Introduction and the Three Flaws in the Restorative Justice Process

One anecdote can reveal a number of the shortcomings currently inherent in both the criminal justice system and the various forms of alternative dispute resolution that are referred to as restorative justice. One night in Manhattan, three youths pursued a man, who was carrying around $1000 in electronic equipment, up a flight of stairs, eventually cornering him and pushing their victim into a plate glass window; they continued beating him until a police officer arrived. This caused two of the youths to flee, but the third was taken into custody. Only sixteen, he was canny enough to claim the attack was provoked by the victim, leading to competing claims about the attack from the two participants, both claiming the other was the aggressor. Under the statutory scheme in place at the time, the parties were given the option to settle their dispute in an informal hearing; this mediation would take the place of the normal operations of the criminal justice system.

This story could, from this point, have had a satisfying restorative justice ending: the offending youth could profess remorse, apologize to the man and perhaps perform some sort of service for him; the man could forgive his attacker, and get answers to his questions about the attack; both parties could walk away whole. However, this ending was merely a fantasy for this particular pair. The man declined the mediation; he had no questions about the attack, and no desire to forgive his attacker – what he wanted was retribution. He never heard anything else about the crime from the government, although justice was eventually served. The youth, already well on his way to becoming a
hardened criminal, was arrested again in a few months and plead guilty to both charges. The man heard nothing of this, and decided that if the criminal justice system had abandoned him, he would need to look after his own safety. The man’s name was Bernie Goetz.1

This precursor incident to Goetz’s famous subway shootings is illustrative of the failings of both modern justice structures. The criminal justice system is impersonal and generally ignores the victim, preferring to keep the crime in the abstract and process rather than study offenders. These failings are well documented and analyzed; what the story also contains is an implicit critique of restorative justice and how it can not always fill the gaps in the justice system, as its proponents may claim. In this case, the victim had no desire to participate in the sentence handed down to the offender, except perhaps to make it more stringent. He had no interest in receiving an apology or absolving the youth, both fundamental principles of restorative justice and tenets of the mediation programs that encompass it. On the side of the offender, there was no sincere desire to admit wrongdoing and make amends, which is the threshold requirement for engaging in any type of restorative justice program. In short, in this case, none of the stated goals of restorative justice could be met – yet the mediation was offered anyway.

Why was mediation offered in this case? The justice system was compelled to offer it, hoping to ease the burden on the court system by allowing the parties to work out their differences in a cheaper and more streamlined fashion. The goal of the program was to reach an agreement between the offender and victim and hopefully provide some

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1 This story is adopted from Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System, 99 Harv. L. Rev. 1808-09 (1985-86).
healing to both parties, allowing them to return to a state of right-relation. In this anecdote the opposite effect took place – instead of being healed by the encounter, this episode debatably caused greater harm in the future. This result was specific to this victim, however; if the unfortunate youths had attacked a more forgiving person, they may have been able to engage in the mediation and receive absolution for their crime, despite their lack of contrition.

This story is offered to show two theoretical flaws in the modern conception of restorative justice, which this paper will discuss along with a more practical flaw in the application of restorative justice programs, specifically focusing on victim-offender mediation, the most common format. The theoretical flaws are first; they are the lack of equality between the treatment of equal offenders and the restorative justice approach’s obviation of society’s interest in instituting retributive justice to punish crime. The practical flaw is the coercive influence inherent in restorative justice programs, and how they can institute a type of debt slavery upon the offenders. This paper does not seek, by any means, to do away with the concept of restorative justice. Implemented correctly, the system works wonders among both the parties involved and the society in which they live; there are programs rife with success and many examples of satisfied victims and reintegrated offenders. The argument, rather, is against the widespread expansion of restorative justice as a full alternative to the normal criminal justice system by pointing out the limits of restorative justice in the criminal setting. These limits should keep restorative justice from becoming widespread, as certain classes of crimes are essentially unable to be dealt with in a restorative fashion.

In the view of Annalise Acorn, this is the ultimate goal of restorative justice – allowing the parties to live in “right-relation,” that is, able to live together in a society free of any of the negative emotions that generally surround a crime. See Annalise Acorn, *Compulsory Compassion* 2 (UBC Press, 2004).
Equality in the Restorative Justice Process

Suppose the following situation was to take place; two offenders, both identically situated in terms of age, race, criminal background, and all other variable factors, commit two separate but identical crimes – for example, a mugging. Exactly the same method is used for both crimes, and exactly the same amount of money is extracted from the victims. Both are soon caught and remitted to the court system for adjudication. How should the system treat these two criminals? Speaking theoretically, the two offenders should be treated exactly the same. They committed the same crime and are essentially the same person with the same *mens rea* – there is no reason for their punishment to differ. Realistically, their punishment will probably differ at least slightly under the systems currently in place.

