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Serge Gutwirth and Paul De Hert,
“To Punish or to Restore? A False Alternative”,1
in

“The restorative justice movement is in full bloom. Far beyond a tremendous production of theoretical texts and discourses are the practical applications of its various propositions. Indeed, in certain countries one can even see the development of fervent restorative initiatives in the margins of criminal law. Here, we have chosen to call this dynamic ‘restorativism’ as we see in it above all an ideological movement2 and not, moreover, evidence of the new ‘paradigm’ that has purportedly been developed in criminology or in criminal law studies3.

1 This chapter is a translation of Gutwirth S. & P. De Hert, ‘Punir ou réparer? Une fausse alternative’, in Fr. Tulkens, Y. Cartuyvels & C. Guillain C., La peine dans tous ses états. Hommage à Michel van de Kerchove, Larcier, Bruxelles, 2010, 93-114 by Margaret Malmquist-West.
2 Fossier & Gardella, E. (2006), ‘Entretien avec Bruno Latour’, in Tracés. Revue de Sciences Humaines, Genres et Catégories, no. 10 (February), March 19, 2010 from http://traces.revues.org/index158.html. Translation (MMW) : “En law, to believe that the sentencing consoles, mourns, is typically a categorical error. Law does not mourn, it does not transport something that one might call therapeutic or salvific (…) It’s like telephoning someone who is supposed to deliver a pizza and saying: ‘Fax it to me’. A typical categorical error: he didn’t understand that the mode by which he ordered the pizza is not the mode by which it is delivered. So, to ask law to bear your sorrows, to bring an end to your mourning, it’s the same thing”.
4 In the context of the debate with restorativists, we use the concept of ‘paradigm’ strictly in the sense that Thomas Kuhn defined it. In this contribution, as we simply need to distinguish the restorative ideology from scientific and juridical approaches, we prefer to avoid calling them all ‘paragards’ and thus implying, wrongly, that they all refer a priori to the same scientific ‘genre’. For our prior explanations of this use, see
Early on, proponents of restorativism requested that they be allowed to work pragmatically. They did not want their material efforts to be impeded by a debate on the movement’s theoretical foundations. Accordingly, some even asked for the moratorium on all theoretical discussion: an understandable request supposing that the purpose of the movement was, first, to facilitate the development of new ideas and, second, to avert any preemptive expunctions of these new ideas (von Holderstein Holtermann, 2009:191). Today — now that the birth of the movement has been traced back to the 1970s and 80s and now that the comportment of restorativists has proven to be more brazen than benevolently assertive — this respectful moratorium is over. Faced with the temporal maturity and the political and ideological impact of restorativism, we would like to resume the debate, from both juridical and scientific perspectives, on its theoretical foundations.

Restorativism comprises at least two trends that need to be differentiated. One trend, called ‘maximalist’, is radical and aims to replace criminal law with restorative practices. Proponents of the maximalist program maintain that the punishments imposed by criminal law, which they find ethically unacceptable, must be abolished and replaced by ‘bottom-up’, ‘participatory’ mechanisms that are negotiated amongst the perpetrator, the victim(s), and the ‘community’. The other trend is more moderate. This trend recognizes both the necessity and the influential presence of traditional criminal law and as such envisions both the installation of and the operation at ‘switching points’ or ‘interchanges’ between traditional criminal law and the restorative processes of reparation or of reconstruction. In the first part of our contribution, we will examine the viewpoint of radical or ‘maximalist’ restorativists, exemplified by our Belgian compatriot Lode Walgrave; in the second, we will look at the work of the moderates, best represented by the Australian John Braithwaite.

Before we proceed, let us be clear on one point: that we reject the restorative ideology does not imply that we defend the criminal system as it exists and functions in contemporary Western nation-states, be they in the Anglo-Saxon world or on the European Continent. On the contrary, we find the ‘criminalization’ of our societies to be cause for alarm and as such, systematically, and for some time we have defended policies of decriminalization (fewer criminal accusations) and of reduction of criminal responses (fewer criminal pursuits, fewer implemented punishments). 5 Parallelly, we favor the revalorization of civil law and, more specifically, of civil liability (judiciously called ‘quasi-delictual’ liability in continental law). Within such a framework, one could successfully develop a legal system based on compensation, reparation, restoration and, perhaps, on reconstruction. We are convinced that punishment must first be symbolic, and, above all, must denote both the rejection of the act (not its

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author) and the reestablishment of flouted order. Incarceration, whose sole recognizable objective is to incapacitate, must be avoided. Yet, if one must incarcerate — that is, if even after the symbolic criminal adjudication the given judicial framework still requires the physical imposition of this penalty — we favor the implementation of more positive measures that encourage resocialization and rehabilitation or measures that are reparative, reconstructive, and (re)integrative. To this end, we are not abolitionists: we do not seek to abolish criminal law whose use in the minimal and exceptional we think unavoidable; to this end, we are radical reductionists: we do seek to radically reduce incarceration.

Nevertheless, we know that the history of the stabilization of relationships and conflicts in Western societies has been, for at least the past two thousand years, a juridical history. Law, inseparable from its particular regime of enunciation, characterizes Western civilization and as such it will not vanish overnight — at least not without serious repercussions — in the face of a couple of good ideas. The knowledge of this does not however prevent us from defending the principle that civil law should occupy the most important legal role, the default role, and that criminal law remain, as stated in its manuals, the last resort, the ultima ratio.

1. Restorativism Instead of Law

Maximalist restorativism positions itself as a challenge (Walgrave, 2001:24 and 2009‡:531) and as an alternative to criminal law. Following this logic, criminal law and restorativism can neither agree with nor accommodate for one another. Indeed, according to Walgrave the two engage in a ‘duel’, and, as we all know, all duels end in death (2001:97-109).

