiated pleas shifted attention to the sentencing process, and there was widespread dissatisfaction with uncertainty about sentencing purposes and disparities in sentencing outcomes. Meanwhile, the Law Reform Commission of Canada, pursuant to a federal government "white paper", was engaged in a wholesale review of Canadian substantive criminal law and criminal procedure which led to voluminous reports to Parliament which were, for the most part, never acted upon. The stage was set for a retreat from the punitive and rehabilitative models of criminal justice as clothe in their bi-partite adversarial trappings. However, the political process could not deliver the long-contemplated, wholesale criminal justice reform, which seemed a politically explosive product. The result was an incremental shift toward a new inclusionary model of criminal justice.

C. A Formal Inclusionary Model of Criminal Justice

1. Victims and Postmodern Criminal Justice

The most significant influence for reform on Canadian criminal justice within the last twenty years has been the victims' rights movement. In part this has been driven by victims' lobby groups, test case litigation, and rational policy development in response thereto. However, there has been
mandate consultation with victims on whether to lay charges. The Criminal Code requires justices to take victims' interests into account in bail hearings. Prosecution services across the country have virtually all adopted guidelines or directives encouraging consultation with victims prior to making key decisions in relation to plea bargaining and sentencing submissions. Establishing the victim's right to privacy of personal records, in the face of the accused's right to disclosure, involved a controversial balancing act which was finally stabilized by the Supreme Court's acceptance of Parliament's legitimating the position of its dissenting judges from a previous case.

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

2. Formal Criminal Justice with Victim Participation

Victim-inclusive criminal justice now commences with policing and carries through to corrections and the appellate process. This has resulted in part from federal legislation in the areas of criminal law, criminal procedure and corrections, and in part from the advent of "victims' bills of rights" which exist in all provinces and affect provincial authorities in their administration of criminal justice. In the pre-trial context, police protocols now

62 A reluctance to engage, which is rooted in prudence and ethical constraints: see for example, Nova Scotia Barristers' Society, Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia (Halifax, 1990) at c. 22, "Public Appearances and Public Statements by Lawyers".
64 See generally, J. Barrett, Balancing Charter Interests: Victims' Rights and Third Party Remedies, looseleaf (Toronto: Carswell, 2001); inclusion of victims is also characteristic of youth justice: see Kent Rouch, "The Role of Crime Victims under the Youth Criminal Justice Act" (2003) 40 Alberta L. Rev. 965.
65 For a collection of these documents see Barrett, ibid.
66 This a topic canvassed by the Report of the Ontario Attorney General's Advisory Committee, On the Role of Victims and Their Advocates in the Criminal Justice System, Crown Prosecution Service, (Report submitted to the Minister of Attorney General) (Toronto: Queen's Printer, 1993), and has been reinforced by the trend toward community policing; see J. Chako and S. Nanoco, Community Policing in Canada (Toronto: Scholar's Press, 1993).
67 Section 518(1)(d.2).
68 For example, Nova Scotia Public Prosecution Service, Crown Attorney's Manual, "Spousal/Partner Violence Policy", supra, note 68; or Federal Prosecution Service Deskbook, Chapter 20, "Plea and Sentence Discussions and Issue Resolution", where under the heading "Openness and Fairness" one reads: "Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case—in particular, the victim and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel."
persons, regulate cross-examination of the complainant by certain persons, and allow bans on publication of information revealing the identity of the complainant.73

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

Finally, victim participation is now encouraged in the post-trial phases of criminal justice. Since 1992, victims have been entitled to information concerning offenders serving sentences in institutions, may submit victim impact statements for the consideration of the Parole Board, and may be granted the opportunity to attend Parole Board hearings.78 Victims have been granted the possibility of participating in special jury hearings under the so-called “faint hope clause” of the Criminal Code79 whereby offenders serving life sentences for murder may apply for early release on parole. In an analogous legislative development, victims may also participate in proceedings of Review Boards dealing with accused persons found not criminally responsible by reason of mental disorder.80 An equally important category of victim participation is the possibility of being granted status as intervener in appellate proceedings.81

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

3. Continuing Punitive, Rehabilitative and Corrective Elements

The formal inclusionary trial has not been entirely deprived of its older punitive, rehabilitative and corrective aspects. However, these aspects have been recast to a significant degree by the sentencing reforms which ran more or less parallel to the victim-driven procedural changes.83 These changes, which finally became effective in 1997, formalized the utilitarian purposes of the criminal sanction,84 while subjecting them to sentencing limitations based on the principle of proportionality.85 Thus, Parliament has rejected a punitive purpose for criminal justice, while restricting its punitive effects through principles of limiting retributivism originally rooted in an assessment of the punitive impact of the criminal sanction.86

The closest Parliament now comes to endorsing a pre-modern punitive approach to crime is the recognition that among the objectives of sentencing are included denunciation of and accountability for unlawful conduct, deterrence of the offender and others, and separating offenders from society, where necessary.87 This is a sanitized version of the punitive justification, based on communicative theories of action rather than retribution.88 These objectives, of course, are also justifiable on utilitarian grounds. On the other hand, the modern treatment approach is specifically accepted in the subsec-

