

Restorative Justice: Sketching a New Legal Discourse

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What needs radical reexamination is what it means to punish, what is being punished, why there is punishment, and, finally, how punishment should be carried out. What was conceived in a clear and rational way in the seventeenth century has grown dim with the passage of time. The Enlightenment is not evil incarnate, ~~just~~ from it; but it isn't the absolute good, either, and certainly not the definitive good.

*Michel Foucault*¹

Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one's anger, the more so when the provocation is extreme. For it is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and for others.

*The Dalai Lama*²

Introduction

As the epigraphs suggest, the aim of this paper is not merely an exploration of the practice of restorative justice, but rather an examination of the radical re-visioning of criminal justice specifically and legal discourse generally which restorative justice gestures toward. Restorative justice imagines, and seeks to bring about, a system of justice which is responsive to the vicissitudes and dynamism that characterize individual experiences of crime. In order to do this, it re-imagines what the priorities of a system of criminal justice should be by enacting an inversion of the priorities of traditional legal discourse. Whereas the traditional Western legal discourses of justice theory and utilitarianism, or efficiency, emphasize the so-called public needs triggered by crime, restorative justice emphasizes the private needs which go largely unaddressed in the criminal justice system as it exists today.

The result of this inversion of the traditional concern of public over private is that neither of the traditional legal discourses can descriptively or normatively account for a restorative justice paradigm. In other words, restorative justice cannot be adequately explained using the vocabulary of either justice theory or utilitarianism/efficiency theory. Since both these traditional theories make universal claims and tend toward totalizing theories of human behavior and justice, the fact that the dynamism of restorative justice is not fully exhausted by the vocabulary of either discourse indicates that perhaps the two traditional discourses have some common underlying tenet with which restorative justice is incompatible. My suggestion in this paper is that restorative justice does not embrace

¹ Michel Foucault, *Interview with Actes*, in *Power* 394, 398-99 (James D. Faubion ed., Robert Hurley trans., The New Press 2000).

² John Braithwaite, *Restorative Justice & Responsive Regulation* 3 (Oxford University Press 2002).

the traditional Enlightenment notion that a universal and transcendent rationality or Reason frames and inflects the formation of individual subjects. Instead, restorative justice embraces an understanding of subject formation which is akin to, or at least parallel with, Michel Foucault's notion of subjectivation; that is, restorative justice emphasizes the historical, social, institutional, cultural, and ultimately constructed and constructive nature of the individual subject as opposed to the universal and transcendent subject of traditional legal discourse, which is itself one of the historical legacies of the Enlightenment. This kinship between restorative justice and Foucault's philosophy, and the shift from Reason to 'conditions of possibility' which it entails, suggests the emergence of a new type of legal discourse, one that is less rigid in its formalism and more agile in its application, a legal discourse which can account for and respond to the lived needs and experiences of human beings, and a legal discourse which, unlike the traditional discourses, does not demand that all other truths be subsumed or ignored, but instead recognizes the value of alternatives and embraces multiplicity. This is, admittedly, a monumental task which I have set before myself, one which I cannot hope to fully realize within the confines of this article, but as the title indicates, the pages that follow are mere sketches, provisional pencil marks on a blank page, a work in progress; taken as such, it is my hope that I have at least made visible the contours of an alternative legal discourse, one which is, by its very premises, vital and evolutive in nature.

I. Restorative Justice

Many writers locate the origins of restorative justice in the criminal justice practices of indigenous peoples around the world and pre-modern societies in Africa, the Middle East, and Asia, practices which were, and in some cases still are, embedded in religious and spiritual traditions.³ The modern restorative justice movement developed out of victim-offender mediation programs begun in Mennonite communities in Canada and the U.S. during the 1970s.⁴ Beginning as a means of dealing with relatively minor property crimes, especially those involving juveniles, many restorative justice programs have expanded to include more serious crimes such as rape, assault, and murder.⁵ The

³ *Id.*; Michael L. Hadley, *The Spiritual Roots of Restorative Justice* 1-25 (SUNY Press 2001). Of course, writers on restorative justice do not romanticize the restorative practices of the past, and recognize that most pre-modern societies "sustained side-by-side restorative traditions and retributive traditions that were in many ways more brutal than modern retributivism." Braithwaite, *supra* n. 2, at 5. The goal for restorativists is to reactivate and perhaps re-imagine these restorative traditions in a way that could augment, and in certain circumstances replace, our modern criminal justice practices which are dominated by retributivism and punishment.

