

Citizen Participation in Canadian Criminal Justice: The Emergence of “Inclusionary Adversarial” and “Restorative” Models*

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* I would like to thank my colleagues Archie Kaiser, Jennifer Llewellyn and Ronalda Murphy for helpful comments on the first draft of this paper. My stubbornness on some controversial issues will be evident to them, and of course, remaining errors are my responsibility alone

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Changes in how citizens relate to criminal justice are in the air. Perennial demands to “get tough on crime» continue. But as a society, we are “getting smart about getting tough”.¹ As the new *Youth Criminal Justice Act*² and the relatively recent amendments to the sentencing provisions of the *Criminal Code*³ attest, Canada is at the forefront of international developments which acknowledge the importance of integrating restorative and more traditional paradigms of criminal justice.⁴ Moreover, the character of traditional criminal justice is changing.⁵ All of these initiatives are rooted in varying degrees of citizen alienation from what traditionally has happened in our criminal justice system. Individual citizens and identifiable communities are demanding greater participation in the administration of criminal justice.⁶ Courts, legislators and criminal justice policy makers are

¹ This is to steal the title of the Saskatchewan restorative justice programme: “*Getting Smart about Getting Tough*”: *Saskatchewan’s Restorative Justice Initiative*, Department of Justice of Saskatchewan, 1997.

² S.C. 2002, c. 1.

³ R.S.C. 1985, c. C-46; Part XXIII on Sentencing was recast by S.C. 1995, c. 22 (proclaimed in force September 3, 1996) and modified by S.C. 1997, c. 18.

⁴ David Daubney, of the Federal Department of Justice, among others, is involved in United Nations-sponsored discussions concerning adoption of an international protocol entitled *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, Prison Fellowship International ESC Res. 2000/14, UN ESCOR, 2000, UN Doc. E/2000/30 (2000) 35, online: <http://www.pfi.org/who.htm> (date accessed: January 13, 2002).

⁵ See: K. Roach, *Due Process and Victim’s Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

⁶ Canadian aboriginal communities are arguably the most prominent: Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: The Commission, 1996); J. Rudin, “Aboriginal Self-Government and Justice” in P. Fontaine, ed., *Aboriginal Self-Government* (Saskatoon: Purich, 1999). But see also *Ontario Report of the Royal Commission on Systemic Racism in the Ontario Criminal Justice System*, (Toronto: Queen’s Printer, 1995) and Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution: Findings and Recommendations*, vol. 1 (Halifax: Province of Nova Scotia, 1989).

responding to these demands with measures, sometimes *ad hoc* and sometimes more coordinated, to increase the capacities of those affected by criminal harms, and their procedural aftermath, to participate meaningfully in effective societal responses to these wrongs. Meanwhile there is ferment in the scholarly literature about concepts of citizenship and theories of democracy.⁷ This paper is intended to sketch a map of these changes and reflect on the various new trails that are being blazed over what might otherwise be thought to be somewhat familiar territory.⁸

What is the cartographic structure of the paper? One must start by placing the detailed area map of criminal justice on the broad marine chart of the constitutional and political coastlines which channel the sometimes turbulent waters of egalitarian and participatory values around Canada's post-modern democracy. Secondly, it is critical, when coming on shore, to reflect on the outlines of the traditional "exclusionary and hierarchical" criminal justice landscape which we seem to be leaving for more verdant environs. Thirdly, we shall focus on the redeveloped territory of formal criminal justice: that which, for a want of a more elegant label, I am describing as an egalitarian and inclusionary adversarial model. Fourthly, we examine a skeletal relief map of the restorative justice processes which are emerging as alternative routes or supportive by-ways to channel criminal justice traffic to both novel and well-known criminal justice destinations. Finally, it is important to reflect on the public security features of the journey, to ensure that in our criminal justice policy travels we maintain a safe balance between individual citizens' goals and principles of fundamental justice which protect our over-all societal interests.

One definitional caveat is in order at the outset. While this paper is informed by recent debates over the nature of citizenship in multicultural democracies, and is oriented to issues of inclusion,⁹ it does not directly engage with the theoretical literature on citizenship *per se*. This is because our criminal law has for some considerable time largely ignored the question

⁷ A. Cairns *et al.*, *Citizenship, Diversity and Pluralism* (Montreal: McGill University Press, 1999); I. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) and W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), to cite some of the most recent examples.

⁸ The mapping analogy in legal and social science literature is becoming more attractive as the underbrush of ideological conflict makes the traditional terrain more difficult to discern: see W. Twining, *Globalization and Legal Theory* (London: Butterworths, 2000).

⁹ *Supra* note 7.

of citizenship as a threshold for defining substantive and procedural rights.¹⁰ While citizenship may be relevant to the status of judges¹¹ or jurors,¹² crimes and their defences generally apply to all those found on Canadian territory¹³ and the legal rights provisions of the *Charter*¹⁴ apply to everyone, regardless of citizenship.¹⁵ Thus, this paper is about rights of participation in the criminal justice process available to all persons affected by that system regardless of formal citizenship. From time to time the word “citizen” may thus be used in this broad sense to include all members of the community, both transient and permanent, who may have such rights of participation. For certain purposes, however, precise and formal rights of citizenship are relevant to the subject, and this will be noted where appropriate.

¹⁰ This principle may be modified in the light of the New York terrorist attack of September 11, 2001: see R.J. Daniels, P. Macklem, & K. Roach, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), in particular the contributions by Kent Roach and Don Stuart.

¹¹ Being a Canadian citizen or British subject was formerly and indirectly a qualification for being a judge in most Canadian jurisdictions by virtue of the fact that one had to be a barrister or advocate to become a judge and such status was required in order to be a lawyer. However, since the finding in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 21 [hereinafter *Andrews*] that a citizenship qualification for lawyers is contrary to the equality protections of the *Charter*, the derivative citizenship requirement for judges is no longer operative and such statutes as the *Supreme Court Act*, the *Federal Court Act* R.S.C. 1985, c. F-7 and the *Nova Scotia Provincial Court Judges Act* R.S.N.S. 1989, c. 238, have not been amended to re-instate a citizenship requirement, even though it would seem to be justifiable under the *Andrews* reasoning.

¹² Citizenship may be a qualification for jury service in Canada (see the *Juries Act*, R.S.N.S. 1989, c. 242, s. 4, as amended), although there is an argument that this might be contrary to the reasoning in *Andrews*, *ibid*.

¹³ On the “territorial principle” as the primary basis for jurisdiction in Canadian criminal law, as opposed to the “nationality principle” or the “protective principle”, see Law Reform Commission of Canada, *Working Paper # 37: Extraterritorial Jurisdiction* (Ottawa: Ministry of Supply and Services, 1984).

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁵ *Charter* sections 7, 8, 9, 10 and 12 explicitly apply to “everyone”, while the procedural protections of section 11 apply to “any person charged with an offence.” The extent of the application of the *Charter* to non-citizens has been most controversially litigated in the immigration and refugee context: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

I. EGALITARIAN AND PARTICIPATORY VALUES IN POST-MODERN CANADIAN DEMOCRACY

In the post-modern world, the legitimacy of the rationalist vision of state-centred law is under siege.¹⁶ The “sacred canopy” of divinely inspired natural law has long been rent asunder,¹⁷ and conflicting relativistic claims about the nature of law and society invade our consciousness.¹⁸ In these circumstances, constitutional values and institutions assume ever greater importance in the symbolic and practical maintenance of a democratic social order.¹⁹ This is nowhere more true than in Canada. Since 1982, the advent of the *Charter* has propelled Canadian legal and political discourse into realms which previously might have been thought purely theoretical.²⁰ The Supreme Court of Canada in its *Charter* jurisprudence is melding democratic constitutional theory with practical problems in ways which are both familiar and innovative.²¹ This is particularly true in the area of criminal litigation where recent cases demonstrate that basic notions of personal autonomy, equality and relationship among citizens are informing the Court’s decision-making in such areas as substantive criminal law,²² criminal procedure,²³

¹⁶ A. Carty, ed., *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (Edinburgh: Edinburgh University Press, 1990); for a delightful and mercifully brief primer on post-modernism for the uninitiated, see R. Murphy, “Postmodern Pride: Mary Joe Frug’s Manifesto” (1994) 19 *Law & Soc. Inquiry* 1079.

¹⁷ P. Berger, *The Sacred Canopy: The Social Reality of Religion* (London: Faber, 1969).

¹⁸ E. Gellner, *Relativism and the Social Sciences* (Cambridge: Cambridge University Press, 1985).

¹⁹ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Democracy* (Cambridge: MIT Press, 1998) [hereinafter *Facts and Norms*].

²⁰ A. C. Hutchinson & P. Monahan, *The Rule of Law or Ideology?* (Toronto: Carswell, 1987); A. C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); L. Trakman, *Reasoning with the Charter* (Toronto: Butterworths, 1991); R. Elliott, “References, Structural Argumentation and the Organizing Principles of Canada’s Constitution” (2001) 80 *Can. Bar Rev.* 67.

²¹ D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995); L. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80 *Can. Bar Rev.* 699.

²² *R. v. Lavallee*, [1990] 1 S.C.R. 852 and the so-called “battered woman’s defence”, or *R. v. Creighton*, [1993] 3 S.C.R. 3 or *R. v. Naglik*, [1993] 3 S.C.R. 122 and the retreat from purely subjective standards of criminal liability are pertinent examples.

²³ *R. v. Darrach*, [2000] 2 S.C.R. 443 on the constitutionality of the rape shield provisions of the *Criminal Code* or *R. v. Mills*, [1999] 3 S.C.R. 668 in relation to the disclosure of complainants records in sexual assault prosecutions are relevant examples here.

evidence²⁴ and sentencing.²⁵ Such developments are in accordance with much recent theory about substantive²⁶ and procedural law.²⁷ Moreover, they create interest and controversy in the popular press. However, these jurisprudential approaches are somewhat at odds with certain traditional perspectives on criminal litigation centred simply in notions of individual responsibility, due process and the maintenance of order and crime control.²⁸

These jurisprudential developments are not occurring in a political vacuum. Many of these political pressures go back decades. Pierre Trudeau was not only the prime mover behind the *Charter*; he had earlier championed the slogan “participatory democracy”. However, the democratic liberal centre did not happen upon the new ideology of participatory democracy by accident.²⁹ There were pressures from the “new left” in the 1960s and 1970s for more democratic and consultative structures in universities, the workplace and elsewhere.³⁰ During this period, liberal human rights concerns were on the agenda at the provincial and federal levels, with the aim of expanding citizen access to a whole range of private and public services on an egalitarian footing.³¹ The Law Reform Commission of Canada began a wholesale review of Canadian criminal law and procedure under

²⁴ See generally B. Archibald, “The Canadian Hearsay Revolution: Is Half a Loaf Better than No Loaf at All?” (1999) 25 *Queen’s L. J.* 1 and B. Archibald, “The Uncertain ‘Revolution’ in the Canadian Law of Privilege: What Principles Take Us Where?” in C. M. Breur, M.M. Kommer, J.F. Nijboer & J. M. Reintjes, eds., *New Trends in Criminal Investigation and Evidence*, vol. II (Leiden: Intersentia, 2000).

²⁵ *R. v. Gladue*, [1999] 1 S.C.R. 688, where restorative justice is placed on the agenda as a sentencing issue by the court.

²⁶ A. Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1999).

²⁷ W. T. Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York: New York University Press, 1999); M.A. Glendon, *Rights Talk: The Impoverishment of Legal Discourse* (New York: Macmillan, 1991).

²⁸ H. Packer, *The Limits of the Criminal Sanction*, (Stanford: Stanford University Press, 1968); W. J. Stuntz, “The Uneasy Relationship Between Criminal Procedure and Criminal Justice” (1997) 107 *Yale L. J.* 1; and Roach, *supra* note 5.

²⁹ T.E. Cook & P. M. Morgan, *Participatory Democracy* (San Francisco: Canfield Press, 1971) is a representative example of the currency of the debate at the time.

³⁰ P. Long, *The New Left: A Collection of Essays* (Boston: Sargent, 1969); D. Roussopoulos, *The New Left in Canada* (Montreal: Our Generation Press/Black Rose Books, 1970).

³¹ W. Tarnopolsky, “The Evolution of Judicial Attitudes” in S. Martin & K. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

federal government auspices.³² But the face of criminal law and procedure in Canada really began to change with the combined and sometimes interlinked impacts of the feminist³³ and victims' rights³⁴ movements of the 1970s and 1980s. The 1990s has seen pressure for greater citizen access and fairness of treatment for visible minority³⁵ and aboriginal communities³⁶ in Canada. The interesting aspect of these political developments, also reflected to some measure through changes in citizen access to the criminal justice system, has been the shift away from simply thinking in terms of individual citizens' rights to a concomitant emphasis on the rights and participatory capacities of various groups of citizens who identify themselves as communities or persons with common interests.³⁷ An attempt will be made to portray all of these influences on the evolving map of citizen access to criminal justice in Canada. But before doing this it may be helpful to examine related developments in the field of political/legal theory.

³² The policy document from the federal Government which formally started the process was Canada, Department of Justice, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982) and the culminating reports from the Law Reform Commission of Canada were *Report No 31: Recodifying Criminal Law (Revised and Enlarged Edition)* (Ottawa: Government of Canada, 1986) and *Report No 33: Recodifying Criminal Procedure (Vol. I, Title 1)* (Ottawa: Government of Canada, 1991).

³³ A. Miles & G. Finn, *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982); M.A. Bertrand, C. Boyle, C. Lacerte-Lamontagne & R. Shamai, *A Feminist Review of Criminal Law* (Ottawa: Ministry of Supply and Services, 1986); E. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 *N.Y.U. L. Rev.* 589.

³⁴ J. Zambrowsky & D. Davies, *Proceedings of the First National Seminar on Victims' Rights and the Judicial Process* (Ottawa: Canadian Criminal Justice Association, 1985).

³⁵ Royal Commission on the Donald Marshall Jr. Prosecution, and the *Report of the Royal Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 6.

³⁶ *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Government of Manitoba, 1991); Royal Commission on Aboriginal Peoples, *supra* note 6; Rudin, *supra* note 6.

³⁷ On the theoretical aspects of this debate, see the sources referred to, *supra* note 7.

Theories of democracy are changing to adequately comprehend this complex new political reality in its various manifestations.³⁸ Jurgen Habermas boldly attempts to bridge the gap between the normative, moral discourse of political philosophy and the empirical discourse of the social sciences in a theory of democracy based on the principles of communicative action.³⁹ In fact Habermas differentiates three dimensions of the “self-understanding of modernity” which he argues cannot be collapsed: cognitive, evaluative and normative validity.⁴⁰ He writes in the wake of the “linguistic turn” and claims that communicative reason, on which political communities are built, is possible because of “the linguistic medium through which interactions are woven together and forms of life are structured.”⁴¹ In what is perhaps an optimistic universalist premise, Habermas asserts:

In seeking to reach understanding, natural language users must assume, among other things, that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the inter-subjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction.⁴²

³⁸ The description and analysis in the following paragraphs is based on and more fully explored in my recent paper “Democracy and Restorative Justice: Comparative Reflections on Criminal Prosecutions, the Rule of Law and Reflexive Law” delivered at the Fifth International Conference of the International Network for Research on Restorative Justice, Leuven, Belgium, September 16-19, 2001.

³⁹ *Facts and Norms*, *supra* note 19 and M. Deflem, *Habermas, Modernity and Law* (Thousand Oaks: Sage Publications, 1996). The abridged version of his theory here is intended only to whet the appetite of the reader to pursue it in more detail.

⁴⁰ *Facts and Norms*, *ibid.*, p. xli.

⁴¹ *Ibid.*, p. 3.

⁴² *Ibid.*, p. 4. In fact, Habermas goes further and makes the following claim at p. 311-312:

“In all language and in every language community, such concepts as truth, rationality, justification and consensus, even if interpreted differently and applied according to different criteria, play the same grammatical role. At any rate this is true for modern societies that, with positive law, secularized politics and a principled morality, have made the shift to a post-conventional level of justification and expect their own members to take a reflexive attitude toward their own respective cultural traditions.”

In other words, earnest communication is intended to have, and has, real meaning to participants in such conversations. He also recognizes that communication for strategic purposes in the short-term may not be characterized by the degree of integrity described above as characteristic of communicative rationality.⁴³ That is, people may lie for sleazy, short-term purposes, and expect for a time to get away with it. Communicative interaction creates the basis for potential social solidarity despite the diversity of pluralistic secular societies which have lost their “sacred canopy” of common religious beliefs and which are characterized by complex differentiation of function among politics, law, education and social welfare subsystems. However, his claim is that law, as a form of communication, is a critical category of social mediation between facts and norms.⁴⁴ He sees modern societies as integrated “not only socially through values, norms and mutual understanding, but also systemically through markets [including labour relations systems] and the administrative use of power”.⁴⁵ Law is linked to all three of these mechanisms of social integration. Indeed as a central communicative medium, law (both private and public) is the coercive glue which can serve to hold key aspects of society together when less formalized mechanisms prove inadequate to the task.

For Habermas, constitutional democracy rests on a “discourse principle” which becomes translated into a “democracy principle”. The discourse principle, a matter of morality and law, holds that “valid action norms are only those to which all possibly affected persons could agree as participants in rational discourses”.⁴⁶ The democracy principle is that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discourse process of legislation that in turn has been legally constituted.⁴⁷ The democracy principle thus implies a system of recognized rights and a constitutional/procedural organization. Habermas concludes that these basic rights are equality, citizenship or community membership, mechanisms for enforcement of individual rights, capacity for autonomous

⁴³ For a discussion of the relevance of broader forms of public communication (including greeting, rhetoric and narrative) to democratic theory, see Young, *supra* note 7.

⁴⁴ *Ibid.*, Chapter 1, *passim*.

⁴⁵ *Ibid.*, p. 39.

⁴⁶ *Ibid.*, p. 107. Such a principle, of course, is not entirely unfamiliar: John Rawls, *Justice as Fairness: a Re-Statement*, E. Kelly, ed., (Cambridge: Belknap/Harvard University Press, 2001).

⁴⁷ *Ibid.*, p. 107-113.

participation in politics, and a minimum standard of living.⁴⁸ In Habermas' conception of popular sovereignty, political power derives from the communicative power of citizens. However, in complex societies this must be exercised through legitimated procedures rooted in the rule of law for legislatures, courts and administrative bodies. Thus for Habermas, deliberative politics involves a procedural concept of democracy based on the empirical/normative substructure of the communicative theory of action underlying broad cultural forms (the "life-world").⁴⁹

Critical to the Habermasian understanding of deliberative democracy is the necessary co-existence of formal and informal public spheres—state and civil society. The free development of opinion in pluralistic societies occurs in a wild, undisciplined and unrestricted informal public sphere, which becomes procedurally transmogrified into democratic opinion and democratic will formation in the political/legislative institutions of the formal public sphere.⁵⁰ However, Habermas finds the traditional liberal and modern welfare-state paradigms of democratic theory to be inadequate. Consider the following from Habermas' *Between Facts and Norms*:⁵¹

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

⁴⁸ *Ibid.*, p. 121 ff. These are similar to Amartya Sen's basic capacities for the exercise of freedom, see his *Development as Freedom* (Oxford: Oxford University Press, 1999).

⁴⁹ *Ibid.*, p. 287. This notion of "life-world" is significant for Habermas' empiricist universalism. The "life-world" is the practical reality of day-to-day interaction among individuals as family members, consumers and citizens, etc., conducted on the assumption that simple communication has inter-subjective meaning and that mutual understanding based on everyday language is possible. Out of this pragmatic communicative action emerges a possibly crude but generalized culture, and the potential basis for the informal, and ultimately formal, public spheres.

⁵⁰ *Ibid.*, p. 307. Of course, the notion "free development of opinion" must be understood in complex and mediated terms: see E.S. Herman & N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Pantheon Books, 1988).

⁵¹ *Supra* note 19.

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

But in the post-modern deliberative democracy, the thematized connections between private and public spheres become reciprocal, self-reflective and mutually regenerative or “reflexive”.⁵² In the decentralizing and, at least partially, privatizing democracies of the present world, the “supervisory” or “regulatory state” emerges. As Habermas says: “The supervisory state looks to non-hierarchical bargaining for an attunement among sociofunctional systems...”⁵³, and to reflexive law through relational programmes which “induce and enable systems causing dangers to steer themselves in new safer directions.”⁵⁴ In other words, the post-modern supervisory state tends to rely on consultation and participation by affected individuals, corporate/social entities and communities as the means to supplement the older “democratic will-formation” mechanisms of legislation and top-down regulation in the liberal and/or social welfare state. This is a procedural theory of democracy whereby legitimacy of those wielding authority is based upon their exercise of power in accordance with constitutionally appropriate and democratically approved procedural norms involving both broad electoral politics and functionally specific participation by affected segments of society or interest groups.

⁵² This view of reflexivity, based on Habermas, is not exactly the same as G. Teubner’s, of which Habermas is critical. See G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993). A more approachable presentation may be G. Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17 *Law & Soc’y. Rev.* 239 and an ensuing dialogue: E. Blankenburg, “The Poverty of Evolutionism: a Critique of Teubner’s Case for Reflexive Law” (1984) 18 *Law & Soc’y Rev.* 273 and G. Teubner, “Autopoiesis in Law and Society: A Rejoinder to Blankenburg” (1984) 18 *Law & Soc’y. Rev.* 291.

⁵³ *Facts and Norms*, p. 344.

⁵⁴ *Ibid.*

There are also aspects of the fragmented culture of post-modern democracy which have a pervasive impact on criminal justice policy. Hans Boutellier⁵⁵ convincingly argues, following Richard Rorty,⁵⁶ that morality has become “victimized” and that the only substantial question having general cogency in this context is “Are you suffering?” The only broad moral consensus in relation to criminal law is a negative one: we cannot tolerate cruelty, inhumane treatment, humiliation and exclusion. He observes that the “...moral significance of a criminal offence mainly manifests itself in the popular emotions evoked by it and in the court room reaction [to it].”⁵⁷ However, criminological analysis tends to focus on keeping criminality under control or on the socio-political analysis of the genesis of criminality. In neither case is there a sufficient appreciation of the moral and emotive dimensions of crime. The modern professionalized and technocratic criminal justice system, as opposed to the pre-modern one, has fallen into the first category of downplaying the emotive aspects of crime. Professional criminal justice bureaucrats do their jobs according to law, regardless (and sometimes in spite) of their emotional reactions to offence, offender or victim. Meanwhile the media play up the emotional side, and the politicians respond. It is difficult to get the sceptical, post-modern citizen to swear allegiance to the established order as represented by the criminal justice system and its agents, while it is far easier to mobilize support around a perceived victim. Politically acknowledged victimhood can and has consequences for criminal justice policy. Boutellier concludes it is therefore not surprising that in post-modern democracies there has been a shift away from the dichotomized state/offender concept of the criminal process toward formal procedures that include victims in a three-cornered process. Nor, might one add, should it be surprising to see the development of informal restorative process which responds to victims, offenders and communities in localized and reflexive ways in accordance with the notions of the supervisory state posited by Habermas.

⁵⁵ H. Boutellier, *Crime and Morality: the Significance of Criminal Justice in Post-Modern Culture* (Dordrecht: Kluwer Academic Publishers, 2000).

⁵⁶ See R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1980) and his *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989).

⁵⁷ Boutellier, *supra* note 55, p. 2.

The implications of deliberative democracy and reflexive law for post-modern criminal justice will be more fully explored below. Given the evolution of complex democracies toward reflexive procedures, it should be no surprise, however, that increased victim participation and community involvement in criminal justice process have appeared on the agenda. But there has been a deeper shift in recent years in the manner in which criminal justice matters are conceptualized, that corresponds to cognate developments in the realm of political/constitutional theory in post-modern democracies. Autonomy, equality and relationship, in a context of community and diversity, are arguably now the key principles for analysis of criminal justice issues. As noted above, this holds true in relation to the justifications for and content of criminal sanctions, the general principles of substantive criminal liability and the evolution of criminal procedure. Moreover, the application of these three principles of autonomy, equality and relationship has both individual and collective dimensions.

II. THE CRITIQUE OF THE HIERARCHICAL AND EXCLUSIONARY ADVERSARIAL CRIMINAL PROCESS

In the classic conception of the criminal trial, the state prosecutes the individual for causing harm in breach of a pre-existing criminal law rule.⁵⁸ The aim of the process is to punish the culprit and deter others. The agents of the state, the police and prosecutors, have a public duty to engage in this exercise on behalf of society as a whole in within the scope of their respective spheres of recognized discretion. This retributive model has its roots in the Judeo-Christian religious tradition and many of its substantive and procedural implications had been worked out by medieval theologians.⁵⁹ Moreover, this moralizing, punitive orientation was espoused by Sir James Fitzjames Stephen, author of the English draft code after which our *Criminal*

⁵⁸ The democratic principle of legality, embodied in the Canadian abolition of common law crimes and the requirement that all crimes be defined in statutes, is found in *Criminal Code*, s. 9, and has been found in that section or its analogues since 1955—well before the advent of sections 7 and 11(g) of the *Charter*.

⁵⁹ J. Crawford & J. Quinn, *The Christian Foundations of Criminal Responsibility: A Philosophical Study of Legal Reasoning* (New York: Edwin Mellen Press, 1991) at iv:

“As the common law left its early Christian roots, its development was never fully excised from Christian belief. The grand names of English law were at the same grand churchmen. Sir Edward Coke (d.1634) or Sir Matthew Hale (d.1676), for example, were equally at home in writing about theology and philosophy.”

See also H. Parent, “Essai sur la notion de responsabilité pénale : analyse sociologique et historique de la fonction punitive” (2001) 6 *Can. Crim L. Rev.* 179.

Code was modelled, when he opined it was “right to hate criminals”.⁶⁰ It was in this context that many of the formative doctrines of our criminal law developed. Principles of individual criminal responsibility and notions of justification and excuse evolved in an era when the punishments imposed by the criminal process were exceedingly harsh.⁶¹ The counterweight to this substantive harshness, however, was the emergence of due process protections. Indeed, the political struggles of the late eighteenth century in England, America and France gave rise to rights declarations which were in substantial part intended to correct the procedural abuses of old regimes in their use of the criminal law as a weapon of self-protection.⁶² The procedural protections of the *Canadian Charter of Rights and Freedom*, particularly those found in sections 7 through 14 dealing with “legal rights” are in this tradition.⁶³ Indeed, the *Charter* can be seen as having brought Canadian criminal law out of the middle ages and fully into the eighteenth century near the end of the twentieth.

In this pre-modern retributive model of criminal justice, the intimate opportunities for citizen participation were present by virtue of the relative simplicity and restricted scale of most communities in a predominantly rural and agrarian Canadian society.⁶⁴ Citizen arrest powers have existed at common law for generations and these were incorporated into the Canadian *Criminal Code* from the outset.⁶⁵ Charges might be laid by local constables, municipal and provincial police forces or the Royal Canadian Mounted

⁶⁰ See also G. Parker, “The Origins of the Canadian Criminal Code” in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: Osgoode Society/University of Toronto Press, 1981).

⁶¹ H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983). As to their modern evolution, see: G. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978); P. Robinson, “Criminal Law Defences: A Systematic Analysis” (1982) 82 *Colum. L. Rev.* 681; and B. Archibald, “The Constitutionalization of the General Part of Criminal Law” (1988) 67 *Can. Bar Rev.* 403.

⁶² For a useful schematic overview of the struggles, see R. Claude, “Comparative Rights Research” in R. Claude, ed., *Comparative Human Rights* (Baltimore: Johns Hopkins University Press, 1976).

⁶³ J. Maxwell & J. Friedberg, eds., *Human Rights in Western Civilization: 1600 to the Present* (Dubuque: Kendall/Hunt Publishing, 1994); J. Shestack, “The Jurisprudence of Human Rights” in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984).

⁶⁴ See generally, J. Phillips, T. Loo & S. Lewthwaite, eds., *Essays in the History of Canadian Law*, vol. V (Toronto: Osgoode Society/University of Toronto Press, 1994).

⁶⁵ B. Archibald, “The Law of Arrest” in V. Del Buono, ed., *Criminal Procedure in Canada* (Toronto: Butterworths, 1982). This provision is now found in *Criminal Code*, s. 494.

Police (RCMP), but the private prosecution provided the opportunity for the individual citizen to bring the matter forward.⁶⁶ The Attorney General of a province would often prosecute cases in person, no doubt giving all citizens involved a sense of closeness to governmental authority, for better or ill.⁶⁷ Though Supreme Court judges might travel on circuit,⁶⁸ most magistrates or justices of the peace dealing with ordinary crimes would be well-known members of the local community, and most of these judicial officials were citizens who were not legally trained.⁶⁹ Trials were by and large swift, and often the indigent accused were processed without benefit of defence counsel.⁷⁰ Subjects owning property could sit as members of a jury, and feel proud to have done their duty on behalf of Her (or His) Majesty for the community. In the pre-confederation colonial period, punishments such as sitting in the stocks, confinement in the “bridewell” (lock-up) or hanging would be carried out within the sight of any curious on-looker in the locality. However, the terrors of the system might be mitigated by royal prerogative of mercy, capricious though its exercise might be.⁷¹ Thus, the pre-modern criminal law of Canada can, on one level, be presented as providing ample opportunity for citizen participation. On the other hand, of course, this early system of criminal “justice” was highly exclusionary. Women, the poor, aboriginals and persons of colour were excluded as controlling participants in the process, and relegated to the status of witnesses or accused persons. Moreover, for victims the process brought them virtually nothing other than possible moral satisfaction. Compensation or restitution was deemed to be a matter of civil law, and even fines went not to the coffers of the Crown for the benefit of the community, but rather into the pocket of the magistrate!⁷²

The mid-nineteenth and early twentieth centuries brought a shift in the focus of the criminal justice system. Successive waves of reformist

⁶⁶ P. Burns, “Private Prosecutions in Canada: The Law and a Proposal for Change” (1975) 21 *McGill L.J.* 269. This power still exists, of course, by virtue of *Criminal Code*, s. 504.

⁶⁷ B. Cuthbertson, *The Old Attorney General: A Biography of Richard John Uniacke* (Halifax: Nimbus, 1980).

⁶⁸ J. Phillips, “The Criminal Trial in Nova Scotia” in J. Phillips & B. Baker, eds., *Essays in the History of Canadian Law*, vol. VIII (Toronto: Osgoode Society/University of Toronto Press, 1999).

⁶⁹ R. Kimball, *The Bench: The History of Nova Scotia’s Provincial Courts* (Halifax: Province of Nova Scotia, 1989).

⁷⁰ Phillips, *supra* note 68.

⁷¹ D. Hay, *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (London: A. Lane, 1975).

⁷² Kimball, *supra* note 69.

activism led to rejection of the punitive ideology, at least among moral entrepreneurs toiling in the wasteland of criminal justice.⁷³ Religion⁷⁴ and then burgeoning social science⁷⁵ intervened to reorient the criminal justice system toward forward-looking utilitarian goals: general and specific deterrence, rehabilitation and treatment, and incapacitation of the dangerous, where necessary. Retribution came to be associated not with basic notions of justice, but rather with crude, barbarous and unjustifiable sentiments of revenge.⁷⁶ The notions of punishment and retribution were even excised from the modern lexicon of sentencing rhetoric in some Canadian jurisdictions.⁷⁷ While Canadian federal penitentiaries had become a fixture in our justice system since the late nineteenth century, the promises of the rehabilitative ideal overshadowed retribution in official pronouncements on criminal law.⁷⁸ Provincial probation services and the federal correctional service grew, and the National Parole Board was created to modernize the “ticket of leave” system.⁷⁹ This professionalization of the penal system was paralleled by a similar phenomenon in the courts. Provincial and federal prosecution systems were put on a modern footing,⁸⁰ and provinces largely did away with lay magistrates and justices of the peace as provincial courts

⁷³ M. Grunhut, *Penal Reform: A Comparative Study* (Montclair: Patterson Smith, 1972, reprint of 1948 edition); Sir Leon Radzinowicz & R.G. Hood, *A History of English Criminal Law and Its Administration since 1750: The Emergence of Penal Policy*, vol. 5 (London: Stevens, 1986).

⁷⁴ Protestant denominations had a huge impact on theories of punishment and prison architecture in the nineteenth century: see M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution - 1750-1858* (New York: Pantheon Books, 1978).

⁷⁵ G. Vold, T. Bernard & J. Snipes, *Theoretical Criminology*, 4th ed. (Oxford: Oxford University Press, 1998).

⁷⁶ B. Wootton, *Crime and the Criminal Law: Reflections of a Social Scientist*, 2nd ed., (London: Steven and Sons, 1981).

⁷⁷ In Nova Scotia, the leading case of sentencing *R. v. Grady*, (1975) 10 N.S.R. (2d) 90 (N.S.S.C.(A.D.)) held that the purpose of sentencing was the protection of the public, and that this purpose was to be attained by deterrence or rehabilitation or a combination of both. Retribution or punishment were no longer invoked.

⁷⁸ *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: Queen's Printer, 1938) [The Archambault Report].

⁷⁹ The latter being the result of the *Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada* (Ottawa: Queen's Printer, 1956) [The Fauteux Report].

⁸⁰ P. Stenning, *Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (Cowansville: Brown Legal Publications, 1986).

became the judicial workhorses of the criminal justice system.⁸¹ This apparent confidence in the professional capacities of the welfare state to manage criminal justice was accompanied by a reduction in citizen participation in the criminal trial. The “speedy trials” provisions were introduced into the *Criminal Code*⁸² which enlarged the absolute jurisdiction of magistrates or provincial court judges to try indictable offences, and thus reduced the range of offences for which jury trials were available. Grand juries were also done away with as an archaic and clumsy screening device no longer required in an era of professionalized prosecution.⁸³ Of course, citizens thereby lost the opportunity to make periodic, if irregular, forays into the well-being of the justice system as grand jurors with their amateur, but perhaps satisfying, recommendations for administrative reform.

In this shift to the modern rehabilitative ideal, the focus of criminal justice continued to be very much on the accused. The paradigm of the criminal trial as struggle between the state and the individual was still paramount.⁸⁴ Models of “crime control” versus “due process” were contrasted with one another, and in the 1970s the side of the angels was represented by the civil libertarians.⁸⁵ Accused persons were often viewed as the exploited victims of the criminal justice system,⁸⁶ although publicly funded legal aid was available to some indigent accused persons in most Canadian jurisdictions by the 1970s.⁸⁷ This concern, moreover, was reinforced by pre-*Charter* judicial rulings which approved the admissibility of illegally obtained evidence, encouraged police misconduct and arguably brought the administration of justice into disrepute.⁸⁸ The legal rights and

⁸¹ See for example D. Drinkwater, *Ontario Provincial Offences Procedure* (Toronto: Carswell, 1980).

⁸² Now found listed in *Criminal Code*, s. 553: indictable offences within the “absolute jurisdiction” of the then magistrate, or now provincial court judge.

⁸³ Nova Scotia was the last of the provinces to do this in 1985: R. E. Salhany, *Canadian Criminal Procedure* 5th ed. (Aurora: Canada Law Book, 1989) at 182.

⁸⁴ H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

⁸⁵ *Ibid.*

⁸⁶ R. Ericson & P. Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982).

⁸⁷ D. Hoehne, *Legal Aid in Canada* (Lewiston: E. Mellon Press, 1989).

⁸⁸ *R. v. Wray*, [1971] S.C.R. 272 was the root of the problem, and can be contrasted with the post-*Charter* exclusionary rule (section 24(2)) as exemplified by *R. v. Burlingham*, [1995] 2 S.C.R. 206: both involved finding the murder weapon as a result of improper police conduct.

remedial aspects of the *Charter of Rights and Freedoms* were born out of this climate and were a welcome righting of the balance in favour of due process in Canada. However, the adversarial criminal trial at the advent of the *Charter* era was an exclusionary and hierarchical affair by today's standards. While the 1970s had brought victim's compensation legislation to virtually all Canadian jurisdictions,⁸⁹ this did not alter the status of the victim in criminal trials. Restitution provisions of the *Criminal Code* were hedged about with practical constraints and rarely used.⁹⁰ Victims, called complainants, were relegated to the status of mere witnesses and often treated as a simple means to an end in the professionalized combat of the criminal trial. Victims seeking compensation for the harms caused by criminal conduct had to pursue separate civil (tort and delict) or administrative remedies.⁹¹ Sexual assault victims were further victimized in criminal trials by rules of evidence which invited broad cross-examination and much irrelevant evidence on reputation and prior sexual conduct, often turning rape trials into unfair trials of the complainant.⁹²

The conclusion must be that until the 1980s, the Canadian criminal trial, whether in the ancient retributive guise or its modern rehabilitative incarnation, was an exclusionary and hierarchical exercise. Opportunities for citizen participation, other than through professional representation, were limited and apparently shrinking. Offenders might now be more regularly represented by defence counsel, but victims were often not pleased by the manner in which they were treated by Crowns.⁹³ Effective remedies for aggrieved citizens cast in the roles of either offender or victim were often not to be had. Jury trials had become a symbolic, if important, rarity. Criminal sanctions, increasingly believed to be ineffective by a sceptical public, were now administered behind closed doors by professionals whose capacities were being questioned by offenders, victims and the public alike. At the appellate level, the parties were essentially deemed to be the state and the accused, and the recognition of other persons with interest in the outcome as intervenors was undertaken with great reluctance. With the benefit of hindsight, change at that point of modernity seems to have been inevitable.

⁸⁹ P. Burns, *Criminal Injuries Compensation*, 2nd ed., (Toronto: Butterworths, 1992).

⁹⁰ *R. v. Zelensky*, (1978) 36 C.R.N.S. 169 (S.C.C.).

⁹¹ I. Waller, *The Role of the Victim in Sentencing and Related Processes* (Ottawa: Department of Justice, 1988).

⁹² C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984).

⁹³ J. Hagan, *Victims before the Law: The Organizational Domination of Criminal Law* (Toronto: Butterworths, 1983).

III. CITIZEN ACCESS: EGALITARIAN AND INCLUSIONARY ADVERSARIAL CRIMINAL JUSTICE

In the last twenty years, there have been significant modifications to the standard adversarial criminal process which render it far more egalitarian and inclusive.⁹⁴ Citizens, in varying roles, now have a greater capacity than ever to have an impact on the outcome of a criminal trial in order that their interests can be reflected or protected.⁹⁵ These new forms of citizen access run from the commission of the offence to the release of offenders, and not all are without controversy. However, they are consistent with certain post-modern trends in political/legal thinking.

While not involving legally enforceable citizen rights of access to criminal justice, it is helpful to put post-modern policing practices in context. Public dissatisfaction with distant and hierarchical policing (largely involving police from central headquarters seeming isolated in their squad cars), has led to the widespread introduction of “community policing”.⁹⁶ Neighbourhood police stations and more accessible police officers on foot (or on their bicycles) create forms of citizen access which should not be disparaged in complex urban environments, particularly when combined with such participatory programmes as neighbourhood watch and crime-stoppers. Of course, knowledgeable victims or members of the public dissatisfied with the police resolution of an investigation, may lay criminal charges themselves.⁹⁷ Moreover, many current directives on the exercise of police discretion require these agencies to take into account the victims’ wishes when determining whether charges should go forward.⁹⁸ If charges are laid, police, court houses, provincial departments of justice and

⁹⁴ K. Roach, *Due Process and Victims’ Rights: the New Law and Politics of Criminal Justice* (Toronto: University of Toronto, 1999).

⁹⁵ This is particularly true for victims of crime, in relation to whom there have been recent amendments to the *Criminal Code: An Act to amend the Criminal Code (victims of Crime)*, S.C. 1999, c. 25, arising from the Report of the Parliamentary Committee on Justice and Human Rights, *Victims’ Rights: A Voice not a Veto*. On this topic in general see J. Barrett, *Balancing Charter Interests: Victims’ Rights and Third Party Remedies*, looseleaf (Toronto: Carswell, 2001).

⁹⁶ J. Chako & S. Nanoo, *Community Policing in Canada* (Toronto: Scholar’s Press, 1993).

⁹⁷ There are, of course, offences for which the permission of the Attorney General or a prosecutor may be required: see Barrett, *supra* note 95 at 2-20 and 2-21.

⁹⁸ This a topic canvassed by the Report of the Ontario Attorney General’s Advisory Committee, *Charge Screening, Disclosure and Resolution Discussions* (Toronto: Queen’s Printer, 1993) [the Martin Committee] and consistent with the preambles to “victims’ bills of rights” which exist in all provinces.

community organizations often have victim support services to provide information and assist victims who may appear as witnesses in criminal cases. The general impact on citizen access to criminal justice of such policies should not be underestimated.

The exercise of prosecutorial discretion is critical for citizen access to criminal justice. The private prosecution still exists, if very much subject to the Crown's right to stay the proceedings.⁹⁹ Prosecution policy may leave the prosecution of some minor offences to private complainants,¹⁰⁰ while enforcing the prosecution of other crimes notwithstanding the apparent desire of the victim not to go forward to trial.¹⁰¹ The interests of the citizenry at large are in principle reflected in the primary policy that prosecutions are to be pursued only where two criteria are met: 1) there must be evidence on all elements of the offence sufficient to give rise to a reasonable likelihood of conviction; and 2) the prosecution must be in the public interest as evaluated by a number of factors structuring this discretion.¹⁰² At the pre-trial stage, the traditional model of the criminal trial attempted to balance the public and the accused person's interests, while subsuming the interests of the victim under those of the public. Thus, the Crown's duty of pre-trial disclosure to the defence¹⁰³ or the right of the accused to release on bail¹⁰⁴ could traditionally be discussed in the light of the classic opposition between accused and public rights, with little attention to the particular status of victims as such. Shifting this balance required legislative intervention. The amendment to the *Criminal Code* requiring judges to take into account

⁹⁹ *Criminal Code*, s. 579 and 795.

¹⁰⁰ Notably, common assault. For example, the Nova Scotia Public Prosecution Service does not prosecute cases of common assault under *Criminal Code*, section 266(b) other than in exceptional cases: see Nova Scotia Public Prosecution Service, *Crown Attorney's Manual*, looseleaf (Policy/Protocol Tab. 17), dated June 19, 1985 (updated September 1, 2000).

¹⁰¹ Notably sexual assaults and domestic violence against women and children. For example, see the current Nova Scotia Public Prosecution Service, *Crown Attorney's Manual*, *ibid.*, "Directive of the Minister of Justice on Spousal/Partner Violence", para. 4, dated March 28, 1996, and the Director of Public Prosecution's "Spousal/Partner Violence Policy", June 7, 1996.

¹⁰² Virtually all prosecution services in Canada now have written guidelines which render this traditional common law principle explicit: see for example, Department of Justice, *Federal Prosecution Service Deskbook* looseleaf (Ottawa: Government of Canada, 2000), Chapter 15; or Nova Scotia Public Prosecution Service, *Crown Attorney's Manual*, *supra* note 100 "Directive of the Director of Public Prosecutions", undated.

¹⁰³ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

¹⁰⁴ *R. v. Morales*, [1992] 3 S.C.R. 711.

victims' views at bail hearings may be relatively uncontroversial.¹⁰⁵ However, sexual assault victims' rights to privacy of personal records, in the face of accused's rights to disclosure, involved a controversial balancing act which was finally stabilized by the Supreme Court's recognition of the legitimacy of Parliament's legislating on the position of its dissenting judges from a previous case.¹⁰⁶ Prosecution services across the country are recognizing this enhanced status of the victims of crime in protocols which mandate consultation with victims prior to making key prosecutorial decisions, such as those arising during plea bargaining and sentencing.¹⁰⁷ In terms of harmonizing individual citizens' goals with the adversarial structure of the legal system, the accused as a citizen has seen his interests balanced against those of victims who were previously more subordinated participants in pre-trial adversarial process. In this exercise, moreover, the role of the prosecutor as sole guarantor of the public interest is now subject to the supervisory jurisdiction of the courts under the *Charter*.¹⁰⁸

The institutional structure of the criminal trial and related sentencing hearings have also changed in the last 20 years to reflect a capacity of courts to balance a wider range of diverse citizens goals. The composition of the court has arguably been democratized. Qualifications of counsel cannot be restricted in ways which are discriminatory.¹⁰⁹ While judges and jurors are normally limited to persons of Canadian citizenship,¹¹⁰ the opportunity for jury service has been broadened by recently improved support for potential

¹⁰⁵ *Criminal Code*, s. 518(1)(d.2).

¹⁰⁶ *R. v. Mills*, [1999] 3 S.C.R. 668 endorsing the constitutionality of *Criminal Code* sections 278.1 ff.

¹⁰⁷ For example, Nova Scotia Public Prosecution Service, *Crown Attorney's Manual*, *supra*, "Spousal/Partner Violence Policy", *supra* note 101; or *Federal Prosecution Service Deskbook*, Chapter 20, "Plea and Sentence Discussions and Issue Resolution", where under the heading "Openness and Fairness" one reads: "Crown counsel should, where reasonably possible, solicit and weigh the views of those involved in the Crown's case—in particular, the victim and the investigating agency. However, after consultation, the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel."

¹⁰⁸ Although the courts are enjoined not to exercise this supervisory jurisdiction over the exercise of prosecutorial discretion unless there is "conspicuous evidence of improper motives or bad faith or of an act so wrong that it violates the conscience of the community, such that it would be genuinely unfair and indecent to proceed" *R. v. Power*, [1994] 1 S.C.R. 601.

¹⁰⁹ *Andrews*, *supra* note 11.

¹¹⁰ For example, the Nova Scotia *Juries Act*, subject to what was noted in notes 11 and 12.

jurors with disabilities.¹¹¹ Moreover, the *Charter* and interpretive case law have ensured that non-native speakers and the deaf have translation services to facilitate effective participation in the criminal trial.¹¹² The accused's participation in the trial has arguably been rendered more effective by the *Charter's* beefing up the scope of the pre-trial right to counsel,¹¹³ although the support for paid counsel at trial has not advanced substantially.¹¹⁴

The traditional procedural and evidentiary rules applicable during the criminal trial assume that the state and the accused are the primary parties, with certain constraints being imposed upon the state in order to ensure fairness in the light of its superior power and resources. The Crown normally bears the burden of proving the case beyond a reasonable doubt,¹¹⁵ and the even-handed principle that all relevant evidence is admissible is sometimes skewed in favour of rules which exclude evidence which may operate to the disadvantage of the accused.¹¹⁶ But here too the situation of the victim is being enhanced, particularly in relation to cases of sexual assault. The rule requiring corroboration of a sexual assault complainant's testimony has been abrogated,¹¹⁷ as has the rule based on the assumption that a woman sexually assaulted will immediately complain to others, failing which negative inferences may be drawn against her.¹¹⁸ In addition, the rape shield

¹¹¹ *Criminal Code*, ss. 627 and 631(4).

¹¹² *Charter*, s. 14 and *R. v. Tran*, [1994] 2 S.C.R. 251.

¹¹³ *Charter*, s. 10(b) and such decisions as *R. v. Brydges*, [1990] 1 S.C.R. 190 and *R. v. Whitford*, (1997) 115 C.C.C. (3rd) 52 (Alta. C.A.). Appeal to the Supreme Court refused: (1999) 117 C.C.C. (3rd) vi.

¹¹⁴ See B. A. MacFarlane, "The Right to Counsel at Trial and on Appeal" (1990), 32 *Crim. L. Q.* 440; and Don Stuart, *Charter Justice in Canadian Law*, 3rd ed., (Toronto: Carswell, 2001).

¹¹⁵ See for example *R. v. Oakes*, [1986] 1 S.C.R. 103 and *R. v. Laba*, [1994] 3 S.C.R. 965.

¹¹⁶ Examples of such exclusionary rules favouring the accused would include those relating to hearsay, to character and similar conduct, as well as the newly recognized judicial discretion to exclude evidence where prejudice may outweigh probative value: see generally, J. Sopinka, S. N. Lederman & A. W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999); and D. Paciocco & L. Steusser, *The Law of Evidence*, 2nd ed. (Toronto: Irwin, 1999).

¹¹⁷ *Criminal Code*, s. 274. It must be said, however, that the full expectations of the proponents of this legislation may not have been met if one considers recent caselaw: see *R. v. S.*, (1997) 116 C.C.C. (3d) 435 (Ont.C.A.); *R. v. Stymiest*, (1993) 79 C.C.C. (3d) 408 (B.C.C.A.); or *R. v. Saulnier*, (1989) 48 C.C.C. (3d) 301 (N.S.C.A.).

¹¹⁸ The results of the abrogation of the recent complaints rule are somewhat ambiguous: see *R. v. F.(J.E.)*, (1993) 26 C.R. 220 (Ont. C.A.); *R. v. Ay*, (1994) 93 C.C.C. (3rd) 456 (B.C.C.A.) and *R. v. M. (T.E.)*, (1996) 110 C.C.C. (3rd) 179 (Alta. C.A.) (leave to appeal to the Supreme Court refused: 114 C.C.C. (3rd) vi).

provisions of the *Criminal Code* preventing unnecessary evidence as to the complainant's prior sexual activity have been held to be constitutional.¹¹⁹ These changes are all designed to rectify inappropriate reliance on damaging stereotypes, and encourage the reporting and prosecution of sexual assault. In a similar vein, relatively new *Criminal Code* provisions authorize exclusion of public from the courtroom, allow the presence of support persons, regulate cross-examination of the complainant by certain persons, and allow bans on publication of information revealing the identity of the complainant.¹²⁰ The impact on citizen participation of these latter provisions, however, is ambiguous: while they encourage victim reporting and more rigorous prosecution, they restrict public participation and knowledge about the evidence and its impact on the proceeding. Moreover, while the victim's role is made easier, she still maintains the status of witness rather than party.

It is perhaps in relation to the sentencing hearing that greatest expansion of citizen/victim participation has been mandated. In respect of the purposes of sentencing, the range of issues has been broadened with the concomitant likelihood that more persons will be heard at this crucial point in the proceedings (it must be remembered that most criminal prosecutions end in guilty pleas, such that the sentencing hearing is the only significant aspect for those involved). *Criminal Code* section 718 makes clear that retribution *per se* is not a purpose of the criminal sanction,¹²¹ although it must be the underlying limiting principle for the proportionality provisions in section 718.1.¹²² However, section 718 also makes clear that victim compensation and offender acknowledgement of harm done to the community are purposes that take their full place with denunciation, deterrence, incapacitation and rehabilitation. With such greater victim and community-related purposes, one can anticipate a broadening of citizen

¹¹⁹ *Criminal Code*, s. 276 as approved on constitutional review in *R. v. Darrach*, [2000] 2 S.C.R. 443.

¹²⁰ *Criminal Code*, s. 486.

¹²¹ *Criminal Code*, s. 718 states that the fundamental purpose of sentencing is to contribute, along with other crime prevention measures, to the maintenance of a "just, peaceful and safe society" through sanctions which have one or more of the following objectives: denunciation, deterrence, incapacitation, rehabilitation, reparation of harm and promotion of a sense of responsibility among offenders. This despite the views of the Supreme Court in *R. v. C. (M.A.)*, [1996] 1 S.C.R. 500, which purported to recognize retribution as a formal purpose of the criminal sanction.

¹²² *Criminal Code*, s. 718.1 states a fundamental limiting principle in sentencing: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718.2 sets out corollary principles of aggravation and mitigation, parity, totality, and restraint (in two guises).

participation in the sentencing process. But the most significant development for expanding citizen input has been the introduction of victim impact statements.¹²³ While such statements must be prepared in writing, they can be read by the victim at the sentencing hearing, providing a dramatic opportunity for important citizen participation creating what one court has described as “parity of identity” for victim and accused in the criminal process.¹²⁴ One might also mention in this context jury recommendations on eligibility for parole in murder sentencing,¹²⁵ which though of significant symbolic importance for citizen participation in substantive outcomes, are of lesser quantitative impact than the victim impact statement which is available for all offences. Nevertheless, this victim involvement in the sentencing process is rare in common law jurisdictions as opposed to, say France, where juries regularly vote on sentence in relation to a broad range of serious crimes.¹²⁶ and where victims can obtain compensation through a civil action piggy-backed onto the criminal proceeding.¹²⁷

Finally, of course, there is the issue of citizen involvement in the criminal case after trial. Most prominent in this category are the various forms of victim involvement in matters of parole. Since 1992, victims have been entitled to information concerning offenders serving sentences in institutions, may submit victim impact statements for the consideration of the Parole Board, and may be granted the opportunity to attend Parole Board hearings.¹²⁸ More recently, victims have been granted the possibility of participating in special jury hearings under the so-called “faint hope clause” of the *Criminal Code*¹²⁹ whereby offenders serving life sentences for murder may apply for early release on parole. In an analogous legislative development, victims may also participate in proceedings of Review Boards

¹²³ *Criminal Code*, ss. 722 to 722.2.

¹²⁴ *R. v. Gabriel*, (1999) 26 C.R. (5th) 364 (Ont. S.C.) per Hill, J.

¹²⁵ *Criminal Code*, s. 745.2 .

¹²⁶ C. Elliott & C. Vernon, *The French Legal System* (Harlow: Longman, 2000).

¹²⁷ M. Joutsen, “Listening to the Victim: The Victim’s Role in European Justice Systems” (1987) 34 *Wayne L. Rev.* 95; J. Languier, “The Civil Action for Damages in French Criminal Procedure” (1965) 39 *Tulane L. Rev.* 687; C. Howard, “Compensation in French Criminal Procedure” (1958) 21 *Mod. L. Rev.* 687.

¹²⁸ *Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 26, 101, 140 and 142. *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*.

¹²⁹ *Criminal Code*, s. 745.63 pursuant to S.C. 1995, c. 22 and *An Act to amend the Criminal Code (victims of crime)*, *supra* note 95.

dealing with accused persons found not criminally responsible by reason of mental disorder.¹³⁰

An equally important category of citizen participation in the criminal process in the post-trial period is the possibility for affected persons, including victims and interest groups, to be granted the status of intervenor in appellate proceedings.¹³¹ Sometimes this occurs in the context of reference cases.¹³² However, a striking feature of Canadian criminal law litigation over the last twenty years has been the extent to which intervenor status has been granted to various public and private organizations with an interest in the outcome of “ordinary” criminal cases. Some of these organizations have had governmental support for the express purpose of engaging in test case litigation with enhanced public policy input.¹³³ This sort of activity has, of course, been particularly marked at the appellate level, with the Supreme Court of Canada in the lead. While other western democracies have encouraged such an approach to some degree, the Canadian courts do seem particularly enthusiastic in this regard. Surely, this must be viewed as a significant example of the manner in which the Canadian adversarial system of criminal justice promotes citizen participation.

The conclusion to be drawn in relation to the foregoing observations is surely that citizen participation in the criminal trial over the past twenty years has advanced exponentially, at least at the level of principle. An

¹³⁰ *Criminal Code*, ss. 672.5, 672.54 and 672.541 following from S.C. 1999, c. 25.

¹³¹ See Gregory Hein, “Interest Group Litigation and Canadian Democracy” in P. Howe & P.H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen’s University Press, 2001), where intervenors are identified under the headings “aboriginals peoples, civil libertarians, corporative interests, labour interests, professionals, social conservatives, victims, Charter Canadians and new left activists.” The article describes the manner in which this process has become politically controversial.

¹³² See for example, *Reference re: Firearms Act (Canada)*, [2000] 1 S.C.R. 783, where intervenors included seven attorneys general, the Federation of Saskatchewan Indians, the Coalition of Responsible Firearms Owners and Sportsmen, the Law-Abiding Unregistered Firearms Association, the Shooting Federation of Canada, the Association pour la santé publique de Québec inc., the Alberta Council of Women’s Shelters, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health, the Canadian Pediatric Society, the Coalition for Gun Control, the Canadian Association of Police Chiefs and three major municipalities; see also Elliot, *supra*.

¹³³ The Government of Canada’s “Court Challenges Programme”, funded by the Department of Heritage, is important in this regard.

empirical investigation would be valuable in order to confirm or disprove at the level of practice these inferences from the formal legal changes wrought by Parliament and the courts. Nevertheless, the nature of the hierarchical and exclusionary criminal trial has been so altered that it may now be proper to speak of an egalitarian and inclusionary criminal trial in Canada. However, from the point of view of the community and from the style of formal justice even in the eyes of the direct participants, the formal criminal trial still limits the nature of citizen participation and its outcomes. Many individuals affected by criminal harms have no status in the adversarial process, and community interests are often represented by prosecutors and judges only in the most abstract sense. The evolving restorative justice model described below responds to many of these concerns.

IV. RESTORATIVE JUSTICE: ALTERNATIVE PARTICIPATION OF VICTIMS, OFFENDERS AND COMMUNITIES

Restorative justice can best be defined as the restoration of relationships and deliberative resolution of issues arising from criminal harms through a process involving victim, offender and representatives of an appropriate community.¹³⁴ This normally occurs either (1) as a matter of diverting from formal prosecution an offender who has taken responsibility for the harmful conduct,¹³⁵ or (2) by invoking restorative justice process as an adjunct to or replacement for sentencing, where an offender has pleaded guilty to an offence.¹³⁶ Restorative techniques can also be used at the

¹³⁴ Defining restorative justice is a controversial undertaking. A definition of restorative process presently under consideration in U.N. circles reads: "...any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, supra note 4. For discussion of the critical focus on transforming relationships, see J. Llewellyn & R. Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission", (1999) 49 *U.T.L.J.* 355; the literature on restorative justice is burgeoning. For a useful if somewhat dated bibliography, see P. McCold, *Restorative Justice: An Annotated Bibliography* (Monsey: Criminal Justice Press, 1997).

¹³⁵ Diversion has a checkered history in recent criminal justice development: see S. Moyer, *Diversion from the Juvenile Justice System and Its Impact on Children: A Review of the Literature* (Ottawa: Solicitor General of Canada/Research Division, 1980); L. Kurki, "Restorative and Community Justice in the United States" in M. Tonry, ed., *Crime and Justice: A Review of Research*, vol. 26 (Chicago: University of Chicago Press, 2000) 235.

¹³⁶ H. Lilles, "Circle Sentencing: Part of the Restorative Justice Continuum" in A. Morris & G. Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation and*

correctional or parole levels in the post-sentencing context.¹³⁷ While the foregoing definition of restorative justice is broad enough to encompass mediation and other techniques,¹³⁸ it is primarily intended to capture the essence of recent breakthroughs in restorative process variously called family group conferencing,¹³⁹ community conferencing,¹⁴⁰ community justice forums,¹⁴¹ and circle decision-making.¹⁴² Regardless of the label used, these restorative methods bring together victim, offender and significant other community players to discuss appropriate responses to the criminal behaviour. Such processes shall be referred to in this paper as *restorative conferencing*.

Restorative conferencing is a significant advance over what has been called “dyadic victim-offender mediation”.¹⁴³ A trained facilitator gathers together the victim and her supporters (family and/or friends),¹⁴⁴ the offender and his supporters (family and/or friends),¹⁴⁵ and members of the

Circles (Portland: Hart Publishing, 2001); see also B. Stuart, “Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System” (1996) 20 *Int. J. of Comp. and Applied Crim. J.* 291 and C. Griffiths, “Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities” (1996) 20 *Int. J. of Comp. and Applied Crim. J.* 197.

¹³⁷ This will be explored below in relation to the Nova Scotia Restorative Justice Programme, *infra* notes 177 to 192 and accompanying text.

¹³⁸ For a good short overview, see P. McCold, “Primary Restorative Justice Practices” in Morris & Maxwell, *supra* note 136.

¹³⁹ This is the original New Zealand term: see G. Maxwell & A. Morris, “Research on Family Group Conferences with Young Offenders” in J. Hudson, A. Morris, G. Maxwell & B. Galaway, *Family Group Conferences: Perspectives on Policy and Practice* (Annandale: Federation Press, 1996).

¹⁴⁰ This rather neutral designation is gaining in currency.

¹⁴¹ This is the name preferred by the Royal Canadian Mounted Police.

¹⁴² See sources cited, *supra* note 136.

¹⁴³ J. Braithwaite, “Restorative Justice and a Better Future” (1996) 76 *Dal. Rev.* 7. This is not to say that victim-offender mediation (VOM) is not a cost-effective technique which has a significant place in the range of restorative options. See M. Bakker, “Reparing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System” (1994) 72 *N.C. L. Rev.* 1479; and see the vast VOM literature, McCold, *supra* note 134.

¹⁴⁴ There is a frequent issue as to whether victims should have a veto over the holding of a conference or whether it is appropriate to invite a “surrogate victim” when the personal victim of the offence is unavailable: see discussion, *infra*, concerning the Nova Scotia Restorative Justice Programme, *infra* notes 177 to 192 and accompanying text.

¹⁴⁵ Care is obviously required in choosing offender supporters to prevent intimidation or “re-victimization” of victims in the process, or in preventing, through careful facilitation, a general sense on the part of victims that the process has been unhelpful: see H. Strang,

community, where possible known and respected by both victim and offender¹⁴⁶. Often, the justice system is represented by a police officer who is familiar with the facts of the incident.¹⁴⁷ Experience shows that the psychological “group dynamic” which occurs in a conference can be very different than a simple mediation session.¹⁴⁸ Victims and their supporters are able graphically to bring home to offenders the impact that the harmful behaviour has had on their lives.¹⁴⁹ Offenders frequently offer heartfelt apologies which go well beyond the ritualized guilty plea of court process or the exculpatory claims of defence counsel in sentencing hearings.¹⁵⁰ Supporters and community participants can make contributions that move offenders and victims from initial entrenched perceptions.¹⁵¹ Offenders can acknowledge the wrongfulness of their behaviour, while not being stigmatized as social outcasts.¹⁵² Victims not only obtain reparation, but can

“Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration” in Morris & Maxwell, *supra* note 133.

¹⁴⁶ In heavily populated areas, where victim and offender may not know one another, choice of such persons may be difficult, but may have the potential for creating social bridges and building community where urban anonymity normally prevails: see J. Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” in M. Tonry, ed., *Crime and Justice: A Review of Research 1-127*, vol. 25 (Chicago: University of Chicago Press, 1999) 1.

¹⁴⁷ Empirical studies suggest that some single parents of offenders who have been discipline problems particularly appreciate the support that the police presence can bring: see D. Clairmont, *The Nova Scotia Restorative Justice Initiative: Year One Evaluation Report* (Bedford: Pilot Research, 2001) at 63-78 (available from the Nova Scotia Department of Justice).

¹⁴⁸ For a useful description of a conferences, see Braithwaite, *supra* note 143.

¹⁴⁹ M. S. Umbreit, R.B. Coates & B. Vos, “Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation and Practice and Research” in Morris & Maxwell, *supra* note 136.

¹⁵⁰ This is not to denigrate the role of defence counsel in a formal sentencing hearing, but merely to note that the focus there is to convince the sentencing judge of the client’s position, not to respond in an effective and affective manner to the victim.

¹⁵¹ Research on restorative justice shows that one of the most prevalent myths of criminal justice is that most victims seek revenge upon their victims: see M. Estrada-Hollenbeck, “Forgiving in the Face of Injustice: Victims’ and Perpetrators’ Perspectives” in B. Galoway & J. Hudson, *Restorative Justice: International Perspectives* (Monsey: Criminal Justice Press, 1996).

¹⁵² John Braithwaite’s theory of “re-integrative shaming rather than alienating stigmatization” in his *Crime, Shame and Re-Integration* (Cambridge: Cambridge University Press, 1989), while not uncontroversial and often misunderstood, has been most influential in Canada and Britain with respect to police initiatives on restorative justice. The central idea is to condemn the harmful behaviour while reaffirming the offender’s connections to the community and positive potential as a valued member of

often find psychological and emotional closure, while alleviating fears of further victimization. Interestingly, victims, who in the restorative conference see offenders not as faceless monsters but rather fellow human beings with problems of their own, often suggest positive rehabilitative or reparative measures to assist offenders and reduce reoffending.¹⁵³ The open discussions, unconstrained by formal rules of evidence as in a sentencing hearing, frequently identify the causes of the offending behaviour and the existence of family or community resources capable of contributing to lasting solutions which can be missed by courts.¹⁵⁴ The emotional temperature typically rises with many participants sharing tears during the discussions which seem to cement consensus outcomes. Healing is a word commonly used to describe the results of restorative conferencing, and in the best of circumstances it is healing for victims, offenders and the community as well.¹⁵⁵

While the foregoing discussion has emphasized the merits of restorative conferencing, restorative justice practitioners stress that it is important not to put restorative justice in a procedural straight jacket.¹⁵⁶ There is no single path to restorative results, and reliance on the creative capacity of community members to suggest practical solutions to offending is widely accepted. Thus, restorative justice, however defined, tends to embrace multiple aims: reparation to the victim; rehabilitation of the offender¹⁵⁷ and his reintegration into the community; the imposition of consequences for the offender which can be seen as punitive or

his family and society: see G. Masters, "The Importance of Shame to Restorative Justice" in L. Walgrave, ed., *Restorative Justice for Juveniles: Potentialities, Risks and Problems* (Leuven: Leuven University Press, 1998).

¹⁵³ D. Van Ness & K. Heetderks Strong, *Restoring Justice* (Cincinnati: Anderson Publishing, 1997).

¹⁵⁴ While good counsel will have prepared well for sentencing, and the court will usually have a pre-sentence report of greater or lesser value, restorative conferences present more flexibility in this regard.

¹⁵⁵ Van Ness, Stuart, Kurki, & Braithwaite, *supra*.

¹⁵⁶ McCold, *supra* note 138.

¹⁵⁷ While restorative conferences may have therapeutic aspects (see S. Retzinger & T. Scheff, "Strategy for Community Conferences: Emotions and Social Bonds" in B. Galaway & J. Hudson, *supra* note 151; and T. Scheff, "Community Conferences: Shame and Anger in Therapeutic Jurisprudence" (1998) 67 *Rev. Jur.U.P.R.* 95), the rehabilitative consequences usually take the form of an agreement by the offender to seek the assistance of relevant treatment facilities within the community.

retributive;¹⁵⁸ the deterrence of other potential offenders who see that restorative outcomes are not necessarily “soft on crime”;¹⁵⁹ and community development or transformation where the restorative conference discussions identify a generalized community problem and seek to implement solutions which go beyond the confines of the particular offender’s case.¹⁶⁰ In attempting to achieve these aims, a multiplicity of procedures are deemed to be legitimate: screening or diversion of the least serious incidents through police warnings or cautions (sometimes with conditions attached);¹⁶¹ accountability sessions with offenders, their family members and community members in the absence of victims;¹⁶² victim-offender mediation sessions

¹⁵⁸ Among some restorative justice advocates, the imposition of punishment is anathema: see for example J. Braithwaite & P. Pettit, *Not Just Deserts: A Republican Theory of Justice* (Oxford: Clarendon Press, 1990) or L. Walgrave, “On Restoration and Punishment: Favourable Similarities and Fortunate Differences” in Morris & Maxwell, *supra* note 136. For others, the punitive aspect of restorative consequences is to be accepted, if not welcomed as appropriate, and an important element of the credibility of restorative justice for victims and in the community: see K. Daly, “Revisiting the Relationship between Retributive and Restorative Justice” in H. Strang & J. Braithwaite, *Restorative Justice: Philosophy to Practice* (Ashgate: Aldershot, 2000) and K. Daly, “Restorative Justice: The Real Story”, paper presented at the Scottish Criminology Conference, September 2000, online: <http://www.gu.edu.au/school/ccj/kdaly.html> (date accessed: July 21, 2002).

¹⁵⁹ R.A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001).

¹⁶⁰ Some restorative justice programmes identify community development as an explicit goal: see the Nova Scotia Restorative Justice Programme, *infra* notes 177 at 192 and accompanying text and South African Peace Committees in the Community Peace Programme of the Western Cape Province (personal conversations with Clifford Shearing and John Cartwright of the Community Peace Programme in Cape Town during the month of January, 2001). It is important to note that the principals in the Community Peace Programme are reluctant to adopt the mantle of “restorative justice”. They might be more comfortable with “transformative justice”, but would really prefer not to be labelled at all. On the potential significance of this latter label, see R. Morris, *Stories of Transformative Justice* (Toronto: Canadian Scholar’s Press, 2000).

¹⁶¹ Cautioning and warnings have been recently restructured and formalized in the United Kingdom: see J. Dignan, “The Crime and Disorder Act and Prospects for Restorative Justice” [1999] *Crim L. Rev.* 48, and have been introduced in Canada (Nova Scotia and Alberta).

¹⁶² Some Maori communities in New Zealand have adopted this approach: G. Maxwell & A. Morris, “Restorative Justice Re-Offending” in Strang & Braithwaite, *supra* note 158; as have some Nova Scotia agencies: see Clairmont, *supra* note 147, even in the face of criticism that conferences without victim participation are less than truly restorative. This approach may even be preferred in some Asian contexts where confrontation of victim and offender groups can result in a culturally unacceptable mutual “loss of face”: see *Prescribed Procedures for Family Conferencing*, Juvenile Court, Singapore, February 2001.

where full-blown restorative conferencing may be thought unnecessary or too resource-rich in the circumstances;¹⁶³ or restorative conferencing as described above conducted at the instance of police, prosecutors, judges or correctional officials or community activists.¹⁶⁴ The agreed outcomes of restorative conferencing are limited only by the circumstances and imaginations of the participants, but typically include: apologies from offenders; reparation to victims; community service; offender participation in treatment or rehabilitation programmes; or offenders, families and community participants engaging in interactive solutions which may be oriented to a single offender, a single victim or the community at large.¹⁶⁵ Compliance with agreed upon outcomes in restorative conferencing seems generally high, which may be linked to surveillance of performance by family members and community observers rather than overworked probation officials.¹⁶⁶ Participant satisfaction with restorative justice process is markedly positive, which may be linked to both participant opportunities to “have their say” during the proceedings,¹⁶⁷ and to the knowledge that privacy and confidentiality may be protected to a greater degree than in public court proceedings.¹⁶⁸ While restorative process may be subject to the constraints imposed by a broad legal framework,¹⁶⁹ it is generally not subject to a narrow application of doctrines of proportionality and parity that one finds in sentencing jurisprudence. Thus, it is to be expected that restorative justice methods may give rise to considerable diversity in outcomes,

¹⁶³ This contrasts with some jurisdictions where there is a systemic preference for mediation: see E. Weitekamp, “Mediation in Europe: Paradoxes, Problems and Promises” in Morris & Maxwell, *supra* note 136.

¹⁶⁴ The allocation of responsibilities for restorative justice initiatives is a major theme for the Nova Scotia Programme, which purports to be comprehensive in scope.

¹⁶⁵ See Van Ness & Heetderks Strong, *supra* note 153.

¹⁶⁶ For a broad empirical assessment of restorative justice outcomes, see: J. Latimer, C. Dowden & D. Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (Ottawa: Research and Statistics Division, Department of Justice of Canada, April 2001).

¹⁶⁷ This observation has almost reached the level of a universal generalization in the restorative justice literature: see Kurki, *supra* note 135 as well as McCold, *supra* note 138, and Clairmont, *supra* note 147.

¹⁶⁸ Nova Scotian restorative justice programme participants mentioned this with some frequency: see Clairmont, *supra* note 147.

¹⁶⁹ This framework, of course, is critical and is found in the *Criminal Code*, s. 717 and the *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 4.

depending upon the circumstances of the offender and community, and the responses of participants in the restorative discussions.¹⁷⁰

Restorative justice is a ubiquitous phenomenon. For those steeped in the retributive “law and order” perceptions of crime novels and Hollywood movies, or even for those trained as criminal justice professionals, the pervasiveness of restorative justice may come as something of a surprise. John Braithwaite, one of the world’s foremost scholars in the field, makes the extraordinarily strong empirical claim that *all* societies contain institutions of restorative justice.¹⁷¹ Certain writers maintain that state-centred retributive justice is the historical aberration and that restorative justice is more “natural” or certainly less socially dysfunctional.¹⁷² What is clear is that pressure for restorative justice alternatives or complements to mainstream justice institutions are emerging worldwide. Some of these pressures come from aboriginal communities in societies that have been characterized by the imposition of state-centred retributive justice by colonialist powers.¹⁷³ Some have their origins in moral or religious opposition to some of the more egregiously dysfunctional aspects of mainstream criminal justice.¹⁷⁴ Other such pressures are coming from institutional tensions inherent in modern criminal justice systems whether their roots are in the European civil law tradition¹⁷⁵ or in the various legal cultures which originate from the common law of England.¹⁷⁶

¹⁷⁰ This “lack of certainty and predictability” is at the root of some serious theoretical critiques of restorative justice: see S. Levrant, F. Cullen, B. Fulton & J. Wozniak, “Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?” (1999) 45 *Crime and Delinquency* 3; R. Delgado, “Prosecuting Violence: A Colloquy on Race, Community and Justice” (2000) 52 *Stan. L. Rev.* 751 and J. Brown, “The Use of Mediation to Resolve Criminal Cases: A Procedural Critique” (1994) 43 *Emory L. Rev.* 1247.

¹⁷¹ Braithwaite, *supra* note 143. It appears that no one has yet demonstrated that he is incorrect. For similar claims, see E. Weitekamp, “The History of Restorative Justice” in G. Bazemore & L. Walgrave, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey: Criminal Justice Press, 1999).

¹⁷² See Weitekamp, *ibid.*, or J. Consedine, *Restorative Justice: Healing the Effects of Crime* (Lyttleton: Ploughshares, 1993).

¹⁷³ This is certainly the case in Africa, Australia, New Zealand and North America.

¹⁷⁴ H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990).

¹⁷⁵ Council of Europe, Committee of Ministers, *Recommendation R(99)19: Mediation in Penal Matters*.

¹⁷⁶ For restorative justice developments in England itself see T. Marshall, *Restorative Justice: An Overview* (London: Home Office, 1999); see also K. Daly, “Conferencing in

An example of a comprehensive restorative justice programme bearing these reflexive law characteristics is that of the Canadian province of Nova Scotia.¹⁷⁷ The overall aim of the Nova Scotia program of restorative justice is more effective crime prevention than that provided by a system which relies largely on fines, probation, community sentences or incarceration.¹⁷⁸ The two “primary goals” of the restorative justice initiative are to reduce recidivism and increase victim satisfaction.¹⁷⁹ The first is to be achieved by emphasis on a family group conferencing or community justice forum models which have been shown to be effective in focusing on the underlying causes of criminal behavior and on “constructive reintegration of the offender into the community.” The second primary goal is said to flow from evidence that in such models, victims have an opportunity to discuss the impact of the offence and gain greater satisfaction from participation in the elaboration of restorative measures for reparation of harm. The “secondary goals” of the Nova Scotia program are to strengthen communities by providing support for organizations and groups which have an interest in justice issues, and to increase public confidence in the justice system through greater participation by offenders, victims, their respective families and community residents in solution of problems which have resulted in criminal behavior.¹⁸⁰ Achievement of all these goals is initially

New Zealand and Australia: Variations, Research Findings and Prospects” in Morris & Maxwell, *supra* note 136. For a description of Canadian restorative justice programmes, see Church Council on Justice and Corrections, *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures* (Ottawa: Correctional Service of Canada, 1996).

¹⁷⁷ *Restorative Justice: A Programme for Nova Scotia* (Halifax: Nova Scotia Department of Justice, 1998) [hereafter *Nova Scotia Programme*]. This document was adopted in a “Programme Authorization” signed by Nova Scotia Attorney General Robert Harrison, June 15, 1999 and published in the Royal Gazette of the Province on August 11, 1999, and effective as an authorization under section 717 of the *Criminal Code* and section 4 of the *Young Offenders Act*, *supra* note 169, as guidelines to prosecutors under section 6(a) of the *Public Prosecutions Act* S.N.S. 1990, c. 21, and as an authorization constituting police officers as agents of the Attorney General for the purposes of the programme under the *Criminal Code* and the *Young Offenders Act*. It also authorizes those involved with the programme to elaborate protocols for implementation which are not inconsistent with the programme authorization.

¹⁷⁸ This description of the Programme is an updated version of what appears as B. Archibald, “A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures in Response to Crime” in D. Stuart, R.J. Delisle & A. Manson, *Toward a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell/Thomson, 1999).

¹⁷⁹ *Nova Scotia Programme*, *supra* note 177 at 5.

¹⁸⁰ *Ibid.*, at 5.

conceived to be through mobilization of police resources and through alternative measures societies previously established under the *Young Offenders Act*. The idea is to promote local community initiatives rather than to rely solely on centralized professional and bureaucratic resources as is the case with the current approach to criminal justice.

The framework for the Nova Scotia program consists of *four entry points* given access to a *continuum of options* which relate to *four levels of offences*. These are to be established in formal guidelines which set out minimum *procedural requirements* and describe the kinds of *discretionary factors* which will be relevant for making the system work. Each of these structural aspects of the program will be described briefly.

The Nova Scotia program may be unique in that it envisions use of restorative justice principles, models and techniques at four distinct *entry points* in the current criminal justice process.¹⁸¹ In this respect, it is both comprehensive and integrative. The first entry point is at the pre-charge stage, where police may use or refer offenders to restorative justice options in relation to a wide range of provincial and lesser *Criminal Code* offences. The second entry point is at the post-charge and pre-conviction stage, where appropriate cases are to be referred to restorative justice processes rather than proceed to trial. The third entry point is at the post-conviction stage, where judges are encouraged to resort to community restorative justice processes to enhance sentencing decisions or possibly to conduct sentencing circles themselves in open court. The fourth and final entry point is at the post-sentence stage, where correctional officials and victims' services staff are authorized to employ restorative justice techniques where restoration, healing and closure for the victim and offender may be thought critical. The description of these entry points is surely sufficient to demonstrate that restorative justice in Nova Scotia is conceived of far more broadly than simply an adjunct to sentencing, as might be thought in a quick reading of section 717 of the *Criminal Code* which establishes the legislative framework for such "alternative measures." However, as the year one evaluation of the Programme demonstrates, implementation has been easier at the police entry point than at the others. An equivalent to the marathon runner's "wall" seems to have been encountered with prosecutorial, judicial and correctional professionals who have been resistant in the initial "run" at the problem.¹⁸²

¹⁸¹ *Ibid.*, at 8.

¹⁸² Clairmont, *supra* note 147 at 118-120.

The *continuum of options* in the Nova Scotia program includes what can be conceptualized as simple “diversion” alternatives and true “restorative justice” models.¹⁸³ As an exercise of police discretion, informal warnings have long been used to divert less serious cases from the courts. This traditional approach is now to be enhanced by a system for “formal cautions” or written letters to offenders and/or their parents from supervising police officers. Records are kept of such formal cautions, to be taken into account in the exercise of police or prosecutorial discretion in the event of further offences on the part of the offender involved. Victims may be consulted by police prior to the use of this cautioning mechanism, but the approach does not envisage the invocation of full restorative justice principles and process. Adult and youth diversion programs for out of court dispute resolution have been available in Nova Scotia for some time in relation to restricted categories of offences and offenders. These programs are to continue, although the mediation techniques used and the frequent absence of victims from the process (in what are called “offender accountability sessions”) have meant that they have been primarily instruments of “diversion” in the light of the principle of “restraint” in the use of criminal law. These accountability sessions have not had a strict focus on restoration of relationships with victims, offenders and the community. Thus the cautions and accountability sessions, while operating under the rubric of the programme, are best conceived as “diversion” rather than true “restorative justice.”

Under the label “restorative justice models”, the Nova Scotia program places a number of processes believed to target “offender accountability, victim healing, offender reintegration and repairing the harm caused by the victim.” The victim-offender conference” run by a trained facilitator enables discussion, expression of feelings and negotiation of a resolution acceptable to victim and offender. It is listed under the “true restorative justice” heading, even though some commentators are sceptical of the restorative potential of “dyadic victim-offender reconciliation” which may not place either victim or offender in a process which involves “significant others” and “community representatives” who can have useful input in the discussion and an important stake in the outcome.¹⁸⁴ Given these concerns, the program was initially intended to concentrate on the mechanism of the “family group conference” (which in RCMP literature is

¹⁸³ *Ibid.*, at 8-12.

¹⁸⁴ See J. Braithwaite & S. Mugford, “Conditions of Successful Re-Integration Ceremonies: Dealing with Juvenile Offenders” (1994) 34 *Brit. J. of Crim.* 139.

called a “community justice forum”).¹⁸⁵ Based on principles articulated by John Braithwaite and in use in Australia and New Zealand, the process emphasizes denouncing or shaming the wrongful conduct while affirming and supporting the offender in effort to ensure reintegration into the community.¹⁸⁶ While involving offenders and victims (though victims are not to have a *veto*), the restorative conference is premised on the notion that success may depend on involvement as well of family members and community people who are significant in the lives of offenders and victims. They may be affected by both the problematic behavior and the nature and implementation of solutions sought. Thus, in principle, restorative conferencing is central to the Nova Scotia restorative justice program. It is intended for use at all four entry points, and in relation to some relatively serious offences. It was used prior to the promulgation of the programme by RCMP in the province¹⁸⁷ and in the facilitative or coordinating hands of authorized community agencies is seen as the most important referral option for police, Crown attorneys, correctional officials and judges, who might prefer input from such a gathering to conducting a sentencing circle. However, the first year evaluation report indicates that some of the community agencies are encountering difficulties in making the transition from offender oriented “accountability sessions” to true restorative conferencing which balances victim and offender interests and incorporates meaningful community participation.¹⁸⁸

Another central aspect of the Nova Scotia program is the *four level classification of offences* for the exercise of restorative justice discretion by the various players in the criminal justice system and in the supportive communities involved. The simplest way to describe this classification scheme is to reproduce the “Table of Included and Excluded Offences” from the document itself:¹⁸⁹

¹⁸⁵ The Clairmont evaluation, *supra* note 147, indicates that in the initial phases the programme has in fact relied heavily on offender “accountability sessions” rather than full conferences with victims in attendance.

¹⁸⁶ See J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

¹⁸⁷ With some favourable local publicity; see: “Restorative Justice Program a Viable Alternative” *The Oxford [Nova Scotia] Journal* (August 5, 1998).

¹⁸⁸ Clairmont, *supra* note 147 at 29-31.

¹⁸⁹ *Nova Scotia Programme*, *supra* note 177 at 16. It should be noted that soon after the Programme was introduced, a directive was issued to put a moratorium on the use of restorative justice in relation to sexual assault, which continues to be governed by the

Included and Excluded Offences	
LEVEL 1 OFFENCES	
These are the only offences for which a formal caution is an option	<ul style="list-style-type: none"> • Provincial Statute offences • Minor property offences • Disorderly conduct offences (<i>i.e.</i> loitering, vagrancy) • Assaults nor resulting in bodily harm • Mischief
LEVEL 2 OFFENCES	
These offences can be referred at all four entry points	<ul style="list-style-type: none"> • This is the largest group of offences. They constitute all <i>Criminal Code</i> offences that are not Level 3 or Level 4 offences
LEVEL 3 OFFENCES	
These offences can be referred only at the court (post-conviction/pre-sentence) and corrections (post-sentence) entry points.	<ul style="list-style-type: none"> • Fraud and theft-related offences over \$20,000 • Robbery • Sexual offences (proceeded with as a summary offence) • Aggravated assault • Kidnapping, abduction and confinement • Criminal negligence/dangerous driving causing death • Manslaughter • Spousal/Partner Violence offences • Impaired driving and related offences
LEVEL 4 OFFENCES	
These offences can be referred only at the corrections (post-sentence) entry point.	<ul style="list-style-type: none"> • Sexual offences (indictment) • Murder

The final aspects of the structure of the program which needs to be presented are the formal minimal requirements and the discretionary factors which condition its invocation in particular cases. The *formal minimal requirements* are those considerations set out in section 717 of the *Criminal Code* and section 4 of the *Young Offenders Act*. These of course, include protection of society, reference to offenders needs, and victim's interests; offender consent to the process; right to counsel; acceptance of responsibility for the offence by the offender; sufficiency of the evidence; privilege against the use of admissions made in the process, etc. The *discretionary factors* are similar to those found in Crown attorney guidelines concerning the decision

Minister of Justice's Directive and the D.P.P.'s Protocol on "Spousal/Partner Violence Policy" referred to above in notes 101 and 102.

to terminate proceedings in the public interest or those found in various alternative measures schemes presently in use across the country, though with a heavy emphasis on victim concerns.¹⁹⁰

The point of this long description of an operating restorative justice programme is to demonstrate the complex fashion in which restorative justice can enable citizens to achieve goals in relation to criminal justice which are in considerable measure unattainable in the context of even the egalitarian and inclusionary incarnation of the adversarial criminal justice system. It is an example of constitutional democracy based on a theory of communicative action as described above in Part II. The programme reconciles broad substantive and procedural criminal justice norms (fashioned by the federal Parliament) with administrative processes (established by the exercise of governmental discretion at the provincial level) which are implemented through ongoing consultation and citizen participation (through local community groups). Moreover, empirical evidence suggests that on four main axes of comparative evaluation, restorative justice outperforms the adversarial paradigm. Both victims and offenders express higher levels of satisfaction with restorative process than with adversarial trials.¹⁹¹ Offender compliance rates with restorative

¹⁹⁰ *Nova Scotia Programme*, *supra* note 177 at 14, where the list reads:

1. the cooperation of the offender;
2. the willingness of the victim to participate in the process;
3. the desire and need on the part of the community to achieve a restorative result;
4. the motive behind the commission of the offence;
5. 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;
6. the relationship of the victim and offender prior to the incident, and the possible continued relationship between them in the future;
7. the offender's apparent ability to learn from a restorative experience, and follow through with an agreement;
8. the potential for an agreement that would be meaningful to the victim (*i.e.*, restitution, actual repairs);
9. the harm done to the victim;
10. whether the offender has been referred to a similar program in recent years;
11. whether any government or prosecutorial policy conflicts with a restorative justice referral; and
12. such other reasonable factors about the offence, offender, victim and community which may be deemed to be exceptional and worthy of consideration.

¹⁹¹ Kurki, *supra* note 135; McCold, *supra* note 138; Clairmont, *supra* note 147; and Latimer, Dowden & Muise, *supra* note 166.

outcomes are higher than with their adversarially achieved counterparts.¹⁹² Where restorative justice outcomes supplant sentencing dispositions, rather than widening the net in the direction of simple cautions or official inaction, the costs of criminal justice appear to be reduced significantly.¹⁹³ Finally, there is emerging evidence that restorative conferencing reduces recidivism rates more than standard sentencing where other variables are held constant.¹⁹⁴

V. POST-MODERN CITIZENS' GOALS AND FUNDAMENTAL JUSTICE: MAINTAINING THE BALANCE

Unguarded restorative justice talk may sometimes create the impression that restorative justice ought entirely to replace the criminal justice system as we know it. Such thinking is misplaced utopianism and potentially dangerous. It is necessary and indeed right that central elements of the formal criminal justice system remain in place, even though it is likely and desirable that restorative justice will play an ever more prominent role in criminal justice, both here in Canada and around the world. A moment's reflection on the importance of traditional standards of criminal justice in this context is of value here. In particular, it is helpful to understand why state-centred criminal justice, rooted in *limiting* retributivism, must continue to constitute both a defining and a default paradigm¹⁹⁵ in any complex democratic society which purports to operate in accordance with the rule of law.

¹⁹² See the Latimer, Dowden & Muise "Meta – Analysis", *supra* note 166.

¹⁹³ Morris & Maxwell in Strang and Braithwaite, *supra* note 162.

¹⁹⁴ See, for example, A. Morris & G. Maxwell, "Family Group Conferences and Reoffending" in Morris & Maxwell, *supra* note 136 and the Latimer, Dowden & Muise, "Meta-Analysis", *supra* note 166.

¹⁹⁵ The phrase "default paradigm" is intended to refer here to the idea drawn from the computer world of a system which will determine outcomes in the absence of a valid decision to employ an alternative system or approach. For a discussion of limiting retributivism, see B. Archibald, "Crime and Punishment: The Constitutional Requirements for Sentencing in Canada" (1988), 22 *R.J.T.* 307.

Democratically determined criminal laws typically ought to provide clear definitions of behaviour proscribed as unacceptable in society so that people can govern their actions accordingly in order to comply with the law and avoid punishment.¹⁹⁶ That governments, or others wielding official power (including restorative justice conference participants), must be constrained from arbitrary and unlawful behaviour is an axiomatic principle of democracy.¹⁹⁷ Thus, it is important, especially in complex societies where social stratification and subcultural differentiation inhibit the development and maintenance of universal standards of behaviour, that basic norms of criminal conduct continue to be debated, determined and promulgated through authoritative democratic institutions.¹⁹⁸ The abandonment of substantive standard setting in criminal matters to restorative justice agencies, no matter how well-intentioned, well-trained or representative of the local community they may be, is simply “not on” in a democratic society. While restorative conferencing may be an excellent way to deal with the consequences of criminally harmful actions, it is not the forum in which society should determine basic standards of what is right and what is wrong. Restorative conferences are authorized only to respond to criminal offences, not to criminalize what participants may or may not view as harmful or immoral. Legislatures must do that job. Basic notions of liberty in a democratic society demand such a perspective, and cannot be lost sight of in the enthusiasm for restorative justice.¹⁹⁹

¹⁹⁶ This concept is, of course, critical aspect of the principle of legality which is entrenched in *Charter*, ss. 7 and 11(g). For judicial discussion of these issues, see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. The requirements of an agreement resulting from a restorative conference must be viewed as punishment in this context, even if all participants are in favour of them and share in a consensus concerning their restorative character.

¹⁹⁷ This truism found its classical expression in A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1886) and is the foundation of modern administrative law: see D. Mullin, *Administrative Law* (Toronto: Irwin Law, 2000).

¹⁹⁸ *Facts and Norm*, *supra* note 19.

¹⁹⁹ The perversions of justice during the totalitarianism of Nazi and Fascist regimes in Europe which gave rise to the Second World War were not lost on post-war European constitutionalists. The post-war Italian and German constitutions made criminal prosecutions mandatory where crimes were found to have been committed, and prohibited the exercise of prosecutorial discretion in this regard. However, even Italy and Germany are now moving toward restorative justice options within the limits of modified constitutional constraints: G. Di Federico, “Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective” (1998) 38 *Br. J. Crim* 371; M. Loschnig-Gspandl & M. Kilchling, “Victim/Offender Mediation and Victim Compensation in Austria and

Similar concerns arise in relation to procedural due process. The disturbing litany of recent cases of wrongful conviction in major western democracies²⁰⁰ serve as a grim reminder that complacent confidence in the institutions of criminal justice, even in societies characterized by a formal commitment to the rule of law, is dangerous. While offenders who accept responsibility for or plead guilty to offences may properly be dealt with by restorative techniques as described earlier,²⁰¹ those who assert their innocence must have access to a fair trial. Despite the claims of some,²⁰² restorative justice process is rarely an appropriate venue for the determination of contested facts. The procedural protections of the formal criminal trial, including the burden of proof on the prosecution²⁰³ and formal rules concerning the fair presentation of proof,²⁰⁴ are essential bulwarks against injustice where claims of innocence are asserted. Increased reliance on restorative conferencing cannot be allowed to sap the commitment to procedural criminal justice which is the product of historical struggles against oppressive use of the instruments of state power in democratic societies. Avenues for recourse to the formal criminal justice system must

Germany - Stocktaking and Perspectives for Future Research" (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 58.

²⁰⁰ Attentive readers of the popular press will be familiar with the "Birmingham Six" and "Guildford Four" in the United Kingdom; with the celebrated names of Truscott, Marshall, Morin, Milgaard and Sophonow in Canada; and with recent FBI cases resulting in wrongful convictions in the United States.

²⁰¹ The issue of pressured pleas of guilty or inappropriate acceptance of responsibility by offenders with legitimate grounds for defence arises whether one is dealing with the formal justice system or restorative process: *R. v. Adgey* [1975] 2 S.C.R. 426. However, as will be discussed below, restorative justice diversion must put in place safeguards to protect against such occurrences to the extent possible.

²⁰² Braithwaite, *supra* note 146.

²⁰³ Despite myths to the contrary, criminal justice systems in the continental tradition do have functional equivalents to the burden of proof «beyond a reasonable doubt» in criminal matters: see H. Jeschek, "Principles of German Criminal Procedure in Comparison with American Law" (1970) 56 *Val. L. Rev.* 239.

²⁰⁴ While the civilian-derived jurisdictions do not replicate the full array of common law rules of evidence, even they have significant rules about the fair presentation of proof in criminal matters: W. Pakter, "Exclusionary Rules in France, Germany and Italy" (1985) 9 *Hastings Int. L. Rev.* 1. Such rules are not present in the discursive give and take of restorative conferencing, although protection against derivative use of damaging admissions is given by the statutory rule of privilege in the *Criminal Code*, s. 717 (3).

always be preserved for use at any point in restorative process where an offender feels that he is being subjected to an unfair procedure.²⁰⁵

The rules of due process, of course, apply not only to the criminal trial itself.²⁰⁶ It is an unfortunate fact of life that police and criminal justice personnel may sometimes exceed their authority in ways which cause damage or prejudice to accused persons. Criminal procedure generally provides the formal means by which to limit or sanction the harmful effects of abuse of the state's virtual monopoly over the lawful use of force in the apprehension of offenders, the gathering of evidence and processes of trial, sentencing and punishment. Even if restorative process is generally far more satisfactory to both offenders and victims as a means of responding to criminal wrongs, it has only an indirect, if any, capacity to deal effectively with these procedural problems.²⁰⁷ Where an accused claims to have been subjected to improper police procedure or other abuse by those in authority, the formal criminal trial must be available as an effective forum in which to air such allegations and seek redress.²⁰⁸ Restorative justice cannot "do it all."

The foregoing concerns about the inadequacies of restorative justice as a total response to crime are put forward from the perspective of accused persons or those who might find themselves in that unfortunate position. However, there are equally if not more compelling reasons to reject any notion of a procedural monopoly for restorative justice which are rooted in concerns about crime prevention. The retributive paradigm, with its emphasis on punishment, is an unambiguous denunciatory statement about

²⁰⁵ *Criminal Code*, s. 717 reflected, for example in the "discretionary factors" enumerated in the *Nova Scotia Programme*, *supra* note 177, embodies these procedural safeguards.

²⁰⁶ The extent to which the criminal trial (as opposed to collateral legal procedures against malefactors in positions of authority) ought to provide the opportunity to sanction wrongdoing has long been a matter of controversy: see H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968). Exclusionary rules of evidence or stays of proceedings, even in relation to potentially guilty offenders, are of course widely used mechanisms for depriving the State of a conviction where its operatives have exceeded their lawful authority, and have been given a new lease on life in Canada by the *Charter*, s. 24: see Stuart, *Charter Justice in Canadian Criminal Law*, *supra*.

²⁰⁷ On the conflicting paradigms of procedural justice since the rise of the victim's rights movement, see K. Roach, *supra* note 5.

²⁰⁸ This, of course, does not mean to ignore or denigrate the possibilities of alternative courses of action against the officials concerned, such as civil suits for trespass or false imprisonment, or administrative complaint procedures, such as those found in many police regulatory statutes.

the unacceptable nature of the criminal behaviour in question.²⁰⁹ The symbolic and educational nature of the criminal trial and its attendant punishment are difficult to discount, even for those who are most sceptical of the deterrent effects of sentencing.²¹⁰ Restorative conferencing, which is complex to explain and not often exemplified in current popular films or other communications media, may not have this same denunciatory impact. More importantly, thoughtful restorative justice advocates must admit that there are some dangerous, manipulative or irrational offenders for whom incapacitation is the only strategy.²¹¹ Abolitionists may cringe at the idea, but it is hard to deny that incarceration is a necessary evil in a fallen world.²¹² Restorative justice may be appropriate for a range of serious offences beyond those one might think of at first blush.²¹³ Nonetheless, incarceration is the ultimate sanction, and it is a right and proper tenet of criminal justice that such punishments are to be imposed only by a judge following a formal criminal conviction, obtained in a manner consistent with appropriate procedural safeguards.²¹⁴

²⁰⁹ Denunciation is an express aim of sentencing in many jurisdictions, including, of course, Canada: *Criminal Code*, s. 718.

²¹⁰ Criminological literature is replete with studies which indicate that public confidence in the deterrent effect of criminal sentences is almost entirely misplaced: see S. Lab, *Crime Prevention: Approaches, Practices and Evaluations* (Cincinnati: Anderson Publishing, 1992); and D. Nagin, "Deterrence and Incapacitation" in M. Tonry, ed., *The Handbook of Crime and Punishment* (Oxford: Oxford University Press, 1998).

²¹¹ The controversy over the prediction of dangerousness is even more intense than that over deterrence. The reason may lie in the fact that predictions of dangerousness, always statistically problematic, are used to justify indeterminate incarceration with all its politically fraught consequences: A. von Hirsch, "Selective Incapacitation Re-examined: The National Academy of Science's Report on Criminal Careers and 'Career Criminals'" (1988) 7 *Criminal Justice Ethics* 19; and C. Webster, B. Dickens & S. Addario, *Constructing Dangerousness: Scientific, Legal and Policy Consequences* (Toronto: University of Toronto Centre of Criminology, 1985).

²¹² G. West & R. Morris, *The Case for Penal Abolition* (Toronto: Canadian Scholars' Press, 2000).

²¹³ The empirical literature somewhat surprisingly indicates that restorative methods are more effective in relation to offences of personal violence than with minor public or property offences: this is one of the conclusions of the Canberra Re-Integrative Shaming Experiment (RISE) Study: H. Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration" in Morris & Maxwell, *supra* note 136.

²¹⁴ The constitutional right to jury trials in common law jurisdictions, or to trials by superior courts judges in civilian jurisdictions, are naturally enough connected to the seriousness of offences and the degree of attendant stigma and punishment. For example, *Charter*, s. 11(f) provides that any person charged with an offence has the right "except in the case of an offence under military law tried before a military

One is thus left with a situation where both formal justice and restorative justice are each necessary but insufficient on their own. The formal state-centred adversarial system is critical for the definition of crime and punishment, as well as for the establishment of procedural due process to be invoked *in extremis* where required. It must continue to be the “default paradigm”. Restorative conferencing provides a healing corrective to an alienating and bureaucratic formal system when offenders are willing to accept responsibility for the harm caused or plead guilty to offences charged and come to terms with the needs of victims and the community. The notion that a crime is simply a wrong against the state, to be prosecuted by its agents, can be supplemented by a recognition that victims, offenders, their families and communities are adversely affected and can be involved in determining solutions where appropriate. However, it is naive to think that restorative justice is a complete alternative which is opposed to and must replace the formal criminal justice system. The two are inextricably linked and complement each other. The question is how are the tasks to be allocated in ensuring that retributive and restorative justice mechanisms play a balanced and reciprocally reinforcing role in the criminal justice system.

CONCLUSION

In the past twenty years, Canada has been a global pioneer in advancing egalitarian citizen participation in the administration of criminal justice. The formal adversarial criminal trial has taken on a variety of inclusionary characteristics. This adversarial process has been supplemented by restorative conferencing as a potential alternative at virtually all levels of the system. These restorative methods can enhanced the capacities of individuals to achieve their goals in relation to criminal justice, while simultaneously encouraging community development, crime prevention and healing of harms caused by criminal wrongs. These are forms of reflexive justice well adapted to the needs of Canada’s complex multi-cultural society which maintain a commitment in criminal justice to the principles of autonomy, equality, relationship and procedural fairness. The combination of inclusionary adversarial proceedings and healing restorative ones has extraordinary potential for the enhancement of citizen participation, both individual and collective. This is all to the good. But the process must be fully understood and its structures properly balanced if the legitimacy of our criminal justice system is to be maintained. It is, moreover, easy to become

tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”

lost in the forest of conflicting rhetoric and technical terminology in these new debates on criminal justice. A map with as simple directions as possible is required in order not to lose the forest for the trees. Perhaps the foregoing may have served the purpose.