73 Criminal Code, s. 486.
74 Criminal Code, ss. 722 to 722.2.
76 The Crown is sometimes in a difficult position, being required by the Criminal Code to introduce the victim impact statement, while not necessarily agreeing with its contents.
77 Criminal Code, s. 737.
80 Criminal Code ss. 672.5, 672.54 and 672.541, following from S.C. 1999, c. 25.
83 Unlike the Law Reform Commission of Canada’s proposals for reform of substantive and procedural law, supra, which met a dead end, the proposals for reform of the Canadian Sentencing Commission became the subject of Parliamentary study which led to partial legislative implementation: Standing Committee on Justice and the Solicitor General, Taking Responsibility (the Dauphney Committee Report) (Ottawa: Queen’s Printer, 1988).
84 Criminal Code, s. 718, states that the fundamental purpose of sentencing is to contribute, along with other crime prevention measures, to the maintenance of a “just, peaceful and safe society” through sanctions which have one or more of the following objectives: denunciation, deterrence, incapacitation, rehabilitation, reparation of harm and promotion of a sense of responsibility among offenders. This despite the views of the Supreme Court of Canada in R. v. M. (A.A.), [1996] 1 S.C.R. 500, 46 C.R. (4th) 269, 105 C.C.C. (3d) 527, 1996 CarswellBC 1000, 1996 CarswellBC 1000F (S.C.C.), which purported to recognize retribution as a formal purpose of the criminal sanction.
85 Criminal Code, s. 718.1, states a fundamental limiting principle in sentencing: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 sets out corollary principles of aggravation and mitigation, parity, totality, and restraint (in two guises).
86 The extent to which this crucial distinction has not been appreciated by the Supreme Court of Canada in R. v. Proulx, supra, will be discussed below.
87 Criminal Code, paras. 718(a), (b) and (c).
88 R.A. Duff, supra, note 23.
tion which says an objective of sentencing is “to assist in rehabilitating offenders”, and implicitly in the subsection which says it is also an objective “to promote a sense of responsibility in offenders, and acknowledgement of harm done to the victim and to the community.” This treatment orientation can be operationalized not only in carceral institutions but also through the possibility of voluntary treatment in probation orders and mandatory treatment orders in conditional sentences of imprisonment to be served in the community. Thus the formal inclusionary model maintains a strong commitment to modern utilitarianism while relegating the punitive notion to limiting retributivism.

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

4. Advantages and Limitations of the Formal Inclusionary Model

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

The major disadvantages of the formal inclusionary model are also intimately connected to its due process characteristics. The formal trial is professionalized, putting offenders and victims alike at arms length from fashioning solutions which are in the hands of counsel and the judge. Procedural protections and rules of evidence limit the scope of issues and evidence, such that the underlying causes of crime and its resolution cannot be fully explored. While the inclusionary model expands participation for victims, the families of victims and offenders as well as other members of the community are usually shut out of the process. These defects, among others, have given rise to pressures for a less formal and more broadly restorative model of criminal justice.

100 Need one do more than remind the Canadian reader of the names Truscott, Milgaard, Marshall, Morin, Johnson, Parsons, etc.?
102 In a famous article Nils Christie speaking of lawyers having “stolen the conflict” from those affected: "Conflict as Property" (1977) 17 British Journal of Criminology 1.
103 The underlying principle of evidence law is Thayer’s canonization of the notion of relevance: all relevant evidence is admissible but only relevant evidence is admissible: James Bradley Thayer, Preliminary Treatise on the Law of Evidence at Common Law (Boston: Little Brown, 1898). For the application of this principle in Canada see R. v. Morris, 36 C.R. (3d) 1 (1985) 2 S.C.R. 190, 7 C.C.C. (3d) 97, 1983 CarswellBC 695, 1983 CarswellBC 730 (S.C.C.). Relevance applies narrowly to offence elements and defence at the criminal trial, but may also be applied relatively strictly in the sentencing hearing, particularly in relation to contested facts: see Criminal Code, ss. 720-729.
D. A Flexible Restorative Model of Criminal Justice

1. Restorative Justice Goals and Principles

Restorative justice can be defined, in this context, as the restoration of relationships and reparation of criminal harms based on values of equality, mutual respect and concern, through deliberative processes involving victims, offenders and representatives of their respective communities under the guidance of skilled facilitators. There are a number of aspects of this definition which warrant emphasis. Firstly, the offender and the victim are seen as embedded in a web of relationships which are disrupted by the occurrence of the crime. Restorative justice is not just concerned with rehabilitating the offender as an isolated individual or improving the lot of an isolated victim, but rather using the offence as an opportunity to identify the community circumstances which contribute to crime causation and re-establishing healthy community relationships for offenders and victims based on values of equality and mutual respect. Secondly, restorative justice is here responding to violations of victims’ rights occurring through criminal conduct contrary to norms established by a democratic legislature. In other words, restorative justice in the criminal realm is not merely about balancing interests between victim and offender, and restorative process is therefore not simply civil mediation or alternative dispute resolution (“ADR”), the purpose of which is “getting to yes”. Thirdly, as a corollary to the last point, restorative justice in response to crime is a process in which offenders’ and victims’ rights must be protected through procedural standards applied by trained facilitators. This is an area for a supervisory, though not necessarily controlling, role for the state. Finally, restorative process must be a broadly deliberative one, capable of embracing the participation not only of victims and offenders, but also of their families and those in the community either affected by the crime or capable of contributing to a restorative resolution. Restorative justice cannot thus be uniquely the concern of criminal justice system professionals.

2. Restorative Justice Methods and Techniques

Consistent with the above definition, operationalization of restorative justice is primarily reliant on recent breakthroughs in restorative process variously called family group conferencing, community conferencing, community justice forums, and circle decision-making. Regardless of the label used, these restorative methods bring together victim, offender and significant other community players to discuss appropriate responses to the criminal behaviour. These processes can be compendiously referred to as restorative conferencing. This restorative conferencing is to be contrasted with “case conferencing” which is also encouraged now under the Youth Criminal Justice Act. Case conferences often bring together professionals such as police officers, probation officers, social workers as well as the offender and his or her family members in order to discuss an appropriate resolution to a case. Case conferences can be an effective means to ensure counselling and treatment resources are helpfully focussed on an offender. However, they are essentially a product of the rehabilitative model of justice to the extent they rely predominantly on professionals seeking treatment for offenders, rather than on broadly deliberative processes involving victims and members of the community seeking consensus-based collective solu-


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

109 Daniel W. Van Neas and Karen Hoedtstra Strong, Restoring Justice, 2nd ed. (Cincinnati: Anderson, 2002). See also the discussion in Part E of this article, infra.