For Walgrave, the goal of the maximalist program is to remove as much as possible of the ‘punitive apriorism’ of criminal law in order to replace it with a ‘reparative apriorism’. Thus the alternative: to punish or to restore (Walgrave, 2008:65).

Restoration: the Only Legitimate Objective

Walgrave defines maximalist restorativism as “an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational, and social harm caused by that offence” (Walgrave, 2008:24). In analyzing the structure of this particular definition, one can easily see the form taken by the maximalist tendency. Such a conception puts all the weight on the

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reparative objective of the restorative response while at the same time disregarding at least three processes particular to criminal law: first, the defining of an ‘offence’; second, the criminal procedure by which this offence is attributed to a person; and, third, the reprobative and symbolic character of the subsequent criminal sentencing. Walgrave’s maximalist restorativism concentrates all effort and attention on the reparative objective, and it is precisely this concentration that allows him to explicitly ignore the process of defining the ‘offence’ as either a ‘juridical fact’ or an ‘ontological being’. In other words, the process by which an act is taken into jurisdiction. This leads the belief that under restorativism there is an offence as soon as there is personal, relational, or social harm. Therefore, it is necessarily an offence that starts the process of horizontal mediation that in turn leads the material and emotional reparation of individual, relational, and social harm. Evidently, maximalists imagine a radical replacement of criminal law: it is no longer the foreseen perpetuation of an offence as provided for by criminal law that spurs the intervention we now call ‘doing justice’, but the occurrence of harm. What is more, this intervention is no longer a legal procedure, but an ethical evaluation left as much as possible in the hands of those directly affected by the incident, the ‘community’ included. Thus, the maximalist ideology proposes ‘bottom-up’ instead of ‘top-down’, ethics instead of law, and community member instead of legal person (Walgrave, 2008:30).

Even more remarkable than this plan to replace criminal law is the fact that restorativism indistinctively presents itself as a ‘philosophy’, ‘a complex and lively realm of different beliefs and options, renovating inspirations and practices in different contexts’, a social movement, a domain of scientific research, the component of a ‘larger socio-ethical and political agenda’, etc (Walgrave, 2008:11). Unsurprisingly, such a mix of genres — in which philosophy, ethics, belief, political engagement, law, and science find themselves interchangeable — permits both the espousal of extreme analytical standpoints as well as the construction of ideological utopias. This configuration fails, however, when one must apply its critical discourses to real and lasting practices like law, science, and politics that are not only singular and each function accordant with a particular mode, but that are constitutive, collectively and each with its particular and complex institutional articulations, of our cultural heritage.

The premises of maximalist restorativism can be presented in three steps: firstly, punishment and a fortiori incarceration are not efficacious methods and are moreover socially and ethically undesirable; secondly, criminal law ignores the ‘real stakes’ of a conflict, notably the victim, his or her bereavement, material, social, and emotional harm, and compensation; and, finally, people and their communities must be given back their rightful conflicts, conflicts that were expropriated from them by the cold and indifferent machine of criminal law. In adhering to these positions, maximalist restorativism roots itself in an approach based on the victim, in a criminological abolitionism, and in a normative communitarianism. Though in his recent writings Walgrave attempts to refine these ideas with warnings against the excesses that could result from them, this fundamental ideological extremism remains unmistakably present. The alternative that maximalist restorativism proposes is the horizontal resolution of conflicts and the collective management of victims and perpetrators by the community — genre ‘extended family’ — that

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10 And not on the horizontal processes — the ‘means’ as opposed to the ‘end results’ — that are of such importance to other proponents of the movement. For these proponents, mediations, communication, and the playing out of shame, repentance, forgiveness, and reconciliation are crucial.
11 On the difference between the ‘characteristic’ and the ‘objective’ of penalty, see van de Kerchove, M. (2005), op. cit., pp. 35-36.
12 We critiqued this aspect in: Gutwirth, S. (2009), op. cit.
13 Ibid.
is in turn helped by mediators or ‘facilitators’ benevolently instructed, one supposes, in the social sciences or in criminology.

For these reasons as well as several others, we consider maximalist restorativism to be both highly problematic and questionable.

**Utopianism**

First off, there is to our knowledge no empirical indication that attests even to the possibility of this proposed alternative to criminal law. On the contrary, far from replacing criminal law, implemented restorative initiatives have simply articulated upon it. Though undoubtedly legislators have created sectors of horizontalism, these sectors have always been overseen by criminal law. Here, not only does criminal law supervise the process, but it takes over if the affair cannot be regulated horizontally. This type of architecture — where spaces of soft and voluntary resolution are overshadowed by the intervention of the attorney general and the descent of prison walls — creates a continuum in which the threats of intervention and of incarceration resound even in the softest corners of the justice system. In these sectors, criminal pressure remains efficaciously present and the suspect has noticeably fewer legal protections. These sectors are not simply ‘versions’ of restorativism or of criminal law; in our eyes, they would be more accurately described as ‘perversions’. Hereof, we agree with Walgrave when he argues that one must separate radically from the traditional criminal system in order to preserve the identity and the singularity of restorativism. Now, the logicality of this last point notwithstanding, our argument remains that in contemporary Western societies, whether we like it or not, restorative practices occur not instead but under the surveillance of traditional criminal law. And Walgrave, in defending the utopian dimension of maximalist restorativism, inexplicitly reinforces this argument (Walgrave, 2009‡:539).

**Anti-Legalism**

It is clear that horizontal, non-legal, and reparative conflict regulation occurs in situations preceding those which heretofore necessitate legal intervention. For example, A crashes into B’s car. A and B get out of their cars, converse, and decide to settle things privately. A gives B 300 dollars and avoids an increase on his insurance premium. Or, A and B get in an argument in a public place, fists fly and blood spatters. Those present separate A and B, speak to them, and together all decide that it would be better to not call the police. A and B go to their respective doctors to be treated. These are, we feel, two examples of maximalist restorativism. And yes, they are effectively laudable since they divert from heavier legal interventions, and all parties leave on equal footing. But then again, one cannot deny that legal action, even the mere possibility of it, is fundamental. For in the event of persistent discord between A and B, it will be law, be it civil or criminal, that assigns responsibility, stabilizes relationships, and sets

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up the ‘truce’. From this angle, maximalist restorativism finds itself in a very contradictory position because it tries to impose spontaneity, informality, and community where they would not spontaneously arise, i.e., precisely where, in practice, horizontal reconstruction does not work out and is even unwanted.