Their sentence in the criminal justice system will be largely the same except it is subject to the whims of judge, jury and prosecutor, and also the particular skill of their defense counsel. The large sameness is controlled both by common law sentencing structures and sentencing guidelines, which impose both a ceiling and a floor on the discretion of the court. An interesting contrast comes from tort law, where the offenders would be punished based not on what they had done, but what the effect was – even with identical crimes, if one had a greater impact – for example, one offender stole a more expensive watch – his punishment would be greater due to the increased impact of his crime. Shades of this theory of punishment can be seen in criminal law, such as the concept of grand theft and various decrees of assault, but criminal law generally deals with the specific crime and not the heinousness thereof.
In restorative justice, however, the punishment is made to fit not the crime but the criminal, and not by an impersonal court system, but by the actual victim of the crime. The benefits are obvious – tailor made sentencing that will provide satisfaction to the victim and direct punishment to the offender. However, the process is overly subject to the whims of the victim. In the scenario of identical offenders with identical crimes, the principle of equality dictates that they be treated at least nominally the same, with exceptions perhaps for impact, such as are given in tort. Restorative justice violates equality by allowing these offenders potentially vastly different treatment, not due to any characteristic of their own, but the attributes of their victim. One victim may be magnanimous, and willing to allow the offender to escape with only an apology. The other victim may be vindictive, and demand not only restitution but a severe punishment be set to the offender. There is no basis for this disparity in sentence except for the whim of an individual.

This cannot serve as a sustainable form of justice in a modern society. The Forth Amendment to the United States Constitution prohibits cruel and unusual punishment, directly implying that there is some “usual” punishment to be imposed for the commission of crimes. The entire concept of restorative justice almost explicitly denies that there is any such thing as a usual punishment, instead relying on the individuality of offenders and victims to craft unique resolutions to their conflict. While this is certainly noble, and without question works more towards the goals of the restorative justice

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4 Mediation may lead to great expressions of anger by the victim, which is naturally focused on the offender. However, if a victim displays too much emotion, their case can be rejected. See Jennifer Gerarda Brown, The Use of Mediation to Resolve Criminal Cases: A Procedural Critique, 43 Emory L. J. 1247, 1276 (1994).
movement, it leaves important considerations of rights and equality behind. There is, by
design, no overarching control over the sentencing structure in programs like victim-
offender mediation, and thus the program is subject to abuse by vindictive victims, using
their position of power to hurt or demean the offender, or the possible converse, offenders
taking advantage of well-natured or weak victims to escape with little to no repercussions
for their actions.

One proposed solution to this problem of inequality is to set guidelines, proposed
or mandatory, on restitution granted from restorative justice programs; a similar program
has been instituted in the United Kingdom. However, this runs contrary to the original
principles of restorative justice, making it more of a formal sentencing procedure than the
personalized mediation that delivers such uncertain results. Further, formalized
sentencing is already widely disfavored in many countries; in the United States, the
Federal Sentencing Guidelines have been called a failure by many commentators⁵, and
either their reform or repeal is sought. Thus, an attempt to institute a similar scheme in
the restorative justice setting may be marked by a similar draconian bent, and come
across many of the same issues that plague the criminal justice system.

The Interest of Society in Instituting Retributive Justice

To properly confront the second flaw in the restorative justice process, it is
necessary to look into the system that restorative justice is interested in fixing – the
traditional criminal justice system used in every nation in the world. This system is

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⁵ For example, see Frank O. Bowman III, The Failure of the Federal Sentencing Guidelines: A Structural
Analysis, 105 Colum. L. Rev. 1315 (2005). The author argues that the Guidelines, originally meant as a
method of reforming the vast disparity in sentencing, have become a political tool that puts the power in the
hands of persons divorced from front line sentencing, adding that most sentencing decisions are made by
prosecutors, not the judiciary.
founded on the principle that justice belongs to the state – that criminal violations are offenses against the general rule of law propagated by a sovereign, and thus this sovereign has the right to punish the offender on behalf of all of society. This does not clash, ultimately, with restorative justice views; part of the restorative effort is based on folding the offender back into the community, such as the group mediation concepts or the neighborhood circles. However, there must be some area of difference, since the two philosophies offer a different method of approaching criminal punishment. Most of the divergence is explained by the focus the camps have on the goals of justice, and how it relates to the actual parties in criminal activity. It should be noted that this disconnect is mainly for crimes that society has a large interest in punishing – other, perhaps more personal crimes, are likely to be appropriately dealt with using restorative principles.