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

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

114 See sources cited, infra at note 135.

tions. Case conferencing can be a useful adjunct to restorative processes insofar as a restorative conference may identify a need for a rehabilitative approach, but the two types of conference are different in their practices and proceed from different conceptual foundations.

I have previously described restorative conferencing in terms which bear virtual repetition here.116 Restorative conferencing is a significant advance over what has been called “dyadic victim-offender mediation.”117 A trained facilitator gathers together the victim and her supporters (family and/or friends),118 the offender and his supporters (family and/or friends),119 secondary victims, and members of the community (whose knowledge is known and respected by both victim and offender).120 Often, the justice system is represented by a police officer who is familiar with the facts of the incident.121 Experience shows that the psychological “group dynamic” which occurs in a restorative conference can be very different than a simple mediation ses-


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

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

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

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

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

122 Victims and their supporters are much more likely to bring home to offenders the impact that the harmful behaviour has had on their lives.123 Offenders frequently offer heartfelt apologies which go well beyond the ritualized guilty plea of court process or the exculpatory claims of defence counsel in sentencing hearings.124 Supporters and community participants can make contributions that move offenders and victims from their initial entrenched perceptions.125 Offenders can acknowledge the wrongfulness of their behaviour, while not being stigmatized as social outcasts.126 Victims not only obtain reparation, but can often find psychological and emotional closure, while alleviating fears of further victimization.127 Interestingly, victims, who in the restorative conference see offenders not as faceless monsters but rather fellow human beings with problems of their own, often suggest positive rehabilitative or reparative measures to assist offenders and reduce re-offending.128 The open discussions, unconstrained by formal rules of evidence as in a sentencing hearing, frequently identify the causes of the offending behaviour and the existence of family or community resources capable of contributing to lasting solutions which can be missed by courts.129 The emotional temperature typically rises with many participants sharing fears during the discussions which seem to cement consensus outcomes.

Healing is a word commonly used to describe the results of restorative
conferencing, and in the best of circumstances it is healing for victims, offenders and the community as well.\textsuperscript{130}

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

\textsuperscript{130} Van Ness, supra, note 128; Stuart, supra, note 98; Kurki, infra, note 155, and Braithwaite, supra, note 117.

\textsuperscript{131} In the early 1970’s, the insights of labelling theory led to programs for diverting young/first time offenders from the justice system on the theory that stigmatization through criminal convictions led to increased recidivism. Law Reform Commission of Canada, Working Paper 7, Diversion (Ottawa: Dept. of Supply and Services, 1975); S. Moyer, Diversion from the Juvenile Justice System and Its Impact on Children: A Review of the Literature (Ottawa: Solicitor General of Canada/Research Div., 1980); and J. Aubuchon, “Model for Community Diversion” (1978) 20 Can. J. of Criminology 296; although courts were not always accepting of the procedural implications: see, for example, R. v. Jones (1978), 40 C.C.C. (2d) 175, 4 C.R. (3d) 76, 1978 CarswellBC 410 (B.C. S.C.).

\textsuperscript{132} Both of these forms of diversion are encouraged in the new Youth Criminal Justice Act, ss. 6-9. See Nicholas Bala, “Diversion, Conferencing and Extra-judicial Measures for Adolescent Offenders” (2003) 40 Alberta Law Review 991.


\textsuperscript{134} This is the label used in Criminal Code, s. 717, as a generic term in the provisions which are used to establish adult restorative justice programs.


\textsuperscript{136} One example is the Nova Scotia Restorative Justice Program, online: <www.gov.ns.ca/juss/ejrfj-contents.htm> See also: B. Archibald, “A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures in Response to Crime” in D. Stuart, R.J. Delisle and A. Manson, Toward a Clear and Just

3. Offenders, Victims, Communities and the State

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

The Parliament of Canada represents the whole policy where normative prescriptions concerning criminal law and procedure are at issue.\textsuperscript{140} The

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\textsuperscript{138} The Church Council on Justice and Corrections, Satisfying justice: Safe Community Options that Attempt to Repair Harm from Crime and Reduce the Use of Length of Imprisonment (Ottawa: Correctional Services of Canada, 1996).

\textsuperscript{139} See Nova Scotia Restorative Justice Framework Document at <www.gov.ns.ca/just/ejrfj-framework.htm> The procedural implications of this approach for the exercise of discretion are discussed below in Part E. Belgium is another jurisdiction which appears to be moving in this direction.

\textsuperscript{140} Constitution Act, 1867, s. 91(27). This approach must bracket issues relating to aboriginal treaty rights in the area of criminal justice: see Melissa S. Williams, “Criminal Justice,
substantive content of criminal offences and the manner in which they are to be dealt with procedurally are matters for political debate and democratic decision making at the federal level. Thus participants in restorative conferences are not to determine what is criminal and what is not, nor whether an accused should be accorded due process protections. However, the administration of criminal justice, including the control of police and prosecutorial discretion respecting crimes, is largely a matter of provincial jurisdiction. While it has been held that provinces need not necessarily introduce alternative justice schemes where authorized to do so under federal legislation, once a province has exercised its authority to do so, the structure of, say, a restorative justice program is a matter for determination by the provincial government. Restorative conferences are not in a position to simply take the administration of justice into their own hands, even where pre-charge proceedings may never be reviewed by a court (unlike the situation in circle sentencing). It is not surprising, therefore, that the federal legislation authorizing the creation of restorative justice regimes establishes minimum procedural safeguards for their operation. Nor is it surprising that within this framework, provincial governments have elaborated protocols which further structure the exercise of discretion by those conducting restorative processes. Provincial authorities are establishing practice standards for training of facilitators and others in the community involved in the provision of restorative conferencing. Thus, while restorative justice ought to be a community centered process, it is not one which is outside the ambit of state supervision in the interests of ensuring basic program uniformity and equality of service, as well as protection of minimum standards of procedural justice.