The above examples also demonstrate the necessity of a third-party arbiter. In a conflict, there is more at stake than the interests of the victim and his or her ‘immediate community’. This third-party arbiter serves to uphold general or public interest (that of society at the state level), concerned with both the resolution of the conflict as well as a ‘distributive justice’. If one of the protagonists is simply not able to pay the amount wanted by the other or the other and the community, the third party finds a different solution in light of criteria other than the means and demands of those involved and the ethical convictions of the community.

The first example reveals yet another remarkable aspect of the restorativist ideology, one to which we will return in the second part of this chapter. This type of conflict falls under civil, not criminal, jurisdiction. This is hardly surprising given that restorativism resembles civil law — and more specifically civil liability — much more than it does criminal law. It is surprising however that the vast majority of restorativists remain radically blind to civil law: surprising, of course, because how could one seriously defend a restorativist treatment of criminal matters without also, not to say before, defending its application in civil matters?

Maximalist restorativism is thus much more than a criminal or criminological abolitionism. Though the writings of Walgrave suggest positions that seemingly call for legal intervention, maximalist restorativism is plainly and simply anti-legal. If in his writings Walgrave does open the door to legal intervention, his aim is not to employ law as law, but to mobilize a judicial power that can legitimately and forcefully impose reparative sanctions upon recalcitrant and/or irrationally negative offenders, upon nonconformists, and upon those who resist communal pressure, voluntary mechanisms, and the good intentions of restorative facilitators. Though maximalist restorativism prefers voluntarism and horizontalism, this preference does not eradicate the need to be able to force reparation or reconstruction on a non-cooperative offender: thus restorativists appeal to the legal system to impose the ‘reparative sanction’. But this invocation of legal power — where law is mobilized by restorativists simply as a means of coercion — is in no way a friendly reunion with law. Even after having gotten rid of civil and criminal law, even after having replaced law (in theory, happily) with an alternative and maximally restorative system (the ‘pyramid of restorative law enforcement’ (Walgrave, 2008:144-155)), Walgrave realizes that only under duress will those who would resist and/or refuse to participate in the deliberative ceremonies of shame, forgiveness, and reparation value the restorative alternative. Thus, when restorativism fails, Walgrave calls on the legal system to wield the billy and to impose ‘restorative sanctions’. The nature of this judicial appeal — where ‘law’ is put into the service of a non-legal program purely as an instrument of force — exposes the strong anti-legal inclination of maximalist restorativism.

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16 Walgrave responds to this question, but only in order to introduce the larger maximalist agenda: “Maximalist restorative justice cannot be limited to settling a tort according to civil law, but deals with crime, which are considered also public events, traditionally dealt with by criminal law” (2008:26). It is not infra-juridical and civil affairs that interest Walgrave, but exactly those that are taken up by criminal law, or, more accurately, offences that mobilize traditional criminal law and that entail public prosecution. If civil law is not present in Walgrave’s work, it is precisely because he wants to move immediately to serious affairs, because he leap-frogs civil law, its systems of liability and its compensatory damages.
17 See Walgrave, L. (2008), op. cit., on e.g. p. 8 and Walgrave, L. (2009†), op. cit., p. 20.
18 And worse, for certain “serious offenders who are unwilling to participate in deliberation, and who are likely to reoffend seriously,” despite everything Walgrave sees no other solution than, in the name of danger and risk management, incapacitation (See Walgrave, L. (2008), op.cit., pp.153-155).
In light of this anti-legalism, it is not surprising to see restorativism inspired by indigenous, historical, religious, and other systems of conflict resolution that arise in communities where law as we know it does not exist or that are/were governed by mechanisms of pacification and of conflict resolution based on moral values, the authority of old sages, the interests of the group, etc. But what is more, this anti-legalism makes painfully obvious the radical nature of the maximalist tendency. Through utopian projection, maximalist restorativism permits itself to disregard the history of Western societies in which law, since even before the Romans, has functioned as a particular ‘mode of existence’ or ‘regime of enunciation’ (according to Bruno Latour), as a ‘practice’ (following Isabelle Stengers), or as a ‘great cultural formation’ (to use the term of Clifford Geertz).\textsuperscript{19} Now, the history of law in the West teaches us that law always — regardless of the political system under which it was active — stabilized links, set up truces, and assigned the responsibility for acts, things, and words. Therefore, the anti-legalism of maximalist proponents is, to say the least, ahistoric and slightly naïve. The presence of a juridical regime in our civilization and in our various forms of secular ‘rule of law’ (‘Rechtsstaat’) — both characterized by a complex system of checks and balances — is much more deep-seated in and constitutive of our Western identity than believe those who want to replace it with a ‘pyramid of restorative law enforcement’ or with that which what one could meanly call a system of institutionalized palavers overseen by those whom the Dutch call ‘reparation workers’ (‘herstelwerkers’).