The traditional goals of justice, as they are implemented by the criminal justice system, are four separate elements; each merits some discussion. They are: deterrence, incapacitation, retribution, and rehabilitation. Restorative justice rejects essentially all of the traditional arguments for criminal justice. The flaw in restorative justice that is under discussion here is that the system rejects retribution, which is one of the fundamental rationales behind criminal justice systems that have existed in civilized societies, as early

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6 The most popular phrasing is the “king’s peace,” but that is probably not accurate in a modern society, as contemporary rules of law see as violations many activities that do not disturb what most people would consider to be peaceful living. The term was first used by William the Conqueror after the Normans successfully annexed England. Delgado, supra n.3, at 755.

7 A good argument could be made that under the social contract that the sovereign has a duty to establish and enforce laws regulating the population; for example, Locke states “[t]he legislative, or supreme authority…is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges…” John Locke, Second Treatise of Civil Government Chapter 11, Section 136 (1689).

8 As discussed in the previous section, society’s punishments tend to the impersonal and standard, depending on the level of the crime. One of the benefits of restorative justice is the ability to personalize punishment, but this has the effect of allowing punishments for similar crimes to be vastly different depending on circumstances and whims of the individual parties involved, particularly the victim.
as the Code of Hammurabi\textsuperscript{9}. A short and non-exhaustive summary of these goals is in order.

Deterrence is simple society’s interest in avoiding crimes in the future. Although many individual crimes are irrational, many are done by a rational calculation cost-benefit analysis\textsuperscript{10} that can be changed by the sovereign changing the computation by making criminal acts more costly for their perpetrators. This is generally legislatively accomplished by criminalizing more acts, and by increasing punishment for disfavored activity\textsuperscript{11}. Incapacitation works in a similar fashion – if people who have shown criminal tendencies are removed from society, where they can presumably do no (or at least lesser amounts of) damage, this logically must reduce crime and thus better society. Also, the principle of incapacitation folds nicely into deterrence, since removal from society is the most common form of punishment. Thus, taken together, these two aims of criminal justice work to better society by reducing the amount of crime it must bear.

Rehabilitation also seeks to reduce crime, though by a slightly different mechanism. Its focus is on when the criminal is re-introduced into society, and how the offender can

\textsuperscript{9} This text is regarded as one of the first “modern” legal documents; it contains a set of fundamental laws for the Babylonian people, notable for being above the authority of the king – a primitive constitution. Locke would probably refer to such a collection as “natural laws” – principles above the meddling of man. These laws are heavily retributive – an typical example of a Babylonian law is “[i]f fire break out in a house, and some one who comes to put it out cast his eye upon the property of the owner of the house, and take the property of the master of the house, he shall be thrown into that self-same fire.” Cited version at http://www.wsu.edu/~dee/MESO/CODE.HTM - last checked 6/1/09. However, it should be noted that the Code also contains numerous restorative principles, as the punishment for most crimes – when the punishment isn’t death – is to work with the victim of the crime and give some form of reparations unto them.

\textsuperscript{10} The leading work in the economic analysis to crime is Gary Becker, \textit{Crime and Punishment: An Economic Approach} 76 J. Pol. Econ. 169 (1968). Becker evaluates a model in which such variables as police effectiveness and criminal sentencing in fact have a large impact on crime rates.

\textsuperscript{11} An interesting example is the now-infamous sentencing disparity between cocaine and crack cocaine. Despite being essentially the same drug, possession of crack cocaine leads to a much higher minimum sentence; the likely rationale for the distinction is that Congress decided that crack was more damaging to society than cocaine, and thus its possession and distribution needed to be dealt with more harshly. The rationale behind that understanding is much murkier.
changed their behavior into a normal citizen, as opposed to the malcontent they
previously were. This aim seeks to prevent crime in the future by taking demonstrated
social deviants and returning them as productive inhabitant of the societal fabric in which they live.

Restorative justice seeks to reach the same end as these goals – that is, reducing crime in society – but by a different mechanism that provides far less stress upon the system and the offender, and grants greater relief to the victim of the underlying crime. The philosophy behind the restorative approach is to extract forgiveness from the victim in response to the sincere remorse of the offender, which enables the community to fully embrace both parties and to reintegrate the offender back into the public order. This differs from rehabilitation; the focus is not on the wrongness of the offender, but the harm that the offender’s actions have had on the specific victim and on the community.