⁴ Howard Zehr, *The Little Book of Restorative Justice* 11 (Good Books 2002).

⁵ *Id.* at 4. There are, of course, concerns about the use of restorative justice in the context of crimes such as rape and domestic violence because the meeting between victim and offender which is typical of restorative processes can lead to re-victimization or encounters which are severely power imbalanced. *see* Braithwaite, *supra* n. 2, at 152; Zehr, *supra* n. 4, at 38-39.

1990s saw enormous growth in restorative justice programs throughout the world.⁶ Much of this growth was embodied in small victim-offender mediation programs, but systemic adoption of restorative justice practices has also occurred in many U.S. states, Europe, and other regions.⁷ In short, over the last 30 years or so, restorative justice has developed into a viable tool in the practice of criminal law.

It is impossible to articulate a definition of restorative justice that would satisfy all practitioners and theorists.⁸ This is due, at least in part, to the evolutive nature of restorative justice itself; it is more a process than a form and practitioners value adaptation over formal consistency.⁹ The following working definition has been offered: “Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”¹⁰ This definition captures the practice of restorative justice, but before exploring the practice of restorative justice, it would be useful to set out some of the core ideas of restorative justice and explain who or what is being restored in a restorative model.

Restorative justice practice has led theory in many ways and the goals and values of restorative justice are not universal, in the sense that restorative justice is practiced differently in different places, but there are some fundamental commonalities which can be found across restorative practices.¹¹ Perhaps the concept which is most central to understanding restorative justice is the difference between the way restorativists view the social significance of crime and the role of criminal law, on one hand, and the way the traditional legal discourses of efficiency theory and justice theory view criminal law and crime, on the other. I will explore crime and criminal law from all three perspectives below, comparing and contrasting as I progress. While there are some ways in which restorative justice is compatible with both efficiency theory and justice theory, or at least can be made to appear compatible, at base restorative justice signifies a radically different approach to criminal law in particular, and perhaps legal discourse more generally.

Restorativists begin from the premise that crime is fundamentally “a violation of people and interpersonal relationships.”¹² Restorativists often oppose this notion of crime to an understanding of crime as an offence against the state, a view they attribute to the traditional legal discourses.¹³ This opposition is, on one level, too stark and attributes somewhat too much abstraction to traditional legal discourse. Traditional justice theory does not merely treat crime as an offence against the ‘state’ in some abstracted way, but as “a breach of social order and security that is a nondiscrete harm to every member of

⁶ Braithwaite, *supra* n. 2, at 8-10; Mark S. Umbreit, Betty Vos, Robert B. Coates, and Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 Marq. L. Rev. 251, 259-263 (2005).

⁷ Braithwaite, *supra* n. 2, at 8-10; Umbreit, *supra* n. 6, at 259-263.

⁸ Braithwaite, *supra* n. 2, at 11.

⁹ *see* Braithwaite, *supra* n. 2, at 15; Zehr, *supra* n. 4, at 62-3.

¹⁰ Braithwaite, *supra* n. 2, at 11

¹¹ *Id.* at 15-16; Zehr, *supra* n. 4, at 44-57

¹² Zehr, *supra* n. 4, at 19.

¹³ *Id.* at 21.

the community.”¹⁴ Clearly, this is not incongruous with the restorativist understanding of crime as violative of people and interpersonal relationships. However, the distinction being made by writers on restorative justice when speaking of the ‘state as victim’ is somewhat more subtle, and strikes at the heart of what restorative justice is attempting to do differently, namely, redefine the priorities of the criminal justice system with regard to crime and, more importantly, punishment.