While the normative force of federal law in criminal matters has been the formal rule since Confederation in 1867, recent developments in Canada have been acclimatizing legal professionals, politicians and the general public to the notion that cultural diversity can be recognized appropriately in some criminal justice contexts. The injustices suffered by Canada’s aboriginal peoples in relation to criminal law have not only raised awareness of problems, but pointed to culturally sensitive solutions to criminal justice issues. Not the least of these have been circle sentencing initiatives which have gained prominence worldwide in the literature on restorative justice.

147 This is occurring presently in Nova Scotia under the guidance of the Nova Scotia Dept. of Justice’s Restorative Justice Program Management Committee; see also Minnesota Dept. of Corrections, Facilitating Restorative Group Conferences, with Assistance from the National Institute of Corrections, 2000.


151 See Lilles and Stuart, supra, note 135; or M. Jaccoud, “Les cercles de guérison et les
A critical question is whether analogous restorative conferencing, which is based on community participation, can be as successful in large, socially stratified, culturally diverse urban centres as in relatively homogeneous and geographically discrete rural or aboriginal communities. The harnessing of conflict resolution mechanisms within established urban subcultures seems an obvious possibility for restorative justice programs. Indeed, practitioners of restorative justice claim with some credibility, that the criminal harms which are brought to the attention of the justice system can be opportunities for community building despite cultural differences and that the process of restorative conferencing in the hands of a skilled facilitator can recognize and strengthen communities of harm across eraswhile cultural barriers. The point is that restorative justice principles and techniques provide the wherewithall to recognize collectivities which mediate between individuals and the system at large, and which form a legitimate station between abstract “public interest” and partisan “self-interest”. Within the context of general criminal justice structures erected by the democratic institutions of the state, there is room for recognition of community interests, in urban as well as rural settings, which can be culturally specific.

4. The Pros and Cons of Restorative Justice

As to the advantages of restorative justice, there is a growing body of empirical research which evaluates programs along four significant dimensions. Firstly, the literature is virtually unanimous that those affected by crime, whether offenders, victims or others, find greater satisfaction in restorative justice processes than in formal criminal proceedings.

rates of offender compliance with agreed restorative outcomes are higher than rates of compliance with court imposed outcomes in such dispositions as probation orders and conditional discharges. Thirdly, where restorative justice outcomes replace standard sentencing outcomes rather than widening the net of criminal justice control over those who might have received only a police caution or warning, restorative justice is more economically efficient than the regular court process. Finally, there is mounting evidence that restorative justice processes reduce recidivism rates more effectively than formal criminal justice outcomes when other variables are statistically controlled in an appropriate manner. These are not inconsequential advantages, and they should go some distance toward calming the fears of restorative justice sceptics.

The “cons” of restorative justice are a number of concerns at levels of both principle and formal implementation. Firstly, there is the matter of proportionality in responses to crime. Among those who emphasize the punitive value in criminal sanctions, there is a concern that restorative justice methods are “soft on crime”. Those personally familiar with restorative conferencing are often concerned that the process and its outcomes are far more harsh than criminal dispositions, such as absolute or conditional discharges or probation, often meted out in similar circumstances. From either perspective, the question of fairness and proportionality of sanctions is problematic. Secondly, and related to the first concern, there is one of equality. That some cases may be the subject of restorative process while

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

1. The Legislative Framework: Criminal Code and Youth Criminal Justice Act

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

A second aspect of this legislative coordination is the establishment of minimum legislative standards for the restorative process, also mentioned above. The details are instructive and include: discretionary consideration of the needs of offender, victim, and society; the implementation of the offender’s right to counsel; the offender’s “taking of responsibility” for the offence; the sufficiency of the evidence to proceed to a trial if need be; an evidentiary privilege against use of admissions or confessions in subsequent civil or criminal proceedings; a double jeopardy rule against subsequent punishment where a restorative agreement has been fulfilled; and the mitigation of punishment in a subsequent proceeding if a previous restorative agreement is partially fulfilled. Thus, informed consent with advice from

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


169 Criminal Code, s. 717(2), states that alternative measures are not to be used if the alleged offender “(a) denies participation or involvement in the commission of the offence; or (b) expresses the wish to have any charge . . . dealt with by the court”. See also YCJA, s. 50(2).

170 Criminal Code, s. 717(1), and YCJA, s. 10(2).

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

172 Criminal Code, subs. 717(1) (4) and YCJA, subs. 10(2) (5).
counsel, and protection from adverse consequences should the restorative process fail and require a formal proceeding, are the hallmarks of the legislative protection of the relationship between the two models.

