Specifying Aims and Limits for Restorative Justice Models: a Reply to von Hirsch, Ashworth and Shearing

by

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Abstract

The purpose of this essay is to attempt to answer the question of how we ought to respond to criminal offenders whose guilt has been established. Restorative justice theorists have offered new and interesting answers to this question, but their work has been increasingly criticised. In their well-known critique, von Hirsch, Ashworth and Shearing argue that restorative justice models common in the literature: (1) posit several vaguely formulated goals without priority among them specified, (2) have underspecified means and modalities, (3) contain few or no dispositional criteria, and (4) lack adequate fairness constraints on severity of dispositions. In this essay I present a novel composite-aims restorative justice model and specify its aims and limits. The composite-aims model builds upon the work of other prominent restorative justice theorists to produce a model that withstands von Hirsch et al.’s critique and provides a desirable framework for responding to convicted offenders.
# Table of Contents

Abstract ......................................................................................................................... ii
Table of Contents ........................................................................................................... iii
Acknowledgments .......................................................................................................... iv
1. Introduction .............................................................................................................. 1
2. Von Hirsch, Ashworth and Shearing's Critique of Restorative Justice ................... 4
3. Gerry Johnstone's Response .................................................................................. 7
4. Aims ......................................................................................................................... 9
5. Conflicting Goals ..................................................................................................... 15
6. Means ....................................................................................................................... 18
7. Scope of Application .............................................................................................. 26
8. Limits ....................................................................................................................... 37
9. Dispositional Criteria ............................................................................................. 43
10. Conclusion ............................................................................................................. 46
Works Cited .................................................................................................................. 48
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Introduction

The question of how a state should respond to convicted criminal offenders is one that remains as pressing, morally important and controversial as ever. Debate amongst advocates of the traditional philosophical theories of punishment continues and is complemented by a growing discussion of new ideas on the subject. Following the increased proliferation of restorative justice programs and literature internationally, the movement has attracted considerable attention from prominent legal scholars. As a result, restorative justice theorists currently face a number of criticisms. Probably the most distinguished legal scholars to attack restorative justice are well-known retributivists Andrew von Hirsch and Andrew Ashworth. In the 1990’s von Hirsch and Ashworth jointly published two articles critiquing John Braithwaite and Phillip Pettit’s model of criminal justice which included restorative justice values and practices.\footnote{Braithwaite and Pettit’s, \textit{Not Just Deserts: A Republican Theory of Criminal Justice} was criticised in von Hirsch and Ashworth’s, “Not Just Deserts: A Response to Braithwaite and Pettit”. This was followed by Braithwaite and Pettit’s, “Not Just Deserts, Even in Sentencing,” and von Hirsch and Ashworth’s, “Desert and the Three R’s”.

Independently, Ashworth attacked preeminent restorative justice advocate/scholar Daniel Van Ness in his article “Some Doubts about Restorative Justice” and further criticised restorative justice programmes in his article “Responsibilities, Rights and Restorative Justice”. In 2003, von Hirsch and Ashworth, collaborating with Clifford Shearing, formulated the strongest challenge facing restorative justice theorists today. In their chapter “Specifying Aims and Limits for Restorative Justice: A ‘Making Amends’ Model?” the authors argue that prominent restorative justice models are not conceptually coherent and they do not provide meaningful guidance for policy.
Although the term ‘restorative justice’ refers to values and practices which may be applied in multiple settings, von Hirsch et al.’s critique concerns only restorative justice as a response to convicted offenders. The critique is aimed at prominent scholars who have tried to formulate a model of criminal justice that integrates restorative justice values and practices. Like many philosophical concepts, restorative justice is deeply contested. For the purpose of this essay, the term ‘restorative justice’ refers to any theory of criminal justice in which encounter and reparation play important roles. The encounter element focuses on the importance of meetings between parties who have been affected by crime, and the reparation element focuses on criminal offenders making amends for their crimes. When I refer to restorative justice ‘programmes’ or ‘practices’ I am referencing popular encounter processes such as victim-offender mediation, family-group conferencing and circles.

My main purpose in writing this essay is to attempt to answer the question of how we ought to respond to criminal offenders whose guilt has been established. My aim is to produce a conceptually coherent model that can withstand von Hirsch, Ashworth and Shearing’s critique. Such a model could contribute to the restorative justice movement and could help to encourage reform of our treatment of convicted offenders. I aim to provide a framework that outlines this model along certain key dimensions. In order to provide a model that can offer meaningful guidance for policy I will address a number of key questions: Which goals should the criminal justice system pursue when dealing with a convicted offender? What criteria should we appeal to when multiple goals conflict? How might we, in practice, achieve the appropriate aims of criminal justice? What
limiting principles, if any, should be applied to sentences? How should we respond to different types of offences and offenders? What should the sentencing process look like?

The model I endorse, which I call the ‘Composite-Aims’ model, posits four determining goals for our response to convicted offenders: censure, amends, reform and crime prevention. I argue that, properly understood, these goals are usually harmonious and can be pursued together. Restorative justice processes, in conjunction with traditional processes, offer an appropriate method for achieving these aims. The state should pursue these aims in a suitably nuanced fashion: censure should be roughly proportionate to the offender’s culpability, restitution should be made for damages actually incurred to victims and restraints should be reserved for persistent and dangerous offenders. Instead of judicial imposition of punitive sanctions we should respond to criminal offenders by arranging a facilitated dialogue between victims and offenders where offenders are held accountable, compensation for harms caused by crime are identified and measures for treatment of the offender are discussed. Various experts should: prepare the citizens participating in restorative justice conferences, assist in determining restraints, assist in determining rehabilitative obligations and monitor restitution agreements to ensure fairness.

I begin the essay by reviewing von Hirsch et al.’s critique and restorative justice advocate Gerry Johnstone’s response. Following this discussion, I present my composite-aims model and specify its aims and limits. This essay attempts to establish that the composite-aims model, which encompasses certain restorative justice values and processes, provides a desirable framework for responding to convicted offenders.
Von Hirsch, Ashworth and Shearing’s Critique of Restorative Justice

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

The first problem the authors identify is that advocates of restorative justice often put forward multiple unclear goals. The authors argue that restorative justice theorists posit imprecise goals such as ‘restoring relationships’ or ‘restoring the bonds of communities’ without explaining exactly what is damaged and how this so-called ‘restoration’ is to take place. Restorative justice theorists propose a multitude of goals and values without providing any rule to appeal to when said goals or values conflict. The authors argue that a theory that posits numerous imprecisely defined goals cannot provide the guidance our criminal justice system needs (22).

The second problem is that advocates of restorative justice often fail to specify the means to be used for achieving their proposed objectives. When specific means are endorsed restorative justice advocates rarely explain how they purport to accomplish given objectives (23). Only certain kinds of processes and dispositions are likely to produce the goals restorative justice theorists endorse. How do we know in a particular
case which intervention to use? How exactly do restorative justice processes and their dispositions achieve their goals? Restorative justice theorists must provide guidance as to which means are appropriate for accomplishing given aims and how they allege to do so.

A third problem von Hirsch et al. identify is that restorative justice advocates leave the responsibility of deciding on a fitting disposition up to conference group participants (33). This being the case, the participants in the conference may come up with any number of unusual obligations for the offender to fulfill. Giving conference participants the freedom to pursue any aim they choose, and any means to achieve it, opens the door for inappropriate treatment of offenders. What if conference participants chose to pursue special deterrence by giving the harshest disposition they could come up with? The authors worry that nothing ties the dispositions to the supposed aims restorative justice theorists endorse.

In his article “Responsibilities, Rights and Restorative Justice” Ashworth argues that the state must keep control of criminal sentencing to ensure a consistent response to offenders. In restorative justice proceedings two offenders who commit similar offences and are similarly blameworthy may receive appreciably different sentences. A number of factors could produce such an outcome: conference members in different encounters may formulate different agreements due to their diverse attitudes, values or beliefs; offenders may have significantly different harms to repair (even though similarly culpable) and may differ in their capacity to make repairs.

According to retributivists like von Hirsch and Ashworth, punishment expresses blame and the severity of punishment conveys how much the conduct is disapproved of.²

² This is argued in many of their works.
This expressive feature of criminal punishment demands that sentences reflect the blameworthiness of the criminal conduct. Where proportionality is disregarded offenders may suffer more or less implicit censure than their conduct warrants. Although some restorative justice theorists advocate proportionality constraints, von Hirsch, Ashworth and Shearing argue that the grounds for such limits within the restorative justice paradigm are rarely addressed.

Finally, von Hirsch, Ashworth and Shearing explore restorative justice theorists’ proposed scope of application. In order to implement restorative justice processes we must know which situations call for them. Different states of affairs may pose challenges for restorative justice advocates such as: a victim unwilling to participate; an offender unwilling to participate; a crime with no direct victim; a serious crime like murder; etc. The authors argue that even if restorative justice processes are worth implementing they should serve only a limited role within the larger structure of a retributive sentencing system (28).

Von Hirsch, Ashworth and Shearing suggest that restorative justice advocates need to specify aims and limits better. Advocates should: prioritize goals, specify means-ends relationships, provide guidance for deciding individual cases and impose fairness constraints on severity of dispositions (40). In order to have a sensible debate about the pros and cons of an alternative model of criminal justice, theorists need to provide clear and consistent criteria for implementation. The authors claim that popular accounts of restorative justice have failed to provide that.
Gerry Johnstone’s Response

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

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

The second option that Johnstone presents is that restorative justice theorists might reply by claiming that they have already presented detailed, conceptually coherent models. Some restorative justice theorists have created comprehensive models. Duff, Van Ness and Braithwaite are perhaps the best examples. Ultimately however, none of these models are acceptable³.

The third option is to acquiesce and proceed to construct a coherent model along the dimensions outlined by von Hirsch et al. Such a model would provide a more developed answer to the question of how the criminal justice system ought to treat convicted offenders. This model could then take on a bigger role in current debate. I aim to do this. I attempt to construct a model for the state’s response to convicted offenders along the dimensions outlined by von Hirsch, Ashworth and Shearing. I answer a number of questions: Which aims should the criminal justice system pursue when dealing with convicted offenders? What criteria should we appeal to when multiple goals conflict? How do restorative justice processes accomplish these aims? Which types of offences/offenders ought to be dealt with using restorative processes? What limiting principles, if any, should be applied to restorative dispositions? What should the decision-making process in restorative conferences look like? In what follows, I describe my novel composite-aims model.

Aims

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

Crime Prevention

When responding to convicted offenders we need to take measures to help prevent future crimes. Crime causes serious harm to society and its members; the thesis that crime is a serious social problem is rarely disputed. Legal philosopher Donald Scheid explains that every human society seeks to control crime (452). The benefits of preventing criminal conduct such as murder, theft, rape and assault are obvious. Without an effective means to enforce crime prevention and protect citizens’ basic human rights and freedoms we would lose the benefits that come with government and a juridical state.

In his “Prolegomenon to the Principles of Punishment” preeminent legal philosopher Herbert Hart explains that the purpose of designating certain actions as ‘criminal’ and forbidden by law is to announce to society that these actions are not to be done and to secure that fewer of the actions are done (6). It makes sense to respond to violations of the criminal law in a way that prevents further breaches.
The second social aim we should pursue when responding to convicted offenders is moral communication. Legal philosophers such as Duff, von Hirsch and Narayan hold that the state should condemn criminal offenders and express disapprobation of the offender’s criminal wrong. Philosophers have argued that this is important for a number of reasons. First, censuring institutions are required in order to respond in a morally appropriate way to victims of crime. Victims have suffered moral wrongs and a community that refuses to censure offenders would fail to vindicate the victims’ moral status and would suggest that violating citizens’ rights is acceptable. Censuring offenders conveys to victims the acknowledgment that they were wronged. It is important for victims to know, and have demonstrated, that what happened was not their fault. Second, wrongdoings must be recognized by the public if the rule of law and the values that have been infringed are to be taken seriously. Censuring offenders for their criminal wrongs expresses society’s condemnation of the conduct and recognizes the importance of rights in the political community. Third, Narayan explains that treating individuals as moral agents requires that we make critical moral judgments against them and inform them of those judgments (172). If I contravene the norms of my community, it is appropriate that I should be held responsible for my actions. This is an essential part of what it is to treat someone as a moral agent: to judge their actions as being worthy of praise or blame (Duff et al. 5). Failing to acknowledge that someone actions are worthy of praise or blame treats them like a non-person. Narayan argues that criminal offenders have an interest in being informed about the nature of critical moral judgments made

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4 See for example, Van Ness and Strong (3).
against them. Offenders must be given the opportunity to respond to criticism by apologizing or trying to give reasons why the conduct was not actually wrong (172).

Reform

The third social aim for the criminal justice systems’ response to convicted offenders is reform. Admittedly, reform is valued because it contributes to crime prevention, but I discuss it separately as it is also valued for the beneficial effects it has on offenders. After offenders have been held accountable and have made amends for their crimes we should help them reform and rejoin society. The goal of reform can be divided into three parts: moral education, changing behaviour and reintegration. The goal of educating criminals is to cultivate in them: emotions of guilt and remorse, empathy for those who have been victimized, comprehension of moral standards and a commitment to reform. The goal is not only the development of these dispositions on the part of the criminal, but also to develop them through means that respect them as autonomous agents. Philosopher Jean Hampton explains that we ought to try to convince offenders to reflect on the moral reasons for our criminal laws so that next time they will decide not to perform the prohibited action for moral reasons (212). This offers society another method of dissuading potential criminals and reduces our reliance on ineffective threats to their self-interest.

The goal of changing behaviour seeks to have offenders change not just their values, but also their ability to successfully pursue those values and make law-abiding behaviour habitual. It would be poor planning to convince an offender that theft is immoral without addressing his addiction or capacity to satisfy basic needs. The aim is to have offenders take steps to change their behaviour. Reintegration is the rejoining of
offenders back into society as full contributing members after they have been held accountable for their crimes. Moral education and changing behaviour are part of this, but it also requires additional assistance from the political community.

Amends

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

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

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

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

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

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

It is important to acknowledge, as restorative justice theorists do, that criminal behaviour may cause a variety of harms that need to be repaired, and victims of crime have different needs compared to victims of non-criminal tortuous injury. First of all, victims of crime often suffer strong psychological reactions to being victimized and may suffer from a range of emotional problems such as depression, anxiety, panic, confusion, embarrassment, anger, helplessness and a sense of loss of control (Gatts 10). Second, with criminal offences property is not just lost or accidently damaged, it is stolen or maliciously destroyed (Duff, “Restorative Punishment and Punitive Restoration” 85). Victims are not simply harmed, they are wronged and any attempt at making amends ought to acknowledge that. So, the general aim of amends is to have offenders make reparations for the broad harms caused by crime.

**Conflicting Goals**

A widely accepted view among prominent legal philosophers is that theories of punishment must incorporate a plurality of moral principles and purposes. Crime is a complex social problem and an adequate response to crime should attempt to accomplish a number of goals. Limiting our treatment of criminal offenders to serve only one purpose will needlessly neglect other important social purposes. In much the same way, common moral assessment requires us to display sensitivity to a variety of moral considerations such as fairness, dignity, respect for autonomy and concern for well being. We ought to pursue a composite aims approach in which each of the aforesaid legitimate

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5 See for example Duff, “Legal Punishment”.
Von Hirsch, Ashworth and Shearing criticize restorative justice theorists for proposing a multitude of goals and values without providing a rule to appeal to when these goals or values conflict. I emphasize, however, that it will be a rare occasion when the endorsed goals of the composite-aims model conflict. The goals of crime prevention, censure, reform and amends can typically be pursued together without interfering with each other in any significant way. This claim is best evidenced in the later section on scope of application in which I explain how my model will deal with a number of difficult offences and offender types.

However, there are circumstances where our interests in crime prevention and amends must be weighed against each other. For example, some offenders who are motivated to earn money for restitution may have to be restrained in a manner that limits their capability to make amends. Though we might assume that offenders who truly wish to make amends would also be dedicated to reform, we can imagine a dangerous criminal (eg. a mass murderer) who truly feels he owes victims amends but who is too dangerous to release from custody. In such a case we would have to weigh the value of public safety against the value of having the offender (as opposed to a societal fund) make restitution to the victim.

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

On my model restraints are only used for specific types of offenders and offences which are predetermined: seriously harmful offences (murder, aggravated sexual assault, etc.), and persistent offenders. When dealing with these types of cases the judiciary should assume crime prevention as the most important determining goal. However, their judgment need not be completely restricted, when dealing with restraint-appropriate situations. The judiciary should be permitted to favour amends where exceptional circumstances demand it so long as they justify deviating from the assumed norm. In Canada we already entrust the judiciary to balance society’s interests and act on behalf of the political community. For example, when it is found that a provision of the Criminal Code violates citizens’ rights provided under the Canadian Charter of Rights and Freedoms the Court is required to evaluate whether the infringement can be justified under s. 1 of the Charter. The Court determines whether the aim of the Criminal Code provision is of ‘sufficient importance’ to justify limiting Charter rights (R. v. Oakes). The judiciary is practiced at weighing the importance of competing goals.
Means

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

Censure

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

Restorative processes also provide a proper forum for calling the offender to account for his actions. The dialogical nature of restorative encounters ensures that offenders are treated as responsible agents who must account for their behaviour. Unlike in conventional criminal justice processes, offenders who admit guilt must apologize and answer questions from those they have harmed. This process prevents offenders from denying their responsibility, denying the wrongfulness of the act, or denying the authority behind the condemnation. Offenders cannot get away with the standard excuses that allow criminals to commit crime without troubling their conscience. Standard excuses include: “I didn’t mean to do it,” “I didn’t really hurt anybody,” “They had it coming to them,” etc. (Agnew).

Amends

Restorative justice dispositions offer offenders a number of avenues for making restitution for harms to victims’ property such as earning money, returning or replacing property, or performing direct services or repairs. Victims can also secure compensation for pain and suffering related to injuries or time lost without property. Restorative processes allow victims to encounter their offenders and seek out answers to the questions that plague them. It is reported that encountering their offenders can provide considerable healing for victims and release them from fears and compulsions (Cayley 227). This should not be surprising as there is evidence that forgiving can result in psychological healing (Garvey 315). Restorative justice encounters may work in a similar manner to exposure therapy. In traditional exposure therapy patients are forced to
confront what they fear so that they will realize their fear is exaggerated or unjustified (Oltmanns et al. 219). In an encounter the victim is exposed to the offender and forced to see him as he truly is. This may rid the victim of any nightmarish caricaturing of the offender that might be producing anxiety. Victims even report that meeting the offender is the most satisfying part of the criminal justice process, even more so than receiving restitution (Van Ness and Strong 75).

Criminal offenders must also attempt to repair the moral damage they caused. Wrongdoing damages normative relationships, which also need to be restored. The paradigmatic way of compensating for a moral wrong is apology. Like other restorative justice theorists I hold that apology is crucial and I propose a similar method. The verbal apology should generally include: acknowledgment of wrongdoing, recognition of moral responsibility, expression of guilt and remorse and repudiation of behaviour. To properly repudiate the wrongdoing, the offender must also commit to reform. Many scholars of the subject accept this conception of apology (O’Hara and Yarn 1121).

Duff and Van Ness note that an apology for serious wrongdoing requires more than just words. For Van Ness apology requires changed values represented by changed behaviour, for Duff apology requires the fulfillment of a secular penance. The general idea that these authors are articulating is that criminal offenders must apologize through their actions, not just their words. Offenders need to demonstrate to their victims and the public that they are committed to adopting a law-abiding lifestyle and that they are committed to restoring victims to their previously enjoyed state of wellbeing. For example, a verbal apology from an addict who has repeatedly stolen your money to feed his addiction would not typically be satisfying. However, if the offender apologized,
committed to a rehabilitation program and found employment to make restitution, a different picture emerges. The offender’s commitment to change makes us more likely to accept his apology. There are a number of ways in which criminal offenders can demonstrate their commitment: meeting with victims and their support groups, fulfilling their reparative duties (not neglecting payments, etc.), fulfilling their reformative duties (attending, and taking seriously, counselling sessions, etc.). Admittedly, it is difficult for offenders to demonstrate their active commitment to change when they are effectively coerced into performing these duties. However, offenders who participate in restorative justice processes at least demonstrate their repentance in the encounter, and actively make amends, rather than simply enduring imposed constraints like in conventional punishment.

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

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

If a gunman robs my neighbour as he is about to enter his home, for example, then the gunman has wrongfully harmed my neighbour. But by robbing my neighbour, he may also wrongfully cause various harms to me. I may suffer from anxiety and lost sleep as a result. I may feel forced to incur the added expense of installing and maintaining a security system in my house or of buying a gun. The value of my property may go down. My insurance rates may go up. I may incur various opportunity costs, forfeiting whatever I would have enjoyed with the time and money that I have instead been forced to devote to responding to the offence against my neighbour. (225)

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

Reform

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

In restorative justice processes offenders are also confronted with the consequences of their criminal actions which otherwise may have remained unknown. Offenders are often unaware of how seriously their actions have affected victims. For example, in one case of post-incarceration victim-offender mediation, a twenty one year old criminal offender who had robbed a convenience store met the young woman who had worked during his robbery (Cayley 233). The young woman explained to the offender that: she had wet herself from the fear of his death threats which resulted in her peers teasing and insulting her; she lost her job for failing to immediately call the cops; she began to suffer from recurrent nightmares and insomnia; and she had to undergo psychological therapy for her anxiety. The offender who robbed her had no idea that the clerk was so strongly affected by his actions. Criminal offenders may know even less about the harms they caused to secondary victims.

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

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

Making amends with fellow citizens also helps convicted offenders successfully reintegrate. Studies show that those who confess their wrongs and apologize elicit more forgiveness than those who do not (Weiner et al. 283). Those who have been convicted of a crime may have a variety of needs that must be met in order to successfully reintegrate. Van Ness and Strong explain that barriers can include: hostility, violence, discrimination, unemployment, lack of money for food and shelter, peer pressure, distrust of community members, weak social skills, etc (100). On my composite-aims model the state must accommodate ex-convicts and help them successfully reintegrate.

**Crime Prevention**

Finally, we need to take measures to prevent crime aside from purely reformatory means. Two prominent means are general deterrence and incapacitation. Although
evidence supporting the efficacy of conventional criminal justice sanctions to deter criminals is weak/non-existent\(^6\), whatever effect they might have could also be achieved using restorative justice processes. Convicted offenders suffer a number of burdens as well as informal sanctions of social disapproval, shame and embarrassment.

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

The character of the restraints endorsed on my model is different from conventional criminal justice restraints. Because the infliction of pain is not an aim of my model, the prisons in which convicted offenders would be confined would be reminiscent of prisons in Netherlands. In Dutch prisons the inmates’ rooms may include beds, sinks, toilets, wardrobes, TVs, coffee makers, desks, chairs, posters, etc. (Schinkel). Prisoner routines involve work, trips to the library, sports and recreation, visitation periods, watching TV and therapy (Schinkel). Repugnant conditions like those in American prisons could not be justifiably maintained on the model I propose. I refer to the horrific epidemic of violence, sexual assault, and disease that characterize American prisons today.\(^7\)

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\(^6\) See for example Doob and Webster.

Scope of Application

How should we respond to the types of cases that von Hirsch, Ashworth and Shearing claim are “less well suited to this kind of response” (28)? In this section I will clarify my model’s scope by addressing how it would respond to a number of scenarios that might prove troublesome for popular restorative justice models.8

Ideal Case

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

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

8 Most of the scenarios I introduce were identified in Boonin’s The Problem of Punishment.
on his crime. The offender would apologize, and commit to changing his behaviour (eg. drug treatment if addiction motivated the burglary).

Unwilling Victim

How should the state respond if a victim is unable or unwilling to participate in a restorative encounter? To avoid problems we can arrange a victim-offender panel to take the place of an encounter between the offender and their direct victim. Panels are typically made up of a group of victims and offenders who are linked by a common type of offence, but the victims were not directly victimized by the particular offenders. Using a panel of burglary victims, the offence of burglary can be meaningfully denounced by those who can explain to an offender the full consequences of such theft. The victim-offender panel can also be used to play the direct victim’s role in educating the offender by explaining the impacts of the offence. Although the offender cannot make a direct apology to the victim, he can fulfill the other components of amends. Studies have shown that, when compared with control groups, victim-offender panels provide: offenders who better understand the offence, reduced recidivism, change in attitudes and criminogenic thinking of offenders and victim participants reported it helped their healing (Van Ness and Strong 70).

Unwilling Offender

How should the state respond if the offender is unable or unwilling to participate in a restorative encounter? There are two scenarios I will discuss here: the first, in which the offender is unwilling to perform any of the duties required of him; the second, in which the offender is willing to fulfill the duties required of him but is unfit to meet the victims.
An offender who is unwilling to cooperate or perform his reparative or rehabilitative duties must be restrained from further infringing on citizens’ rights. The state can secure censure through traditional means. The judiciary should be educated and instructed to properly censure offenders and vindicate victims. An offender that refuses to recognize a breach of the criminal law as wrongdoing, and refuses to repair the harm he caused is a danger to the public.

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

**Serious Wrongdoing**

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

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

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

Victimless Crimes

A fourth non-ideal situation obtains when an offender commits what is called a ‘victimless crime’ or a ‘public order offence’: a crime in which it is commonly believed that the offender’s act harms no one or only the offender himself. The main types of offenses characterized as victimless crimes involve illegal sexuality (prostitution, pornography, paraphilia) and substance related offences (abuse or trafficking of illicit drugs).9 I will briefly argue two points: actions that do not seriously offend or harm other

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9 See for example, Siegal and McCormick.
citizens should not be criminalized, and so-called victimless crimes usually do, in reality, harm other citizens.

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

Boonin points out that there are widespread and contentious debates about forbidding sexuality and substance abuse. Those who favour criminalization do so in part because they deny that the behaviours are truly victimless (246). Boonin explains that those who favour laws criminalizing so-called victimless offenses like gambling, prostitution, pornography and polygamy maintain that the offences are harmful to women, people’s families, society in general, etc (247). This sentiment is echoed in Canadian jurisprudence. For example, prohibitions against assisted suicide were upheld in large part based on worries about proper safeguards rather than moral or religious reasons (Rodriguez v. Attorney-General of British Columbia), and restrictions on

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10 For an excellent discussion of state limits on individual liberty see Joel Feinberg’s four volume series: The Moral Limits of the Criminal Law.
pornography were upheld because of their potential to predispose viewers to mistreat women, not their inherent immorality (R. v. Butler).

**Attempted Crimes**

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

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

An offender convicted of operating a motor vehicle while impaired who did not harm anyone should not have the same restitution requirements as an offender who did. However, the offender must make amends with the members of his political community whom he took advantage of and endangered. Victim offender panels allow for an encounter experience. Victims can censure and educate the offenders concerning the harms that result from driving under the influence. The offender’s community service requirement might include a work assignment for Mothers against Drunk Driving and rehabilitative duties might include substance abuse counselling.

**Rich and Poor Offenders**

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

It is true that on my composite-aims model wealthy offenders will have an easier time making restitution. However, it is our entire political and economic system that allows for a class of economic elites and the benefits that accompany wealth. The rich have all sorts of advantages and if we begrudge them their advantage in torts, we need to provide some reason why said advantage is morally different then all their other advantages we allow. Critics have failed to do this.

As Boonin notes, even on a system of retributive punishment the wealthy may suffer less because the typical less well off offenders often have serious difficulties finding work after spending years in prison, whereas the wealthy are not burdened in this way (261). Offenders are also affected differently during imprisonment. For example, Human Rights Watch points out that convicted offenders who are: young, small, white, gay, or possessing feminine characteristics such as long hair or a high pitched voice face a significantly increased risk of being sexually abused in prison (sect. 4). On my composite-aims model wealthy offenders still have to undergo burdens such as: community service, rehabilitation, restraints, censure by fellow citizens and the pain of focussed repentance.
Critics object to restorative responses because many criminals are poor and will be unable to make restitution to their victims. We can imagine a case in which a poor offender vandalizes the home of a rich citizen and has no means to pay for the damages. However, this is not reason enough to reject the model. Our tort system suffers from the same defect and it has never been suggested that the problem is grounds to dismantle the tort system. My claim is that the composite-aims model is the best available for responding to convicted offenders; I do not claim that all types and instances of harm and wrongdoing can be perfectly restored. Boonin notes that even a retributive model of punishment will run into cases where it cannot inflict as much suffering on the offender as is desired (262). For example, elderly or ill criminals may not be able to serve their full prison sentences.

On the composite-aims model poor offenders are required to meet their victims and apologize, undergo censure, perform community service and reform. Poor offenders who are persistent and dangerous would be restrained. There is a better chance of victims receiving restitution on my model, compared to contemporary criminal and civil actions because offenders are given more alternatives for repayment. Offenders are more likely to earn the money for restitution on my model because of the focus on reform and rehabilitation: fewer offenders are in prison. I also advocate a state-funded account which would top-up a victim’s compensation where the offender cannot fully repay his debt.

White-Collar Criminals

White-collar crimes represent some of the most grievous criminal wrongs. The nature of white-collar crime is controversial, but I refer here to illegal acts that violate
The public trust committed by individuals or organizations, usually members of the upper socio-economic class, typically during the course of legitimate occupational activity (Helmkamp, Ball and Townsend 351). Aside from Braithwaite, prominent restorative justice theorists rarely address white-collar crime. White-collar crimes present a number of unique conditions that differentiate them from the more common street crimes. Large scale white-collar crimes involving major political and economic players may victimize considerable numbers across large geographical areas. White-collar criminals are more often wealthy and perceived as being motivated by greed rather than need, addiction, or other social circumstances (Seigal and McCormick 348). Due to their economic positions, white-collar criminals may be capable of causing such serious financial damage to victims that they cannot make restitution. However, white-collar criminals may also possess the talents and resources to provide great benefits to society.

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

In the 1970’s and 80’s James Bakker worked as a televangelist for the PTL (‘Praise the Lord’ or ‘People that Love’) corporation which he formed. Bakker and PTL also constructed a massive Christian retreat center called ‘Heritage USA’ and had plans to add a vacation park with hotels, bunkhouses and other facilities called ‘Heritage Village’. Bakker broadcast on the PTL Television Network to solicit lifetime partnership packages ranging from $500 to $10000 in order to finance Heritage Village. Bakker oversold the partnerships and failed even to complete the promised premises. Bakker used the funds to pay operating expenses for PTL and to support his lavish lifestyle.
which included numerous mansions, a Rolls Royce, transportation in private jets and limousines, and an air-conditioned dog house for his pets. Bakker resigned from PTL in 1987 after admitting to using almost $363,700 of the Network’s money to buy the silence of a former church secretary about a sexual encounter (Nowell). Bakker was charged and convicted of mail fraud and wire fraud and was sentenced to 45 years of imprisonment and a $500,000 fine, but his jail time was later reduced to 8 years and he was paroled after serving 5 (Jones). PTL went bankrupt and none of his followers’ $150 million was returned. Bakker claimed that he only acted in good faith and did not intend to defraud his followers. After being paroled Bakker wrote a book confessing to a sinfully lavish lifestyle, though not to defrauding his followers. Bakker is now back on television, has a church, and is building a new Christian community (Latham). Bakker has also returned to selling merchandise including small granite monuments, other ‘love gifts’ like post-apocalyptic survival kits and thousand dollar memberships to his church and special events (Latham).

On the composite-aims model someone like Bakker would be restrained if he refused to admit his wrongdoing, although he might face up to his responsibility when faced with the alternative of imprisonment. If the offender was willing to be held accountable then restorative justice encounters would be held so that the victims of fraud could meet with him, tell their stories of how the fraud affected them, and condemn the criminal behaviour. Victims would be able to directly engage the offender in dialogue, forcing him to confront the consequences of his actions and acknowledge his responsibility to his followers. The victims would receive a proper apology from the offender, rather than the excuses and denials Bakker tried to pass off. Being a non-
dangerous first-time offender, he would not be sent to prison as he poses no threat to the physical safety of other citizens. However, the gravity of his crime (theft of millions of dollars) would require that he be restrained from having unsupervised control of such a significant quantity of other peoples’ money. The offender would owe significant financial restitution to his victims, likely more than he could ever repay. However, rather than simply enduring an incarcerated life paid for by taxpayers, the offender could perform community service and re-enter the workforce under Christian or charitable organizations. If, like Bakker, the offender returned to a profitable career of televangelism then his income could be garnished in order to compensate his victims.

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

Limits

Von Hirsch, Ashworth and Shearing explain that in traditional punishment systems the sanctions involve censure. On retributive sentencing schemes the severity of the sanctions signifies the level of condemnation that the offender deserves. Giving an offender a prison sentence that is lengthier than the seriousness of his conduct merits is undesirable because it unfairly censures him where censure is not due. To punish him
with disproportionate severity or leniency communicates more or less condemnation than is deserved. This would be dishonest and unjust. What kinds of limits are needed for the model I have proposed? Is the composite-aims model fair?

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

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

Community service orders aim to morally educate the offender and contribute to his repentance as well as serving as a means for offenders to make restitution to secondary victims and law-abiding citizens. An offender’s moral education requirements should be distributed according to a scheme governed by relative proportionality: those who committed more serious offences should have more severe moral education requirements than those who committed comparably less serious offences. This requirement follows from the logic of moral education: we should spend more time focusing on our more serious wrongdoings. We do not judge it appropriate to spend 200 hours focusing on a minor wrongdoing (recklessly stepping on a friend’s toe) and 2 hours focusing on a more serious wrongdoing (aggravated assault). I cannot think of any absolute measure by which we can determine the duration of contextual community service. Perhaps criminologists could at some point determine an approximate duration that is most efficient for reducing recidivism. For now I assume only that we follow existing penal practices that have been determined by a host of historical contingencies. The maximum limit in Canada of assigning 240 hours of community service over 18 months might well be an appropriate limit. Because the restorative justice encounter and the work done to prepare for it focus the offender’s attention on his wrongdoing, time spent on this should count towards the moral education requirement. The community service requirement should also count towards the offender’s reparative obligations. If
the offender completes his reparative obligations before he is finished with community
service he can be paid for the work he does.

An offender’s requirements with respect to rehabilitation and changing behaviour
should be limited by consequential considerations. These duties are not a means of
expressing censure, but rather a means of helping the offender reform and demonstrate to
others his commitment to lawful behaviour. Because they are not a means of expressing
censure, giving one offender more rehabilitative obligations than another similarly
culpable offender does not visit him with an undeserved amount of censure. It is also
important to note that although two equally culpable offenders might be required to fulfill
different rehabilitative obligations, each offender is treated in a way that is contextually
just. Each offender is doing what he must to satisfy corrective justice and make amends
to his victims and community. Repudiating the criminal offence and committing to
rehabilitation and a law-abiding lifestyle are crucial to making amends. However, a
system in which criminal justice officials have the power to assign unlimited burdensome
rehabilitative obligations is unsatisfactory. Braithwaite and Pettit explain that citizens’
recognition that in the event of coming before a criminal court they would be reduced to a
condition of utter vulnerability would be a severe breach in the citizens’ dominion (“Not
Just Deserts” 231). In order to counteract this negative impact on citizens’ dominion we
must institute limits on the rehabilitative obligations that can be imposed. Some
measures, such as attending group therapy are burdensome. Accessibility to the
programs, however, should not be withdrawn from an offender that voluntarily chooses to
continue.
Restraints need limits for the same reason. We do not want to establish a system in which law abiding citizens fear a future of lifetime imprisonment if they commit a minor offence. We also want to give offenders the opportunity to demonstrate that they can reform and live a law-abiding lifestyle. Coercive restriction of convicted offenders should have a more limited role than the one it plays in Canada’s current sentencing scheme. The aim is to restrain offenders from committing crime by taking steps to ensure they have fewer opportunities to do so. The type and duration of restraints will be determined by the following factors.

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

Second, only persistent and dangerous offenders should have restraints applied to them. Reform should generally be attempted before coercive restraints like imprisonment are applied as we don’t want to restrain those who could be reformed and reintegrate into society as full participating members. Were we to simply restrain all offenders, many would not have the opportunity to make amends, our system would be tremendously expensive, and we would risk unnecessarily imposing serious burdens on those who could reform and lead a law-abiding life.

Advocates of selective incapacitation have traditionally determined sentence severity based on predictions of an offender’s likelihood of recidivism (von Hirsch and
Kazemian 96). Unfortunately these predictions are often made based on an offender’s non-criminal behaviour such as his employment history or substance abuse history. In *R. v. Proulx* Canadian judges explained that relevant considerations when estimating an offender’s likelihood of reoffending should include the offender’s: occupation, lifestyle, family situation and mental state (para. 70). This strategy implicitly criminalizes non-criminal behaviour. Were this common practice, law-abiding citizens might rightly come to avoid substance use, certain family dynamics, and periods of unemployment solely for fear of restraints being applied should they ever be arrested. One can also imagine a scenario in which experts rely on aspects of an offender’s history that the offender was not in any way responsible for, for example, whether an offender was sexually abused as a child. But this would likely decrease the number of sexual abuse victims who come forward about their victimization. Perversely, this could increase sexual abuse and crime. The only factors which can rightly be used for determining severity of restraints are offenders’ culpable conduct: their criminal behaviour.

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

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

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

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

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

**Dispositional Criteria**

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

In his article “Rights, Responsibilities and Restorative Justice” Ashworth voices further doubts about victim involvement in restorative justice conferences. Ashworth argues that although victims play a legitimate role in determining amends, the same cannot be said for their role in determining an offender’s punishment. Ashworth explains that the fact that someone has committed an offence against me does not privilege my interests over the interest of the general public when it comes to the offender’s rehabilitation or punishment (585). Citizens have a right to the state’s protection which they are owed in exchange for giving up certain freedoms and submitting to the rule of law (585). It follows from this that the interests of citizens from the political community should be weighted equally with those of direct victims when crime prevention measures are decided. Ashworth adds that victims cannot be expected to be impartial or to know about the available range of orders at their disposition (587).

Luckily, there is a solution to this problem: educate participants and involve experts and the mediator where appropriate. The mediator needs to prepare participants for the censuring portion of the encounter. The victims have a crucial role in determining damages, but the mediator must ensure that offenders aren’t coerced into over-paying. Professional oversight of restitution contracts can ensure fair play. The determination of rehabilitative obligations ought to be guided by experts who participate in the encounter. However, there is no reason that conference participants should not contribute. The offender’s support group can play a crucial role. This group can help experts gain valuable insight into factors that have been affecting the offender and help support the
offender through his rehabilitation.\textsuperscript{11} Offenders’ support groups might make promises to help with treatment, or they might threaten offenders with informal sanctions (e.g. ending relationships) if the offender does not try to reform. This is a common practice in interventions for citizens with substance abuse problems. The mediator works with the victims, offender, support groups and experts to determine appropriate rehabilitation obligations and ensure that limits are respected.

Ashworth is right to suggest that participants may not have the necessary skill-set to determine fitting crime prevention restraints. There are at least two ways this problem could be dealt with. First, we could have restraints determined by experts before the restorative justice encounter takes place. Because restraints are only used for dangerous and persistent offenders this would only occur in a minority of cases. A second possibility is that, like rehabilitation experts, restraint experts could be directly involved in the encounter and make recommendations while considering the input of conference participants. The offender’s support group may have valuable insight concerning the suitability of restraints for the particular offender. Again, the mediator will have an important role to play because it is his responsibility to ensure that limits are respected.

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

\textsuperscript{11} Family centered interventions for adults are considered to be among the most effective treatments for mental health problems. See for example, Alan Carr “The Effectiveness of Family Therapy and Systemic Interventions for Adult-Focused Problems”.
Conclusion

The composite-aims model introduced in this essay provides a desirable framework upon which a response to convicted offenders could be developed. The model is conceptually coherent, specifies aims and limits, and is capable of providing meaningful guidance for a new direction in criminal justice policy. I constructed and defined the composite-aims model by answering a number of key questions: Which aims ought to be pursued by the criminal justice system when dealing with a criminal offender whose guilt has been established? What rule should we appeal to when multiple goals conflict? How might we accomplish said aims? What limiting principles, if any, should be applied to dispositions? How should we respond to different types of offences and offenders? What should the sentencing process look like? I also addressed the criticisms of von Hirsch, Ashworth and Shearing who claimed that restorative justice models: (1) posit several vaguely formulated goals without priority among them specified, (2) have underspecified means and modalities, (3) contain few or no dispositional criteria, and (4) lack adequate fairness constraints on severity of dispositions.

The composite-aims model posits four determining goals that can typically be pursued agreeably: censure, amends, crime prevention and reform. Goals of amends and crime prevention may sometimes clash, in which case crime prevention should habitually take priority. Restorative justice programmes in particular are useful tools for pursuing our aims. Condemnation of the offender by conference participants must be honest and true. Restraints and rehabilitative obligations must be kept within limits. Securing amends requires that the offender apologizes, compensates direct and indirect victims,
and commits to reform. Involving experts in encounters ensures restraints and rehabilitative obligations will be effective.
Works Cited


Feasey, Simon, Patrick Williams, and Rebecca Clarke. *An Evaluation of the Prison Fellowship Sycamore Tree Program*. Sheffield Hallam University, 2005.