Restorative justice’s flaw is that one essential party to a crime is removed from the final calculation of punishment. Society has no interest in restorative justice proceedings – one could argue that it is represented by the community involvement, but the community is not universally involved in restorative justice programs, and the community is, in theory, more focused on the right-relation of the immediate parties than on the actual interests that society advances through the current criminal justice system. This would be acceptable if society had no interest in the criminal activity of its citizens, but this is not the case. In fact, in many instances even of actions with a clear offender and victim, society has an even greater interest in punishing the perpetrator than the actual victim of the crime does. To elucidate this concept, consider some examples from a specific class of crimes and how they would be treated from a restorative justice perspective.
In the first scenario, a person, standing on one side of a street, fires a loaded gun blindly across the street. They have no intent to do any damage to person or property; however, another person is walking on the other side, and hears the bullet fly by. They are upset by their brush with danger, but no actual harm comes to anyone or anything. In this example, the parties are obvious, as is the harm done to the victim – the offender has disturbed their emotional balance by performing a reckless act. Dealing with this situation in a restorative justice context would be straightforward; the offender could apologize for their wrongdoing, and given that the victim is willing to forgive, provide some sort of compensating act to make the victim whole again. Since the harm was comparatively petty, this sentence would presumably not be onerous.

In the second scenario, the facts are largely the same except that the offender was not firing the gun blindly, but had noticed the victim walking by and, deciding to scare them, took a quick shot. The result is the same, however – the perpetrator misses, the victim gains knowledge of the bullet, and is startled. Here the distinction is between the negligence of the first offender and the malicious mens rea of the second – the actual harm suffered by the victim is the same. It is not clear that the restorative justice approach can measure finely enough between the two sets of circumstances to ensure that the second offender is punished more severely. The process of mediation between the two parties would be identical; the offender would express remorse, the victim would forgive and set a proper punishment for the harm suffered. Assuming the victims would require the same reparations, the consequences to the offenders would be identical.

In the final setting, an offender enters a house where a certain person lives, intended fully to do that person harm. They enter the dark bedroom of the potential
victim, and fire a gun into the bed where they believe that person is asleep. However, the victim is not there; in fact, they are in a different city altogether. Even though a malicious act was planned and executed, no actual harm to the victim came about; perhaps some petty property damage took place, which will be discounted for purposes of analysis. The restorative justice approach to this case is unclear; how does a penalty make the victim whole, when no harm came as the result of the offender’s actions?

Perhaps some good could still come from the parties engaging in dialogue and exchanging remorse and forgiveness, but ultimately the victim will have a difficult time setting an appropriate sanction, because he did not suffer, except for perhaps some vaporous fear that someone had intentions on his life.

Early in his Second Treatise on Civil Government, Locke describes the various rights of punishment in a state of nature:

In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity… and so he becomes dangerous to mankind… [w]hich being a trespass against the whole species, and the peace and safety of it, provided for by the law of nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or… destroy things noxious to them, and so may bring such evil on anyone, who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and by his example others, from doing the like mischief. And in the case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of nature.  

Besides the crime which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature, and to be a noxious creature, there is commonly injury done to some person or other, and some other man receives damage by his transgression: in which case he who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it: and any other person, who finds it just, may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered.

12 Locke, supra, at Chapter II, Section 8
13 Locke, supra, at Chapter II, Section 10
Essentially, this explains both the reason early societies initially moved to institute the criminal justice system and the modern establishment of restorative justice programs; both types of justice, according to Locke, have a share in the punishment of wrongdoing. The victim, the person receiving immediate harm from the crime, has the right to receive compensation for his injury, but all upright citizens in a society have the right to punish wrongdoing insofar as it offends the common ability to live in peace. This is the foundation of the “king’s peace” and the advent of governmental institution of justice. One of the common complaints of the restorative justice movement is that the criminal justice system ignores the right of reparation possessed by the victim; however, restorative justice programs ignore the right of punishment possessed by society in order to maintain the peace and well-being enjoyed by their citizens.