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

As noted previously, the Criminal Code and Youth Criminal Justice Act establish the statutory framework for formal inclusionary and restorative models of criminal justice, but the implementation of this hybrid system lies primarily with provincial attorneys general. Those provinces, such as Saskatchewan and Nova Scotia, which have implemented comprehensive programs for restorative justice have established rigorous and relatively detailed protocols which define the nature of the alternative measures within the province. These protocols may be supplemented by guidelines and service contracts with community restorative justice agencies which put more flesh on the meagre bones of the federal statutory framework. The Nova Scotia Restorative Justice Program Authorization, for example, sets four broad and ambitious goals. It aims to (i) reduce recidivism; (ii) increase victim satisfaction; (iii) strengthen communities; and (iv) increase public confidence in the justice system. The Nova Scotia Restorative Justice Protocol then describes how the program is to provide a voice and involvement for the victim and the community by such means as early involvement, victim support, victim and community participation, updates on processes and outcomes, and input in program decision making. Next the protocol describes the processes by which offenders, with input from victims and community, may repair the harm caused by the offence, be re-integrated in positive ways into the community, and be held accountable in meaningful ways. The Nova Scotia protocol also sets out requirements for restorative justice agencies, the community partners, with respect to assessing victim needs and willingness to participate, assessing offenders and their acceptance of responsibility, assessing community needs and capacities for participation, exploring possible restorative options, preparing potential participants for restorative conferences, facilitating the restorative processes, and providing follow-up services, including monitoring compliance with conference outcomes.

Critical to the practical exercise of discretion by justice officials under the Nova Scotia Restorative Justice Program, taking it as a comprehensive example of the genre, are the continuum of options under the protocol, and the eligibility criteria for invoking the restorative model. The range of options is interesting because it recognizes a need to distinguish among different procedural possibilities in accordance with the circumstances of the individual case. Thus police and Crown cautions are the least liberty-intrusive and least costly option. Cautions are included in the program protocol for minor cases, not because they are thought to be “restorative” in the true sense of the definition of restorative justice given above, but in order to avoid the problem of “widening the net”, needlessly stigmatizing young people, and unnecessarily increasing the costs and administrative burdens of the program. The next set of options are called “restoratively oriented” processes and really consist of individual and group “accountability sessions”. These are usually meetings between police or justice officials on the one hand and the offender and his parents or family on the other to work out a mechanism by which the offender can be properly held accountable. While often helpful and cost effective, the absence of the both the victim and his or her supporters and other concerned members of the community prevents accountability sessions from having the full characteristics and advantages of restorative conferencing. The final group in the continuum of options under the Nova Scotia protocol is designated as “restorative justice processes” and includes victim-offender conferences, restorative conferences and sentencing circles. As discussed previously, sentencing circles and restorative conferences can clearly be seen as full restorative options. On the other hand, victim-offender conferences (essentially mediation) are certainly more restorative than accountability sessions, but would not be included under the rubric of restor-

174 Supra, notes 136, 139 and 146.
175 Other provinces have implemented alternative measures programs which are not so comprehensive: see Ontario, Alternative Measures Program: Policy and Procedures Manual (Toronto: Queen’s Printer, 1995).
176 For example, see Nova Scotia Dept. of Justice, Restorative Justice Program Protocols (Halifax, March 31, 2000). These protocols are also available on line, but are currently under revision.
177 Supra, note 146.
178 There are currently nine such agencies in the province with which the Nova Scotia Dept. of Justice has service contracts. Eight cover geographical areas which divide up the whole of the province. One deals with aboriginal offenders, regardless of where they reside in the province.
179 There are legitimate criminal justice policy reasons for this “diversion based” option. The diversion literature cited above provides justification for avoiding the negative, stigmatizing impact of needless use of criminal justice processes (including increased recidivism); see note 131, supra. However, while cautioning may be helpful for offenders and critical to the effective operation of the Restorative Justice Program, it should not be thought a full blown “restorative process”: Police and Crown cautions, of course, are now formally recognized in YCJA, ss. 6 through 9 but were used in Nova Scotia prior to the advent of that legislation, and can be used in relation to adult offenders under the Criminal Code as an exercise of common law police and prosecutorial discretion.
180 These sessions may be compared with police warning sessions in certain jurisdictions which are sometimes linked to John Braithwaite’s controversial theory of restorative justice based on “re-integrative” as opposed to "stigmatizing" shaming; see Richard Young, “Just Cops Doing Shameful Business: Police-Led Restorative Justice and the Lessons of Research” in Allison Morris and Gabrielle Maxwell, Restorative Justice for Juveniles: Conferencing, Mediation and Circles (Oxford: Hart, 2001); these accountability sessions also share characteristics with the case conferences described above.
ative justice processes by those who see community participation and community interests as an integral part of restorative justice.\(^\text{181}\) The general point to be made, however, is that a provincially promulgated restorative model under the federal statutory framework can structure official discretion in relation to a complex number of alternatives. Doing this in a fair manner is a critical concern for a justice system under a Charter requirement to adhere to principles of fundamental justice.\(^\text{182}\)

Knowing that a restorative model of justice is available and that there are a number of options within it, how are police, prosecutors or correctional officials to exercise their discretion in routing offenders via one direction or another? The federal statutory frameworks provide some guidance for these discretionary decisions; however, provincial programs may contain additional eligibility criteria. The Nova Scotia protocol speaks of: the cooperation of the youth; the harm done to the victim, and her willingness to participate; the desire or need of the community to achieve a restorative result; the seriousness of the offence and the motive behind its commission; the relationship between offender and victim prior to the offence and prospects for a continued relationship; the potential for an agreement which would be meaningful to the victim; whether the offender has participated in such a program in the past; whether other government or prosecutorial policies conflict with a restorative justice referral; and any other reasonable factors deemed to be exceptional and worthy of consideration. With respect to the operationalization of the exercise of discretion in relation to such factors, there must be institutional rewards or pressures to advert seriously to the choice between formal and restorative models in such a hybrid system. In Nova Scotia, the approach taken in relation to youth crime is to require a “restorative justice checklist” to be filled out prior to the laying of a charge.