\textbf{Forgoing Due Process}

The extremism of the maximalist ideology never ceases to amaze. If it were up to Walgrave, the justice system would sideline the legal rights provided for by the criminal system and endorsed in Article 6 of the European Convention on Human Rights. Indeed, he unhesitatingly calls for the abstraction of due process in the name of the so-called new restorativist paradigm (Walgrave, 2009\textsuperscript{‡}:532-533 and 2008:155 \textit{et seq}.). Herewith, the magnitude of the restorativist program would be great enough to justify deemphasizing, even forgoing, the political principles and traditions emphasized in the Convention’s preamble and, more particularly, the preeminence of law or the ‘rule of law’. These political principles and traditions are characteristic of our society, signifying that power can only be exercised constitutionally, that we are governed more by law than by humans, and that, in the case of conflict, an independent judge will intervene heeding the rights and liberties of citizens, laws, and the fundamental principles of law. That we live under a ‘rule of law’ — a structure equally constitutive of our society — means that we can always find recourse in law and the rights protected by it. These principles, one will do well to remember, came into being during the age of political Enlightenment and the ensuing revolts against the arbitrary and absolute sovereignty of the former rulers in England (1689), America (1776), and France (1789). Fortunately, law will not disappear simply because one introduces another ideological program, even if this program is presented as a paradigm shift and even if one amasses a political and moral majority around it. Paradigm, radical alternative to criminal law, ‘socio-ethical’ program or

ideological movement, restorativism — like all other political and ideological programs — can neither
downplay the respect existing for constitutional principles nor avoid a meeting with law.

2. Restorativism Alongside Law

Three Premises

At first glance, moderate restorativism is more acceptable than its counterpart: this less extreme
tendency aims not to replace criminal law but to ameliorate it. Dissimilar agenda notwithstanding, the
premises of the moderates remain nonetheless akin to those developed by maximalist restorativists.

First premise: moderates claim that the reparation of the harm suffered by the victim lies at the
heart of the debate, yet traditional criminal law attaches very little importance to it.

Second premise: compensation, reparation, and restoration are objectives linked to the
restorativist preference for processes in which concerned persons (‘stakeholders’) participate voluntarily
(‘victim-offender mediation’, ‘conferencing’, ‘circle’) and that are closed to the public in order to ensure
privacy and confidentiality.

Third premise: ultimately, moderate restorativism also rejects criminal law because the latter, by
definition and often for the wrong reasons, punishes: where restorativists favor reparation, criminal law
reprimands and/or averts. Moderates maintain that, cynical objections aside, criminal punishments — a
fortiori incarceration — do not work and that as such criminal law should only be called upon when there
is no other option, as a last resort. For moderate restorativists, criminal law intervenes only if the
voluntary and deliberative processes occurring amongst stakeholders fail: for example, if malefactors
refuse to cooperate or are found obstinate, recalcitrant, malevolent, or dangerous.²⁰

Criminal Law Does Not Work, but It Can Be a Last Resort

We will begin with last premise, according to which restorative justice would be the default
course of action and criminal law the exception. Hence, in moderate restorativism, the switching point
between the two systems functions in terms of subsidiarity: if the processes of restorative justice do not
work, the case can be sent to the back-up, to traditional criminal law.²¹ However and importantly, this
interchange or transfer mechanism between the two systems remains undefined and thus brings up several
significant questions concerning the fundamental differences between restorative justice and criminal law.
When exactly will an affair be transferred to criminal law? After having been transferred to criminal law,
is it possible to return to the restorative system? And, with all this in mind, what happens to the rights of
the accused that according to certain restorative thinkers will (or should) be less comprehensive?

²⁰ “I part company with those who see punishment as a respectful way of raising our children, of dealing with criminals or with nations we
disagree with. Compared with restorative dialogue […] punishment is less respectful. That is not to say we should never resort to it. But when we
do it should be on consequentialist grounds – because there is no alternative way of resisting injustice. We should then do so as respectfully as we
can, but without deluding ourselves that hitting or confining can be inherently respectful” (Braithwaite, 2003:2).
²¹ “Principals to any restorative justice process about a legally significant matter, not just criminal matters, should have a right to appeal the
restorative solution to a court of law and a right to resolve the dispute in a court of law in preference to a conference/circle” (Braithwaite, 2003: 10).
Without precise answers to these questions, one cannot seriously consider this proposed cooperation system between the restorative approach and criminal law. Indeed, as Jakob von Holderstein Holtermann has expertly shown, these answers are too often absent. Restorative thinkers have neither clearly defined nor overtly treated these interchanges between restorative justice and traditional criminal law. Where is the gateway between the two situated? How does this interchange function and who mans it? Even John Braithwaite, the most eminent thinker in the school of moderate restorativism and undoubtedly one of the most eloquent restorativists, remains unclear. One is indebted to von Holderstein Holtermann for his long analysis of Braithwaite’s vast work (von Holderstein Holtermann, 2009:187-207), an analysis to which we remain faithful in the following paragraphs.

Braithwaite envisions the intervention of criminal law when, for example, a recidivist persists even after having been given a warning (Braithwaite, 2002†:29-43). At some point in his or her career and after having passed numerous times through the restorative system, a known offender will be confronted by the latter and presented with a choice: either adapt to the norms of society or be subject to intensified police surveillance. If still the offender persists, he or she would no longer be given a choice and all new infractions would be processed criminally. As von Holderstein Holtermann justly remarks, the person identified as a known offender — who is moreover not suspected of a specific crime at the moment of confrontation with the restorative mechanism — will not truly be at liberty to refuse a restorativist offer. That is, if the person refuses, he or she would necessarily be ‘sanctioned’ by intensified police surveillance. If this is the case, where are we with the principles of respect and of non-domination advanced by restorativists?22

In further contradiction, though respect for the victim is supposedly restorativists’ primary concern, in no way does their proposed system take into account those who suffer at the hands of a recidivist. In Braithwaite’s example there is not yet a victim: when confronted, the known offender must face an ensemble of persons (family, workplace…) who are not truly victims but who are instead concerned persons willing to help him or her.23 In short, this proposal is neither restorativism nor traditional criminal law, but a third system, and one that would undoubtedly please classical utilitarianists. This system aims not to repair but to prevent further infraction (von Holderstein Holtermann, 2009:194-195). As such, the future victims of this known offender will not be given the chance to go through a restorative process (and thus will not benefit from the advantages attributed to it by its proponents) simply because the author of these infractions previously refused to adapt him- or herself to and to voluntarily obey the restorative propositions that were made to him or her (von Holderstein Holtermann, 2009:195).

Yet, the situations that warrant transfer to the criminal system are not limited to that of known offender. Ultimately, traditional criminal law is much more present in Braithwaite’s work than one might expect for Braithwaite envisions blocking access to restorative justice and transferring the suspect to a criminal court in at least four other situations: (i) when a suspect overtly refuses to participate in a process of reparative justice; (ii) when the criminal suspect claim his or her innocence; (iii) when the agreements reached through a process of reparative justice are more severe than those prescribed by criminal law for

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22 On these principles, see Braithwaite, J. (2003), op. cit., pp. 10-11, and below.
23 Cf. the notion of ‘affected communities’: “Restorative justice programmes must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities. Programmes were victims are exploited as no more than props for rehabilitation of offenders are morally unacceptable. Deals that are win-win for victims and offenders, but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable” (Braithwaite, 2003:10).
the same infraction; and (iv) when the participants in a process of reparative justice cannot come to an agreement.24

To say the least, these four situations make up a significant portion — and certainly more than that of the known offender — of all existing and possible procedures and as such numerous affairs would be transferred to a traditional criminal court. Protocol is straightforward in the first situation, when the suspect refuses to participate in a process of restorative justice and opts for a criminal trial. Situations (ii), (iii), and (iv), on the other hand, are much more complicated. In light of the abovementioned premises and principles, these three situations pose several insurmountable problems to the restorativist approach. Here, the restorative process took place, but the results of this process were then transferred to a traditional criminal judge for verification or revision.

In these three cases, the recourse to traditional criminal law is far from being neutral or innocent. Oftentimes, it is beneficial for the suspect to avoid traditional criminal law (creation of a criminal record, subjection to traditional penalties, etc.). Even the purported victim could benefit from avoiding a traditional criminal procedure (and its public debates). In order to prevent pressure or even the blackmailing of one concerned party by the other (be it the victim who threatens the suspect with a criminal process if the latter remains inflexible or the suspect who, uncoerced, refuses to accept the given schema of compensation), the judge would need to come up with methods and standards by which one could evaluate a ‘correct’ process of restorative justice. Not only is this a difficult task, but it prefigures a return to paternalism and thus the end of the horizontal and self-managed conflict resolution that restorativists so eagerly forward (von Holderstein Holtermann, 2009:204).

There are additional problems specifically when a suspect is sent to a criminal tribunal because the schema of compensation and restoration agreed upon through a restorative procedure is more severe than the upper-limit penalties prescribed by criminal law for the same act (situation (iii)). According to Braithwaite, victims are reasonable and well-behaved; neither are they vengeful nor are they subject to unpredictable or unbalanced emotions. If the comportment of victims were truly so serene, if truly this comportment yield that which Braithwaite lyrically calls the ‘collective wisdom of stakeholders’ (Braithwaite, 2002‡:158 and von Holderstein Holtermann, 2009:199), situation (iii) would rarely occur, and rare occurrence would inextricably both minimize and justify the exceptional transfer to criminal law. Rarely does not mean never. Clearly proponents of restorativism accept in principle a situation in which a criminal court reverses the collective decision made through and conforming to all the rules of a reparative process. For von Holderstein Holtermann this creates a problem problem of incommensurability: if restorativists employ better and different methods of punishment (and this is at least what Braithwaite and other proponents of restorative justice claim), how can one accept that a traditional judge could intervene afterwards to make the necessary corrections (von Holderstein Holtermann, 2009:199-200)?

Also particularly problematic is situation (ii), when a criminal suspect claims he or she is innocent, his or her case is transferred to a criminal court. Under these circumstances, the restorative process would become a space for plea bargaining where the suspect, under threat of a criminal trial and/or harsher treatment within the restorative system, would be pressured into pleading guilty. Again,

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24 Braithwaite is very imprecise when he addresses these four situations and nowhere in his work does he address them fully and all at once. They must instead be localized through interpretation and in doing so one runs the risk of being reproached for reading in his work things which he did not write. On this interpretive reading and its risks, see von Holderstein Holtermann, J. (2009), op. cit., p. 195 with specific references to Braithwaite’s work.
given restorativism’s characteristic respect for protagonists’ freewill and its preference for horizontality,\footnote{But a programme is not restorative if it fails to be active in preventing domination. Any attempt by a participant at a conference to silence or dominate another participant must be countered" (Braithwaite, 2003:9).} this would be a situation to avoid. As evoked above, the threat of a criminal trial and its influence on the decisions made in a restorative process ultimately pervert the identity and the singularity of the restorative approach. This tension could be resolved by giving the suspect claiming his or her innocence the opportunity to return to a restorative process after having been condemned by a traditional judge, but regardless of its nature, this exception seems to us above all to lead to another failure on the part of this proposed restorative system. It is extremely difficult on one hand to maintain that restorativism is based on the principles of non-domination and horizontal and self-managed conflict resolution while on the other to plan on calling in a judge when, in practice, these principles do not hold (von Holderstein Holtermann, 2009:198).

\textbf{Deliberative Processes Closed to the Public}

Our criticism of the third premise of moderate restorative also cast doubt on its second premise, the preference for horizontal and deliberative processes closed to the public so as to guarantee the spontaneity, privacy, and confidentiality of participants\footnote{"Not all of the accountability mechanisms of criminal trials, however, seem appropriate to the philosophy of restorative justice. For example, if we are concerned about averting stigmatisation and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public" (Braithwaite, 2003:10).}. As we have seen, criminal law is well and truly present in all restorative practices, but this presence is much more blatant in the moderate approach where the deviation to a traditional criminal judge is a veritable right. If we follow a restorative logic, this unspoken ‘right to criminal action’ seems contradictory and thus raises several questions. The unwavering presence of criminal law serves as a form of intimidation: it puts pressure on those who refuse to participate in the ‘spontaneous and private’ ceremonies of restorativism. Malefactors, dissidents, and even those who dare to plead their innocence — in short, all those who do not admit their wrong doings with the full desire to repair them and/or those who do not satisfy the congregation of stakeholders — are sent back to the chopping block of criminal law. While Braithwaite promotes the empowerment of participants, mutual and respectful listening, non-domination, and horizontality as the essential values of the restorative process, he ignores the fact that the possible, even guaranteed, access to a criminal judge is a way for the victim to dominate the suspect for whom, the victim quickly realizes, a criminal trial would most likely be disadvantageous. Paradoxically, this entanglement with criminal law impedes the spontaneity, intimacy, and confidentiality that moderate restorativism places at the heart of its preoccupations.

To add to this, the simple fact that the conditions under which a case can be transferred to a criminal court are unclear is counteractive to due process. Regardless of whether or not Braithwaite values due process, to us it is fundamental. Restorative justice, Holtermann rightly observes, is faced with serious intrinsic problems, due process being one of them: if it wants to be implanted in the center of the justice system, its proponents must deeply consider the effect that the ever-ready criminal axe has on the processes of reparative justice on which it threatens to fall (von Holderstein Holtermann, 2009:206). Restorativists will need to find a way to counter the dissemination, even ‘metastasis’, of the threat of criminal action through the continuum created by the links between the two systems.
The Reparation of Harm Lies at the Heart of the Problem, yet Traditional Criminal Law Attaches Very Little Importance to it.

Now, let us return to the first premise. Moderate restorativists maintain that the reparation of harm occasioned by victim should be the main concern of a process yet this reparation is of little importance to criminal law. This claim, we feel, derives from an incomplete and inaccurate comprehension of the history of criminal law and the ensemble of its operations.

The history of criminal law is heavily marked by vengeance, feud, and private justice. The story is well known: in communities where there is neither centralized power nor law, perceived harm triggers an act of vengeance that in turn triggers retribution and so on until the series degenerates into a great vendetta or clan war. Here, vengeance is horizontal and remains so even when taking it becomes a right. This right is negotiable (the lex talionis of the Code of Hammurabi, the Old Testament, and the Lex Duodecim Tabularum) and can eventually lead to the compositio or the payment of wergeld. In vengeance, protagonists are equals and there is no authority that can intervene on their behalves. Law does not preexist, it is produced through negotiation. Without negotiation, there is war. If vengeance is retributive, it is thus not ‘punishment’ in the contemporary sense that presupposes the existence of an institutionalized power. M. Hildebrandt defines ‘punishment’ as a voluntary infringement of the rights and liberties of a person who has violated a legislative norm executed by an institutionalized power in view of (re)establishing the authority of this norm (Hildebrandt, 2002†:103-146). If this definition is accurate, the differences between (rightful) vengeance and punishment are significant. Where vengeance and its derivatives play out horizontally and between free and independent equals, punishment requires the involvement of an authority that vertically and hierarchically opposes the transgressor. Therefore, modern punishment can only be retraced to situations where life was regulated by a central power. Thus, and again according to Hildebrandt, it was the twelfth century that saw the nascence of the modern concept of ‘punishment’, a right promulgated by a sovereign.

In this sense, since they are simply rediscovering that which criminal replaced almost one thousand years ago, the restorativist concentration on the victim and preference for horizontal justice could be considered as a step backwards. It is thus not surprising that proponents of restorativism emphasize the positive aspects of vengeance or that which Garapon, Gros, and Pech call ‘vindictive justice’: the horizontality of relations, the non-domination of one party over another, and the self-management of conflicts by those concerned. Consequently, the development of criminal law appears as a process by which humans are unjustly and cruelly relieved of their conflicts (cf. N. Christie) and all the more so when the concept of vengeance is spun with the Nietzschean grandeur of a question of honor.

27 On this, see our previous works cited in note 3.
28 See Hildebrandt, M. (2002†). op. cit. and Hildebrandt, M. (2002†), op. cit., p.184: “Het ontbreken van een hiërarchische verhouding sluit het opleggen van straffen uit. De rechtshandhaving binnen de sibbe is consensueel en kan in beginsel door iedere vrije ter hand worden genomen. Private wraak naar aanleiding van een aantasting van de eer van een vrij man was dan ook de meest gebruikelijke vorm van punitieve rechtshandhaving. Ter voorkoming van vetes die het gemeenschappelijk leven in vergaande mate kunnen ontwrichten zal het ding worden genomen op het zoemen van de wraak: de zoen is een overeenkomst tussen partijen waarbij de eer niet wordt hersteld door een punitieve wraakoeefening maar door betaling van een wergeld aan de verwantschapsgroep van het slachtoffer. Private wraak en zoen zijn volgens Immink en Radbruch dus geen voorlopers van de overheidstraf maar worden zodra zich overheden vormen nu juist verdrongen.”
where the adversary is seen as a respected equal instead of being associated with resentment, humiliation, irrationality, exaggeration, and hate.

History thus shows that the sovereign — the State — has reserved for itself the right to punish; this much is evident when one looks at the inquisitorial criminal systems in the countries of Continental Europe. Even though criminal law has always been the State’s prerogative, political changes and our societies’ history have not neglected its evolution. The contemporary State is no longer that of medieval kings or of the Old Regime and the same goes for criminal law. Indeed, if criminal law and the right to punish started out as the prerogative of the more-or-less absolute and authoritarian power of a sovereign and if they were exclusively or most importantly used in order to preserve the interests of the State, things have certainly become more complex under the contemporary ‘rule of law’.

Today, criminal law is supposed to uphold and protect the juridical order of a democratic ‘rule of law’, a juridical order in which the protection of constitutional principles (balance of power, legality of exercising power) and the fundamental rights and liberties of individuals are just as important as the interests of the State and of the government. Criminal law is thus taken in a ‘double bind’: it must legally protect citizens and uphold the legal order. In this way, criminal law functions autonomously. Even though criminal law remains exclusively ‘vertical’ in the sense that in principle it opposes the State and the accused, it nevertheless takes into account interests other than those of the State; these other interests, as we shall see below, include those of the victim.

To add to this, criminal law should in principle be the ultimo ratio, to be used only in final recourse. Lamentably, this is not the case in practice. For some time now, we have defended both legislative decriminalization and the creation of the possibility of decriminalizing a case while a trial is in process, a sort of ‘revocation without possibility of return’ and the transfer to a civil judge. This, however, is beside the point of this contribution. The point is that civil law exists alongside criminal law, and, more importantly, since 1804, civil liability takes charge of the resolution of conflicts arising from harmful acts. Since the Napoleonic Era, law recognizes both civil and criminal liability. While the principle that operates the distribution between a criminal and a civil wrong remains unclear, the difference between their outcomes — the former resulting in punishment and the latter in compensation — remains devastatingly apparent. While civil wrong leads to a ‘horizontal’ process that legally balances opposed parties in order to compensate (or even ‘to repair’), criminal wrong leads to a ‘vertical’ process where, under the eye of a judge, the accused faces the State and risks censure, public stigmatization, and punishment, i.e., a direct infringement on his or her rights and liberties. Through civil law, the victim is compensated; in criminal law, even as the State (r)establishes juridical order, the victim is not barred

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30 See Fr. Gros’s argument in Garapon, A., Gros, Fr. & Pech, Th. (2001), op.cit., pp. 112-138 and p. 132: “the avenger does not obey a blind and evil rage; he neither humiliates nor abuses the other, but his vengeance is a proud reaction that makes of the other a rival, not a prey offered up to his desire to destroy. Vengeance is not structured by a logic of hate that eats away at and corrodes the relation of the avenger and his adversary, but by a logic of exchange that unites them in opposition” (trans. MMW).

31 This does not mean that criminal law no longer serves and safeguards the interests of the State; on the contrary, this dual role is unmistakably present throughout the history of criminal law. Indeed, there is a long list of crimes against the interest of the State placed under the second heading of the Belgian Criminal Code. This prioritized placement confirms that criminal law is still designated for the sovereign’s privileged use and therefore the danger of abuse and over-criminalization is very real, as we see when criminal law intervenes and regulates in, for example, economical, social, financial, and environmental law. For more on this subject, see de Hert, P., Gutwirth, S., Snacken, S. & Dumortier, E. (2007), op. cit. and Gutwirth, S. & de Hert, P. (2002), op. cit.


33 Braithwaite evidently knew the history of criminal law, but for him it was no more than an "obscure idea to have been taken seriously by the intellectuals of the North Atlantic for all these centuries" (Braithwaite, 2003:16).


35 Ibid., pp. 127-140.
access to civil action and compensation. Though both civil and criminal law undoubtedly remain within a legal system, they are fundamentally different and serve dissimilar purposes: civil liability stabilizes the relations between parties, assigns responsibility, and puts an end to the conflict through compensation; criminal law (r)establishes and (r)asserts the violated juridical order. To criticize criminal law because it does not satisfy the victim’s expectations is to make a categorical error; it is like trying to ‘fax a pizza’.

In light of all that precedes, we are still surprised by the fact that restorativists remain radically blind to civil law and to civil liability when these practices possess a multitude of aspects that correspond to their requirements. Civil law and civil liability place the highest of importance on the concerns of natural persons and, in comparison with criminal law, practitioners employ much more refined methods for measuring harm and compensation, less emphasis is made on the rights of the accused, and the burden of proof is distributed differently. Indeed, there are even numerous systems of ‘expanded’ responsibility in the sense that parents, family, or employer can be implicated in the procedure and even required to pay part of the compensation.

Moreover, even in criminal law things are much less radical than restorativists want us to believe. Despite its singular history and the particular function that has been assigned to it, criminal law remains open to the victim. Legislators have not been deaf to the demands of the victim and classical criminal law has significantly evolved. Of course, criminal law is still law and is, of course, still riddled with problems, but always have the interests of the victim been present and influential; after all, victims are also part of the electorate. Today, all over Europe and the world, more and more promising are the instruments that a victim can use in order to obtain just satisfaction in a procedure that is more and more considerate of his or her perspective. As Garland remarked in 2001, “the victim is no longer an unfortunate citizen who has been on the receiving end of a criminal harm, and whose concerns are subsumed within the ‘public interest’ that guides the prosecution and penal decisions of the state. The victim is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical” (2001:11). In Belgium, for example, one can already file a claim for civil damages during and/or demand civil action in a criminal proceeding as well as take action through private prosecution and summon the accused directly before a trial jury (‘la citation directe’). Indeed, the Franchimont Law of March 12, 1998\(^\text{36}\) grants the injured person — the new player on the criminal stage — several specific rights: the right to aid and representation by counsel, the right to inform, the right to be informed, the right to request specific investigative measures, and the right to send lengthy trials to a court of criminal appeals. The 1994 introduction of criminal mediation as a mode of conflict resolution demonstrates that criminal law is opening up to horizontalism\(^\text{37}\), even if, as we wrote above, the opening of the former undoubtedly risks the perversion of the latter.


\(^\text{37}\) With an eye to compensating the victim and to repairing damages, Article 216\textit{ter}, Paragraph 1 permits mediation under the surveillance of a public prosecutor. ‘Reparation’ is not limited to financial amends, but it could also include oral and written apologies, restitution, the defining of rules of tolerance and reciprocity, symbolic reparation, etc. If, for example, a victim’s exorbitant demands or an offender’s derisory offers prevent agreement, the case is taken up by a prosecutor. If, on the other hand, an agreement can be reached, the criminal suit is dropped. In 2005, the Belgian criminal system was enriched by a similar act: Article 3\textit{ter}, written as follows, was inserted in the Preliminary Title in the Code of Criminal Procedure: “the possibility of employing mediation is offered to persons having a direct interest in the given legal procedure, in accordance with the relevant legal stipulations thereupon due. Mediation is a process that permits persons in conflict to actively participate, with their consent and in complete confidentiality, in the resolution of difficulties arising from an infraction with the aid of a third party who adheres to a predetermined methodology. The objective of mediation is to facilitate communication and to help the concerned parties reach an agreement concerning the modalities and conditions of appeasement and reparation” (trans. MMW). In Article 195 of the same Code, a fourth paragraph was inserted, labeled: “If elements of mediation are brought to the attention of the judge in accordance with Article 555; § 1\textit{st}, these elements are
Conclusion

At the end of our itinerary, it seems that the fundamental ideas of ‘maximalist’ and ‘moderate’ restorativism are very similar. Clearly, both tendencies reject criminal law in favor of horizontal and communautarian conflict resolution that is based on the moral, material, and relational reparation of victims and the reconstruction of the community. Instead, it is in their proposed applications of restorative justice that the two ideologies differ: for ‘moderates’ like Braithwaite, the restorative approach must accept, incorporate, and articulate upon criminal law; for the ‘maximalists’, restorative practices should and in preference fully replace criminal law. Moderates must in consequence not only concretize the relations and exchanges between both systems, but also and more importantly confront the fact that threat of criminal action and of the incorporation of a criminal judge disseminates through the restorativist continuum linking their processes of ‘doing justice’ to criminal procedure. In comparison, maximalists are more consistent, but this does not diminish the number and the significance of the problems with which they are faced: the utopian and ideological dimension of their project, the utter lack of practical applications attesting to an ‘extra-legal’ viability of their propositions, the minimization of the right to a fair trial and the rights of the accused, and, of course, the ahistoric and naïve disregard of law’s role in the West, especially now in this era of democratic constitutional states.

As we have said from the beginning, our criticism of restorativism can in no way be interpreted as a defense of criminal law in its present form and we certainly do not count ourselves amongst the supporters of the criminalization of society. On the contrary, we support the minimal and exceptional use of criminal law and the default use of civil law (of an enriched civil law). We take very seriously the principle that criminal law is the last resort and that as such decriminalization is a priority. We also think that after the disapproval and symbolic rejection that the sentencing performs, one must avoid the imposition of destructive and lethal penalties such as prison.38 But on the other hand, we know that law will continue to produce, following two thousand years of history, stability in our Western society. Law is neither therapeutic nor salutary: it provides legal security, it resolves, it passes judgment, and it measures and defines the responsibility of the condemned or the acquitted. Law ends that which without it could remain the subject of eternal discussion and boundless interpretation. Neither truth nor justice, law produces stability and establishes a truce. Whether or not an outcome is satisfying, we can be confident that law will resolve that which we cannot resolve ourselves.

Restorativism clearly lacks empirical, anthropological, philosophical, and juridical underpinning. The latter is all the more detrimental since restorativists are blind to civil law (even if here too there is much to criticize) despite the fact that it resembles their objectives. ‘To punish’ is not ‘to restore’; the two are not interchangeable, but are distinct and different and moreover are the concerns of different legal registers. If the moderate and realist tendency of restorativism truly aims to construct a robust and effective articulation on law, it must take an interest in civil law and in the complex division of labor that links civil law to criminal law. Horizontalism and compensation lie at the heart of civil law, whereas the primary concern in criminal courts remains the State’s reaction to the act that violated the legal order regardless of whether or not this violation was caused by an infringement of the rights and liberties of a

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38 On these positions, see Gutwirth, S. & de Hert, P. (2002), op. cit.
victim. In criminal law, the State faces off with the offender: the objective is to correctly punish the offender and not to satisfy the victim’s needs. Criminal law transcends private interests; it is characterized instead by its public dimension.

Now, since our particular juridical order — that of a democratic ‘rule of law’ — represents its citizens and their aspirations as victims, there is no reason why the legal system, be it criminal or civil, should not benefit from restorativism’s propositions. Therefore, why not create mechanisms that, on one hand, provide for the irreversible decriminalization of a criminal case and its transfer to a civil judge if the victim and the attorney general agree to do so and that, on the other, give the civil judge enough flexibility so that he or she may allow the parties to prepare and propose a fair and reparative solution. On the application or execution of punishments, i.e., that which happens after the criminal sentencing, criminal law could learn a lot from restorativism and its creativity in constructive and reparative sanctions (that some, like Walgrave, refuse to call ‘sanctions’ but which are nevertheless punitive reactions). Since the law of April 17th, 2002, Belgian criminal law has added labor as an autonomous penalty. Indeed, if one broadens the number and type of available penalties, one could diminish incarceration and even replace it with sanctions that contribute to the material and moral reparation of victims and the community as well as to the communal reintegration of perpetrators.

Punishment and restoration are two very different things. The former is carried out by criminal law and exclusively by criminal law. This exclusivity is important not only because the State prohibits us from taking justice into our own hands, but also because in criminal law more than in any other branch of law the State must in principle respect the strictest of rules that protect us against its power should we find ourselves suspect in a criminal trial. The latter, restoration, occurs either outside of law, when we (or our representatives) are able to settle things amongst ourselves, or within civil law, where the interests of opposed parties are compared and balanced under the watchful eye of the judge, guarantor of the law.

To say that one must restore instead of punish is thus to propose a false alternative. Now, this does not prevent one from asserting, rightfully moreover, that it is time to start thinking about how better to punish and how better to restore.
REFERENCES (in order within the text)