To return to the examples above, all show, in gradual levels of impact, the need for society’s input in the punishment of criminal acts. The offender in the first two scenarios, whether acting negligently or maliciously, is causing greater harm to the general peace of society than they are to the individual victims. If a person fires a gun where the possibility exists that harm could come to another person, regardless of the intent involved, this action is harmful to society even if no one is actually hurt. Thus, in the above examples, the victim of the crime suffers little damage, but society is harmed; the perpetrator has put his or herself outside of the normal rule of law, and poses a risk to all mankind, not just the person who happened to be walking by. Further, society does distinguish between the intent of the different offenders – someone shooting at another maliciously is punished to a greater degree than someone acting negligently. This is to preserve society’s interest in deterring people from shooting at their fellow human beings,
an interest that is not present in the restorative justice framework. This difference is even more pronounced in the third example, where the victim suffers no actual harm. In contrast, society is here harmed the greatest amount – the offender has the specific intent to commit murder, which is certainly the most harshly punished crime in civilized societies. Dealing with this case in the criminal justice context would render a heavy punishment onto the offender, while the restorative justice process could end up issuing no punishment – after all, the victim was not harmed in any tangible fashion, and would not need reparations to become whole.

The obviation of society’s interest in punishing crimes is most apparent in crimes like attempt, as is shown above, but this same interest extends to crimes where the victim does suffer actual harm. Society has the right and the need to punish those who step outside its boundaries, if for no other reason in order to show all citizens that certain types of behavior will not be tolerated. It is difficult to see how that interest can be maintained in the restorative justice context. One theoretical solution would be to classify offenses on a continuum ranging from personal, where the interest of the victim far outweighs that of society, to global, where the criminal action is extreme enough to transcend the immediate interaction between the parties. Crimes that were classified as global could be dealt with in the normal criminal justice system, where personal crimes could be referred to restorative justice programs; of course, since participation in these programs is voluntary for both offender and victim, the criminal system will end up handling many of those cases as well. This is far from a perfect solution – the controversy over the classification would likely be endless – but it could provide a
mechanism for restorative justice to handle appropriate types of offenses while leaving actions that resound in society to the criminal courts.

The Deprivation of Rights and the Inherent Coercion in Restorative Justice

The practical consideration that is lacking in restorative justice programs is their inattention to the maintenance of the rights of the offenders participating in their programs. These procedural aspects can lead to wholesale violations of the rights of the accused, which can lead further to coercion being present in the system – in fact, some argue it is inherent in the system. The United States Constitution allows the accused numerous rights, but not all of them are observed in a restorative justice context. Rights that are frequently waived before the offender even enters a restorative justice program are right to counsel, right to trial by jury, right to appeal, and the Fifth Amendment right to not self-incriminate. This obviously presents important issues about the fundamental fairness of restorative justice proceedings. This discussion will be modeled on Victim-Offender Mediation, which is probably the most common form of restorative justice program.

Many of the rights waived, however, are necessary to obtain the remorse and apology that are what restorative justice asked of the offender. It would certainly be difficult to have an open and honest dialogue with the victim or a mediator without confessing guilt to the crimes at hand. The offender, in fact, loses little if they receive a

14 See Acorn, supra n.2, at 163.
15 For example, alternative dispute resolution (ADR) has been criticized for having lack standards of evidence, allowing prejudice to enter the proceeding which would not be allowed in a normal trial situation. See Richard Delgado et. al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359, 1374 (1985).
17 See Brown, supra n.4, at 1248.
favorable outcome to the mediation; they receive a nominal sentence from the victim and are released, or they are placed on a far less stringent probationary program than they would have been subject to in the criminal justice system. The practical consideration the offender must weigh is the possibility of the mediation going poorly; it is not likely that an offender will have sufficient information to do this properly, although they may have counsel for this portion of their proceedings.

The potential sources of a deadly flaw in the victim-offender mediation dynamic are many; the victim could be unsatisfied with the degree of sincerity displayed by the offender, who in turn could balk at the harsh reparations demanded by the victim, who could be too emotionally scarred to be able to face their tormentor, and so on. The consequences of mediations having unfavorable outcomes, however, are extremely disparate between the parties. The victim will likely leave in the same manner as they entered; although they were hurt by the initial crime, and perhaps expanded energy and emotion on the mediation process, they are ultimately no worse off than if the offender had gone straight into criminal proceedings. The offender, conversely, can suffer severe penalties for having engaged in a failed mediation session.\textsuperscript{18} Since one of the prerequisites of the mediation is an admission of guilt, the offender is dumped back into criminal proceedings already having ceded their presumption of innocence, along with the assumption that they are not truly sorry for their actions. This leads to perhaps the most troublesome practical concern in restorative justice programs – the coercion of the offender into participating in mediation, and to resolving it favorably to the victim.\textsuperscript{19}