3. Participatory Process and Responsive Professionalism

What is the fit between these new participatory processes (whether it be the formal inclusionary model or the flexible restorative model) and a responsive approach by legal professionals? Firstly, in the hybrid criminal justice system under discussion here, there are particular concerns about institutional and professional competence in relation to the new restorative model. We go to great lengths to ensure that those in charge of the formal criminal justice system, whether lawyers, judges or others, are trained and sufficiently experienced to carry out their responsibilities. What assurances must there be that the facilitators and community members involved in restorative processes have adequate levels of competence? There are practice standards emerging.\(^{185}\) It is recognized that certain facilitative techniques

\(^{182}\) See Archibald, "The Politics of Prosecutorial Discretion...", supra, note 3.

\(^{183}\) Police compliance with procedure in the early days was quite variable; see Don Clairmont, *Nova Scotia Restorative Justice Program Evaluation*, supra, note 121.

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

\(^{185}\) See Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Ministers of Public Works and Government Services, 2003); David B. Moore and John MacDonald, *Community Conference Kit: Transformative Justice Australia*, Sydney (undated, on file with the author and available online); P. McCold and B. Wachtel, *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* (Washington, D.C.: U.S. Dept. of Justice/National Institute of Justice, 1998 (also at the International Institute for Restorative Justice Practices website, and for the police service to indicate why the restorative model has been rejected if formal charges are to be laid.\(^\text{183}\)

As mentioned previously, the Nova Scotia restorative justice program encourages use of restorative processes at four junctures in the criminal justice process: pre-charge, post-charge, post-conviction and post-sentence. Just because the restorative model was rejected at an earlier phase in the process does not mean that it cannot be invoked at a later one. Participants may change attitudes or assessments of the situation. Moreover, for certain serious offences, a restorative process is only to be invoked at the post-conviction and post-sentence stages.\(^\text{184}\) The basic statutory frameworks and the provincial protocol just described structure the exercise of discretion at these four critical moments. The rule of law requires that broad discretion of the type involved here be subject to protocols or guidelines to structure its exercise in order to avoid, to the extent possible, problems in relation to proportionality, equality and security referred to above as some of the "cons" of restorative justice. However, discretion is still a matter of professional judgement even when official guidance is provided. This raises the question of responsive professionalism.
work while others do not. A cottage industry is developing in facilitator training. Restorative justice is now on the curriculum in undergraduate criminology departments in Canada. The restorative model is gradually being placed on a sound institutional footing in so far as personnel development is concerned.

There is evidence, however, of a certain recalcitrance on the part of legal professionals to embrace participatory processes. Don Clairmont in his first evaluation of the Nova Scotia restorative justice program talked of the program “hitting a wall”, like a marathon runner, when it encountered prosecutors, defence lawyers, judges and correctional officials. Professor Clairmont’s empirical data demonstrated that police were making large numbers of restorative justice referrals, while there were comparatively few from prosecutors, judges and correctional personnel. Moreover, in interviews with stakeholders, it was members of the legal profession, including defence counsel who tended to express the most skepticism about the new restorative model of justice. Perhaps this should not be surprising. Law schools and professional continuing education have long been dedicated to ensuring professional competence rooted in traditional adversarial proceedings. While mediation and ADR have been making inroads in the practice of civil litigators and among certain practitioners of administrative law, the traditional appeal of the adversarial model of criminal justice has been harder to overcome. However, restorative justice is now on the curriculum in at least one Canadian law school.

In this context, a professionalism which is responsive to the new participatory forms of criminal justice is required. The agenda for continuing

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

187 Supra note 121, “Year One Evaluation”.

188 Supra note 121. This is true for all three years of evaluation.

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


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


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

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


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

Continuing judicial education faces similar needs. In fact, in order to enhance prospects for restorative process beyond “diversion” at the front end of the justice system, the need for judicial training in the area may be the most critical. After all, attorneys-general can promulgate guidelines to bring prosecutors on board (more or less) with the requirements of the hybrid model. However, without legislative change mandating the use of restorative conferencing in the post-conviction stages, judicial education may be one of the few tools available to advance the potential of the restorative model. This, of course, is because circle sentencing, the use of advisory elders panels, or referral to community led restorative conferencing is a matter of the exercise of sentencing discretion. There are celebrated examples of judges taking the initiative with circle sentencing and circle sentencing has become significant in some Canadian jurisdictions. However, there is clear reticence among some trial court judges to leap into the waters of restorative justice without some instruction in swimming and practice in controlled aquatic conditions. Once again, the simulation of circle sentencing or restorative conferencing, supplemented by lecture and discussions about their values and techniques, would seem to be the best manner in which to encourage responsive judicial professionalism with respect to hybrid models of justice. Moreover, the dangers of having the judiciary set unfortunate examples with respect to the relationship between the formal inclusionary

and flexible restorative models may be particularly far reaching. Judicial misconceptions can take on the mantle of precedent as the following section is intended to demonstrate.

4. Interpreting Problematic Precedents: Gladue and Proulx

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

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

205 See, on this point, the debate in response to Roberts and Stenning, supra, note 150.
208 R. v. Proulx, supra, note 5 at 40 [C.R.].
209 Ibid. at 14.
Court’s undermining of the notion of limiting as opposed to punitive retributivism actually began with the case of R. v. M. (C.A.) where the court endorsed the idea that punishment was a purpose of sentencing in Canada. This was at the same time when Parliament was enacting a statutory statement of the purposes and objectives of sentencing which eschews any reference to the concept of punishment. Section 718 of the Criminal Code now sets out utilitarian purposes and objectives for sentencing, subject to the limiting principle of proportionality in section 718.1, and its corollaries in section 718.2. The problem with Gladue and Proulx is that they set up a false dichotomy, implicit in Gladue and explicit in Proulx, between punitive and restorative justice, and ascribe to each a substantive and procedural content which renders more difficult the task of integrating the formal inclusionary and restorative justice models as they have emerged from Parliamentary and governmental policy.