Whereas traditional legal discourse tends to emphasize the public aspect of crime over the private, restorative justice emphasizes the private dimensions of crime over the public.¹⁵ This is an inversion of the way both traditional justice theory and utilitarianism speak about crime, but it is an inversion with a difference. Traditional legal discourse tends to all but erase the *private* dimensions of crime and relegates remedies for those private dimensions to civil actions. Restorative justice, on the other hand, while inverting the traditional order of concern, works hard to acknowledge the *public* dimensions of crime, though it significantly narrows the definition of public and radically redefines what the needs of the public are. In essence, restorative justice broadens the private to include the public, at least to the degree that members of the public are *directly* affected by a specific crime.¹⁶ Paul McCold does a good job of explaining the way in which restorative justice essentially divides the public dimensions of crime into two categories: *micro-communities* and *macro-communities*.¹⁷

Micro-communities are made up of individuals who might be called *secondary victims*, those who “suffer because they have a personal relationship of responsibility with a victim or offender, including family members of offenders and victims, especially

¹⁴ Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 San Diego L. Rev. 1425, 1432 (2003).

¹⁵ Howard Zehr, *Changing Lenses* 182 (Herald Press 1995). Restorative justice’s tendency to define crime as lying on a continuum with other harms and conflicts which our legal system would normally classify as private (*Id.* at 183-186) raises the question of whether restorativists would desire to get rid of the public/private distinction altogether. Zvi D. Gabbay says that restorative justice differs from a restitution approach precisely on this point; the restitution approach calls for “the abolishment of criminal law as a separate body of law.” Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. Disp. Resol. 349, 358 (2005). He goes on to say that rather than “focusing almost solely on the offender and the public dimension and neglecting to address the private dimension of the victim, the restorative justice theory advocates a better balance between the two.” *Id.* Zehr talks about crime as being a ‘legal construct’, but doesn’t directly address whether the public/private distinction should be entirely discarded. Zehr, *supra*, at 183.

¹⁶ see Paul McCold, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 *Contemporary Justice Review* 357, 364-65 (2000).

¹⁷ *Id.* at 365. It should be emphasized that while McCold’s model is useful for understanding the broad strokes of how restorativists speak about community, not all restorativists speak about *micro* and *macro-communities*. So I use it with the understanding that it does not exhaust the restorative justice notion of ‘community’, but instead supplies a starting point and a vocabulary for speaking about a restorative justice approach.

their parents and/or spouses.”¹⁸ Micro-communities also include *communities of support*, those who “have an ongoing relationship of concern for a victim or offender, and are only indirectly emotionally connected to the specific offense.”¹⁹ These *micro-communities* are considered *primary stakeholders* in any given criminal event because the crime has directly affected these individuals.²⁰

Macro-communities include “local residents who are not personally connected to victims or offenders, and the local government which represents them. They may experience a sense of vicarious victimization, but their injury is abstract or unrelated to the specific offense in question.”²¹ *Macro-communities* also include society and government, “the totality of society and the agents of government responsible for justice policy, including state and federal authorities.”²² These *macro-communities* are considered *secondary stakeholders* in any specific offence because the crime has only indirectly affected these individuals and restorativists understand their needs to be much more attenuated than those of the primary stakeholders.²³

By dividing the public nature of crime into the categories of primary and secondary stakeholders, restorativists are attempting to counterbalance the way in which traditional criminal justice deals with crime at a remove from those who have been directly affected by a specific criminal act.²⁴ Furthermore, restorativists argue that because of this abstraction, traditional legal discourse misperceives the actual needs of

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 364.

²¹ *Id.* at 365.

²² *Id.*

²³ *Id.*

²⁴ Zehr, *supra* at n. 15, 184. There is another distinction going on here as well. Restorativists see traditional legal discourse as stealing the conflict from the victim and the offender not solely in order to ‘put things right’, but also to re-establish obedience and sovereignty. McCold, *supra* n. 16, at 381. This second distinction is somewhat more nuanced and a thorough examination exceeds the scope of this paper. However, what McCold seems to be pointing to is a notion that criminal justice is aimed not at righting the wrong as much as legitimizing and re-inscribing the usefulness of the criminal justice system, specifically, and government itself, more generally. *see Id.* This understanding of criminal justice as a reassertion of state power whether one accepts it or not, at least provisionally explains restorativists’ insistence that the state, as an institution and not as ‘society’, is substituting itself for the victim in traditional legal discourse. The “obedience paradigm” of justice, as it is referred to, seems to bear some resemblance to what Foucault identifies as discourses of ‘discipline’ which emerge during the eighteenth century and are intimately connected with utilitarianism and the birth of the modern prison. In Foucault’s words, the “historical moment of the disciplines was the moment when an art of the human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely.” Michel Foucault, *Discipline and Punish: The Birth of the Prison* 137-38 (Alan Sheridan Trans., Vintage Books 1995).