\textsuperscript{18} At least one example exists of the criminal justice system taking a refusal to participate in mediation into account during the subsequent trial of the accused offender. See Brown, supra n.4, at 1267 n.80.
\textsuperscript{19} For other discussions of coercion in restorative justice, see Delgado, supra n.3, at 761, and Guill, supra n.16, at 1329.
The admissions made during the mediation are likely not to be used in court; however, as a practical matter both prosecutor and judge will know of the failed mediation and will inflict harsher punishment upon the offender than if the attempt towards restorative justice had not been made. The court will likely see it as the offender wasting the time and resources of the judicial system; the prosecutor may be able to strengthen their case by independent verification of the offender’s confession – even if they are not privy to the actual admissions, the victim will likely be happy to help. Thus, an offender has a huge incentive to enter the program once it is offered and to reach an agreement with the victim once the mediation is entered. This is troublesome in that it forces the offender to make choices in response not to their emotions and desire for repentance, as ideally would be the case, but out of a practical fear of greater punishment coming from the criminal system they will be reverted to.\(^{20}\)

Removing this element of coercion from the system is probably impossible. As long as the threat of criminal proceedings lies behind the mediation process, the offender will feel the need to comply with the wishes of their victim, despite the form of the punishment – the exception will likely come when the offender judges the sentence passed down by the criminal proceedings is preferable to the mediation outcome. However, criminal proceedings at least offer some small chance that a defendant will be acquitted in the eyes of the law; in mediation, the offender is tried not by a jury of their

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\(^{20}\) One disturbing parallel is that of debt-slavery. Here, the offender must comply with certain demands of the victim, regardless of the form those might take, or they will likely be incarcerated for failing to meet the obligation they owe of reparation. Acorn offers a story of two youths, having paralyzed a man, coming to the agreement to care for him for 25 years – which, in her view, would have led to slavery in violation of the Constitution, since they would be under a legal order to be his servants. See Acorn, supra n.2, at 12-14. She furthers the analysis by proposing that if the perpetrators are sufficiently wealthy, they can buy off their victims and essentially commit crimes at will, as long as they have access to restorative justice. Id., at 15. This violates one of the principle tenets of restorative justice – the offender must express sincere remorse for their actions – but a less extreme case may give one pause about the appropriateness of this type of arrangement.
peers, but an autocracy of the person who bears him ill will. Coupled with the plea of
guilt that is necessary for mediation to begin, and a situation compromising the offender’s
rights and best interests arises. Certainly not all victims will condemn instead of
understand, but as a practical matter allowances in the system must be made; currently,
the free reign allowed to the wronged party imputes to them a great deal of power over
the future of another.

**Conclusion**

It is unlikely that restorative justice will ever be able to replace the criminal
justice system to any large degree. The three flaws in the restorative process elucidated
above are alone enough to discourage the use of restorative justice with regards to any
serious crime. The interest society has in punishing crime, and the right of society to
chastise its members when they have removed themselves from obedience to the laws of
the system, is too powerful to be reduced to the background during a focus of the
personal aspect of crime. One good starting point for restorative justice may be to
identify the offenses in which the personal far outweighs the global interest and
concentrating on adjudicating those crimes; this will both provide the individualized
approach to certain classes of crimes which is the aim of restorative justice, while not
obviating the societal interest in criminal justice that is vital to maintaining a rule of law.

Even if implemented on this scale, restorative justice would need to determine
how to equalize the disparity in punishment meted out between the individual victim-
offender pairing. The downside of tailoring a sentence to fix the circumstances is the
extremes to which such and approach can lead you; some victims may be willing to
forgive absolutely, whereas others might require the offender to place themselves into
debt-slavery, working for the victim with the fear of the harsh punishment of the criminal justice system at their back. The coercion of the offender into first accepting, and then abiding by the terms of, mediation between the parties is inherent in the process, but should be mitigated to as large a degree as possible; its presence taints the final outcome, as instead of true remorse, the victim receives some mixture of sorrow and apprehension.

These flaws in no way invalidate the concept of restorative justice. Done correctly, it is an excellent method to heal individuals and communities, while maintaining the standards of justice modern society has come to expect. However, restorative principles focus on one method of punishing crime as tightly as the current criminal justice system focuses on another; neither structure should be above learning from the other and integrating some of its ideas. Both the wronged individual and society have a right to chastise wrongdoers; neither right should be ignored in a truly just civilization.