Proulx identifies denunciation, deterrence and separation as “punitive objectives” of sentencing to be achieved primarily by incarceration, and identifies rehabilitation, reparation and promotion of a sense of responsibility as “restorative objectives” of sentencing, to be achieved primarily by less coercive dispositions such as probation and conditional discharges. Conditional sentences of imprisonment are a sort of halfway house since “a conditional sentence can achieve both punitive and restorative objectives.” This is an oversimplified classification at a substantive level which does not recognize the potential rehabilitative aspects of certain carceral options, nor does it recognize the denunciatory, deterrent and incapacitative aspects of some restoratively achieved outcomes. Moreover, the Court in Proulx clearly associates restorative justice with being “soft on crime” and incarceration with being “tough where it counts.” In procedural terms, restorative justice is associated with lenient and largely rehabilitative sentencing options and punitive justice with incarceration as a sentencing option—aspects of a formal process only. There is no hint that the restorative model is a theory of justice exemplified by a broad, flexible range of restorative conferencing practices that can be usefully invoked at pre-charge, pre-trial, sentencing and correctional stages of the criminal justice system. Not surprisingly, Gladue, since it is a case of an aboriginal offender, unlike Proulx, does make reference to “healing and sentencing circles” in the context of a discussion about restorative justice. The court might then, have been expected to advert in Proulx to the broader procedural aspects of restorative justice derivable from Gladue. However, both cases are sentencing appeals, and the prominent brandishing of “punitive objectives” combined with a rather distortive dis-

111 R. v. Proulx, supra, note 5 at 37 [C.R.].
113 R. v. Gladue, supra, note 4 at 224 [C.R.].

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

1. Deliberative Democracy and a Reflexive Rule of Law

There is a fundamental sense in which the Canadian shift away from punitive and rehabilitative paradigms of criminal justice toward the inclusionary adversarial and restorative models is reflective of, and explained by, contemporary theories of deliberative democracy. The insufficiencies of the minimalist, liberal, laissez-faire capitalist state of the 19th century gave way to the regulatory, republican or social democratic model of the mid-20th century. The basic legal and political human rights of the eighteenth and nineteenth centuries were overtaken by an uneven implementation of social and economic rights through social democratic governments or centrist governments under pressure from the left. As mentioned above, the ebbing fortunes of the punitive criminal justice in the face of rising confidence in the rehabilitative capacities of the modern welfare state tracked these broader political developments. However, public confidence in the capacities of the state to provide cradle to grave well being has been greatly undermined, for better or for worse, in much of the western democratic world. In the late 20th century, much of the alienation from the welfare state, however, was rooted not just in criticism from the economic right that governments could not run efficient economic enterprises, but also in a

215 See especially the work of Habermas and of Kymlicka, supra, notes 1 and 2 and Brainvaile, note 159.

...
popular antagonism to the overbearing bureaucratic tendencies of big government, even when it distributed some degree of largesse. Thus a confluence of pressures from both right and left have contributed to the movement of western governments in the last decade to abandon public ownership of economic enterprises, to downsize government, reduce deficits that emerged from mismanaged Keynesianism, and generally to dismantle the institutions of the welfare state. But what emerges in the 21st century is not a simple return to the minimalist liberal state of the 19th century and its raw capitalism, but rather a conversion of the welfare state into what is being called the supervisory or regulatory state. The latter attempts to maintain some capacity to influence economic, social and cultural policy, even in hostile international conditions of economic, social and cultural globalization.

Canadian citizens of the postmodern era seem to demand it. Jurgen Habermas brilliantly encapsulates the deficiencies of traditional liberal and social democratic visions of the state in Between Facts and Norms:

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

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

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

Essential characteristics of politics in postmodern democracies, however, are an absence of universal values, cultural pluralism and great social and economic diversity among the citizenry. As the "sacred canopy" of religious, social and cultural homogeneity (if it ever existed) is definitively torn asunder, deliberative democracy becomes an exercise in articulating values which can be shared, and gathering disparate individuals and communities together in an inclusive manner, which enable the society to function at national, provincial and local levels. As other institutions in civil society increasingly represent partial economic, cultural and social interests, law and legal institutions take on increasingly important roles in communicating common ground and mediating or adjudicating among conflicting individual and collective claims. As Habermas says, postmodern societies are integrated "... not only through values norms and mutual understanding, but also systemically through markets [including labour] and the administrative [lawful] use of power." Law is linked to all these integrative mech-


222 Habermas, in translation uses the term "supervisory state" in Facts and Norms, whereas John Braithwaite speaks of a "responsive regulatory state" in Restorative Justice and Responsive Regulation, supra, note 159. See also, Christine Parker and John Braithwaite, "Regulation" in P. Cane and M. Tushnet, The Oxford Handbook of Legal Studies, ibid.