both victims and community, or, rather, traditional legal discourse attributes to victims and communities a need for retribution which is inflated and not supported by empirical studies.²⁵ Writers on restorative justice acknowledge that retributive emotions and feelings of revenge are natural and do not deny that these are part of the initial reaction to a crime.²⁶ However, the restorative model operates from the premise that “the closer people are to the situation, the less punitive they tend to be – personalized justice tends to be more restorative.”²⁷ The process by which restorative justice proceeds will be explored more thoroughly below. For now it is enough to understand that under a restorative model “justice is done when the needs of the *primary stakeholders* are met to the extent possible.”²⁸ And, finally, restorativists contend that “doing justice in this way sufficiently meets the needs of the wider society for crime control.”²⁹

On a very basic level, restorative justice seeks to restore that which has been upended, disrupted, and violated by the criminal act; namely, the life of the victim and, ultimately, the life of the community itself, a community which includes the offender.³⁰

²⁵ McCold, *supra* n. 16, at 361; Heather Strang and Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 Utah L. Rev. 15, 18 (2003). Surveys cited by Strang suggest that a substantial percentage of victims are much less retributive than is presumed. Strang, *supra* n. 25, at 18. There is some support for the notion that communities are in favor of “more retribution on victims’ behalf.” *Id.* However, Strang points out that surveys which point to the public’s “high level of dissatisfaction” with the criminal justice system have not clearly linked this dissatisfaction to perceived leniency. “Rather, dissatisfaction may be just as likely to result from a lack of effective options for preventing repeat offending.” *Id.*

²⁶ Braithwaite, *supra* n. 2, at 16. Braithwaite argues, however, that although retributive emotions are natural and “easy to understand from a biological point of view retribution is in the same category as greed or gluttony; biologically they once helped us to flourish, but today they are corrosive of human health and relationships.”

²⁷ McCold, *supra* n. 16, at 361 (internal citations omitted). Restorativists also point to surveys of public attitudes toward crime which point to broad acceptance of the notion of less punitive and more restorative measures. *Id.* at 381.

²⁸ *Id.* at 372 (emphasis added).

²⁹ *Id.* (internal quotations omitted).

³⁰ “Community” is, of course, not a precise term and can connote exclusionary practices as well as inclusive ones. In his essay *From Community to Dominion: In Search of Social Values for Restorative Justice*, Lode Walgrave suggests that restorative justice must distance itself from the concept of ‘community.’ Instead, restorativists should focus on incorporating the socio-ethical attitudes which communitarianism embraces (“respect, solidarity, and taking responsibility”) into a legal framework which could balance the exclusionary tendencies of the concept of ‘community.’ Walgrave appeals to the republican theory of criminal justice put forth by Braithwaite and Petit and offers the concept of ‘dominion,’ defined as “the assurance of rights and freedoms,” as an alternative to the concept of ‘community.’ Unlike some traditional articulations of the concept of ‘freedom as non-interference’ where ‘the other’ is a rival, republican theory conceives of ‘the other’ as an ally in trying to extend and mutually assure dominion as a collective good. Thus, public intervention when a crime occurs is “not needed primarily

Restorative justice, therefore, begins with a concern for the ‘needs’ of victims, offenders, and the community.³¹ According to restorativists, a crime triggers unique needs in each of these ‘stakeholders,’ all of which are inadequately addressed in the traditional justice system.³²

The traditional justice system, at least in its modern incarnation, tends to remove the victim from the criminal process.³³ Victims are given no role in the criminal justice system except perhaps that of witness. Instead, the dispute is handed over to a professional prosecutor who determines the course of the trial, what punishment is to be sought, what information the victim receives regarding the progress of the trial, and whether or not the victim will have an opportunity to act as a witness.³⁴ The sense of disempowerment the victim suffered at the hands of the offender is reified in the criminal justice process, and in the end, restorativists argue, the traditional justice system often leaves victims feeling re-victimized.³⁵

In contrast, the needs of victims are at the center of restorative justice practices. According to restorativists, the victim is the most directly affected party to the crime, and therefore the victim deserves a central role in determining what will be required to put right the wrong.³⁶ In order for the reparations of offenders to ‘mean’ anything, victims must be actively involved in determining what offenders must do in order to put things right.³⁷ Furthermore, restorativists contend that the victim needs to play a central role in

to put right the balance of benefits and burdens, nor to re-confirm morality.” Rather, intervention communicates to victims and the public that ‘dominion’ is taken seriously. It is, in other words, a social restoration. Lode Walgrave, *From Community to Dominion: In Search of Social Values for Restorative Justice*, in *Restorative Justice: Theoretical Foundations* 71, 71-89 (Elmar G.M. Weitekamp and Hans-Jurgen Kerner, eds., Willan Publishing 2002).

³¹ Zehr, *supra* n. 4, at 13, 14-17.

³² *Id.* at 14-17, 22-24.

³³ *Id.* at 14. It is worth noting that this was not always the case. As late as 1889, in the state of Wisconsin, victims could bring a criminal action against an offender and prosecute that action on behalf of the state using a privately retained attorney. Zigurds L. Zile *Vosburg v. Putney: A Centennial Story*, 1992 WILR 877, 895-901 (1992). The procedure was still very much adversarial, so this type of victim involvement is certainly not what restorativists have in mind. However, it does indicate that there is precedent in our traditional justice system for much more victim involvement in the criminal justice process.

³⁴ Zehr, *supra* n. 15, at 30-32; Gabbay, *supra* n. 15, at 351-352. Some jurisdictions have sought to give victims a voice in the process by allowing victim impact statements to be entered into the record before sentencing. However, for restorativists this is too little too late; judges are usually not required to take victim impact statements into account in sentencing, and there is much evidence that indicates these victim impact statements have little impact on victims’ satisfaction with the process or the outcome. Strang, *supra* n. 25, at 21-22.

³⁵ Gabbay, *supra* n. 15, at 360 n. 35.

³⁶ *see* Zehr, *supra* n. 15, at 30.

³⁷ Zehr, *supra* n. 4, at 65-66.

the process in order to move forward with her healing, and that being able to exercise some power in a situation which has left her powerless helps her to regain a “sense of self” which was, if not destroyed, at least disrupted by the crime.³⁸ On a general level, restorativists identify victims as needing the following from the criminal justice process: information (regarding the progress of their case), truth-telling (or, an opportunity to tell their story), empowerment, restitution or vindication (both material and symbolic or emotional), and a sense that they have been treated fairly and with respect.³⁹ Of course, in practice, restorativists do not presume to know what victims need; rather, the needs of victims are identified by the victims themselves within the context of the restorative justice process, which will be explored in more detail below.

One could argue that a traditional civil action can serve the restorative function of giving the victim the opportunity to have some say in what must be done to right the wrong. However, restorativists contend that civil actions are not equipped to provide the type of restoration victims seek. For example, Strang cites victims as saying that “emotional harm is healed, as opposed to compensated for, only by an act of emotional repair. The evidence suggests that victims see emotional reconciliation to be far more important than material or financial reparation.”⁴⁰ There is no existing mechanism in civil suits for addressing emotional harm in this very human, interactive manner; instead, civil suits reduce all decisions to the absence or presence of liability and the calculation of damages. A number of victims also indicate that the power to exercise mercy is a critical step toward emotional healing.⁴¹ Civil actions, as presently constituted, are ill-suited for the exercise of mercy. While a victim may exercise a form of mercy by settling, dropping the action, or not bringing suit altogether, the inevitable presence of lawyers and the inherent adversarial nature of traditional civil proceedings (including settlement negotiations) cannot, in present form, accommodate the types of exchanges necessary for a victim to experience a genuine emotional connection with the offender such that the victim finds comfort in the act of forgiveness or mercy. Rather, for an act of mercy to have any genuine meaning for both victim and offender, that mercy must be exercised in a forum conducive to interpersonal exchange, such as the victim-offender encounters which are the mainstay of restorative practice. This is not to say that civil procedures cannot be designed that would accommodate some of these victim needs, but those procedures would look a lot different than the adversarial model utilized today, and would likely have to incorporate much of the practices which restorativists advocate should be part of the criminal justice process.

In addition to excluding the victim from the justice process, the traditional criminal justice model also enacts an exclusion of the offender. The offender is positioned outside society, as in *People v. Offender*, and has every incentive to reject the concerns of society for those of his own self-interest. However, despite the obvious regard for self embedded in the adversarial model, the offender is often as uninvolved in his trial as the victim.⁴² Unless the offender chooses to be tried *pro se*, his case is taken

³⁸ Zehr, *supra* n. 15, at 25.

³⁹ Zehr, *supra* n. 4, at 14-17; Strang, *supra* n. 25, at 20-25.

⁴⁰ Strang, *supra* n. 25, at 22.

⁴¹ *Id.* at 28-29.

⁴² Zehr, *supra* n. 15, at 33.

over by a professional defense attorney and resolved through the dialogue, negotiations, and argument of legal professionals, a process in which he is only involved to the degree his attorney feels he should be.⁴³ Furthermore, throughout the procedure, the offender is discouraged from taking responsibility for the act and is instead encouraged to engage in exculpatory strategies.⁴⁴ This means that the “stereotypes and rationalizations that offenders often use to distance themselves from the people they hurt . . . are never challenged.”⁴⁵ The result of this rationalizing behavior and the limited engagement of the offender in his own trial is that he is distanced from the meaning of the procedures.⁴⁶ Neither the trial nor the imposition of punishment take on significant meaning for the offender because it seems not even to involve him.⁴⁷

In addition to these procedural concerns, restorativists point to the utter failure of the criminal justice system with regard to reintegrating offenders into society.⁴⁸ In prison, offenders are cut off from their families and other communities of care, and thrown into an environment where violence is the primary means of conflict resolution. Prisons are notoriously, and understandably, incapable of transforming offenders into responsible citizens. The alliances formed and the skills developed in prison generally serve offenders only if they are to return to a life of crime. This is borne out by the recidivism rates which indicate that 67.5% of prisoners who are released will be rearrested within three years, and 51.8% will be reincarcerated.⁴⁹

In a restorative justice model, the primary need/obligation of offenders is to “put right” the wrong they have committed.⁵⁰ Restorativists argue that, under the traditional justice model, offenders are “discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways.”⁵¹ Of course,

⁴³ *Id.*, at 33-34; Daniel Van Ness, *The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System*, in *Restorative Justice: Theoretical Foundations* 1, 5 (Elmar G.M. Weitekamp and Hans-Jurgen Kerner, eds., Willan Publishing 2002). Clearly the rules of professional responsibility and the law preclude an attorney from acting against his client’s wishes, so the defendant has a legal right to be involved in her representation, but for all practical purposes a defendant does not participate in her own defense except to the extent her attorney feels it is necessary or advisable.

⁴⁴ Zehr, *supra* n. 15, at 73. Clearly there are very important reasons for these strategies, and no restorativist would advocate that an innocent person accused of a crime should be forced to accept responsibility for that crime, in a court of law or any other forum. Restorativists are especially focused on those cases where the offender’s guilt is not in question.

⁴⁵ Zehr, *supra* n. 4, at 16.

⁴⁶ Gabbay, *supra* n. 15, at 368.

⁴⁷ Zehr, *supra* n. 15, at 33; Gabbay, *supra* n. 15, at 368.

⁴⁸ Zehr, *supra* n. 15, at 37.

⁴⁹ Patrick A. Langan and David J. Levin, *Recidivism of Prisoners Released in 1994*, in *Bureau of Justice Statistics Special Report* (June 2002), <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

⁵⁰ Zehr, *supra* n. 4, at 20, 28.

⁵¹ *Id.* at 16.

one can argue, as R.A. Duff seems to, that the procedure of the traditional trial is itself an attempt to encourage the defendant to acknowledge the wrong she has committed.⁵² Duff describes the trial as a “rational process of argument in which [the defendant is] invited to participate. Like moral blame, a criminal conviction must justify to the accused the condemnation which it expresses.”⁵³ According to Duff, this ‘rational process’ demonstrates to the convicted criminal that “she ought to accept the verdict.”⁵⁴ This certainly fits with the Kantian notion that, as rationally moral beings, criminals would choose the punishment being inflicted on them were they to reflect properly on the rationale for imposing the punishment.⁵⁵ And like Kant’s musings on the rational offender, Duff’s argument requires similar intellectual contortion. The idea that the give and take of a trial has a persuasive impact on the defendant is, at best, an extremely broad construction of the notion of persuasion. The give and take of a trial bears no resemblance to the type of give and take which would be aimed at persuading an offender of anything; the offender is always on the defensive and firm in her position. The only party that can be persuaded in this type of ‘rational argument’ is the trier of fact.⁵⁶ The restorativists’ legitimate point seems to be that there is an ‘attitude’ or ‘spirit’ embedded in the traditional justice system which creates incentives for even those offenders who are guilty to deny any wrongdoing. Traditional trials likely have little influence on an individual offender’s eventual acknowledgement of wrongdoing, and indeed traditional trials may be at odds with that acknowledgement.

Conversely, acknowledging responsibility for one’s wrongdoing is a cornerstone of the restorative justice model. It often involves apology or other formal acknowledgements of the harm one has caused.⁵⁷ Acknowledging responsibility also signifies very differently than in the traditional justice system: restorative justice involves the offender in the crafting of what will be done to “put things right.” In one sense, restorativists up the ante on Kant’s respect for the rational capacity of the offender by not simply insisting that he *would* agree with his punishment were he to rationally reflect on it, but instead asking him to *actually* reflect on his offense and participate in a discussion regarding what amends can be made. Accountability, under a restorative model, involves not only facing up to what one has done, but taking responsibility for the consequences and being “allowed and encouraged to help decide what will happen to make things right, then to take steps to repair the damage.”⁵⁸ The active involvement of offenders in crafting the restitution required means that ‘punishment’ under a restorative justice model

⁵² R.A. Duff, *Trials and Punishments* 34 (1986).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence* 121 (Rev. Ed., 1990).

⁵⁶ This does, incidentally, highlight the fact that restorative justice practices may not have a role in fact-finding or guilt-determination. *see* Gabbay, *supra* n. 15, at 365 (saying that pleading guilty is the “initial precondition for a restorative process.”)

⁵⁷ Van Ness, *supra* n. 43, at 3-4.

⁵⁸ Zehr, *supra* n. 15, at 42.

takes on significance for offenders which cannot be hoped for in the traditional justice system.⁵⁹

“Putting right” under the restorative justice model also involves attempting to *reintegrate* offenders into the community.⁶⁰ Restorative justice views the moment of punishment as an opportunity for potential transformation in the offender’s life.⁶¹ Ideally, the process of the encounter with the victim begins to chip away at the psychological strategies of distancing and objectification which have allowed the offender to shield himself from the reality of the victim’s experience.⁶² The encounter forces the offender to see the victim as a fellow human being and to contemplate the effect of his actions on the life of a very real person. In addition to the encounter with the victim, the acts of reparation which the offender must undertake have the potential of having a transformative effect on the offender through changed behavior and attention to the causes of old patterns of behavior.⁶³ Restorative justice, at its best, seeks methods of conflict resolution and reparation which have the potential to engage the offender in such a way that he develops a renewed positive sense of himself as a member of the community.⁶⁴ This process may involve what is referred to as ‘reintegrative shaming’: a process by which shaming, coupled with encouragement of the offender’s capacities for “right action,” creates an opportunity for personal transformation on the part of the offender.⁶⁵ This means that a restitution agreement for, say, a youth who committed vandalism might involve traditional community service such as painting over graffitied walls, but may also include a more positive component like volunteering with a community organization that works to beautify the neighborhood through gardening or mural-painting.⁶⁶ These types of activities give the youth an opportunity to develop skills and a different sense of self, to create meaning, to ‘re-story’ himself by placing him in an environment where he will receive positive feedback and enter into nurturing

⁵⁹ Gabbay writes that “one of the most fundamental elements of justice is achieved by giving meaning to the actions taken in response to crime. This meaning must be ‘constructed from the perspectives and experiences of those most affected: victim, offender, and perhaps community members.’” Gabbay, *supra* n. 15, at 367-68 quoting Barb Toews Shenk and Howard Zehr, *Ways of Knowing for a Restorative Worldview*, in *Restorative Justice in Context: International Practice and Directions* 257 (Weitekamp & Kerner eds. 2003).

⁶⁰ Zehr, *supra* n. 4, at 29; Umbreit, 256.

⁶¹ Zehr, *supra* n. 4, at 17; Braithwaite, *supra* n. 2, at 3.

⁶² Zehr, *supra* n. 4, at 16.

⁶³ Zehr, *supra* n. 4, at 59; