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Restorative Justice and the Rule of Law: Rethinking Due Process through a Relational Theory of Rights

Restorative approaches to criminal justice can be reconciled with fundamental notions of the rule of law through a relational understanding of rights. Firstly, the paper demonstrates how theories of rights have evolved from a liberal understanding in representative democracies, where individual rights holders can trump the interests of others, to a relational theory where rights embody values which structure appropriate relationships among citizens. Second, the paper shows that relational theory can explain how formal criminal justice and restorative justice in a deliberate democracy interrelate, while embodying different, though compatible, rights, duties and remedies among wrongdoers, victims, communities and justice system authorities. Third, the paper invokes a relational understanding of administrative law to chart an approach to judicial review of restorative justice processes, which can reinforce their deliberative and participatory nature through vindication of relational rights and remedies, without simply returning cases to criminal courts. Finally, the paper details the substantive and procedural administrative law standards to be applied in reviewing restorative justice. The conclusion asserts that a relational understanding of the role and rule of law in relation to restorative justice promotes relationships of equality based on mutual concern, respect and dignity in ways that can enhance justice and social solidarity in a deliberative democracy.

Certaines approches restauratives à la justice pénale peuvent être mises en accord avec le principe de la légalité par le biais d'une conception relationnelle des droits fondamentaux. En premier lieu, on constate que les théories des droits fondamentaux ont evolué d'une appréciation libérale implicite dans la démocratie représentative (où un droit individual peut se jouer comme un atout contre les intérêts des autres), envers une théorie relationelle des droits fondamentaux dans la démocratie délibérative (où les droits fondamentaux se conçoivent comme des liens sociaux appropriés entre citoyens). Deuxièmement, il est démontré que la théorie relationnelle explique la façon par laquelle on peut relier la justice pénale formelle à la justice restaurative, tout en reconnaissant qu'il existe des différents, mais compatibles, droits, obligations, et recours parmi les malfaiteurs, victimes, communautés et autorités impliqués dans les deux systèmes. Troisièmement, une compréhension relationnelle du droit administratif est employée pour créer une approche à la revision judiciaire des procédés restauratifs qui renforce leur nature délibérative et participatoire, tout en soutenant des droits et des recours relationnels, et sans un renvoi simpliste aux tribunaux criminels. Quatrièmement, un contenu substantif et procédural des règles du droit administratif applicable à la révision des procédés restauratifs est élaboré. En conclusion, on prétend qu'une vision relationnelle du rôle du principe de la légalité en ce qui a trait à la justice restaurative peut promouvoir des relations sociales d'égalité, de la sollicitude réciproque et du respect pour la dignité d'autrui, par des moyens qui mettent en valeur la justice et la solidarité sociale dans une démocratie délibérative.

* Professor of Law, Dalhousie University, Schulich School of Law. A Paper Based on Remarks Originally Prepared for Presentation at The 14th World Conference of the International Institute of Restorative Practices held jointly with The Nova Scotia Restorative Justice Community-University Research Alliance, Halifax, Nova Scotia, Canada, 15–17 June 2011. The author would like to acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada through its Nova Scotia Restorative Justice-Community University Research Alliance grant (online: <www.nsrj-cura.ca>), and the research assistance of Mark Stebbins, Jessica Schofield, and Amanda Fricker at Dalhousie University, Schulich School of Law, in the preparation of this paper. In the early stages of this project, the views of Darrel Carmichael, then of the Nova Scotia Public Prosecution Service, were particularly helpful. The paper was improved by discussions among the researchers of the NSRJ-CURA and its community stakeholders during the course of the grant. The author would also like to thank colleagues Diana Ginn and Sheila Wildeman at Dalhousie University, Professor Tony Foley at the Australian National University, and Professor Nessa Lynch at the University of Victoria (Wellington), for carefully reading and commenting on the penultimate draft, as well as reactions from participants during seminars in the United Kingdom law faculties at Leicester and Brunel universities in the fall of 2012. Helpful comments from the anonymous external reviewer have also improved the final version. Terry O'Connell, the intrepid former Australian police officer and expert restorative justice proponent, has also been most helpful and encouraging. None of these generous people are responsible for the errors and omissions.

Introduction

Restorative justice is coming of age as an institutionally entrenched aspect of legal systems in many constitutional democracies.[1] But despite the initial hopes of many restorative justice advocates,[2] the advent of permanent restorative justice programs beyond pilot project status has not led to the withering away of formal, adversarial criminal justice institutions. Scholars and practitioners have given some attention to the linkages between traditional justice processes and restorative justice approaches—where one should be used as opposed to the other, or where each can be used to complement the other.[3] But less attention has been given to the question of what standards of fairness ought to infuse various restorative processes once there is agreement to put them in motion.[4] Both ordinary citizens and jurists have more or less clear notions of what due process means in relation to criminal trials. But there does not appear to be a consensus among restorative justice practitioners or theorists, to

1. Nova Scotia, Canada, New Zealand, and Belgium are prominent examples. See Bruce Archibald & Jennifer Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dal LJ 297; New Zealand, Ministry of Justice, *Overview of Restorative Justice in New Zealand* (December 2010), online: New Zealand Ministry of Justice <http://www.justice.govt.nz>; and Ivo Aertsen & Tony Peters, "Mediation and Restorative Justice in Belgium" (1998) 6 Eur J Crim Pol'y & Research 507. For a relatively comprehensive survey of European and other views on restorative justice, see Estelle Zinsstag, Marlies Teunkens & Brunilda Pali, *Conferencing: A Way Forward for Restorative Justice in Europe* (Leuven: Report of the European Forum on Restorative Justice, 2011), online: Euroforum <http://euroforumj.orgassets/upload/Final_report_conferencing_revised_version_June_2012.pdf>.

2. Jennifer J Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998).

3. Andrew Ashworth, "Victims' Rights, Defendants' Rights and Criminal Procedure" in Adam Crawford & Jo Goodey, eds, *Integrating a Victim Perspective within Criminal Justice: International Debates* (Aldershot, UK: Ashgate, 2000); John Braithwaite & Philip Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice* (Oxford: Clarendon, 1990); Bruce P Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (1998) 3 Can Crim LR 69 [Archibald, "Prosecutorial Discretion"]; Elizabeth M Elliott, *Security, With Care: Restorative Justice and Healthy Societies* (Halifax, NS: Fernwood, 2011).

4. For early treatments of this topic, see, *inter alia* K Warner, "Family Group Conferences and the Rights of the Offender" in C Alder & J Wunderlitz, eds, *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?*(Canberra: AIC, 1994); and J Bargen, "Kids, Cops, Courts, Conferencing and Children's Rights – A Note on Perspectives" (1996) 2 Austl J HR 209.

say nothing of the general public, about what constitutes due process in a restorative justice session, and what the consequences ought to be where a participant deems such processes to be unfair.[5] This paper will ultimately attempt to address three questions: (1) How should due process rights be conceptualized in restorative justice? (2) What remedies should be available where failures to achieve due process in restorative justice processes occur? (3) How does a relational theory of rights help to answer the foregoing questions? The central thrust of the paper is to answer these questions in ways which demonstrate that restorative justice processes are actually aligned with administrative law standards of legality (both procedural and substantive), consistent with enlightened notions of the rule of law in a democratic society. However, there is considerable conceptual terrain to be traversed in the attempt to reach this destination.

Some might argue that pursuing due process in restorative justice risks saddling restorative processes with the dysfunctional formalism of traditional justice procedures which restorative justice is intended to obviate. This is a legitimate concern.[6] The relative informality and egalitarian deliberative nature of restorative conferences are major sources of their strength and effectiveness. However, just because one has consented, as a victim, offender, or community member, to engage in a restorative process, surely cannot mean that fairness concerns go out the window. Voluntariness of participation is not a curtain which falls over restorative conferences shutting out the light of fairness. But how does one draw the line between protecting basic rights in restorative justice and choking the process with the full panoply of adversarial criminal trial

5. This article focuses on restorative justice in the context of harms that come to the attention, or within the jurisdiction, of criminal courts or youth courts that deal with otherwise criminal matters. It does not address fairness in restorative approaches or practices which are intended to encourage positive relationships in the context of school discipline, institutions associated with community services, elder abuse situations, human rights violations, or workforce grievances, even though restorative approaches are currently being used in all these contexts: see Nova Scotia Department of Justice, "As We Go Forward: Nova Scotia's Approach to Crime Prevention 2012 - 13," online: <http://www.gov.ns.ca>; Nova Scotia Human Rights Commission, "Legal Authority for Restorative Boards of Inquiry" (27 April 2012), online: <http://humanrights.gov.ns.ca>; and Nova Scotia Human Rights Commission, "Restorative Boards of Inquiry: Fostering Dignity and Respectful, Responsible Relationships Draft Framework and Procedures" (25 April 2012), online: <http://humanrights.gov.ns.ca>.

6. See Bruce Archibald, "Progress in Models of Justice: From Adjudication/Arbitration through Mediation to Restorative Conferencing (and Back)" in Ronalda Murphy & Patrick A Molinari, eds, *Doing Justice: Dispute Resolution in the Courts and Beyond* (Montreal: Canadian Institute for the Administration of Justice, 2000) [Archibald, "Models of Justice"], for a description of the manner in which procedural sclerosis has set in, weakening both criminal court proceedings and labour arbitration over the years in Canada, and undermining original hopes for fast, efficient yet fair processes in both contexts.

procedures? Achieving a balance in this regard can be advanced by taking a relational approach to the understanding of rights.[7]

As discussed in Part I below, our liberal democratic constitutional traditions have spawned sophisticated analyses of rights in general,[8] and rights in criminal procedure in particular.[9] However, such analysis often conceives of procedural rights as "trumps" to be played in the vindication of formal procedural rights, regardless of the underlying relational interests at stake for participants in the process. Taking a relational approach to rights allows a broader contextualization of due process, and lays the groundwork for understanding the principles that can appropriately distinguish different standards of fairness in formal trials as opposed to those in restorative processes. To do this, however, it helps to embed discussion of relational rights and restorative justice in evolving understandings of constitutional democracy. This is done in Part I of the article. The general thrust is to demonstrate how the rule of law in a democratic society can be re-shaped through means that include judicial oversight of restorative justice fairness, without sacrificing the relational/deliberative characteristics which make restorative processes effective.

Following Part I, the rest of this paper is divided into three further parts followed by a brief conclusion. Part II elucidates how relational theory can explain a satisfactory reciprocal linkage between traditional adversarial justice on the one hand and restorative processes on the other in accordance with the rule of law, while preserving the distinct virtues of each in their respective spheres. Part III demonstrates how criminal courts and judicial review of restorative process using principles of administrative (and civil) law can invoke relational understandings of rights and duties to promote the evolution of appropriate due process standards for restorative justice. Thus, Part III might be thought to be the pragmatic kernel of the paper. In a procedural denouement, Part IV attempts to specify acknowledged rights

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7. Jennifer Nedelsky, "The Reciprocal Relation of Judgment and Autonomy: Walking in Another's Shoes and Which Shoes to Walk In" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: University of British Columbia Press, 2011) [Nedelsky, "Shoes"]; Jennifer J Llewellyn, "Restorative Justice: Thinking Relationally about Justice" in Downie & Llewellyn, *ibid* at 89-108 [Llewellyn, "Thinking Relationally"]; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law's Relations*].

8. Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 [Hohfeld, "Fundamental Legal Conceptions, 1913"]; Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale LJ 710 [Hohfeld, "Fundamental Legal Conceptions, 1917"].

9. Steve Coughlan, *Criminal Procedure*, 2d ed (Toronto: Irwin Law, 2012); Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Thomson Carswell, 2010); Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed (Toronto: Thomson Carswell, 2005).

and duties for offenders, victims, and community in restorative justice as relational due process standards which, while different than due process in a criminal trial, can withstand scrutiny during judicial review as upholding simultaneously basic principles of fairness and the rule of law.

I. *Relational rights in deliberative democracy: evolution of adversarial and restorative justice*

1. *The legacy of enlightenment due process in a post 9/11 world*

The evolution of constitutional democracy since the rise of the nation state in the eighteenth century has been a complex process. Revolutions in America and France produced bills of rights which placed the equality and autonomy of individual citizens and universal suffrage at the core of the notion of governance.[10] Elected legislatures were established to promulgate laws, and separate executives and independent judicial branches of government were created to carry out or enforce them.[11] Predominant political theories portrayed individual citizens as equal rights bearers entitled to exercise their rights and liberties in an autonomous fashion, while the state provided conditions of order and security to promote private economic and social activity which would allow industrious individuals to flourish (and the devil take the hindmost).[12] In the non-revolutionary societies of Britain and its overseas dominions, evolutionary political changes in the nineteenth century wrested from a recalcitrant aristocracy equivalent individual rights and freedoms in constitutional monarchies.[13] The point, however, is that the individual rights we now often take for granted emerged from social, political, and legal struggles against the holders of power. In this context, rights were seen in theory and practice as sources of political rhetoric and, increasingly, legally enforceable cards to be played in court to curb the abuses of state power.[14] Most particularly, revolutionary bills of rights contained standards of procedural due process relevant to criminal proceedings, which had previously been used against political dissidents

10. See Francis Fukuyama, *The Origins of Political Order: From Pre-Human Times to the French Revolution* (New York: Farrar, Strauss and Giroux, 2011). Eighteenth-century notions of equality, of course, had their limits: it took a Civil War to begin the process of dismantling slavery of Afro-Americans, property qualifications widely limiting the political franchise, and prohibitions on women's voting rights, etc.

11. De Montesquieu, *De l'esprit des lois* (Paris: Garnier, 1973) had a far reaching impact in this regard.

12. John S Dryzek, Bonnie Honig & Anne Philips, *The Oxford Handbook of Political Theory* (Oxford: Oxford University Press, 2006).

13. Peter Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, ON: Thomson Carswell, 2007); Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed by ECS Wade (London: Macmillan, 1893).

14. Nedelsky, "Shoes," *supra* note 7.

in terrorem. [15] The right to one's "day in court," before a fair and impartial judge independent of partisan political influence, is a continuing aspiration that needs constant vigilance to vindicate in practice.[16] Due process as a bulwark against tyranny is arguably more important today than ever before as otherwise enlightened states invoke draconian measures to combat the spectre of terrorism.[17] Thus, advocates of restorative justice ought not to be too quick to abandon the rights protections for individual liberty found in the constitutionally entrenched institutions of adversarial due process in criminal matters.[18]

On the other hand, proponents of restorative justice are surely right to criticise the assumption that a monolithic "command and control" criminal justice model should be the only, or even the predominant, approach to the administration of criminal justice.[19] But our sense of punitive and adversarial criminal justice as being in some sense "natural" is strongly embedded in our culture. By the nineteenth century, the legacy of enlightenment justice found political expression in state institutions, which imposed reforms in a paternalistic manner over citizens, who may have elected legislators, but had little opportunity to participate meaningfully in the formal criminal justice system in which adversarial due process is legally embodied. In many ways, this situation is a result of ancient historical circumstances. Rational criminal justice in the western tradition evolved in painfully slow ways after the Roman Church forbade priests from participating in trials by ordeal in a decree of the Lateran Council of 1215.[20] On continental

15. In a sense, the Canadian *Charter* brought Canada the full advances of the Eighteenth century near the end of the Twentieth! *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

16. Alan Young, "Not Waving but Drowning: A Look at Waiver and Collective Constitutional Rights in the Criminal Process" (1989) 53 Sask L Rev 47; Patricia Hughes & Mary Jane Mossman, "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 WRLSI 1 at 47.

17. See Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) on Canada's terrorism legislation. There are thought provoking ironies in President Obama's simultaneous support for renewal of the American *Patriot Act* and encouragement of the courageous youths provoking the so-called "Arab Spring."

18. Ashworth, *supra* note 3.

19. Bruce Archibald, "Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy: A Modest Contribution For Criminal Law and Restorative Justice" (2008) 16 Cardozo J Int'l & Comp L 1 [Archibald, "Let My People Go"].

20. Albert M Rosenblatt, "The Law's Evolution: Long Night's Journey Into Day" (Paper delivered at the 55th Benjamin N Cardozo Lecture, Association of the Bar of the City of New York, 6 March 2003), (2003) 58:2 Rec Ass'n Bar City of NY 144 at 162-164.

Europe, the so-called "inquisitorial system" emerged,[21] while the use of "juries of presentment" gradually became the "petty jury" at the much vaunted core of the English criminal justice system in the eighteenth century.[22] These gradual developments, of course, occurred in societies where there was no universal education, and where aristocratic and emerging commercial elites, often through the clergy, established and ran criminal justice to maintain order and protect their own class interests.[23] In this legal and social environment, it is perhaps not surprising that victims were regarded as mere witnesses at the disposition of the court and an accused's rights were, more often than not, honoured in the breach with the absence of counsel.[24] The whole edifice was nonetheless suffused with a sense of moral, and even religious, propriety: the perceptive book entitled *The Protestant Ethic and the Spirit of Punishment* represents more than a clever play on words.[25] Moreover, public participation in criminal justice through jury duty has been a statistical anomaly from the earliest times. Most people's contact with criminal justice was, and to some extent still is, through often imperious or even quixotic magistrates in police courts where rough justice continues to be dispensed in summary fashion.[26] The legacy of rights-based criminal due process remains ambiguous: a bulwark against tyranny that often has its own authoritarian and alienating

21. Continental jurists consistently assert that "inquisitorial justice" was an aberration which was rectified in post-Napoleonic Europe, that the penal systems of modern Europe are "accusatorial," even if judge centered, and that the continued reference by untutored Anglophones to European "inquisitorial justice" is an indefensible, anachronistic slur. See A Esmein, *A History of Continental Criminal Procedure with Special Reference to France*, translated by John Simpson (Boston: Little, 1913).

22. Edmund Morris Morgan, *Basic Problems of Evidence* (Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1963). See also R Blake Brown, *A Trying Question: The Jury in Nineteenth Century Canada* (Toronto: U of T Press and the Osgoode Societyfor Canadian Legal History, 2009) for early Canadian developments regarding the role of the jury.

23. Douglas Hay, "Crime and Justice in Eighteenth- and Nineteenth-Century England" (1980) 2 Crime & Just 45; EP Thompson, *Whigs and Hunters: the Origin of the Black Act* (New York: Pantheon Books, 1975).

24. Francis Regan, *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999).

25. T Richard Snyder, *The Protestant Ethic and the Spirit of Punishment* (Grand Rapids, MI: WB Eerdmans, 2001). The title, of course, harkens back to a book that had a huge influence over a generation of sociologists, economists, and political scientists: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (London: G Allen & Unwin, 1930).

26. Roy Edward Kimball, *The Bench: the History of Nova Scotia's Provincial Courts* (Halifax: Province of Nova Scotia, 1989); Philip Girard, *Lawyers and Legal Culture in British North America: Beamish Murdoch of Halifax* (Toronto: University of Toronto Press, 2011). This over-statement is, nonetheless, made with due deference to the majority of highly competent judges in Canada's provincial courts, which are now the true work-horses of the criminal justice system.

characteristics for those subjected to its seemingly inexorable bureaucratic power.[27]

2. *Deliberative democracy and relational rights: beyond a neo/liberal theory of the state*

The minimalist laissez-faire state of the nineteenth century was replaced, under pressure of war, social upheaval and global ideological tension, by the Keynesian welfare state in the mid-twentieth century.[28] But there was a similar kind of paternalistic and hierarchical governance which continued throughout this shift. To ensure social and political order, the welfare state purported to do things *for* vulnerable citizens to allow for their participation in the economy, rather than doing things *to* unruly under-classes, as was largely the case with laissez-faire states. Nonetheless, the state continued to govern largely through command and control mechanisms, even though the sphere of its operation was enlarged to economic and social sectors. As the welfare state unravelled at the end of the twentieth century under economic pressure from the third world[29] and the release of political pressure with the demise of the Soviet block,[30] theories of governance may be thought to have taken two contradictory turns. On the one hand, one has the re-emergence of neo-liberal ideology, advocating a romanticized return to a post-enlightenment, minimalist state where energetic individuals will make their own way within a state whose key roles are to protect the "free" market through police, justice, and military means, as well as "anti-trust" laws.[31] Countries whose politics are dominated by such ideologies often exhibit policies of harshly retributive penal populism in matters of criminal justice.[32] On the other hand, there is a vision of deliberative and participatory democracy where the state "steers" various private institutions of civil society, while eschewing a

27. Herbert L Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968).

28. Gordon A Fletcher, *The Keynesian Revolution and its Critics: Issues of Theory and Policy for the Monetary Production Economy* (New York: St Martin's Press, 1987).

29. Gary Teeple, *Globalization and the Decline of Social Reform* (Toronto: Garamond Press, 1995) at 55-74; Bert Cochran, *Welfare Capitalism- and After* (New York: Schocken Books, 1984). See also, Alain Supiot, *The Spirit of Philadelphia: Social Justice v. The Total Market,* (New York: Verso, 2012)

30. Jane Burbank & Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton, NJ: Princeton University Press, 2010).

31. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) as represented in the political sphere by Thatcher, Reagan, Howard, GW Bush, Harper, etc.

32. John Pratt, *Penal Populism: Key Ideas in Criminology* (New York: Routledge, 2007); Nicola Lacey, *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (New York: Cambridge University Press, 2008). It is the anti-trust laws which are now largely honoured in the breach. See Kent Roach & Michael J Trebilcock "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall LJ 461.

primary role in "rowing" the economy through state ownership or direct control, but nonetheless ensures equality, dignity, and mutual concern and respect among citizens through various forms of inter-active politics and regulation.[33] In the deliberative vision of governance, the state works *with* citizens and organizations of civil society at all levels in the elaboration of law and policy through consultative processes, which promote civic involvement without imposing state domination of a hierarchical sort.[34] The mechanisms of self-reinforcing "meta-regulation"[35] and "smart regulation" continue to ensure economic and social order, avoiding the dangers of "de-regulation" as exemplified by the American/global financial collapse of 2008.[36] In the context of this optimistic re-thinking of constitutional democracy, an important development has been a re-assessment of the meaning and role of rights. This development is significant for restorative justice practice because of its revelation of a relational theory of rights of which restorative justice can be seen as an embodiment.

Individualist conceptions of rights have a long and respected pedigree in the western political tradition. Judeo-Christian beliefs in individual salvation mingled in the Renaissance with the newly re-discovered Aristotelian notions of individuals as rights holders, and influenced Enlightenment theories of rights, which, as mentioned above, are at the core of our constitutional democracies.[37] In the twentieth century, the theoretical classification of individual rights became very sophisticated. Hohfeld, for example, asserted that "rights" ought to be understood in relation to four analytical categories: true individual rights claims (which impose correlative duties on others), privileges or liberties (where one is free to act without transgressing upon another's rights), powers (where one has legitimate authority to alter another's legal situation), and immunities

33. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, MA: MIT Press, 1996); Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (New York: BasicBooks, 1996); Braithwaite & Pettit, *supra* note 3; and dare one suggest the "third-way" policies of Tony Blair, shorn from his military debacle in supporting the invasion of Iraq? See Anthony Giddens, ed, *The Progressive Manifesto* (Cambridge: Polity Press, 2003). The jury is still out on Obama Democrats? Thomas Mulcair's NDP?

34. Habermas, *supra* note 33; Braithwaite & Pettit, *supra* note 3.

35. John Braithwaite & Christine Parker "Restorative Justice is Republican Justice" in Gordon Bazemore & Lode Walgrave, eds, *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey, NY: Criminal Justice Press, 1999) 103; John Braithwaite, Judith Healy & Kathryn Dwon, *The Governance of Health and Safety Quality* (Australia: Commonwealth of Australia, 2005).

36. Paul Krugman, *End this Depression Now!* (New York: WW Norton, 2012); Michael Lewis, *The Big Short: Inside the Doomsday Machine* (New York: WW Norton, 2011); Michael Lewis, *Boomerang: Travels in the New Third World* (New York: WW Norton & Company, 2011).

37. Harold Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).

(where one's legal situation or status can be enjoyed or exercised without interference from others).[38] Each of these particularized characterizations of individual rights was said to have its opposite: rights claim and no right, liberty and duty, power and liability, and immunity and disability.[39] While not without its detractors,[40] the Hohfeldian generic system for the analysis of rights has been highly influential.[41] But its complexity did not displace the predominant liberal individualist theory of rights, which sees the exercise of constitutional rights, for example, as trumps which can knock out the claims or assertions of others.[42] This notion, of course, has been touted as critical to the protection of minority interests against intolerant political majorities.[43] But it does not generally consider the broader concerns about mediating majoritarian and minoritarian interests and relationships over the long haul. Moreover, while the Hohfeldian scheme does to a degree recognize that rights structure legal relations between individuals, it does not focus on relationships, but rather on separate activities where potential rights bearers may have conflicting legal claims, each of which needs to be sorted out analytically.

However, as deliberative democracy has emerged in theory, and to some degree in practice,[44] feminist scholars and others have been elaborating a relational theory of rights as a firmer means of understanding how to adequately conceptualize the operation of rights in the context of continuing human relationships.[45] Nedelsky asserts:

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38. Hohfeld, "Fundamental Legal Conceptions, 1913," *supra* note 8; Hohfeld, "Fundamental Legal Conceptions, 1917," *supra* note 8.
39. T Perry, "A Paradigm of Philosophy: Hohfeld on Legal Rights" (1977) 14 Am Phil Q 41.
40. A Halpin, "Hohfeld's Conceptions: From Eight to Two" (1985) 44 Cambridge LJ 435, where it is argued that Hofeld's categories can be collapsed simply into *rights* and correlative *duties*.
41. See S Hudson & D Husak, "Legal Rights: How Useful is Hohfeldian Analysis?" (1980) 37 Philosophical Studies 45.
42. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978).
43. Laurence Tribe, *American Constitutional Law*, 2d ed (Mineola, NY: Foundation Press, 1988).
44. For a sophisticated theoretical approach to deliberative democracy, see Habermas, *supra* note 33. One might see proto-typical practical examples of Canadian governments adopting the consultative mechanisms of participatory democracy in the 1970s, and the rhetoric of the regulatory state round the turn of the twenty-first century: for scholarly discussions of such ideas see, for example, TE Cook & PM Morgan, *Participatory Democracy* (San Francisco: Canfield Press, 1971); or J Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham, UK: Edward Elgar, 2008).
45. For a helpful overview of relational theory, see the essays in Downie & Llewellyn, *supra* note 7. For this discussion on relational rights, the work of Jennifer Nedelsky is particularly significant. See Nedelsky, "Shoes," *supra* note 7, as well as Nedelsky, *Law's Relations*, *supra* note 7, especially Chapter 6 entitled "Reconceiving Rights and Constitutionalism."

> …rights are collective decisions about the implementation of core values. Constitutional rights, in particular, are means of holding governments accountable to core values.[46]

She then makes two important points:

> The first is that all the inevitable decisions about rights are best analyzed in terms of the ways that rights structure relationships—of power, trust, responsibility, and so on. The second is that the constitutional protection of rights is best understood as a dialogue of democratic accountability.[47]

Significantly, Nedelsky proposes a four step approach to the analysis and interpretation of rights:

1. Examine the rights dispute to see how the law is structuring relevant relations and how the structuring is related to the conflict;
2. Identify the values which are at stake;
3. Ask what kind of relationships would foster those values; and
4. Determine how competing versions of a right would structure those relations differently.[48]

By values, Nedelsky means "any of the big abstractions used to articulate what a given society sees as essential to humanity or to the good life for its members."[49] She includes as possible core values equality, dignity, security, harmony, peace, bodily integrity, autonomy, liberty, freedom of conscience, freedom of expression, adequate material resources, individual and/or collective spiritual expression, respect and care of the earth and the rest of creation, and scope for artistic expression. These ideas play out in important ways for jurisdictions which incorporate restorative justice as an aspect of criminal justice policy. Before exploring these connections, however, a brief reflection on the operation of rights claims in adversarial criminal proceedings is in order.

3. *Adversarial process rights: formalistic protections for offenders, victims, and communities*

Since the advent of the *Charter of Rights and Freedoms* in 1982, Canadian criminal justice process has been put through the sieve of constitutional review to determine whether *Charter* rights can be invoked as trumps

46. *Ibid* at 233.
47. *Ibid* at 234. Nedelsky perceptively notes that section 1 of the *Charter*, *supra* note 15, which sees rights as subject to proportional limitations, is an implied invitation to courts to adopt this relational, dialogic process of accountability. This invitation has been accepted by the Supreme Court of Canada in some contexts (see the rape-shield saga of cases, especially *R v Seaboyer*, [1991] 2 SCR 577 and *R v Mills*, [1999] 3 SCR 668 at 670). See also Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 Oxford J Legal Stud 57.
48. Nedelsky, *Law's Relations*, *supra* note 7 at 236.
49. *Ibid* at 241.

by accused persons to enhance procedural fairness. The presumption of innocence in *Charter* section 11(d) has been invoked to invalidate statutes which reverse the burden of proof, giving the Crown an unfair advantage over the accused.[50] Substantive *Criminal Code* provisions, like constructive murder, which abandoned subjective fault standards as the basis for punishment, have been found to be unconstitutional.[51] Standards for search and seizure have been reinforced, doing away with writs of assistance and creating a presumption against the validity of searches without warrant.[52] The right to silence has been broadened beyond the traditional common law confessions rules through the use of the concept of fundamental justice in *Charter* section 7.[53] The admissibility of evidence following police breaches of an accused's right to counsel has been significantly reduced, thus improving the fairness of criminal proceedings.[54] Indeed, the inclusion of an explicit exclusionary rule of evidence in the *Charter* has had a broad impact on police misconduct, and moved Canadian criminal procedure away from crime control values toward those of due process in ways that are quite significant.[55] There are thus many such examples of the strengthening of the accused's due process rights in the last thirty years of Canadian criminal litigation. They are a significant trend, even if they have been balanced to some degree in the direction of crime control through legislative changes, which have increased mandatory minimum sentences and "charter-proofed" expanded police powers in some instances.[56] The important point for this paper, however, is that individualist conceptions of the rights of the accused in criminal matters have been heightened in the post-*Charter* period, and the adversarial arsenal of the defence in formal criminal trials has been enhanced. What has not been enhanced in these authoritative judicial developments is a relational understanding of what has happened via this *Charter* jurisprudence. That issue will be addressed below.

During this period of expansion of the procedural rights of the accused, the situation of the victim in the criminal process has changed in

50. See, e.g., *R v Oakes*, [1986] 1 SCR 103.
51. *R v Martineau*, [1990] 2 SCR 633, but *cf R v Creighton*, [1993] SCR 91, re: manslaughter.
52. See *In re Writs of Assistance*, [1977] 1 FC 11, (FCTD), and *Hunter v Southam* [1983] SCCA 408, (SCC), but note the slippage re upholding statutory police powers under *Charter, supra* note 15, s 1.
53. See *R v Broyles*, [1991] 3 SCR 595.
54. See *R v Collins*, [1987] 1 SCR 265, (SCC); *R v Manninen* [1987] 1 SCR 1233, 41 DLR (4th) 301, (SCC). The latest iteration of the can be found in *R v Grant*, 2009 SCC 32.
55. Stuart, *supra* note 9; Kent Roach, *Criminal Law* (Toronto: Irwin Law, 2008) at 32. For a critical perspective on the topic see David M Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999).
56. See, e.g., *Criminal Code*, RSC 1985, c C-46, s 25.1, responding to *R v Campbell*, [1999] 1 SCR 565.

somewhat ambiguous ways. Yes, there has been an attempt, under pressure from victims' rights organizations, to increase the level of participation of victims at virtually every stage of the criminal process.[57] Police training puts more emphasis on treating victims with empathy.[58] Prosecution manuals mandate consultation with victims in the laying of charges and the conduct of trials.[59] The *Criminal Code* has been amended to protect child victims and sexual assault victims from certain types of harm or abuse when testifying.[60] Victim impact statements may be submitted to the court or read by the victim at the sentencing hearing.[61] Victims are now authorized to intervene at parole hearings.[62] Criminal trials have thus become victim-inclusive in important ways.

However, the primary role of a victim in a criminal trial is still to act as a witness for the prosecution. This is not a pleasant task, nor is it necessarily a voluntary one. Reluctant witnesses can be forced by subpoena to testify,[63] may be subject to withering, if not demeaning, cross-examination,[64] and can be required to purge their contempt in prison if they refuse to cooperate (even if this heavy handed sanction may be a rare occurrence).[65] But the process often generates animosity and undermines respect for the system, where tolerance and good will may have been the initial stance of a witness who was willing, in the interests of justice, to do his or her civic duty. Thus, the victims' rights movement, while empowering victims in formal criminal procedures, has not necessarily advanced a relational understanding of the exercise of those rights.

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57. Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) [Roach, *Due Process*].

58. Frans Willem Winkel, "Police, Victims, and Crime Prevention: Some Research-based Recommendations on Victim-orientated Interventions" (1991) 31:3 Brit J Crim 250.

59. Nova Scotia, Public Prosecution Service, "The Decision to Prosecute (Charge Screening)" in *Crown Attorney Manual*, online: Nova Scotia Public Prosecution Service <http://www.gov.ns.ca/pps/publications/ca_manual/ProsecutionPolicies/DecisionToProsecute.pdf> at 8; Public Prosecution Service of Canada, *The Federal Prosecution Service Deskbook*, online: Public Prosecution Service of Canada <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch15.html> at s 15.3.2.

60. *Criminal Code*, *supra* note 56, ss 276 & 278.1-278.91.

61. *Ibid*, ss 722 & 745.63(1)(d).

62. *Ibid*, s 745.63(1)(d).

63. David M Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011) at 403.

64. Judges attempt to protect witnesses from abusive cross-examination, but testing credibility is inevitably an unpleasant process where it is notoriously difficult to draw the line between questions which are "tough and challenging" and those which are abusive. See Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham, ON: LexisNexis Canada, 2009).

65. Law Commission of Canada, *Working Paper 20, Contempt of Court: Offences Against the Administration of Justice* (Ottawa: Supply and Services Canada, 1977) [*Working Paper 20*].

The situation of members of the public at a criminal trial may be equally alienating and mutually isolating. Spectators in the court room must remain mute, and risk ejection if they break their mandatory monastic silence.[66] Their possible knowledge and understanding of the facts or circumstances will likely go ignored and untapped. Members of the jury may be present in reluctant response to their statutory duty to provide jury service.[67] Objections to serving may be over-ruled, even if other potential jurors may have been excused for personal reasons.[68] Once the trial is in process, jurors may be periodically required to withdraw from the courtroom to allow for rulings on the admissibility of evidence, on the assumption that they will, unlike a judge sitting alone, be unable to set aside irrelevant or prejudicial evidence in the process of their ultimate deliberations.[69] Their pristine ignorance and its significance may only be revealed to them after the trial, at which time they will be forbidden to speak about it.[70] They will be forced to come to a unanimous verdict of guilt or innocence, failing which there will likely be a new trial, and they cannot even give formal reasons for decision or explain nuances in their reasoning, which might actually be helpful on issues of culpability or sentencing disposition.[71] The presence of the public, as observers (including media) or as jurors, is clearly an important aspect of an open and accountable criminal justice system in a democracy characterized by commitment to the rule of law. Secret trials are anathema, and the principle of openness is a significant guarantee against the emergence of Kafkaesque procedural catch-22s.[72] However, formal criminal trials set up often awkward, frustrating, and, in some measure, dysfunctional relations among all participants, with the

66. *Ibid.* Reasons for expelling spectators from the courtroom are not, however, without their controversy. See Luis Millan, "City of Montreal Discriminated Against Breastfeeding Woman: Commission" (2003) 23:6 The Lawyers Weekly; *Taylor v Canada (Attorney General)*, [1997] FCJ 1748.

67. *Working Paper 20*, *supra* note 65; Alan Gold, "The Jury in the Criminal Trial" in Vincent M Del Buono, ed, *Criminal Procedure in Canada* (Toronto: Butterworths, 1982). See also R Blake Brown, *supra* note 22.

68. *Criminal Code*, *supra* note 56, s 632.

69. Evidence being challenged is heard by the judge in a voir dire to determine its admissibility. If the case is being tried by a jury, the jury will be excused during that process; however, in a judge alone trial the same judge must both hear the voir dire and determine the final verdict without taking into account inadmissible evidence presented during the voir dire. Gold, *supra* note 67.

70. Note the difference between US and Canada on the duty of jurors to remain silent on their deliberations, see *Criminal Code*, *supra* note 56, s 649, and Abraham S Goldstein, "Jury Secrecy and the Media: the Problem of Postverdict interviews" [1993] U Ill L Rev 295.

71. *Criminal Code*, *supra* note 56, s 649. See also *R v Latimer*, 2001 SCC 1, regarding the limits of the jury's influence on sentencing.

72. See Franz Kafka, *The Trial*, translated with a preface by Breon Mitchell, 1st ed (New York: Schocken Books, 1998). Apologies to Joseph Heller, *Catch 22, A Novel* (New York: Simon & Schuster, 1961).

possible exception of the professionals—counsel, the presiding judge, and police witnesses.

There is an obvious truth to Nils Christie's oft-quoted observation that in a criminal trial, the "conflict has been stolen" by the system from those who are most affected by its outcome—accused, victim, and members of the community.[73] On the other hand, there are many sound reasons why these periodic, public morality plays called criminal trials must remain an essential feature of legal systems in democratic societies.[74] Formal, rights-based adjudication is an essential back-stop where an accused denies his or her guilt and the state's case must be put publicly to the test, particularly where there may be political controversy in the matter.[75] However, we all know that the vast majority of criminal matters are resolved by guilty pleas after a process of negotiation, which may include an agreement on sentence, which obviates even a full sentencing hearing.[76] While not denying the symbolic and practical importance of formal criminal proceedings in a democracy, it is important to understand how they are not the only means of dealing with criminal harms. It is also important to understand how their procedural features reinforce notions of individually conceived, as opposed to relationally conceived rights, and which discourage the evolution of restorative processes, which can be a more healthy alternative in many circumstances. The formal, adversarial nature of the criminal trial isolates participants, inhibits open communication among them about what is at stake, and masks the relationships among the participants and the significance of their common interests going forward. While a criminal trial may be a stultifying necessity in extreme circumstances, where the rights of individuals (accused, victim, members of the public) vie with one another in a starkly formal process, presided over by a relatively passive judge in the role of umpire, its current centrality to the criminal process

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73. While Nils Christie is often quoted as saying "the conflict has been stolen" his actual words are that "the conflict has been taken away." See Nils Christie, "Conflicts as Property" (1977) 17:1 Brit J Crim 1 at 1.

74. This is obviously written from the perspective of the common law tradition, although the civilian tradition of continental Europe, with its judge centered trials, still involves rights-based adjudication of a fundamental sort. See Mireille Delmas-Marty & JR Spencer, eds, *European Criminal Procedures*, translation supervised by JR Spencer (Cambridge, UK: Cambridge University Press, 2002).

75. Archibald, "Models of Justice," *supra* note 6.

76. Ontario, Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) at 275-290. G Arthur Martin, Law Reform Commission of Canada, *Plea Discussions and Agreements, Working Paper 60* (Ottawa: Law Reform Commission of Canada, 1989). Plea bargaining is not used only in the case of minor offences but has been used—controversially—in cases as serious as potential murder charges. See Ontario, Ministry of the Attorney General, *Report to the Attorney General of Ontario on Certain Matters Relating to Karla Homolka* (Toronto: Ministry of the Attorney General, 1996).

ought not to induce a sense of its inevitability. Restorative processes, rooted in a relational view of the rights at stake and a vision of how to vindicate such relational rights in a satisfactory manner for all concerned, are increasingly seen as a more viable alternative.

4. *Relational rights and restorative process: protecting deliberative space for participants*

Restorative justice is more than just a set of processes or practices which bring together offenders, victims, their respective supporters, and members of the community to respond to criminal harms in a reparative fashion through a deliberative process, although it is that. Rather, restorative justice is best understood as the embodiment of a theory of justice which is thoroughly relational in its nature. My colleague Jennifer Llewellyn identifies this essence of restorative justice:

> Justice understood relationally is concerned with the nature of the connections between and among people, groups, communities, and even nations. Justice aims at realizing the conditions of relationship required for well-being and flourishing. It identifies as wrong those acts or circumstances that prevent or harm such conditions. With respect to this relational understanding, the goal of justice—either in response to specific wrongful acts or existing states of injustice—is the establishment of relationships that enable and promote the well-being and flourishing of the parties involved…
>
> …What is required are relationships marked by equal respect, concern, and dignity. These qualities underpin *equality of relationship*. It is notable that these same requirements underpin our ideas of basic or fundamental human rights.[77]

Llewellyn continues by noting that doing justice relationally requires processes that are both grounded and contextual on the one hand and inclusive and participatory on the other. In other words, restorative processes must be dialogical and flexible so as to give voice to those who have a stake in the relationships at hand and the harms which have disrupted healthy relationships.[78] However, it must be understood that:

77. Llewellyn, "Thinking Relationally," *supra* note 7 at 89, 91 & 93 (emphasis in original).
78. *Ibid* at 98 & 99.

> Restorative justice is not intent upon establishing or re-establishing relationships of an intimate or personal character. It recognizes that, at a minimum, human selves will be and must be connected to others through networks of social relationships and is concerned with the justice of these connections.[79]

In other words, restorative justice does not aim to return to an unjust or exploitative *status quo ante*, but rather seeks to structure relationships of equal respect, concern, and dignity.[80] This means that restorative justice processes are essentially transformative in nature and must be concerned with the circumstances and relational problems which gave rise to the harm in order to move toward relational balance that promotes well-being as well as individual and collective flourishing.

The procedural upshot of this restorative approach to criminal justice is that ways and means must be found to create processes which respect equality of relationship among all participants and promote equal respect, concern, and dignity for all. Common practices have emerged around the globe, which, to a greater or lesser extent, reflect these restorative justice values. Whether they go under the name of family group conferences, community justice forums, sentencing circles, or restorative conferences, these practices or processes reject some of the central tenets of adversarial adjudication in order to come to a just result as understood in relational terms.[81] The facilitator who convenes a restorative conference will inevitably, after meeting with all participants privately to prepare them, engage in a process which has certain common features. There will be an initial round of discussion which will simply elicit from all participants

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79. *Ibid* at 103.

80. See Jennifer J Llewellyn & Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999) 49 UTLJ 355.

81. For simplicity's sake, this article will refer to such processes as "restorative conferences," while it is acknowledged that a criminal justice system, which wishes to incorporate restorative approaches, may have a range of different standards or "contextualizable" responses, which may run from restoratively oriented practices such as victim-offender mediation through to full blown restorative community conferencing. For detailed information on specific restorative approaches see, e.g., Barry Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 Int J Comp & App Crim Just 291; Jharna Chatterjee, *A Report on the Evaluation of the RCMP Restorative Justice Initiative: Community Justice Forum as Seen by Participants* (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services, Royal Canadian Mounted Police, 2000); John Braithwaite, *Crime, Shame, and Reintegration* (New York: Cambridge University Press, 1989); Allison Morris & Gabrielle Maxwell, "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" (1998) 1:2 Western Criminology Review 1. Note that Family Group Conferencing differs slightly from the other forms of restorative justice in that the family is left alone to prepare a plan for a resolution and propose it to the other participants. For an analysis of the "magic" of restorative conferences, see Audrey L Barrett, "The Structure of Dialogue: Exploring Habermas' Discourse Theory to Explain the "Magic" and Potential of Restorative Justice Processes," (2013) 36 Dal Law J xxx.

information concerning what they believe happened which caused the harm. Another round of discussion will often be directed to determining how all those affected by the harm felt or thought about what happened. In a subsequent round, participants are often asked what they think needs to be done to make things right. Then, there will be discussion concerning the creation of an agreement as to what is to be done, which may involve commitments from many participants in the restorative conference and not just the person who has taken responsibility for causing the harm. Finally, provision will be made for monitoring the fulfillment of the agreement, with an understanding of what the consequences will be for people failing to meet their commitments. In other words there will be fact finding, decision making, and accountability in a context which understands and respects the relationships among all those involved. The process is open, participatory and egalitarian. The facilitator does not make or impose a decision, but assists the restorative conference to achieve an agreement to which all can assent and which is within the range of legally permitted outcomes.

In such restorative conferences, the formal rules of evidence do not apply. In fact the primary rule of evidence in a criminal trial, that of "relevance," if applied strictly in the manner adopted by courts, would hamper the process by precluding discussion of how others felt about what happened, and exclude examination of underlying causes by sticking to a description of the harmful event.[82] In a sense, the restorative conference will be guided by a broad notion of relevance, more akin to a sentencing hearing or a commission of inquiry into a complex sociological issue. Facilitators generally avoid directly questioning an offender on "why" he or she may have caused the harm, since this often provokes controversial justifications at the outset which may impede the helpful unfolding of the restorative process (this, however, does not prevent the offender from justifying or presenting excuses for his conduct or presenting mitigataing explanations, though these will tend to be contextualized by the comments of other participants about the circumstances and how the wrongful conduct may have affected them[83]). There is no cross-examination by

82. It is a basic rule of trial evidence that "information can be admitted as evidence only where it is relevant to a material issue in the case," Paciocco & Stuesser, *supra* note 63 at 24. The difficulty in applying this notion in a restorative justice process is that there will likely be issues from background incidents that must be addressed in order to achieve restorative outcomes, but which are not strictly relevant to the proof of the event which caused the conference to be convened or its consequences.

83. On the distinctions between justifications, excuses and mitigating explanations, see Bruce P Archibald, "The Constitutionalization of the General Part of Canadian Criminal Law" (1986) 67 Can Bar Rev 407.

counsel (although lawyers can attend to maintain a watching brief), since all participants are encouraged to relate their stories about the harm and their relationship with the offender, largely in their own way.[84] The purpose of the process is not to impose a punishment *per se* upon the offender, but to confirm his or her taking responsibility for initially causing the harm, often through providing compensation to the victim or to the community.[85] Apologies may be offered by the offender and accepted by the victim, although there can be no inappropriate pressure on either to engage in this process. Other members of the restorative conference, such as family members or broader community participants, may voluntarily take on responsibilities to make the agreement to put "things right" work, which is an unlikely, though possible, outcome in a sentencing process following a standard trial. If the agreement reflects the essence of restorative justice in terms of establishing or re-establishing equality of relationship among participants based on mutual concern, respect and dignity, in a process where everyone has played a part, it is hard to criticize the results.

A primary imperative of the logic of the restorative conference is that it exists to create and protect a deliberative space for the offender, the victim, their families or supporters, and affected members of the community to explore the harm caused and damage done to their relations, in both personal and larger social senses. Once convened, a restorative conference requires a good deal of commitment and effort from all involved. If an offender takes the view that the process has not been fair, what can be done? It will be shown below that, as things stand, the principle of voluntariness appears to imply that an offender's main recourse for avoiding unfairness is to revoke his consent to participate in the process or to be bound by its outcomes. All participants in a restorative conference are there by choice, including the offender. If the offender bows out, the relevant legislation indicates that he or she may return to court for a formal disposition of the matter by a criminal or youth court judge. But what if the offender, or for that matter another participant in a restorative conference, believes that while not entirely unfair, the process or outcome deserves a second look—some sort of review. It is possible that the facilitator might be willing to reconvene

84. The widespread assumption about the right to counsel and his or her role in a restorative conference seems not to have been tested in any Canadian court, despite a diligent search for reported cases on the matter. Perhaps this is because few counsel ever actually attend such sessions.

85. See RA Duff, "Restoration and Retribution" in Andrew von Hirsch et al, eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Oxford: Hart, 2003) at 53-56, describing punishment as any burden imposed upon an accused as a result of his having committed an offence. This is an important point, since as will be discussed below, an offender may see disproportionately harsh provisions in an agreement at the conclusion of a restorative conference to be punishment rather than simply restitution to victim or community.

a restorative conference. But if this is refused or does not happen, what can be done? That possibility for an independent review, how it might occur and by what standards it could be governed, is the central concern of this paper. In other words, how can this be done while protecting the participatory and deliberative nature of conferencing? Before going there, however, its may be helpful to think about the reciprocal or relational rights and duties that may exist among offenders, victims and citizens, or community participants, in criminal justice processes in general.

5. *Relational rights and duties of offenders, victims, community citizens, and facilitators*

Since the *Charter* and the fillip which it has given to "rights talk,"[86] it is not as fashionable as it once was to assert, along with Hohfeld and others, that rights come with co-relative duties and that the former cannot be properly enjoyed without an appreciation of the latter and a willingness to shoulder one's responsibilities in that regard.[87] However, a relational understanding of rights necessarily revives an appreciation of this reciprocity. If rights are best understood as structuring relationships, those relationships are inevitably characterized by mutual rights *and* duties. In the context of criminal justice, it is thus useful to think of the rights and duties that arise both in formal adversarial processes, and in relational, restorative approaches. It is also useful to distinguish between duties or obligations which are imposed by law mandatorily, and those which can be assumed voluntarily.

While anyone charged with an offence is protected against governmental abuse by the procedural *Charter* rights found in sections 7 through 11, the criminal justice system imposes duties on the citizens who are protected by it. There are crimes of omission which oblige people to act to prevent harm, particularly where their conduct may have given rise to the risk of that harm.[88] One is under an obligation not to mislead the police in the conduct of an investigation or obstruct the course of justice upon pain of criminal prosecution.[89] These are examples of particular substantive duties imposed upon those who are putatively protected by the criminal justice

86. See Mary Anne Glendon, *Rights Talk* (New York: Free Press, 1991) for a discussion of the distortions that this phenomenon can engender.

87. See page X, above, for more on this topic.

88. The most ancient of examples is misprision of treason now found in the *Criminal Code*, *supra* note 56, s 50(1)(b), although there are more prosaic examples such as failing to guard a hole in ice or an excavation which one has created, see s 263.

89. *Criminal Code*, *supra* note 56, s 129, obstructing an officer in the execution of duty or failing to assist in preventing breaches of the peace, or s 139, doing anything to obstruct, pervert or defeat the course of justice.

system. Of course, there might be said to be a general obligation on anyone within the jurisdiction not to cause harm by engaging in conduct declared to be criminal. Procedurally, there is no general legal obligation to report crime, although child protection legislation, for example, imposes duties to report child abuse which could be criminal in character.[90] As mentioned above, citizens are under an obligation to perform jury duty, and under an obligation to tell the truth if called as witnesses. These are the essential minimum core duties imposed by a formal criminal justice system which protects our substantive as well as procedural "rights." One might equally say that criminal law establishes a system which helps to maintain our well-being as citizens: to flourish in a safe society characterized by equality of relationships in terms of mutual concern, respect, and dignity.[91] But for the most part, people fail to see the connection between the rights and the duties: they are often keen to take advantage of the former while chafing under the burdens of the latter. Be that as it may, these are duties which are mandatory and explicitly imposed by statute. Interestingly, it is to be noted that the duty not to obstruct the course of justice imposed by *Criminal Code* section 139 could potentially have application to improprieties in restorative justice processes.

As will be detailed below, participation in restorative conferences is voluntary. But to what extent can it be thought that those who have agreed to so participate may have rights to be protected or obligations to be borne or carried out as a result of their voluntary involvement? It is probably true to say that all participants may feel moral obligations to carry through on their commitments to play certain roles in a restorative conference in accordance with the explanations received from the facilitator or others knowledgeable about, or in positions of authority in relation to, the restorative justice process. But by voluntarily becoming involved in these restorative process relationships, are there legal rights and legal obligations which get established? If so, among whom, and at what point in time, may they arise? These are the issues which will be addressed in Parts III and IV of this paper. But before one can address these issues properly, one must be clear about the legal framework out of which the relationships in a Canadian restorative conference arise.

II. *Relational theory and the legal framework linking criminal process*

90. *Children and Family Services Act*, SNS 1990, c 5, s 23-25.
91. For the full context of the use of these terms in "relational theory" see Llewellyn, "Thinking Relationally," *supra* note 7.

to restorative justice

1. *Charter of Rights And Freedoms: procedural and substantive rights in Canadian criminal law*

In the hierarchy of Canadian sources of law, the *Charter of Rights and Freedoms* is at the top, and must be considered first in examining the legal framework governing both mainstream criminal and restorative justice.[92] The *Charter* has been interpreted and applied to impose both substantive and procedural rights upon the *Criminal Code* and other statutes which create criminal or quasi-criminal offences and sanctions.[93] An issue thus arises as to the extent that constitutional rulings in the purely traditional criminal law context can potentially have an effect on restorative justice processes too. Can the *Charter* be used to trump aspects of restorative justice? Elements of offences have been interpreted to require, as an aspect of fundamental justice under *Charter* section 7, minimum standards of fault which are proportionate to the seriousness of the potential penalty and the nature of the stigma of a conviction.[94] The significant procedural impact of the *Charter* on criminal processes was described above, and, despite the rigour of various decisions, they are premised on the structural and institutional imperatives of the criminal trial which do not obtain in the context of a restorative conference. It is interesting that while the value of "equality of relationship" in terms of dignity, concern, and respect is critical to relational theory and to the practice of restorative justice, the equality provisions of *Charter* s 15 have had a minimal impact in the field of criminal law.[95] The introductory assertion in section 15(1) that "everyone is equal before the law and under the law" has been down-played, while the next phrase describing the "right to equal protection and benefit of the law without discrimination" has been emphasized.[96] The upshot has been to convert section 15 from a provision which promotes equality in a broad sense to one which is aimed at preventing discrimination in a fairly narrow

92. *Charter, supra* note 15, s 52 reads: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

93. For an early assessment of this phenomenon, see Bruce P Archibald, "The Constitutionalization of the General Part of Criminal Law" (1988) 67:3 Can Bar Rev 403.

94. *Vaillancourt v R*, [1987] 2 SCR 636; *R v Martineau*, [1990] 2 SCR 633; *R v Creighton*, [1993] 2 SCR 3; *R v Wholesale Travel Group*, [1991] 3 SCR 154; Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61 UTLJ 545.

95. *Charter, supra* note 15, s 15(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." For a balanced assessment of the s 15 jurisprudence in the criminal context see Stuart, *supra* note 9 at 537-544.

96. *Ibid*.

one.[97] For example, sex-related distinctions as a purported enumerated ground of discrimination, but based on "biological fact," have been upheld as not discriminatory despite plausible arguments to the contrary.[98] On the other hand, the refusal of some provinces to establish alternative measures programs (such as restorative justice) has not been interpreted to be a violation of the equality rights of the residents of those provinces, but merely an inevitable aspect of diversity in Canadian federalism even though large numbers of citizens were deprived of alternative options under the *Criminal Code*.[99] It is in this broad context that one may be somewhat chary of the disruptive potential of constitutional litigation in the field of Canadian restorative justice. But, while constitutional rulings on proportionality in criminal punishment and those on constitutionally required procedural fairness must concern restorative justice practitioners and jurists, it seems ironic that constitutional equality jurisprudence which does not tackle broad issue of social and economic justice will likely be of less consequence because of the Supreme Court's reticence to use equality notions in a robust, substantive manner.

2. *Meta/regulation of restorative justice in Youth Criminal Justice Act (YCJA) and the Criminal Code*

From an international perspective, one of the most astonishing aspects of Canadian criminal and youth justice is the extent to which our federal statutes have institutionalized the potential for an inclusive model of formal criminal justice to coexist with a restorative justice model, and actually allow for the two models to inter-penetrate at all levels in a functional

97. This is not to belittle the Supreme Court of Canada's contributions to equality jurisprudence internationally based on its willingness to bring systemic, as opposed to merely intentional, discrimination within the purview of section 15. However, Brian Langille has recently decried this narrow anti-discrimination approach in the context of labour law: see Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers- And to All Canadians" (2011) 34 Dal LJ 143), but the implications of this critique are far broader and more significant than its applicability only in the field of labour law.

98. *R v Nguyen*, [1990] 2 SCR 906.

99. *R v S(S)*, [1990] 2 SCR 254.

manner.[100] This indicates that restorative justice can be fully integrated with the Canadian constitutional instantiation of the rule of law. The form of this integration, however, is decentralized and localized to a considerable degree. The federal statutory framework for restorative justice allows for considerable provincial variation, and within provinces, organization of restorative justice can encourage a responsive and relational involvement with both government oversight and community service delivery of a deliberatively democratic sort.[101]

In Canada at large by statutory fiat, and Nova Scotia and some other provinces to varying degrees, based on actual practice, restorative justice is not a counter-cultural challenge by communities sceptical of state institutions, but rather part of a holistic official approach to criminal justice procedure, embraced by communities to varying degrees.[102] As described above, formal criminal justice processes purport to integrate victim participation at virtually all stages of the process. While still problematic, this can be described as a relatively inclusary process by global standards.[103] But where "not inconsistent with the protection of society," *Criminal Code* section 717 authorizes an attorney general to authorize the establishment of a "program of alternative measures" where appropriate to the needs of offenders and to the interests of victims and society. In Nova Scotia, and some other provinces, this "alternative" program means restorative

100. For various iterations of this point, see Archibald, "Let My People Go," *supra* note 19, which addresses the notion of meta-regulation; Archibald, "Models of Justice," *supra* note 6; and Archibald, "Prosecutorial Discretion," *supra* note 3. Belgium may be the only other jurisdiction which has such a comprehensive statutory framework: See Ivo Aertsen, "The Intermediate Position of Restorative Justice: the Case of Belgium" in Ivo Aertsen, Tom Daems & Luc Robert, eds, *Institutionalizing Restorative Justice* (Cullompton, UK: Willan, 2006). New Zealand and several Australian States have moved in this direction: for a helpful assessment of concerns about due process for restorative justice in the unique context of New Zealand, see Nessa Lynch, "Respecting Legal Rights in the New Zealand Youth Justice Family Group Conference," (2007-2008) 19 Current Issues in Crim Just 75. For Australia, see Kathleen Daly & Hennessey Hayes "Restorative Justice and Conferencing in Australia" (2001) 186 Australian Institute of Criminology, online: <http://www.aic.gov.au/documents/5/3/D/{53D95879-0B21-40BC-B716-3DACF695FA3B}ti186.pdf>.

101. Archibald, "Let My People Go," *supra* note 19.

102. In some countries, restorative justice may be tolerated by the state as acceptable activity on the part of civil society organizations, while not being officially supported—as is possible in Canada. The fear in such circumstances is that purported restorative processes could degenerate into vigilantism. See Allison Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42 Brit J Crim 596 at 609.

103. The civil law tradition of continental Europe allows victims to constitute themselves as civil parties to a criminal proceeding and get what common law lawyers would call tort compensation from the same court that sentences the offender for the criminal offence, see Andrew Ashworth, "Some Doubts about Restorative Justice" (1993) 4:2 Crim L Forum 277 at 291. But even in France, Belgium, and Germany there are moves to adopt restorative justice processes because of the alienating aspects of continental criminal procedure; see Zinstag et al, *supra* note 1.

justice.[104] What is important about the enabling statutory provision is that it also enacts minimum procedural standards for such programs: the offender's full and free consent to participate, notice of the right to be represented by counsel, the offender's having taken responsibility for the alleged offence, the existence of sufficient evidence to prosecute, and the fact that a prosecution is not in any way barred at law.[105] Further procedural safeguards are also enunciated: restorative justice is not to be used if the offender denies guilt or wants his or her day in court; admissions or confessions made by offenders as a condition of participating are not to be admissible in subsequent civil or criminal proceedings; and if the matter is sent back to criminal court for some reason, a judge must dismiss the charges if the terms of a restorative agreement have been fully carried out, or may dismiss where there has been substantial compliance.[106] These minimum statutory conditions in the *Criminal Code* for the conduct of alternative measures, and thus restorative justice processes where they are the alternative measure adopted in the province in question (also replicated in the *Youth Criminal Justice Act*[107]) are procedural in nature only since they are intended to cover a broad range of "alternative measures.". They say nothing about the substance of the restorative agreement which may result from a conference nor do they say anything about the conduct of restorative conferences or their fairness. These matters are left to be dealt with by the Attorney General in his or her "program," subject to the constitutional concerns mentioned above, and other legal questions to be discussed below.