224 At 407-408.

225 Ibid. at 409.
anisms and, when all else fails, law is the coercive glue holding society/the state together.

2. The Supervisory State and Reflexive Criminal Law in Context

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

Regulation of labour markets may be one of the first examples of reflexive law in Canada. Early employment law displayed the characteristics of hierarchical, direct regulation by the state in the form of such things as child labour laws and maximum hours of work legislation. This direct, top-down approach to legal regulation of the labour market is still evident in the various Canadian labour standards codes which govern almost exclusively (with human rights legislation) in the non-unionized sectors. However, during and after the Second World War, Canadian jurisdictions adopted trade union acts on the American “Wagner Act” model which granted effective rights to employees to unionize in systems as supervised by specialized public labour relations boards, but largely self-regulating through the mechanisms of collective bargaining and private arbitration as between unions and individual employers. This is a paradigmatic example of reflexive law in action (labour law) in tandem with hierarchical, state law as the default

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240 The new mediation/arbitration system is very popular, particularly in high volume jurisdictions such as Ontario.
241 This, of course, was an adaptation by the supervisory state of pre-modern forms of matrimonial property familiar to Europe and introduced into modern continental civil codes of the 19th century: see Alistair Bissett-Johnson and Winnifred Holland, with J. MacLeod and A. Manno, eds., Matrimonial Property Law in Canada (Toronto: Carswell, 1980 (with current looseleaf). The postmodern era sees ADR and restorative practices advanced in family law contexts though not without contest: see Ronald Murphy, “Is the Turn Toward Collaborative Law a Turn Away from Justice?” (2004) 42 Family Court Review 460.
242 See E. Hughes, A. Lucas, and W. Tillemann, Environmental Law and Policy (Toronto: Emond Montgomery, 1993); also, Todd Archibald, Kenneth Jull and Kent Roach, Regul atory and Corporate Liability: From Due Diligence to Risk Management (Aurora: Canada Law Book, 2004), which makes explicit reference to restorative justice in this field, with heavy and appropriate reliance on the work of John Braithwaite.
law are common in Canada. The emergence of formal inclusionary and flexible restorative models of criminal justice are part of a familiar pattern of reflexive law in postmodern deliberative democracy. Just as in other areas of law straightforward hierarchical regulation has given way to more complex, participatory forms of state administration, so too with criminal justice.  

3. Coordinated Participatory Models and Criminal Justice Policy Objectives

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

Both models "contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society." Both models can be used to "denounce unlawful conduct", even if the symbolic denunciatory power of restorative justice is more easily undermined by a news media which does not have the time or the interest to explain its subtleties. Both models can be used to "deter the offender and other persons from committing offences" to the extent that deterrence is effective at all. Both models may be used in conjunction with "separating offenders from society", as long as one understands that restorative justice can be used at sentencing and correctional stages of justice and is not merely relevant as a matter of pre-trial diversion. Both models are relevant "to assisting in rehabilitating offenders" if one appreciates that skillful classification of offenders in accordance with their needs and identification of relevant treatment resources can be an outcome of restorative conferencing as well as an adversarial sentencing disposition. Both models may "provide reparations for harm done to victims or to the community", although restorative conferencing has been shown to do this in a more satisfying way for participants than formal sentencing hearings. Both models may "promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community", even if this is often more difficult to do effectively in a formal sentencing hearing. All of the objectives of the imposition of the criminal sanction can be attained to one degree or another by either the formal inclusionary model or the flexible restorative model, the trick is to determine which model is best for the circumstances of each case and to exercise discretion appropriately to steer it in the most useful direction. The statutory rules and program guidelines discussed above provide the basis for making such decisions in a just and fair manner.

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

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

The legal profession has the opportunity to respond positively and creatively to Canada's hybrid, participatory system of criminal justice. It is

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246 On this point see generally, John Braithwaite "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", supra, note 162.
247 Criminal Code, s. 718.
248 Ibid., para. 718(a).
249 Ibid., para. 718(b).
250 Ibid., para. 718(c).
251 Ibid., para. 718(d).
252 Ibid., para. 718(e).
253 Ibid., para. 718(f).
254 Criminal Code, s. 718.1
255 Criminal Code, para. 718.2(a).
256 Criminal Code, paras. 718.2(b) and (c).
257 Criminal Code, paras. 718.2(d) and (e).
a system characterized by considerable intricacy. The formal inclusionary model provides due process benchmarks for the provision of criminal justice across the country, while the flexible restorative model enables the criminal justice system to respond to the various needs of victims, offenders, their families and communities. The hybrid system is a sophisticated response to diversity through a reflexive rule of law in a deliberative democracy functioning under sometimes confusing postmodern conditions. However, we are no longer in the experimental stages of this hybrid system, but relatively far advanced in the process of its implementation. The legal profession in Canada must accept its responsibilities and understand its full potential as a key component in this complex yet robust new set of criminal processes. Participatory criminal justice is with us to stay and much is to be done in perfecting its details.

The Effect of Pre-Sentence Custody on Eligibility for a Conditional Sentence†

Patrick Healy*

If credit for pre-sentence custody brings a sentence below two years the offender is eligible for a conditional sentence, provided that the offender otherwise meets the requirements for such a disposition. This argument is supported by principle, the Code and the authorities.

Si la peine d’un contrevenant passe en deça de la barre de deux ans en raison de la sous-traction du temps de détention préventive, celui-ci devient alors admissible à une peine d’emprisonnement avec sursis, pourvu cepéendant qu’il satisfasse aux conditions pour l’imposition d’une telle peine. Cet argument trouve son fondement dans un principe, dans le Code et dans la doctrine et la jurisprudence.

A. Introduction

Although the Supreme Court does not frequently hear sentencing cases, R. v. Fice† presents an opportunity to resolve the division of opinion that now exists concerning the effect of pre-trial custody on the eligibility of an

† This article is a reply to Julian V. Roberts, “Pre-Trial Custody, Terms of Imprisonment and the Conditional Sentence: Crediting ‘Dead Time’ to Effect ‘Regime Change’ in Sentencing” (2005) 9 Can. Crim. L.R. 191. Professor Roberts and I had fun arguing about this. As a matter of fact, we respect and like each other, each making generous allowance for imprudence, error and incorrigible faults in the other. When this was finished we went to play tennis—together—with no remission for faults.

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