

# RESTORATIVE JUSTICE AS INTERNALIZATION OF THE RULE OF LAW: COMBINING RESTORATION WITH RETRIBUTION IN THE FILM *FESTEN*

*Michal Alberstein\**

## I. INTRODUCTION

In this paper, I will use a film analysis to explore the potential of restorative justice processes as a more comprehensive, mature approach to the phenomenon of crime. By following the micro-level transformations within the family trial/victim-offender mediation in the film, I will try to develop a notion of law that incorporates the retributive elements into a broader framework of restoration and amendment. I will use cultural analysis as a foundation for the theoretical argument and also offer an “appropriate justice,” inter-cultural formula for addressing crime in a comprehensive manner.

Ideas of restorative justice are traditionally classified as representing an alternative to conventional modern methods of criminal justice.<sup>1</sup> Encounters between victims and offenders within community circles are considered typical of pre-modern community practices and aboriginal ways of life. In this paper, I claim that a theoretical analysis of the restorative justice worldview points to a possible complement between retribution and restoration within victim-offender mediation. In terms of the Symposium title, incorporating retributive concern into comprehensive criminal dispute processing, which is inspired by restorative justice, will promote a better internalization of the rule of law in contemporary society. My analysis will use the film *Festen* (“The Celebration”) by Dogma

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\* LLB, BA, Tel-Aviv University; SJD Harvard University; Senior Lecturer, Faculty of Law, Bar-Ilan University, Israel. This article is written in connection with the Cardozo Journal of Conflict Resolution’s 2006 Symposium, *Restorative Justice: Choosing Restoration Over Retribution*.

<sup>1</sup> See HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 211–214 (1990) (for a paradigmatic presentation of the dichotomy between restorative and retributive justice).

95, an alternative film-making movement,<sup>2</sup> as an illustration for the theoretical argument. By using a film as a concrete artistic example, an articulated and nuanced picture of the potential of restorative processes will emerge.<sup>3</sup> At the same time, some critical perspectives on using these methodologies will also become more vivid.

The arguments developed in the paper are as follows:

*First*, there is an advantage in using a concrete cinematographic example to illustrate the potentials and limitations of restorative justice practices.

*Second*, the alternative film-making style of *Festen* corresponds with the alternative mode of conflict processing that the film depicts.

*Third*, the film emphasizes the complementary character of restorative and retributive justice perceptions within the conflict processing of the family.

*Fourth*, the complementary mode of retributive and restorative justice reflects a full circle of addressing norms that were breached within a community. This circle entails vindication, exclusion, remorse, reconciliation, and an internalization of the social norm.

*Fifth*, each paradigm of justice carries its own ideology and varies across many characteristics, which can be broadly described as representing western and non-western perceptions.

*Sixth*, an integrative intercultural model of justice will incorporate both retributive and restorative elements and will include doors which can provide a full range of criminal justice perceptions.

*Seventh*, devising a process to sort out criminal conflicts will include consideration of retribution and restoration, combined with public consideration of the symbolic effect of the choice.

This paper will first summarize and then provide a restorative-retributive justice account of *Festen*. Later, the concepts of retributive and restorative justice will be analyzed through cultural lenses, and a mediating formula will be offered to overcome the dichotomy they represent. Finally, cultural analysis and an ADR per-

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<sup>2</sup> Richard Combs & Raymond Durnat, *Rules of The Game*, 36 *FILM* comment 28–32, (2000); Charlotte Garson, *Dogme, mensonges et video numerique*, 22 *CAHIERS DU CINEMA*, (Charles Tesson & Jean Marc Lalame eds., C. Bertonenche, trans. (2003)).

<sup>3</sup> See Michal Alberstein, *Victim-Offender Mediation in The Film Festen: Anatomy of a Community Making Law: Potentials and Limitations*, 22 *MECHKAREI MISHPAT* 81 (2005) (on the singularity and particularity of a film scene to provide a micro-cosmos of human behavior).

spective will be offered as a theoretical foundation for incorporating restorative justice methods into the criminal justice system.

## II. *FESTEN* - A MODERN FAMILY CIRCLE AT WORK

*Festen* was produced by one of the founders of the “Dogma 95” group, who follow strict rules of directing called “the vow of chastity.”<sup>4</sup> In *Festen*, patriarch Helge Klindingfelt is celebrating his sixtieth birthday with his family at his magnificent old hotel in the Danish countryside. Gathered together are his loyal wife Elsa, his daughter Helene, and his sons Christian and Michael. Missing from the roster of attendees is Christian’s twin sister, Linda, who recently committed suicide. The reason for her action, and the repercussions from it, form the basis of the shocking and painful events that transpire during the weekend that is the focus of the film. In the midst of dinner, Christian makes a startling accusation, describing how he and his twin sister Linda were abused by their father. The rest of the film depicts the conflicting narratives and accusations within the family, unfolding until a surprising letter from the dead sister is revealed and the truth unfolds. Linda’s letter confirms Christian’s accusations by announcing that the abuse motivated her suicide. From this moment, a series of transforma-

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<sup>4</sup> “The vow of chastity” includes the following rules:

I swear to submit to the following set of rules drawn up and confirmed by DOGMA 95: 1. Shooting must be done on location. Props and sets must not be brought in (if a particular prop is necessary for the story, a location must be chosen where this prop is to be found); 2. The sound must never be produced apart from the images or vice versa. (Music must not be used unless it occurs where the scene is being shot); 3. The camera must be hand-held. Any movement or immobility attainable in the hand is permitted. (The film must not take place where the camera is standing; shooting must take place where the film takes place); 4. The film must be in colour. Special lighting is not acceptable. (If there is too little light for exposure the scene must be cut or a single lamp be attached to the camera); 5. Optical work and filters are forbidden; 6. The film must not contain superficial action (Murders, weapons, etc. must not occur.); 7. Temporal and geographical alienation are forbidden (That is to say that the film takes place here and now.); 8. Genre movies are not acceptable; 9. The film format must be Academy 35 mm; 10. The director must not be credited; Furthermore I swear as a director to refrain from personal taste! I am no longer an artist. I swear to refrain from creating a “work”, as I regard the instant as more important than the whole. My supreme goal is to force the truth out of my characters and settings. I swear to do so by all the means available and at the cost of any good taste and any aesthetic considerations.

MartWeiss.com/Film, <http://www.martweiss.com/film/dogma95-thevow.shtml> (last visited Dec. 24, 2006).

tions occurs and a sort of mediation takes place, during which closure is reached. First, the workers refuse to pour wine for the guests and defy the authority of Helge. Second, Michael Helge's son, looks for him at night and beats him very violently until he is stopped by the other members of the family. Third, during the concluding breakfast Helge gives a defeat speech, flattering Christian for his insistence. Finally, there is a sort of ex-communication where Michael expels Helge from the family table and asks him not to come back, and forbids Helge to see his grandchildren anymore.

The film portrays a direct encounter between victim and offender, far removed from the familiar criminal justice system. This encounter carries a healing promise, a salvation, but at some moments looks dangerous and chaotic. The revealed family secret transforms the relationship between Helge and his family, and a family "trial" combined with the restorative justice process concludes the weekend celebration. As reflected in the film, the relation between restorative justice and traditional trial is unique and complex. On the one hand, the process seems adversarial and alienated: no "formal" mediation process is handled, no real dialogue is reached, and the conflict is resolved using hard facts from Linda's letter, instead of by genuine agreement. On the other hand, a "circle" of family members is formed, direct accusations are brought up, and most of the participants reach empowerment during this unique "celebration." An underlying thread for both "readings" of the film – the retributive and the restorative – is the informal complex interaction between the characters in the conflict, which makes the process they are going through open for various interpretations from different theoretical lenses.

The comparison between a criminal trial and a restorative justice process vis-a-vis what happens in the film, calls for a few observations. First, direct encounters between victims and offenders are presented in the film as having a genuine potential for the healing and empowerment of victims. Besides that, the operation within the intimacy of the family circle contributes to a more effective internalization of the social norm. The victim's acceptance by his own family, and the exclusion of the offender after the collapse of the old patriarchal regime, has a positive effect on the resolution process and contributes to the healing of Christian. At the end of the film, he seems truly relieved, and even considers inviting a partner to live with him in Paris.

If this conflict were to be treated through an official complaint, followed by witnesses, evidence, and monitored by strict

procedural rules, there are fewer chances that these positive effects could have been reached. The charges would probably have been denied, the atmosphere would have become tense, the family would have taken sides, and no internalization would have occurred. The formal legal system could not provide the same effects as the direct dynamic. On the other hand, there are elements in the film that correspond to a family trial. Christian “submits” a clear and detailed charge of abuse; the parents and other family members present a defense of “nothing happened,” or “a case of mental instability and delusions of the complainant,” and so forth. The evidence-based transformation in the film, which we see in the exposure of Linda’s letter, “proves” Christian’s accusation, playing the role that strong evidence in a criminal court would play. Thus, it can be claimed that the film illustrates the complementary character of restorative and retributive justice in transforming human relationships.<sup>5</sup> It demonstrates the intersection of adjudication and mediation into a complex process in which consensual interactions include judgment and reconciliation.

The prevalence of mediation to adjudication<sup>6</sup> in the film, in terms of the process it portrays, illustrates the need to reverse the order between alternatives and mainstream adjudicative processes in dealing with criminal cases, and to search for “holistic justice,” which incorporates retributive, restorative, and other values into the criminal process.<sup>7</sup> The symbolic acts of vindication, exclusion, revenge and admittance are an essential part of the transformation

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<sup>5</sup> See Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systematic look at the Legal Issues in Restorative Justice*, 53 *DRAKE L. REV.* 667 (2005) (discussing the relation of law and restorative justice and the complementary character of them).

<sup>6</sup> See Frank E. A. Sander & Lukasz Rozdeiczner, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 *HARV. NEGOT. L. REV.* 1 (2006) (illustrating the prevalence of mediation among other ADR processes and an argument for “presumptive mediation”); John BRAITHWAITE, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 *UCLA L. REV.* 1727 (1999) (for an account of restorative justice as the default criminal justice mechanism, and for a suggestion to perceive conventional punishment as marginal).

<sup>7</sup> See John Braithwaite, *The Practice of Restorative Justice: Holism, Justice and Atonement* 2003 *UTAH L. REV.* 389, 392 (illustrating the prevalence of mediation among other ADR processes and an argument for “presumptive mediation”). “[A] fundamental part of restorative justice is a procedural ideal that allows retributivists, utilitarians and others to agree to disagree. The holistic process on offer with restorative justice focuses on the particulars of a given crime rather than simply abstracting the offense into a general category.” *Id.*; see Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 *UTAH L. REV.* 205.

in the film.<sup>8</sup> It is part of the transformation of the family regime, and of the small community of the family making new law. Helge's authority is first defied by the refusal of the servants to obey his command. Christian receives empathy and approval from the family members and Michael provides a sublimated moment "between vengeance and forgiveness"<sup>9</sup> when he attempts revenge by attacking his father. Finally, Helge admits his defeat, apologizes to the family, and is excluded from the family circle.

Although there is no formal mediator in the film, a few people can be considered as facilitating the process. First, there is Christian, who tells his horrifying story, sometimes losing his balance and suffering from post-traumatic syndrome. There is the chef, Kim, Christian's childhood friend, who hides the car keys of all the guests, preventing them from leaving the scene and creating a kind of "mandatory mediation." There is also Helena's (the sister) friend Gbatokai, whose black identity helps to expose the racism and prejudice of the participants. Pia the worker, another of Christian's friends also contributes to the resolution, and even Helena at some points has a facilitative effect. The brother Michael performs as the family executor and finally as the new patriarch, after the expulsion of Helge. The whole drama takes place during a birthday celebration. This conveys the mediation message that routines such as a birthday celebration have healing potential and that they can go on in spite of the big and terrible conflicts, and sometimes even through denial and oblivion of them. The party continues even after the very dramatic transformation during the concluding breakfast. The big speeches are put aside, and the simple interaction of a chat over a coffee concludes the film's plot.

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<sup>8</sup> See Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349 (2005) (describing the retributive aspect within the restorative justice process). Gabbay argues that restorative justice:

does not contradict retribution and utility as theoretical justifications for penal sanctioning [and] restorative practices rehabilitate the basic notions of retribution and deterrence that have been neglected in modern sentencing schemes, that restorative justice contributes new and deeper meaning to those notions and values, and that in doing so restorative justice practices improve and promote society's response to crime.

*Id.*

<sup>9</sup> MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

### III. THE INTERACTION BETWEEN RESTORATIVE AND RETRIBUTIVE JUSTICE

As this analysis of the film suggests, the development of the plot in *Festen* exposes mixed elements of restorative and retributive justice in real life situations, and can be described as a transformation of the family patriarchal regime through the interactions of this small community. It is a process of norm validation, and reinforcement of it by the family community. In the *Handbook of Conflict Resolution*, Morton Deutsch describes the means by which “to support and reestablish the validity of moral rules once they are violated.”<sup>10</sup> He maintains that “[t]hey generally call for one, or a combination of these actions on the part of the violator: full confession, sincere apology, contrition, restitution, self abasement, or self reform. They also may involve various actions by the community addressed to the violator such as humiliation, physical punishment, incarceration, or reeducation.”<sup>11</sup>

Retributive justice, according to Deutsch, does not only focus on the individual, or on the past. It has a reparative role in revalidating and strengthening the moral code, can serve a cathartic function for the community, and may have a deterrent effect.<sup>12</sup>

When we look at the criminal justice system through restorative and retributive justice, we can see how there is a mixture of vindication, rights-based decision making, sublimated retribution, reparation and rehabilitation. Each criminal justice procedure provides its own mixture of the essential elements needed to reestablish the validity of the norm.

Each lens juxtaposes some elements as primary and some as marginal and hidden. The oscillation between the paradigms has an historical dimension and reflects evolving trends in criminal law theory.<sup>13</sup> The typical criminal justice system emphasizes retribution as its main visible task and promotes rehabilitation and reparation as marginal but still important concerns after conviction and even before the trial times. The liberal-individualistic ideology be-

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<sup>10</sup> MORTON DEUTSCH, *THE HANDBOOK OF CONFLICT RESOLUTION THEORY AND PRACTICE* 48 (Morton Deutsch & Peter Coleman eds., Jossey-Bass 2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 48–49.

<sup>13</sup> See MICHELLE FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan, trans., Penguin 1977) (for a theoretical-historical overview of the development of modern theory of criminal law); John BRAITHWAITE, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME & JUST.* 1, 3–4 (1999) (for a short overview of the history of restorative justice).

hind the conventional modern treatment of criminals portrays the due process and the protection of the rights of the accused as the paramount social goal. Following this preference, much of the emphasis of the criminal justice system, at least in the common law system, is on a battle between the prosecution and the defense on proving the correlative elements of *actus reus* and *mens rea*. The focus on rehabilitation and on the victim's rights is marginal in relation to the verification of the criminal act and to the infliction of pain on the offender, following strict rules of the law.

From the other side, a restorative justice approach maintains a soft rehabilitative approach which puts forgiveness and restitution before vindication and normative statements. It still requires the perpetrator to admit his acts, to accept responsibility for his deeds, and to apologize before the victim – elements which can be interpreted as retributive. The primary concern of the retributive justice approach – to prove the criminal act and the breach of the legal norm – is marginal here and merely a preliminary requisite for entering the essential process of restoration. In fact, the perspective which a restorative justice approach takes is a relational-communitarian view of the situation of crime, a perspective which views the offender and victim as a dyad which should transform during the restorative process. It is not an individualistic perception which assumes the rights of the accused and the institutional regulated treatment of him or her. Instead, it assumes sincerity and openness, which involve free communication and emotional exchange. Within this framework retribution and vindication are only a small part contained by the broad process of the transformation of the crime's conflict. Thus, we can see the reorganization and restructuring of the same elements in different order within the two approaches – restorative and retributive.

#### IV. THE CULTURAL BACKGROUND FOR INTEGRATION

The emergence of restorative justice ideas is related to a resistance to the existing criminal justice system<sup>14</sup> and to an effort to

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<sup>14</sup> See, e.g., ZEHR, *supra* note 1; NILS CHRISTIE, *LIMITS TO PAIN*, 37–52 (1982). See Braithwaite, *supra* note 13, 2–5. The author describes restorative justice as developing through reform programs in the criminal justice system. “If we take restorative justice seriously, it involves a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation, and crime prevention. It also means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy, and community.” *Id.* at 2.

introduce a radical reform that will address crimes in a more human and communal way. As in the case of ADR reforms, some inspiration for the reform was taken from aboriginal communities,<sup>15</sup> and academic references were made to Asian and other non-western legal systems,<sup>16</sup> where principles of ADR and elements of restorative justice are part of the primary institutional administration of justice.<sup>17</sup> Restorative justice was introduced as an alternative approach to crime, the same way mediation, arbitration and other processes were presented as alternatives to the adjudicative system.<sup>18</sup> Can we imagine a stage where restorative justice processes, in an equivalent sequence to ADR procedures,<sup>19</sup> become “appropriate” rather than alternative? My claim here is that in conceptual terms, and through cultural analysis which will be offered here, an integrated system of “appropriate criminal justice” can be imagined. Furthermore, some transformations in our system might already signify incorporation of the new idea into the existing criminal justice system.

The dominance of restorative elements, such as apology,<sup>20</sup> community orientation, and compensation, are usually at the core of the criminal justice systems that are typical of collectivist socie-

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<sup>15</sup> See Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 10–13 (2000) (describing ADR as inspired by tribal communities’ dispute resolution mechanisms. The author describes Laura Nader as “one of the leading legal anthropologists who helped to conceptualize the study of disputes and legal systems as one of the most important constituent elements of a society”). *Id.* Nader has studied the mediational practices of the Zapotec Indians she studied in Talea, Mexico. In her work, “she demonstrated how a closely knit and isolated community drawing on its needs for internal harmony and solidarity created a mediation-like dispute resolution process.” *Id.* at 10.

<sup>16</sup> See Stanley B. Lubman, *New Developments in Law in the People’s Republic of China*, 1 NW. J. INT’L L. & BUS. 122 (1979); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383 (2000).

<sup>17</sup> See Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 869 (1997) (detailing a cultural account of the procedural aspect of the Japanese society).

<sup>18</sup> See STEPHEN B. GOLDBERG, FRANK E.A.SANDER, NANCY H. ROGERS & SARA RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 6–9 (4th ed. 2003) (on the origins of ADR).

<sup>19</sup> See Judith Resnik, *Many doors? Closing doors: Alternative dispute resolution and adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (giving a critical overview of the institutionalization phenomenon).

<sup>20</sup> See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and The United States*, 20 LAW & SOC. REV. 461, 463 (1986) (explaining the role of apology in the Japanese legal system). “[T]he Japanese perspective on promises is based on the *tatemaie* of *wa*, the idea that social life reflects a strong order hierarchically connecting individuals and groups and that the aim of law is to realize the inherent harmony among the parts.” *Id.*; see Peter Hays Gries & Kaiping Peng, *Culture Clash? Apologies East and West*, 11 J. OF CONTEMP. CHINA 173 (2002).

ties. Collectivist societies are usually also defined in intercultural terms such as “high context,”<sup>21</sup> polychronic<sup>22</sup> and feminine,<sup>23</sup> and as having “high power distance.”<sup>24</sup> A society which emphasizes the collective considers honor as a fundamental value, strives to preserve cohesion in any price, and puts less emphasis on rights and formal rules. Such a society will use restorative practice as a routine option, since it serves its basic values and answers its needs. The gathering together and the ceremonial practices of being in the “circle,” for example, go together with a “high context” communication, which puts less emphasis on verbal exchange and emphasizes other aspects of the interaction.<sup>25</sup> It can also go together with a “high power distance” culture in which the elderly or the traditional figure has a role in transforming a conflict situation.<sup>26</sup> Time

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<sup>21</sup> See EVERETT M. ROGERS & THOMAS M. STEINFATT, *INTERCULTURAL COMMUNICATION* 90–95 (1999) (on the distinction between “high context” and “low context” and the definition of both concepts).

A *High Context* culture is one in which the meanings of a communication message are found in the situation and in the relationships of the communicators or are internalized in the communicators’ beliefs, values and norms. The communication context (particularly the relationship with the other individuals in the communication situation) plays an important part in the interpretation of a communication message.

*Id.*

<sup>22</sup> “In polychronic cultures, multiple tasks are handled at the same time, and time is subordinate to interpersonal relations. In monochronic cultures, ‘one thing at a time’ and ‘time is money’ are important concepts - and interpersonal relations are subordinate to the time.” E. T. Hall, <http://intermundo.net/glossary.pl> (last visited Apr. 12, 2007).

<sup>23</sup> The assertive pole has been called ‘masculine’ and the modest, caring pole ‘feminine.’

The women in feminine countries have the same modest, caring values as the men; in the masculine countries they are somewhat assertive and competitive, but not as much as the men, so that these countries show a gap between men’s values and women’s values.

Geert-hofstede.com, <http://www.geert-hofstede.com> (for a basic introduction of cultural differences); see GEERT G. HOFSTEDÉ, *CULTURES CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES* (1980); EDWARD T. HALL, *BEYOND CULTURE* (1976); KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* 63–68 (1998).

<sup>24</sup> See Geert-hofstede.com, <http://www.geert-hofstede.com> (last visited Apr. 11, 2007) (for a definition of the power distance index in multicultural theory).

POWER DISTANCE Index (PDI) that is the extent to which the less powerful members of organizations and institutions (like the family) accept and expect that power is distributed unequally. This represents inequality (more versus less), but defined from below, not from above. It suggests that a society’s level of inequality is endorsed by the followers as much as by the leaders. Power and inequality, of course, are extremely fundamental facts of any society and anybody with some international experience will be aware that ‘all societies are unequal, but some are more unequal than others.

*Id.*

<sup>25</sup> See ROGERS & STEINFATT, *supra* note 21 (defining high context culture).

<sup>26</sup> Paul R. Kimmel, *Culture and Conflict*, in *THE HANDBOOK OF CONFLICT RESOLUTION* (MORTON DEUTSCH et al eds., 2d ed. 2006) 625, 632–633.

can be more fluid, as in polychronic cultures;<sup>27</sup> and the communication can be more relational and soft, as in feminine cultures.<sup>28</sup> Moral norms can be strengthened through dialogue and collaborative work.

In contrast, elements of a retributive justice approach, such as accusation, assignation of rights, and culpability attribution will be more dominant in individualist cultures. The focus on the proof of the criminal act, the assignation of rights, and the governance of rules go together with a low context culture, because a low context culture emphasizes rules and formal expression. Such focuses also correspond with a synchronic perception of time, convey a masculine approach to human interaction and reflect a low context order in which figures with formal roles conduct the process using formal rules. A presumption of innocence protects any common person within this perception. Moral norms according to this view are relevant only if they are framed as formal legal rules, and their public dimension justifies their governance on the assumed alienated individuals in society. Declaring the rule of law and adjudicating cases help to validate the legal norms and to make them clear to the public.

As the above description manifests, using a strict dichotomist matrix to compare cultures according to polar characteristics suggests that western societies will tend to adopt retributive justice mechanisms, and eastern or non-western societies tend to follow restorative justice principles. Still, it is clear that the second half of the 20th century, continuing in an increasing level until our era, signified an intercultural shift, with intensive exchanges between

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<sup>27</sup> See, e.g., Time Management Basics, <http://www.time-management-basics.com/time-management-polychronic-time.shtml> (last visited Apr. 12, 2007):

Polychronic time followers are not comfortable at repetitive tasks that are easy to define within boundaries. They benefit from the personal contact that tasks may produce. Their tasks are perhaps less easy to define and measure. The polychronic person will use plans but is quite happy to be flexible in their approach to achieve the desired goal. They may flit from project to project as the mood takes them gaining inspiration from one project to utilize on the other. Flexibility is a useful trait of the polychronic person.

*Id.*

Applying this description in the context of management of criminal conflict will result in a less formal process, more sensitive to the people, fluid in a sense and having a more holistic goal of transformation than concrete task of verification, vindication and punishment. The process can still reach these goals, as described above in section III but they will be secondary to the transformation and dialogue. See KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* (1998).

<sup>28</sup> See the reference to masculinity and femininity, *supra* note 23.

east and west.<sup>29</sup> Such an exchange, which includes cultural borrowing, imitation, transformation and adaptation, has reached a point at which the dichotomies do not hold any more, and the contemporary human condition is depicted as a multicultural one, in which a multiple identity<sup>30</sup> is the common phenomenon. Such a personality absorbs diverse cultural influences, performs various roles and answers various stereotypes, yet fits into no specific one. Within this cultural mosaic, one can imagine an appropriate criminal justice process that combines restorative and retributive processes. In fact, such integrations can be seen today in contemporary institutions such as problem solving courts, juvenile delinquency courts and other restorative practices within regular courts. Even if some programs don't implement a full notion of restorative justice, or might seem to overemphasize efficiency and managerial values,<sup>31</sup> the integration itself is a manifestation of a unique intercultural exchange between non western and western cultures of criminal justice.

#### V. SORTING OUT CRIMINAL DISPUTES WITHIN THE CRIMINAL JUSTICE SYSTEM

Several inquiries have to be examined to understand how restorative justice practices are implemented in Western criminal justice systems. What parameters can be used to determine the process used within a criminal justice procedure? How should the balance between retributive elements and restorative ones be settled? Designing a comprehensive scheme to sort out criminal conflicts<sup>32</sup> requires tenets of liberalism. At the outset, it can be argued that a restorative process cannot begin while questions regarding

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<sup>29</sup> See STELLA TING-TOOMEY, *COMMUNICATING ACROSS CULTURES* (1999); STELLA TING-TOOMEY AND JOHN G. OETZEL, *MANAGING INTERCULTURAL CONFLICT EFFECTIVELY* (2001).

<sup>30</sup> See JOHN WINSLADE & GERALD MONK, *NARRATIVE MEDIATION* 44–47 (2003).

<sup>31</sup> See Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements*, 39(1) *ISR. L. REV.* 301 (2006) (reviewing *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003)) and critiquing and evaluating of the problem solving courts and their orientation.

<sup>32</sup> The reference to criminal cases as “conflicts” follows the impulse in restorative justice literature to promote a more human private notion of criminal cases, referring to the victim, the offender and the community as the primary subjects of the criminal case. See e.g., Nils Christie, *Conflicts as Property*, 17 *BRIT. J. OF CRIMINOLOGY* 1–26 (Jan. 1977). See Adina Levine, *A Dark State Of Criminal Affairs: ADR Can Restore Justice To The Criminal “Justice” System*, 24 *HAMLINE J. PUB. L. & POL'Y* 369 (2003) (for an offer to insert ADR processes into the criminal

the criminal act such as, whether it occurred, the identity of the offender, the defendant's mental state and other factual questions remain in controversy. Since the contemporary culture of criminal justice has a liberal individualistic inclination, it is reasonable to expect that many criminal conflicts will not reach the restorative phase, since processing them will focus on persecution and denial. In some areas of the criminal justice system the assumption will be reversed, such as in cases of juvenile delinquency, domestic violence, and minor offenses within the community. Such cases naturally will be referred to restorative justice processes, or will be accompanied by therapeutic measures, as a first preference.<sup>33</sup> Their retributive aspects will be processed into a broader comprehensive picture.

In a sense, the need to keep the retributive adversary criminal justice system alive and functioning is equivalent to the interest in preserving an adjudicative channel in civil cases where mediation and other alternative processes are applied on a regular basis.<sup>34</sup> In civil cases, the norm creation function of the litigation system is important for enriching the public sphere with new articulations of the social norms.<sup>35</sup> In criminal cases, the symbolic interest in creating norms and in the expressive dimension of law follows from a public deterrence interest and an emphasis on punishment.<sup>36</sup> These values cannot be promoted through confidential restorative justice processes. Therefore, since there are tradeoffs to using one system over the other, a screening mechanism is necessary to de-

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justice system in order to improve its quality and "justice orientation," especially in terms of social minorities).

<sup>33</sup> See Betsy Clarke, *Juvenile Justice: A New Philosophy of Restorative Justice: The Juvenile Justice Reform Act of 1998*, 13 CBA RECORD 22 (1999) (for an overview of youth delinquency programs of restorative justice); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 21-43 (Bruce J. Winick & David B. Wexler eds., 2003) (for a description of problem solving courts that are designed by using therapeutic measures to address problems such as domestic violence, youth minor offenses and dependency drug cases).

<sup>34</sup> See *supra* note 7 for a discussion on the prevalence of mediation and restorative justice within a holistic system of justice.

<sup>35</sup> See David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L. J. 2619 (1995) (for the importance of the public sphere and the danger of the erosion of it by promoting settlement).

<sup>36</sup> See R.A. DUFF, TRIALS AND PUNISHMENT (1986) (for a discussion of the symbolic dimension and the retributive aspect as the "expressive quality" of law); Jean Hampton, *The Moral Education Theory of Punishment*, 10 PHIL. & PUB. AFF. 209 (1981); Jean Hampton, A NEW THEORY OF RETRIBUTION, IN LIABILITY AND RESPONSIBILITY 397 (R.G. Frey & Christopher W. Morris eds., 1991); Pablo de Greiff, *Democracy and Punishment: Deliberative Democracy and Punishment* 5 BUFF. CRIM. L. R. 373 (2002) (for an attempt to draw connections between a theory of deliberative democracy and an expressionist theory of punishment).

cide whether to submit a case to restorative justice processes. Such a screening mechanism should consider and balance the following parameters.<sup>37</sup>

First, the victim must have a sufficient level of interest in restorative practices. Initial consent for entering restorative practices is essential, but the level of interest and ripeness of the victim also has an effect on the decision to conduct such processes. For example, a very interested victim might obtain therapeutic effects from encountering even a reluctant offender. In contrast, a threatened, suspicious victim might experience fear and not receive the full benefit even in front of a remorseful offender. Imposing a restorative process on a situation which is unripe for mediation might also re-traumatize the victim and make her situation more severe.

Second, the level of interest in restorative practices must be sufficient from the offender's side. A full circle of restoring justice requires, as discussed before, that the offender has begun to internalize the social norm. Such a process includes full confession, sincere apology, contrition, self abasement and requires some readiness for a direct encounter. An offender who has an interest in rehabilitation and who suffers from genuine remorse can contribute to a transformative norm validating process even when the victim is very reluctant.

Third, the level of public interest in the conflict at stake much be recognized. Such a consideration might seem problematic, since it involves some external political measures for addressing the specific conflict, but as a supplement to the other two parameters for sorting out criminal cases, it can provide additional guidance for the screening mechanism. A criminal dispute which has precedential value or expressive potential and attracts broad attention from the public sometimes calls for more formal processing. Though this concern might serve as a legitimate ground for preferring the public system, it does not trump restorative efforts when both victim and offender are ripe and prepared for such an endeavor.

## VI. BACK TO *FESTEN* AND CONCLUSION

With the analysis above in mind, we can return to the example of *Festen* and search for the cultural nuances that underlie the re-

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<sup>37</sup> See Braithwaite, *supra* note 7, at 393–399 (elaborating on the needs to balance the interests of the victim, the offender and the community and for some preliminary guidelines to do so).

storative process in the film. The emphasis on developing arguments through reference to a specific case is part of the particularity which characterizes the restorative justice approach. According to this attitude, “particularized judgments, based on the relevant features of the single case, represent the highest form of justice.”<sup>38</sup>

Starting with the choice of the film’s genre, the Dogma 95 group explicitly adopted an alternative anti-Hollywood approach that emphasizes collective values and group work.<sup>39</sup> Christian’s opening speech follows an established Danish tradition of giving provocative speeches in family reunions. Although Danish society is very modern and westernized, some family practices provide ceremonial frameworks which can go together with the restorative justice paradigm. There are no moments of meditation or prayers, as in some forms of restorative justice,<sup>40</sup> but some closure and direct encounters are enabled through the family celebration ritual. The underlying individualistic orientation of the participants requires the use of public accusation and the semi-trial with low-context declarations of denial, followed by acceptance and repentance; but much of the transformation in the film is done without words. Silence, implicit messages, and body language are important transmitters of the changing environment. Nuanced shifts in the routines of the celebrating family signify fundamental transformations in the family dynamic, and the collapse of the old patriarchy occurs within a high context communication mode.<sup>41</sup> Such a dynamic integrates restorative and retributive justice elements into a process which can later become more defined. Returning to

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<sup>38</sup> CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 135 (1996).

<sup>39</sup> *PURITY AND PROVOCATION: DOGMA 95 1* (Mette Hjort & Scott MacKenzie eds., British Film Inst., 2003).

Not only did the appearance of the Dogma 95 manifesto significantly predate the detailed conception, creation and release of von Trier’s Dogma film, the tract itself spelt out, in detail, the rules that were to be followed if film-makers were to unite, as they were intended to do, around the vision on offer. In the context, then, of Lars von Trier’s contributions to the manifesto genre, Dogma 95 marks a shift from self-reflexive criticism aimed at mediating works to art-house audiences to a form of genuinely collectivist instigation, a shift motivated in part, it would appear, by the director’s changed sense of his desired role.

*Id.* at 1; see Scott MacKenzie, *Manifest Destinies: Dogma 95 and the Future of the Film Manifesto*, in *PURITY AND PROVOCATION: DOGMA 95 52* (Mette Hjort & Scott MacKenzie eds., British Film Institute, 2003).

<sup>40</sup> See Mark S. Umbreit, *Humanistic Mediation: A Transformative Journey of Peacemaking*, 14 *MEDIATION Q.* 201 (1997).

<sup>41</sup> See D.E. Nye, *Denmark and the Danes – A Short Description For Foreign Visitors* (Copenhagen: FUHU, 1992) (providing cultural analysis of the Danish society).

Deutsch's requirement of strengthening the norm by going through a series of activities which restore justice, we see that confession, apology, contrition and self abasement have begun to take place, and more such activities might appear in later stages. In terms of the classification system suggested for criminal cases, it is clear that *Festen* does not meet even the preliminary requirement of indisputable facts and acknowledgement of the wrong.<sup>42</sup> The borders between a family trial and a mediation are defused in the film. Still, we can see here how a determined victim who is very interested in transforming the situation of crime can promote a restorative process in which part of the progression is sorting out the facts behind the traumatic event. In that sense, this example is again an exception which still falls within the rule, but can never be fully generalized due to its singular character.

Coming back to the seven arguments suggested in the introduction, this paper concludes with the following observations: *First*, there is value in analyzing a singular event depicted in a film for understanding restorative justice; *Second*, the alternative film-making style of *Dogma* goes together with the emphasis of restorative justice practices on alternatives and on community; *Third*, in real life situations the demarcation between mediation and trial is sometimes unclear; *Fourth*, restorative and retributive justice have complementary roles in restoring order and respect for social norms; *Fifth*, there are diverse cultural backgrounds of each paradigm of justice, and their ideas move between east and west; *Sixth*, our multicultural era requires an integrative multicultural model of criminal justice which combines retributive and restorative elements; *Seventh*, such a model should incorporate considerations of victim's and perpetrator's ripeness and public deterrence. When applying this model, and when using restorative justice processes in general, film-making can encourage a particularistic and humanist approach to crime. Such an approach does not presuppose full knowledge and prosecution of the case at stake, and instead preserves some horizon of hope and imagination, each of which have their unique role in transforming situations of crime in unexpected ways.

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<sup>42</sup> See discussion, *supra* section II.