3. *Provincial primacy/variation in administration of criminal and restorative justice*

Provincial autonomy in the administration of criminal justice is thus a central aspect of restorative justice in Canada, and the key policy document governing restorative processes is the attorney-general's authorization

104. Archibald, "Let My People Go," *supra* note 19.
105. *Criminal Code*, *supra* note 56, s 717(1)(b)-(g).
106. *Ibid*, s 717(2)-(4).
107. *Youth Criminal Justice Act*, SC 2002, c 1, s 10 [*YCJA*].

for the establishment of "alternative measures.[108] The authorization for Nova Scotia, which has Canada's most comprehensive restorative justice program,[109] constitutes directions to provincial police, probation officers, and correctional officials,[110] guidelines for prosecutors,[111] and encouraging advice to judges, whether federally or provincially appointed (who, of course, are not beholden to any mere attorney general for the exercise of their sentencing discretion). Referrals to community agencies who conduct restorative conferences can be made at four entry points: police (pre-charge), Crown prosecutors (post-charge, pre-finding of guilt), judges (post-finding of guilt, pre-sentence), and correctional officials (post-sentence). It also includes pre-charge police cautioning, which can remove minor offences from the system and reduce the phenomenon of "widening the net."[112] The scheme involves a fourfold classification of offences: level four concerns serious offences (indictments re sexual offences and offences carrying mandatory prison sentences, e.g., murder), which can be referred only post-sentence; level three is a middle range of offences, which can be referred at the court or corrections levels (serious property offences, robbery, spousal/partner violence, impaired driving, manslaughter, among others); level two includes all other offences, which can be referred at all four entry points; and level 1 offences are minor provincial and federal offences, which can be the subject of police cautions. The authorization re-iterates the statutory conditions and sets out an additional list of

108. There is a residual jurisdiction for federal use of restorative justice through an authorization by the Minister of Justice of Canada in areas of federal regulation such as narcotics, food and drugs, income tax, customs and excise, off-shore fisheries, tele-communications, aeronautics, defence, etc. However, it is an oddity of the Canadian constitution that the federal *Criminal Code* is administered by provincial attorneys general. See the *Constitution Act, 1867*, sections 91 and 92, *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91-92, reprinted in RSC 1985, App II, No 5. For a description of federal involvement in restorative justice, see Barbara Tomporowski et al, "Restorative Justice: Past, Present, and Future: Reflections on the Past, Present, and Future of Restorative Justice in Canada" (2011) 48 Alta L Rev 815.

109. See Nova Scotia, Department of Justice, *Program Authorization* (3 Jan 2003), online: Province of Nova Scotia <http://gov.ns.ca>, signed by the then Attorney General of the Province of Nova Scotia, Mr. Jamie Muir, in 2003. See Archibald & Llewellyn, *supra* note 1, for a full description of the Nova Scotia Restorative Justice Program.

110. Pursuant to the federal *Criminal Code*, *supra* note 56, s 717 and *YCJA*, *supra* note 104, s 7, as well as the Nova Scotia *Youth Justice Act*, 2001, c 38, s 7.

111. Pursuant to section 6(a) of the Nova Scotia *Public Prosecutions Act*, 1990, c 21, which established a statutorily independent Director of Public Prosecutions for the Province.

112. This refers to the counter productive, and expensive, phenomenon of inadvertently expanding alternative programming to cases which might previously have been handling by police in an entirely informal manner in the exercise of their discretion. See Jeremy Prichard, "Net-Widening and the Diversion of Young People From Court: A Longitudinal Analysis With Implications for Restorative Justice" (2010) 43:1 Austl Crim & NZJ 112.

discretionary factors to guide referrals.[113] A continuum of process options is laid out, which comprises police cautions, restoratively oriented options (individual and group accountability session, adult diversion), and true restorative justice processes (victim-offender conferences, restorative conferences, and sentencing circles). These details are important. Nova Scotia restorative justice is a pre-trial diversion program *and* a post-trial sentencing and correctional program. It introduces a relational conception of justice and related restorative processes at every stage of the criminal and youth justice systems as a counter-point to traditional criminal law and procedure.[114]

4. *Community agencies and deliberative democracy in the Nova Scotia restorative justice program*

Another striking feature of Nova Scotia restorative justice is that, unlike many state sponsored restorative justice programs, it is administered not through police[115] or the courts[116] but rather by community agencies which have service contracts with the Department of Justice. These are

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113. See *Program Authorization*, *supra* note 106, s 6.1-6.1.12. Discretionary factors include: the cooperation of the offender; the willingness of the victim to participate in the process; the desire and need on the part of the community to achieve a restorative result; the motive behind the commission of the offence; the seriousness of the offence and the level of participation of the offender in the offence, including the level of planning and deliberation prior to the offence; the relationship of the victim and offender prior to the incident, and the possible continued relationship between them in future; the offender's apparent ability to learn from a restorative experience and follow through with an agreement; the potential for an agreement that would be meaningful to the victim; the harm done to the victim; whether the offender has been referred to a similar program in recent years; whether any government or prosecutorial policy conflicts with the restorative justice referral; and such other reasonable factors about the offence, offender, victim, and community which may be deemed to be exceptional and worthy of consideration.

114. In a small province with less than a million people, the Nova Scotia Restorative Justice Program deals with more than 1,100 cases per year. The distribution of referrals to restorative justice is heaviest at the police entry point and declines as one goes up the referral hierarchy: during the period from 1 April 2011 to 31 March 2012 the program received 1176 referrals, including 580 police referrals, 539 prosecutor referrals, 47 judge referrals, and 10 corrections referrals. Email from Tracy Sabean (1 August 2012), statistics from the Nova Scotia Department of Justice, Restorative Justice Information System (RJIS). See also Don Clairmont & Ethan Kim, "Getting Past the Gatekeepers: The Reception of Restorative Justice in the Nova Scotian Criminal Justice System" (2013) 36 Dal Law J xxx.

115. See Kathleen Daly & Hennessey Hayes, "Restorative Justice and Conferencing in Australia" (2001) 186 Australian Institute of Criminology, online: <http://www.aic.gov.au/documents/5/3/D/%7B53D95879-0B21-40BC-B716-3DACF695FA3B%7Dti186.pdf>; Thames Valley Police, "Restorative Justice," online: Thames Valley Police <http://www.thamesvalley.police.uk>; and Royal Canadian Mounted Police, "Restorative Justice: Recommitting to Peace and Safety," online: Royal Canadian Mounted Police <http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/restjust-justrepar-eng.htm>.

116. Heather Strang, "South Australia" in Criminology Research Council, *Restorative Justice Programs in Australia: a Report to the Criminology Research Council* (March 2001), online: Criminology Research Council <http://www.criminologyresearchcouncil.gov.au>; UK, Ministry of Justice, *About the Youth Justice Board*, online: the Youth Justice Board <http://www.justice.gov.uk/about/yjb>.

independent community organizations with volunteer boards of directors, small professional staffs, and numbers of trained, volunteer, restorative justice facilitators. A Restorative Justice Program Protocol[117] sets out agency standards for volunteer screening, training, and supervision. However, the Provincial Practice Standards which guide restorative processes in the program are "best practice standards" developed through dialogue among the restorative stakeholders, with heavy in-put from community agency personnel.[118] This was not a hierarchical imposition of standards by "experts," but rather respected the egalitarian relationships and experiences of those involved, including restorative justice facilitators, criminal justice personnel, policy-makers, and restorative justice theorists. The workshops and consultative processes out of which the practice standards emerged reflected the relational values which underlie restorative justice. By contrast, the protocol gives focussed guidance on the content of possible restorative agreements, though giving relatively free rein to members of a restorative conference to craft creative options. The range of possible outcomes includes restitution/financial compensation, community service work, personal service to the victim, community reconciliation (apology, *inter alia*), participation in educational programs, assessment/counselling, and standard sentencing options, which all seem useful, if not pedestrian. However, the list also includes "any other outcome agreed upon by the participants in the restorative justice process" and "no further action."[119] Thus, there is plenty of scope for elaboration of contextually sophisticated relational remedies, which ought to be grounded in values of equality, mutual concern and respect, and dignity. Happy outcomes from restorative processes seem to predominate, with overwhelming percentages of participants expressing satisfaction when surveyed, on both offender and

117. Created pursuant to the *Program Authorization*, *supra* note 106, this document was elaborated by the Department of Justice in consultation with a wide range of justice system stakeholders: police, prosecution service, the judiciary, correctional services, victims' services, community agencies, and academic consultants and last formally promulgated in October 2007. See Nova Scotia, Department of Justice, *Restorative Justice Program Protocol* (October 2007), online: Nova Scotia Department of Justice <http://www.gov.ns.ca/just/rj/documents/restorative%20justice%20protocol%20eng%20web.pdf> [*Program Protocol*].

118. Nova Scotia, Department of Justice, *Nova Scotia Restorative Justice Program: Best Practice Standard* (Halifax, NS: Nova Scotia Department of Justice, September 2005) looseleaf prepared by Gola Taraschi for the Nova Scotia Restorative Justice Program.

119. *Program Protocol*, *supra* note 114 at Section Five, C.

victim sides of the equation.[120] But there is clearly scope for difficulty and dissatisfaction given the open textured nature of possible restorative agreements. And while there may be great satisfaction with the vast bulk of the work of community agencies,[121] it is possible that in their role as monitors of compliance with agreements and their duty of reporting completion to the courts, there can be controversy. If participants who are at odds or dissatisfied with the outcome of a restorative conference were to be rebuffed, for example, in a request to re-open a case or re-convene the conference, where can they turn for redress? If, for whatever reason, much vaunted relational theory turns out to be just that—theory but not practice—how could the situation be rectified?

5. *Relational rights, duties, and remedies in adversarial and restorative contexts*

The issue may be put more conceptually by asking about the interplay among relational rights, duties, and *remedies.* How may they interact in the formal adversarial and the flexible deliberative contexts of a criminal justice system, which acknowledges the legitimacy of both rights-based adjudicative processes and dialogical restorative ones? Rectitude of decision making in criminal trials is maintained, at least in theory, through the insistence on respect for formal, individual constitutional rights. Proportionality between fault and harm on the one hand and sentencing outcomes on the other is basic.[122] Respect for constitutionally entrenched due process rights maintaining balance in the adversarial process is also basic.[123] Equality of treatment is problematically asserted via the controversial assumption that the criminal law applies to everyone equally and that judges will assure that justice will be seen to be done.[124]

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120. Don Clairmont, "The Nova Scotia Restorative Justice Initiative: Final Evaluation Report" (December 2005), online: Dalhousie University <http://sociologyandsocialanthropology.dal.ca> [Don Clairmont, "Final Evaluation"]; Nova Scotia, Department of Justice, *The Findings: an Excerpt of the Review of the Nova Scotia Restorative Justice Program* (Halifax, NS: Nova Scotia Department of Justice, September 2009), prepared by Nova Scotia Department of Justice Policy Planning and Research.

121. *Ibid;* Don Clairmont, "Final Evaluation," *supra* note 117.

122. See discussion at *supra* note 91.

123. Discussion at *supra* note 18.

124. The myth of formal equality is most easily maintained in the court context where judicial decision making is hedged in by substantive and procedural laws of relative detail and certainty, but cracks can appear: see *R v RDS*, [1997] 3 SCR 484, or *R v Gladue*, [1999] 1 SCR 688. The mask of presumed equality is most often torn away in relation to the exercise of police discretion, see Jennifer J Llewellyn, "Restorative Justice in *Borde* and *Hamilton*: A Systemic Problem?" (2003) 8 CR (6th) 308; and prosecutorial discretion, see Bruce P Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions between Punitive and Restorative Paradigms of Justice" (1998) 3 Can Crim L Rev 69.

Charter section 24 has revolutionized Canadian criminal law,[125] at least conceptually, by providing potentially robust individual remedies for violations of constitutional rights, particularly when stays of proceedings or the exclusion of evidence deprive the state of its conviction even when there is clearly evidence to demonstrate that the accused is responsible for causing the criminal harm which is the basis for the offence.[126] Thus the remedial vision for the vindication rights in a standard criminal trial is quite familiar and straight forward, at least in principle, and it attempts to balance due process and crime control values.[127]

Things are more complex with respect to a system that provides for possible access to restorative justice at all levels of functioning: police, prosecutions, courts, and corrections. In principle, at least, there is a question of the exercise of discretion in access to a restorative option at every level: if one person is accepted for diversion, circle sentencing, or post-sentence (corrections or parole) and another is not, there are the criteria of the authorization and protocol which structure and justify the exercise of such discretion. But how can putatively discriminatory decisions of this sort be challenged? Similarly, if the outcome agreement seems, on reflection by the offender, to be disproportionately harsh, what is his recourse? If it seems to the victim to be disproportionately lenient, what, if anything, can she do? Does the constitutional principle of substantive proportionality between offence and punishment carry over from formal criminal justice to restorative justice?[128] If a facilitator fails to inform participants of basic matters prior to a conference, can this vitiate the process? If an outcome is for some reason illegal or unconscionable, can it be vacated? If so, on whose "say so?" The principle of the rule of law in a constitutional democracy would seem to require that such matters should be capable of being remedied. But can this be done without negating the benefits of the participatory, relational process which is at the heart of the restorative

125. This has not been universally applauded: see Paciocco, *Getting Away with Murder, supra* note 55.

126. Many assumed that the Supreme Court of Canada's reinterpretation of the exclusionary rule of *Charter, supra* note 15, s 24(2) in *R v Grant, supra* note 54, would lead to a substantial increase in admission of unconstitutionally obtained evidence, but early empirical studies indicate that this may not be the case: see Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of R. v. Grant" (Apr 2011) 15 Can Crim L Rev 229.

127. *R v Grant, supra* note 54, is clear about balancing due process and crime control values, while the Supreme Court of Canada's previous jurisprudence on the s 24(2) exclusionary rule of evidence, represented by cases like *R v Stillman*, [1997] 1 SCR 607, was more opaque on the question (the issue of "trial fairness" is no longer a trump for obtaining exclusion).

128. This is an issue that has worried some prominent commentators on restorative justice: see Andrew Ashworth, "Responsibilities, Rights and Restorative Justice" (2002) 42 Brit J Crim 578; and Lynch, *supra* note 97.

justice and productive of its positive results? One possibility may be to invoke the principles and procedures of administrative law to provide answers to these questions. But this should only be contemplated if it is thought that administrative law processes and remedies can be crafted to respect a relational understanding of the purposes of restorative processes and the values which underlie them.

III. *Relational rights and remedies: rule of law and judicial oversight of restorative processes*

1. *Voluntariness/exit as a primary protection for offenders, participants, and community*

As mentioned earlier, the principle of voluntariness and the possibility of "exit" is the most obvious remedial safety valve for participants in restorative conferencing. The offender who feels he is being railroaded by a hostile restorative conference can declare his desire for his day in court, and may have counsel there to advise him of this statutory right.[129] This will bring the conference to an end. Likewise, victims or other community participants have the right to withdraw at any time. But Nova Scotia process does not allow the victim a veto over the process, and victim refusal to participate can be compensated for by inviting the participation of a surrogate victim[130] or converting the session from a full restorative conference or victim-offender mediation to an accountability session.[131] These approaches recognize the autonomy of both offenders and victims in asserting varying measures of control over the restorative processes in which they participate. Where a restorative justice process cannot be completed, the community agency in charge may refer the case back to the

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129. The law on the right to counsel point is not entirely clear. The right to counsel in *Charter*, *supra* note 15, s 10(b) is a pre-trial right upon arrest or detention. *Criminal Code*, *supra* note 56, s 650(3) in Part XX governing jury trials provides: "an accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel." *Charter*, *supra* note 15, ss 7 and 11(d) have been interpreted to include a constitutional right to counsel paid by the state in some instances as essential to a fair trial: see *R v Robotham* (1988), 63 CR (3d) 113 (ONCA). *Criminal Code*, *supra* note 56, s 717(4) and *YCJA*, *supra* note 104, s 10 provide that advising an offender of his right to counsel is a pre-condition for use of alternative measures, but the question of the attendance of counsel during restorative processes is not specifically addressed. Nova Scotian practice seems to indicate that counsel, while not encouraged to attend, are entitled to do so, but requested not to participate actively in the process. What a reviewing court might think on this question is a matter of some interest.

130. Canadian Resource Centre for Victims of Crime, "Restorative Justice in Canada: What Victims Should Know" (March 2011), online: Canadian Resource Centre for Victims of Crime <http://www.crcvc.ca/docs/restjust.pdf>. Specialized victims' organizations exist in relation to some sorts of offences, and others can be tapped on an ad hoc basis. For example staff of organizations such as MADD or sexual assault centers may speak about the impact on victims generally where a victim in a particular case chooses not to participate.

131. *Program Protocol*, *supra* note 114.

referring body.[132] This can be seen as an assertion of statutory authority by the community agency, which may over-ride the wishes of the victim or the offender, their respective supporters, or indeed other community participants. These alternatives can be seen to represent relational values only in the most abstract sense of not doing greater harm, but do little to encourage positive relations of equality in relation to respect, mutual concern, and dignity among those affected by the harm, or put the exercise of rights and authority in the context of a relational understanding of participant autonomy.[133]

2. *Criminal courts and protection of offenders dissatisfied with restorative processes*

The details of how the statutory frameworks for restorative justice in the *Criminal Code* and *Youth Criminal Justice Act* focus on a return to court in the event that the restorative process fails are important for an understanding of possible alternative approaches to the problem. A denial of participation in the offence by the putative offender deprives the restorative conference of jurisdiction to proceed.[134] The offender can demand that the matter be dealt with in court, presumably at any point in a restorative process.[135] If, in a diversion situation, the restorative conference were to be suspended, abandoned, referred back to police or prosecution, or where the offender has failed to live up to the restorative agreement, the police, or indeed the alleged victim, can lay charges.[136] However, the court is required to dismiss the charges if the offender has complied with the restorative agreement.[137] Moreover, the principle of proportionality in punishment

132. *Ibid.*

133. See Nedelsky, *Law's Relations, supra* note 7 at 118 *et seq*, on a relational understanding of autonomy, where she suggests that "autonomy is not to be equated with independence. Autonomy is made possible by constructive relationships."

134. *Criminal Code, supra* note 56, s 717(2) says: "Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person (a) denies participation or involvement in the commission of the offence…"

135. *Criminal Code, ibid*, continues: "Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person …(b) expresses the wish to have any charge against the person dealt with by the court."

136. *Ibid*, s 717(4) states: "The use of alternative measures in respect of a person alleged to have committed a criminal offence is not a bar to proceedings under this Act…" *Ibid*, s 504, provides that "any one" may lay criminal charges where they have reasonable grounds to believe that a person has committed a criminal offence. Section 717(5) makes all this crystal clear: "Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law."

137. *Criminal Code, ibid*, s 717(4)(a) states: "where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge…"

is recognized in that partial compliance with restorative agreement by an offender may result in dismissal of the charge,[138] or, presumably, in a reduction of sentence were the offender to be convicted.[139] The question to be posed at this point is whether this statutory scheme allows for any fine tuning of a restorative outcome through a process of judicial review in a superior court, rather than simply returning the matter to a criminal court for a kind of "trial de novo," which might negate or ignore the relational elements of the restorative process that had gone before.

The foregoing description of "exit" from restorative process and return to criminal court are operative in the context of restorative processes invoked at the pre-conviction stage, that is, as a matter of diversion from the formal criminal process. Different considerations obviously apply where restorative processes are set in motion by a sentencing court or by correctional officials. Sentencing courts may wish to refer the matter to a restorative justice agency for the convening of a restorative conference which will report its results or recommendations prior to the sentencing date.[140] Alternatively, the judge may wish to chair a sentencing circle him or herself,[141] and could call upon a community agency for assistance in setting up the circle. In either of these scenarios, the sentencing court will decide upon the implementation (or not) of any restorative agreement, and will have an opportunity to review the substantive or procedural propriety of any recommendations from the restorative conference prior to imposing sentence. Moreover, challenging the nature of the outcome would be by way of appeal proceedings instituted by either the offender or the prosecution representing the "public interest."[142] In this context, the dissatisfied victim or community participant has no independent right of

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138. *Criminal Code, ibid*, s 717(4)(b) in relation to partial compliance reads, in part: "the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard the circumstances and that person's performance with respect to the alternative measures."

139. *Criminal Code, ibid*, s 718.3(1) leaves sentencing discretion in the hands of the convicting court, subject to the principles found in s 718.2(d) & (e), which enunciate a principle of restraint: see *R v Bunn*, [2000] 1 SCR 183.

140. The "Judge Lilles Approach." This approach is possible under the Nova Scotia *Program Protocol, supra* note 114 at Section Three, C.1. The conference thus provides a community generated equivalent of a pre-sentencing report from the probation service (which may also have been obtained by the sentencing judge). See Heino Lilles, "A Plea For More Human Values in Our Justice System" (1992) 17 Queen's LJ 328.

141. The "Judge Stuart approach," see Stuart, *supra* note 80. This approach is also encouraged by the Nova Scotia *Program Protocol*, *supra* note 114. For a judicial description of the operation of a judicially conducted sentencing circle, see *R v Moses* (1992), 11 CR (4th) 357, [1992] 3 CNLR 116.

142. *Criminal Code* and *Youth Criminal Justice Act* appeal proceedings vary with the nature of the offence (summary conviction or indictable) and the status of the sentencing court (Provincial Court or Superior Court). See *Criminal Code, supra* note 56, s 37(8) & Parts XXI & XXVI, and *YCJA, supra* note 104, ss 37(1) & 37(5).

appeal, but rather their interests are subsumed under the public interest, which is procedurally in the hands of the prosecutor.[143] As to restorative justice processes initiated at the correctional level and their aftermath, the *Criminal Code* and *Youth Criminal Justice Act* are largely silent, although there are provisions in these statutes under which correctional officials may seek revision of conditions in probation orders and conditional sentence orders.[144] But there are statutory provisions and regulations with respect to decision making authority of correctional officials, which may be relevant to the exercise of discretion on the question of whether or how to invoke restorative processes.[145] The existence of these statutory sources of authority on the part of judges and correctional officials raise the question of how decisions made under them may be challenged by dissatisfied participants in restorative conferences, either internally by statutory appeal or through judicial review in the courts.

3. *Restorative processes as statutory decisional forums open to judicial administrative review*

Administrative law provides that statutory decision makers can be required to adhere to basic standards in relation to both substantive and procedural matters.[146] Judicial review of such statute-based decisions can occur in accordance with the common law where there are no statutory appeal possibilities.[147] It is arguable that referral agents and community agencies, or their facilitators conducting restorative processes, are statutory decision makers operating largely in circumstances where there is no explicit form of appeal from their decisions under either the *Criminal Code* or *Youth Criminal Justice Act*, or under the authorization and protocol.[148] As such, restorative processes, other than those connected to sentencing, may, in principle, be judicially reviewable for error on substantive or procedural grounds. Generally, administrative law remedies have been available

143. The complicated issue of the role of the victim as private prosecutor will not be addressed here, but it is a possibility. Moreover, the idea of a victim right of appeal is appealing to many victims' rights advocates but not to prosecutors. See Roach, *Due Process*, *supra* note 57 at 30.

144. *Criminal Code*, *supra* note 56, s 732.2(3); *YCJA*, *supra* note 104, ss 42(2)(k), 59(1)-(7).

145. *Criminal Code*, *supra* note 56, s 742.4(1); *YCJA*, *supra* note 104, ss 76(6)-(7), 34(6).

146. Sara Blake, *Administrative Law in Canada* (Markham, ON: LexisNexis Canada, 2011).

147. This is still rooted in the ancient prerogative writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, which evolved through the exercise by common law courts of their inherent jurisdiction to resolve disputes among the Crown's subjects as well as supervise the legality of decision makers established under statutory authority.

148. This is based on the assumptions that the process of return to criminal court described above is not an appeal or review of the restorative process, but simply a default possibility in the event of the collapse of the restorative process or non-compliance by the offender, and that one is not contemplating the situation of the sentencing judge referring restorative conferences or conducting sentencing circles.

for both procedural and substantive errors of law, errors of fact, and the misuse of discretion.[149] All of these problems are conceivable in relation to restorative processes or the agreements which flow from them. The current approach in administrative law is to use a common analytical framework for all substantive errors and a separate one for procedural errors. Restorative conference decisions appear to meet the four key factors for governing the threshold for procedural review of the duty of fairness to those affected: they are particular to a given situation; they may affect rights, interests, property, privileges, or liberties; their consequences are serious; and there is an important sense in which their decisions may be final.[150] Furthermore, if a restorative agreement is conceived as a state action which threatens the life, liberty, physical integrity, psychological integrity, or ability to make personal decisions of fundamental importance, it could be thought to meet the constitutional threshold for procedural review.[151] However, the administrative law procedural protections vary in accordance with the nature of the decisions and the decision making process, the statutory context, the importance of the decision to the person affected, the legitimate expectations of the person, and the statutory agency's procedural choices.[152] This flexibility of administrative law is very important for restorative justice, since it implies, for example, that procedural requirements for restorative conferences can be very different than for courts or formal tribunals. On the substantive side, a restorative agreement could be reviewed on a standard of correctness (if there were an issue as to the legality of a requirement) or on a standard of reasonableness (for discretionary aspects, factual assumptions, among others).[153] The former standard would appear to be easily invoked to challenge an agreement with illegal content, whereas the latter would protect the deliberative space of the restorative conference to elaborate creative agreements without interference unless the outcome is deemed "unreasonable."

149. Blake, *supra* note 143.
150. See *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311.
151. See *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307.
152. *Baker v Minister of Citizenship and Immigration*, [1999] 2 SCR 817 (administrative context); and *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 (constitutional context).
153. *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 [*Dunsmuir*].

4. *Administrative law and restorative process: rights, interests, property, privileges, and liberties (and obligations and responsibilities)*

In this segment the analysis assumes that community agencies facilitating restorative processes are acting as statutory decision makers pursuant to the authority delegated to them under the program authorization, protocol, and service contracts with the government. If, however, it were thought that the private nature of these charitable community organizations, combined with the voluntary agreement of all parties (offender, victim, their supporters, community representatives), created a shield protecting them from the status of government actor, there could still be grounds for subjecting them to the procedural and substantive requirements of administrative law. Private clubs and religious organizations have been held to substantive and procedural standards of fairness under administrative law if they are incorporated bodies.[154] At the very least, community agencies facilitating restorative conferences would fall within the ambit of this attenuated administrative law jurisprudence.

If the threshold for judicial review under administrative law is an action by the decision maker, which affects rights, interests, property, privileges or liberties, or constitutionally threatens the life, liberty, physical integrity, psychological integrity, or ability to make personal decisions of fundamental importance, participants in a restorative conference might be thought to have a remedy. Clearly, an offender participating in a restorative conference could have a liberty interest at stake if the offence with which he or she is charged makes the offender potentially liable to a term of imprisonment.[155] His or her property could be in issue if an agreement required him or her to compensate the victim or the community. An offender's interests, privileges, or liberties could be at stake if he or she is denied effective participation in the process or is required by a restorative agreement to make constraining life style changes, which, though not illegal, might restrict his or her liberty. An offender's physical integrity is unlikely to be in issue unless, for example, he or she is required by an agreement to engage in personal service for a victim or the community for which he or she is physically unsuited. An offender's psychological

154. See for example, *Lakeside Colony of Hutterian Brethren v Hofer,* [1992] 3 SCR 375 or *Davis v United Church of Canada* (1992), 92 DLR (4th) 67 (Ont Gen Div).

155. This could be a *Charter* issue since the *Charter*, *supra* note 15, s 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice." The question may turn on whether an offender returned to a court after a flawed restorative process could face imprisonment, which he or she might have avoided had the restorative conference been conducted properly.

integrity might theoretically be threatened, depending upon his or her make-up, by harmful statements or conduct in a restorative conference or by a condition in an agreement which required him or her to act or communicate in ways which were demeaning or otherwise upsetting. If there are procedural flaws in the restorative process or substantive errors in the agreement, an offender may have a case for challenging the results without choosing the "all or nothing" remedy of going back to the criminal court. A corollary issue, of course, is whether the offender, in agreeing to participate in a restorative process, incurs obligations or has responsibilities that can be enforced by victims or members of the community who have agreed to participate.

A similar exercise of legal analysis is possible in relation to victims or community participants in restorative justice processes. A victim's rights may have been violated by a theft, fraud, break-in, assault, or other criminal conduct on the part of the offender. But the question here is whether the victim has rights, interests, property, privileges, or liberties at stake in the restorative process which can be vindicated by judicial review if not adequately protected in the initial restorative conference. By agreeing to participate in a restorative conference, the victim may be relinquishing, or at least postponing, access to other legal remedies such as laying criminal charges or seeking civil recovery in tort or contract. If a restorative process is conducted in such a way as to limit the victim's effective participation in the deliberations or by inadequately protecting her or his property rights, reputational rights, or rights to obtain compensation for psychological harms, surely there are rights, interests, property, privileges, or liberties at stake for the victim, which should entitle rectification at the behest of a reviewing court? These matters might be thought to be matters of "standing" in administrative law parlance. On the other hand, by agreeing to participate in a restorative conference, does the victim incur obligations or undertake certain responsibilities? What if a victim, for example, agrees to participate in a monitoring or reporting upon the implementation of an outcome agreement?

Finally, do members of the community have similar considerations at play which entitle community participants to complain to a court if these are ignored or allow others to complain if they are not lived up to? Do restorative processes create or recognize community rights or collective rights of a public sort which can be asserted by dissatisfied community participants at a restorative conference? Here again, the fact that the offender's criminal behaviour may have caused harm to the community is not the question. The issue is whether the "public" or "the community" has rights, interests, property, privileges, or liberties at stake in the

restorative process which entitle the community to a remedy if they are not adequately respected or vindicated. Members of the public are normally entitled to attend a criminal trial, under the constraints described above. If community members are in attendance at a restorative conference simply by virtue of their desire be present, or if, indeed, they have been asked to be present to contribute their views or possibly their resources (like jurors or government and community agencies at a criminal trial), do they thereby gain a sufficient stake in the outcome to precipitate a judicial review in the event of an alleged unsatisfactory outcome? If such community members are denied standing to ensure effective participation in the process or if a restorative agreement, negotiated with the participation of community members and in the interests of repairing community harm, is in some way defective, can community participants demand to have the matter rectified? This might stretch current concepts of rights, property, privileges, or liberties beyond their currently established limits. But, would it be inappropriate, or beyond the jurisdiction of a reviewing court, to grant a remedy? Surely not. Conversely, what obligations or responsibilities lie upon community representatives who agree to participate in a restorative conference? What of enforcing specific undertakings made by community participants?

5 *Relational rights, duties, and autonomy: a key to the rule of law and restorative justice*

When rights are understood relationally, they require a relational understanding of autonomy, and in this context, the autonomy of participants involved in restorative processes. Jennifer Nedelsky argues convincingly that:

> [Relational] autonomy is not to be equated with independence. Autonomy is made possible by constructive relationships…The central problem in the modern administrative state is no longer the traditional liberal objective of protecting individual autonomy by keeping the state at bay. The problem is how to protect and enhance the autonomy of those who are *within* the (many) spheres of state power…The objective is not to attain a mythic independence, but to structure relations so that they foster autonomy.

In other words, relational autonomy is not the independence to be gained by formally asserting one's rights as trumps against the interests of others. Rather it is the exercise of one's judgment in a way which respects others, takes into account the concerns of others, achieves one's objectives with an understanding that one will have continuing relations with others who

must be accorded dignity, and that this reciprocal and relational account of the world necessarily circumscribes actions in restorative processes.

As argued in Part I, a relational understanding of rights, obligations, and autonomy explains how restorative processes are different than traditional criminal court processes. The latter traditionally rely on formal rights, both procedural and substantive, which are asserted as trumps, that will operate in an adjudicative context, which will determine pre-trial and trial fairness, guilt or innocence, punishment or not, in ways which will take into account the rights and interests of victims and community only in a largely abstract sense. The relational quality of underlying social connections is subordinated to the procedural and substantive requirements through the formal equality of the law which is manipulated at arms length by the professionals: police, counsel, judge (jury maybe), and correctional officials. Restorative processes explicitly raise issues of how the parties felt and what they were thinking during critical events which shaped or distorted a relationship, between or among them. Restorative conference participants are required to put their minds to the issue of what will make things right among all those affected in an exercise which emphasizes the equality of relationship among all present. They agree to conduct themselves differently in the future toward and with one another.[156] The rights and obligations among all are understood contextually and relationally. In the event of the failure of a restorative process, which facilitators are unwilling to rectify, the exercise of the remedy of exit is the independent assertion of an individual right as trump—whether exercised by the offender, victim, community representatives, or facilitating community agency.[157] The use of judicial review, with a prerogative remedy requiring the restorative conference to reconvene and reconsider its processes and outcomes in a relational way, respects the deliberative space created by restorative justice and respects the relational autonomy of the participants and their efforts at re-creating reciprocally acceptable restorative outcomes. However, the possibility of moving between the two modes of justice, and the formal and relational rights which they represent, allows for the possibility of the rule of law operating in two different modes in the two different contexts.

156. See Llewellyn, "Thinking Relationally," *supra* note 7.

157. However, the victim may assert a right of exit as a personal trump, while the agency, offender, and community representatives may wish to carry on—sometimes with a surrogate victim. Thus, the absence of a victim veto allows the relational rights and obligations of others to be fulfilled.

IV. *Restorative rights and duties: relational standards for offenders, victims, and communities*

1. *Content of administrative law standards in the restorative justice context*

Choice among alternative procedures made by administrative decision-makers may affect the nature of procedural rights or protections for participants required by administrative law. In the context of restorative justice in Nova Scotia, procedures for the purposes of this analysis may include accountability sessions, mediation, and restorative conferencing, all of which are conducted by community agencies.[158] Notice of the fact that the process will occur, as well as the nature of the process, how parties can participate, and what the range of outcomes might be, are all procedural concerns for judicial review.[159] Some degree of discovery or disclosure of key factual information prior to the process may be necessary to ensure effective participation.[160] Delays that undermine the fairness of the process (rendering key participants unavailable, for example) could be held to vitiate a restorative process.[161] A common aspect of administrative decision making is orality or interactive responsiveness of the proceedings: the "right to make representation," "to meet the case against one" or "to be heard," are equivalent verbal descriptions, which can be understood to be consistent with circle decision making of the sort most often used in restorative conferences, but which must be understood flexibly in this context.[162] Similarly, the right to counsel in administrative proceedings varies with the nature of the process and, as mentioned above, the primary value of having the "client" tell his or her own story in a restorative conference and the absence of formal argument, reducing the formal participation of counsel by comparison to adversarial proceedings, will

158. Circle sentencing is excluded from this analysis since it is removed from the purview of judicial review on administrative law principles because of the availability of sentencing appeal procedures as described above.

159. *R v Ontario Racing Commission, Ex parte Taylor* (1970), 13 DLR (3d) 405 (Ont HC), aff'd 15 DLR (3d) 430 (Ont CA).

160. Since restorative processes are not adversarial in the traditional sense, this duty of disclosure will likely fall upon facilitators.

161. *Kodellas v Saskatchewan* (Human Rights Commission) (1989), 60 DLR (4th) 143. *Blencoe v British Columbia (Human Rights Commission)*, [2000] SCJ 43 (QL).

162. Interruption to make points of order or structuring adversarial debate will give way to respect for opportunity to make one's point when the talking piece moves round the circle, and an understanding that another circle participant may have made the relevant point before your turn comes again to speak. It will be interesting to see if reviewing judges are easily able to make this mental transition. This is not to say that orality in the sense to a universal or mandatory right to an adversarial oral hearing is a necessary principle of administrative law in all contexts—a right to be "heard" through written submissions may suffice in many circumstances.

have to be appreciated by a reviewing court.[163] Since cross-examination seems antithetical to the collective process of providing information through all participants personally in a restorative conference, a reviewing court would have to be convinced that full opportunity to receive and contest information had been given in order to compensate for the absence of challenging "witnesses" in the traditional manner.[164] Latitude may also be required from a reviewing court on the question of "official notice," since one of the great strengths of restorative conferencing is the ability of participants to bring to the table a wide range of knowledge and experience relevant to understanding the basic relationships underlying the commission of the wrong and its resolution through a restorative agreement.[165] The commonly invoked administrative law principle that those who hear must decide could have application for restorative justice, particularly where it may be appropriate to hold more than one conferencing session in order to resolve the matter.[166] The duty on administrative decision makers to give reasons for their decisions is variable,[167] and one trusts that the role of a restorative conference in coming to an agreement

163. How this works will depend on the degree of understanding a reviewing judge has for restorative principles and how much deference he or she might accord to restorative process. Representation may be confined to providing advice at a hearing, but not extend as far as cross-examining witnesses or making submissions: see *Egglestone v Ontario (Advisory Review Board)* (1983), 150 DLR (3d) 86 (Ont Div Ct). On state funded counsel see: *New Brunswick (Minister of Health and Community Services) v G(J) [JG]* (1997), 145 DLR (4th) 349 (NBCA), which suggests three criteria "seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant." See also *Howard v Stony Mountain Institution* (1985), 19 DLR (4th) 502 (FCA), A case about the right to counsel on charges under Penitentiary Service Regulations which adopts the principle of "the less formal the adjudicative context, the less one has a right to representation."

164. Wigmore's famous dictum that cross-examination is the most efficient mechanism ever discovered for getting at the "truth," (see JH Wigmore, *Wigmore on Evidence*, Vol 5 (Chadbourn revision, 1974) s 1367 at 32) may merely be a testament to the fact that he was unfamiliar with the effectiveness of restorative processes. See *R v Moses, supra* note 138.

165. A parallel might be drawn here to tripartite labour relations tribunals or commercial arbitration tribunals where the nominees of the respective parties may be chosen for their knowledge of the context and subject matter of the type of dispute in question, and who are expected to bring such understandings to the administrative task of the board, even if the neutral chair may be chosen for his or her legal and/or procedural knowledge rather than subject matter expertise. In other words, collective fact finding can go on in a context where all assumptions of the decision makers are not made explicit, and yet this is seen as helpful to the probity and integrity of the outcomes rather than problematic in legal terms. Assumptions or decisions about "relevance," i.e., what is logically probative in a particular context, are susceptible of determination this way in such situations.

166. Contrast *re Ramm* (1957), 7 DLR (2d) 378 (Ont CA) with *Potter v Halifax Regional School Board*, [2002] 213 NSR (2d) 201 (NSCA).

167. See *Baker, supra* note 149 compared to *Future Inns Canada Inc v Nova Scotia (Labour Relations Board)* (1997), 160 NSR (2d) 241 (NSCA).

might be analogized to the role of a jury in this regard.[168] The question of impartiality is a tricky one. Facilitation by someone in relation to whom there is a reasonable apprehension of bias would be an appropriate basis for successful review;[169] however, the participation of supporters of offenders and victims could be seen as appropriately analogous to tripartite labour relations boards or arbitration tribunals where the communities or parties involved in the dispute are represented on the decision-making body while the chair (analogous to a restorative justice facilitator) must be seen to be neutral.[170] Similar considerations would seem to render inappropriate the application of much administrative law doctrine surrounding issues of the independence of tribunals, unless there were evidence of governmental or private pressures on facilitators or conference members to decide in accordance with factors not considered in the restorative process.[171]

In terms of review for substantive error, there has been much litigation in the recent past over selecting standards of review. The Supreme Court of Canada has now settled on two possible standards: correctness and reasonableness.[172] In any given case, it must be determined, for each separate issue where a substantive error is alleged, just what the standard of review will be. The standard of correctness is applicable to legal issues where it is thought there is likely to be only one correct outcome or decision, or at least a need to have consistency across different institutional contexts.[173] In the context of restorative justice process, this correctness standard will most likely be applicable to terms of a restorative agreement which are illegal, in the sense of their being contrary to basic criminal justice policy (e.g., a community service requirement which

168. Juries give verdicts, not reasons for decisions. The conference participants achieve an agreement. Both should be viewed as appropriate outcomes based on "public" participation, which can stand without a requirement for formal reasons. Historically grand juries of presentment acted upon their own knowledge in bringing cases to the attention of judges. It was only with the evolution of petty juries that knowledge of relevant facts came to be acquainted with bias. See Morgan, *supra* note 22.

169. *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369.

170. This is a well-known form of structure for institutional decision-making in both industrial relations and commercial matters. Donald D Carter et al, *Labour Law in Canada*, 5th ed (The Hague: Kluwer Law International, 2002) at 371-372.

171. *Committee for Justice and Liberty v National Energy Board*, *supra* note 165 at 394-95; *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, which set out tests for bias which would have to interpreted contextually, if applied to restorative conferences which include victim and offender supporters.

172. *Dunsmuir*, *supra* note 149 where the "third standard" of "patent unreasonableness" was finally abandoned.

173. "Matters involving constitutional questions, true questions of jurisdiction or *vires*, questions concerning the jurisdictional lines between competition specialized tribunals, and general questions of law of importance to the legal system as a whole which are outside the adjudicator's specialized area of expertise." *Dunsmuir, ibid* at para 58-61.

exceeds the number of hours allowable in the *Criminal Code*) or a civilly unenforceable aspect of reparation or compensation to a victim (e.g., work in an establishment from which minors are barred, or paid work contrary to provincial economic regulations protecting the private sector). However, it is possible to think that a question of the "jurisdiction" of the restorative conference could arise if the group, in, for example, getting at fundamental causes of crime, tried to assert authority over a community in ways which might be thought coercive or only tangentially related to resolving the issues.[174] The standard of reasonableness grants considerable latitude to the administrative decision maker to come to conclusions which a reviewing court might question but not over-turn. The reasonableness standard applies to questions of "fact, discretion and policy": those where "legal issues cannot easily be separated from factual issues," and "where the tribunal has developed particular expertise in the application of a common law or civil law rule in relation to a specific statutory context."[175] This reasonableness standard is key to the idea that administrative law judicial review may be appropriate for use in ensuring that restorative process complies with the principle of the rule of law. The community agency is surely an organization with specialized expertise in the facilitation or restorative justice processes. Assuming this to be correct, a reviewing court should be required to respect this expertise and defer to reasonable decisions of a restorative conference on fashioning contextual restorative outcomes within the broad range of possibilities recognized as feasible by the Protocol. As a matter of administrative law, a restorative conference which comes up with a plan to make the situation right should have its solution respected as long as it is a reasonable one and not clearly illegal.

2. *Offenders', victims', and communities' procedural and substantive restorative process rights*

Standards for conducting restorative justice processes have evolved internationally[176] and locally.[177] There is little doubt that these standards generally comply with the administrative law procedural standards prescribed above. Offenders, victims, and community participants

174. This, frankly, is somewhat speculative.

175. *Dunsmuir, supra* note 149 at para 69, also refers in this context to the presence or absence of a "privative clause" which is not present in either the *Criminal Code* or *Youth Criminal Justice Act* provisions which underpin the creation of restorative processes in Nova Scotia. Thus reference to the privative clause factor is omitted from the discussion in the text.

176. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, E Res 2002/12, UNECOSOCOR, 2002, 39 [*Basic Principles*].

177. Nova Scotia, Department of Justice, *Nova Scotia Restorative Justice Program: Best Practice Standard* (Halifax, NS: Nova Scotia Department of Justice, September 2005) looseleaf prepared by Shruti Gola Tarashi for the Nova Scotia Restorative Justice Program, vols I-V.

will inevitably receive appropriate notice and adequate disclosure for a restorative process convened in accordance with normal procedures.[178] All participants in the circle will generally have multiple opportunities to speak in an embodiment of the principle of voice or the right to an oral hearing.[179] Also recognized is a principle of support which goes well beyond the right to counsel of administrative law: offenders and victims can have not only counsel but family or supporters who can speak on their behalf,[180] although it often appears that each side develops sympathy for the situation of the other.[181] A properly facilitated process will, in response to the question "what happened" (regularly answered by many conference participants) establish an appropriate factual foundation for an agreement.[182] Going beyond any formal process requirements, information obtained through questions like "how did you feel when it happened" or "what were you thinking when it happened" will normally provoke relational understandings of the impact of the various events. In this context, deliberation over the question of "what should be done to make it right," or as a lawyer might say "what are appropriate remedies in the circumstances," will lead to an outcome in which the offender re-affirms his responsibility,[183] may provide an apology to the victim (who may or may not accept the apology),[184] and, possibly, reparation or compensation to victim or community.[185] The question of whether offenders have a "right" to an outcome is an interesting one. One practical resolution of such a question may simply be that in the absence of an agreement, the matter will be referred back to the original referral source.[186] However, the burden of the argument here is that if the process can be put back on the rails via judicial review, that option should be seen to be available. The final

178. *Basic* Principles, *supra* note 172 at s 13(b); *Program Protocol*, *supra* note 114.
179. *Ibid*.
180. *Ibid*. Counsel, of course, may be present and active to the degree consistent with the needs of a deliberative process.
181. Meredith Rossner, "Emotions and Interaction Ritual: a Micro Analysis of Restorative Justice" (2011) 51:1 Brit J Crim 95 at 108-110.
182. Llewellyn & Howse, *supra* note 2 at 57-59.
183. This, of course, was a procedural pre-condition to participation in the restorative process. *Criminal Code*, *supra* note 56, s 717(2)(a).
184. The question of apology is a complex matter as it is often an important aspect of restorative conferencing and yet apology and forgiveness must both be offered voluntarily if they are to be of benefit to the process and participants. Facilitators who try to force apologies are doing a disservice to proper principles of restorative justice. See Natalia Josephine Blecher, "Sorry Justice: Apology in Australian Family Group Conferencing" (2011) 18 Psychiatry, Psychology and Law 95.
185. This, of course, will depend on the nature and seriousness of the offence, the situation of the offender, the commitments made by other conference participants, an assessment of how matters will evolve going forward, etc.
186. *Program Protocol*, *supra* note 114.

procedural "rights" to be considered in this context are those of privacy. In respect of adult restorative justice, there is an appropriate analogy between a restorative conference and a criminal trial: justice should be seen to be done, and adult participants have no reasonable expectation of privacy in such proceedings. This is not a matter of jury deliberation on guilt or innocence but akin to sentencing hearing, which is public. The situation is different with respect to youth restorative justice. *Youth Criminal Justice Act* section 110 provides: "Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a person dealt with under this Act."[187] Similarly, other sections of the *YCJA* limit access to and use of youth justice records in ways which would identify young persons dealt with under the Act.

As to substantive outcomes, the challenge for illegality of provisions in a restorative agreement needs little analysis. Such circumstances, if clear-cut, would likely lead to a re-convening of the restorative conference to rectify the matter, and would only go on judicial review if there were to be legal uncertainty in the law needing interpretational clarity. More interesting, however, are the discretionary, factual determinations implicitly or explicitly underpinning a restorative agreement, which has emerged as the result of the exercise of the "expertise" of facilitators and conference participants. Administrative law assesses reasonableness in relation to process and outcomes. In the context of a formal review of a firing decision, the Supreme Court of Canada in *Dunsmuir* states that review of the "reasoning process" is "concerned mostly with the existence of justification, transparency and intelligibility within the decision making process," while in reviewing "the result" the court must ask "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[188] The court later opined unanimously that review for reasonableness is "an essentially contextual exercise."[189] Sometimes, of course, administrative discretion may involve consideration of *Charter* values, in which case the Court has recently said it will be deferential to administrative decision-makers.[190] How is one to give content to such abstract propositions in the context of restorative

187. The exceptions in subsequent subsections of section 110 deal with young persons who have been given adult sentences, are being prosecuted for an offence with a potential adult sentence, have become adults and wish to publish the information themselves, or who are dangerous and still at large and publication is deemed by a judge to be useful in apprehending them. *YCJA*, *supra* note 104, s 110.
188. *Dunsmuir*, *supra* note 149 at para 47.
189. *Catalyst Paper Corp v North Cowichan (District),* 2012 SCC 2.
190. *Doré v Barreau du Quebec,* 2012 SCC 12, where it was said proportionality was required in disciplining a lawyer.

justice? The answer is surely that a process and outcome are reasonable if in the context of the facts and the law they promote equality of relationship in the sense of demonstrating mutual concern, respect, and dignity in their response to the harm and the interests of all those involved. In fact, one is concerned primarily with the outcomes or results of restorative process, much as a court would review a settlement outcome approved by an administrative tribunal which normally adopts adversarial procedures.[191] Generally, there is a reluctance to go behind and second guess such settlements where the parties have agreed on an outcome and foregone a hearing. How this will play out in relation to potential claims by offenders, victims or representatives of the community is a matter of some interest.[192]

3. *Enforcing duties of participants in restorative process: scattered legal remedies*

It is all very well to think about administrative law being a "rule of law backup" to catch the worst sort of problems which might arise in relation to a restorative process gone wrong, and where those affected do not necessarily see reversion to a criminal court as the optimal solution. However, as has been frequently observed, administrative law can curtail the abuses of negative outcomes, but it does not necessarily pro-actively promote positive outcomes, except indirectly by establishing standards for decision-makers.[193] This is important in relation to the problem of enforcing the duties or obligations which may arise in a restorative agreement. The offender may agree to pay money or do some sort of personal service to victim or community to compensate for harm caused. The victim or a community organization, in agreeing to have the offender do personal service, may have an obligation to facilitate this activity. An individual community representative may offer to assist an offender or a victim in some significant way. A government agency may agree to provide some family support (financial or otherwise) or social service (e.g., anger management counselling), which is thought to be critical to getting at the underlying cause of the harmful behaviour. For the most part, conference participants appear to limit themselves to taking on responsibilities which they can handle, and the dynamics of restorative conferences usually result in formal and informal monitoring arrangements which encourage the participants to meet their obligations willingly. However, there may

191. This proposition gives rise to a need for careful research on the relevant administrative law jurisprudence in relation to the facts of any given case.

192. For a discussion of analogous concerns in another context, see Catherine Piché, "A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness" (2009-2010) 41 Ottawa L Rev 25 at paras 2 & 64.

193. Nedelsky, "Laws Relations," *supra* note 7 at 141 *et seq.*

be occasions where someone backs out of an obligation, and the question arises as to whether that term of the restorative agreement is legally enforceable as a matter of civil, criminal, or administrative law.[194]

There is no reason to think that an offender's agreement to pay a certain sum of money to a victim to compensate for the harm caused by the crime is not a serious legal commitment which is enforceable at law.[195] Indeed, if this is the result of a sentencing circle or sentencing advice from a restorative conference to a judge, one would anticipate that there would be a restitution order as part of the sentence which could be enforced by registering the order with a civil court.[196] However, criminal courts and governments have historically been reluctant to give wide application to the notion of restitution, citing concerns about turning the criminal courts into agencies for collection of civil debts which are within the jurisdiction of the civil courts.[197] The real problem would arise if the order is simply an element of a restorative agreement at the pre-trial stage, which would have to be enforced as a matter of general contract law.[198] In a normal case of a youth involved in a minor property crime, regular court enforcement might cost more than the amount which could be recovered on the on the contract and such a remedy would be impractical.[199] However, as restorative justice moves into the adult sphere, one can imagine more complex scenarios. What if a fraud in the amount of $19,999.00 were to be diverted by the prosecution for restorative conferencing?[200] A victim might feel inclined to enforce that matter in a regular civil court if an offender with assets defaulted on the obligation contracted through the restorative conference. What if, resulting from a restorative conference after an offender's taking responsibility in a case of domestic violence, he

194. The complicated contract law question of the severability or interdependence of legal obligations and their enforceability will not be addressed here, although it could be critical in any given situation.
195. In contract law, this is known as the issue of the "intention to create legal relations," John D McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 111-136.
196. See *Criminal Code*, *supra* note 56, ss 738-741.2.
197. *R v Zelensky*, [1978] 2 SCR 940 (SCC); M Justin Hopkins, "Sentencing: Constitutional Law: Criminal Code Section 653 Compensation Orders: Using Civil Procedure Legislation in an Appellate Disposition: Overstepping Regina v. Zelensky: Regina v. Ghislieri, 25 A.R. 465, [1981] 2 W.W.R. 303 (C.A. 1980)" (1981) 13 Ottawa L Rev 882.
198. It is to be noted that a restitution order under the *Criminal Code*, does not extinguish one's rights to civil recovery. See *Criminal Code*, *supra* note 56, s 11; *R v Zelensky*, [1978] 2 SCR 940.
199. The likely result would be the voiding of the agreement by the agency, and the return of the matter to criminal court for disposition, leaving the victim's contractual right unsatisfied. However, the community restorative justice agency might assist a victim in obtaining recovery through small claims court if he or she were unsure of how to do this.
200. The amount is chosen for the example deliberately, since it is under the $20,000.00 threshold outlined in the *Program Authorization*, *supra* note 106 at Schedule A, s 8.1, at which referrals can be made only post-conviction.

agreed to set up an educational trust for a child as a part of the agreement, and fails to follow through.[201] Here again, the trustee or beneficiary might wish to enforce the trust agreement, rather than simply see it slip away as the offender is returned to criminal court for sentencing. One might also contemplate restorative processes used as part of enforcement of environmental or other regulatory statutes, where a commitment to repair particular environmental damage or contribute to a community protection organization might be a reasonable aspect of a restorative agreement.[202] If a government agency (federal, provincial, municipal) agreed to become involved in a restorative agreement, could this commitment be enforced civilly, be appealed internally or be subject to mandamus under administrative law? Working out the complexities of this last suggestion is beyond the scope of this paper, but it is advanced to make a point. And the point is that obligations incurred through restorative processes must be seen as serious, and subject to legal enforcement, if restorative justice is to be seen as part of a legal system committed to the notion of the rule of law, rather than some sort of informal abandonment of the rule of law. It is also to be noted that the outcome of this way of thinking may be to reduce the distance between civil and criminal justice remedies—a problem which has long bedevilled the common law world. Structuring the means for victims and communities to obtain compensation and reparation in the context of a criminal proceeding holds the promise for restorative justice to make a major contribution to the evolution of efficiency under the rule of law, through an understanding and application of relational rights theory.

4. *Relational rights and duties in restorative justice: administrative dialogue, relational autonomy, and social solidarity*

The general purpose of this section has been to show how the mechanisms of administrative law can, at their best, support the goals of restorative justice which are bound up with a relational understanding of the exercise of autonomy by citizens in a democratic society. If indeed restorative justice is predicated upon understanding that citizens should aspire to relate to one another on the basis of relationships of equality characterized by mutual care and concern, respect and dignity, then such citizens must do so in the exercise of their constitutional, political and moral rights to relational autonomy.[203] Restorative justice and administrative law may

201. See Donovan WM Waters, Mark Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) especially at chapter 6.
202. TL Archibald, KE Jull & KW Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora, ON: Canada Law Book, 2005) at 12:10 & 12:40:50.
203. See Nedelsky, "Shoes" and Llewellyn, "Thinking Relationally," *supra* note 7.

be seen as legal institutions which at their best are capable of promoting a relational understanding of both autonomy and social solidarity. One cannot be forced into restorative justice processes as one can be forced to undergo a criminal trial. Offenders, victims and community participants choose to participate in restorative conferences, implicitly or explicitly, because they understand their connections to the others involved. This promotes a relational understanding of autonomy. As described above, administrative law can be called upon in aid of this project.

It has been suggested that the conception of administrative law, as exemplified in the Supreme Court of Canada's decision in *Baker,* is consistent with a relational approach to "discretion as dialogue."[204] Cartier sees administrative discretion as dialogue developing values of autonomy and democracy:

> First, it conditions the validity of any exercise of discretionary power on the participation of the individual in the determination of the norms that will govern her situation. Second, by mandating that the outcome of the decision-making process be responsive to the dialogue that took place, to the statutory framework and to the public interest, discretion as dialogue favours public accountability.[205]

The foregoing discussion of the use of administrative law to ensure that restorative justice is practiced in a manner consistent with the rule of law is an attempt to illustrate how restorative justice and an enlightened application of administrative law can achieve the values of democracy and autonomy in the manner identified by Cartier. The potential use of administrative law principles to ensure that restorative processes are consistent with the rule of law on which democracy is based, while understanding the relationally autonomous manner in which offenders, victims and community members can interact, is very significant. This does not mean, however, that restorative processes will inevitably induce social harmony, or that offenders, victims or the community may not wish to assert their autonomy in ways that avoid the application of restorative processes. After all, as Nedelsky reminds us, the exercise of even a relationally understood autonomy can prompt individuals to act counter to community on a principled basis in the exercise of personal judgment.[206] In restorative justice terms, the offender always has the option

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204. See Nedelsky, *Laws Relations, supra* note 7 at 147, citing Genevieve Cartier, "Administrative Discretion as Dialogue: a Response to John Willis (or: From Theology to Secularization)" (2005) 55 UTLJ 629.
205. *Ibid.*
206. Nedelsky, "Shoes," *supra* note 7 at 44-45.

of exit, and the victim need not participate. Each may seek to enforce their rights in individual ways. Communities may cry for retribution after the commission of an offence, rejecting restorative processes (putting pro-punitive pressures on police and prosecutors). Courts are there in a democracy to see that formal trials can respect equality, accountability and fairness where formal processes are deemed necessary. This may be particularly necessary in perceived times of crisis. That having been said, restorative justice clearly has its place in the Canadian criminal justice system, (including the resolution of complex and difficult cases) and, to the extent that it can be successfully used it has the capacity not only to reflect values of democracy and autonomy but promote values of social solidarity which come from understanding the world relationally. Invoking administrative law in aid of restorative justice where required ought not to add an incompatible institutional element which is inconsistent with the values of restorative justice. Formal criminal justice, restorative justice and administrative dialogue can be structured in ways which mutually reinforce one another and which are helpfully reinforced by a relational understanding of rights.

Conclusion

Restorative Justice has indeed come of age, at least in some jurisdictions in the world. How restorative justice can be dove-tailed with general concerns about the rule of law has been seen as something of a conundrum. However, a relational understanding of rights promotes a clearer approach to resolving this conceptual and practical dilemma. Seeing rights relationally does not discount the continued importance of a formal criminal justice process, particularly if it is operated in an inclusary manner. But seeing rights relationally can enable us to transcend the problem of viewing the exercise of "exit" from restorative justice and return to the formal criminal justice process as the only answer to the problem of linking restorative justice to the rest of the legal system in a way which respects its essential character and beneficial outcomes. Conceiving of rights relationally allows for the elaboration of restorative procedural rights, which can be respected by reviewing courts employing administrative law, while protecting the deliberative space which enables restorative justice to function. It also allows for achieving the goals of traditional criminal justice and traditional civil justice in compatible ways. It is quite remarkable really. A relational understanding of the role of law and the rule of law not only promotes relationships of equality based on mutual concern, respect and dignity. Relational legal theory provides the possibility of a vision for protecting the rights of those involved in restorative justice and enforcing the

obligations which they undertake, while not hobbling the deliberative and democratic processes which make restorative justice effective. Individual autonomy and social solidarity are reinforced through restorative justice in ways that maintain the coherence of an egalitarian criminal justice system which will still continue criminal trials as an unfortunate necessity. All of this is surely a sign of maturity in the development of restorative justice and perhaps a degree of wisdom in our understanding of the rule of law.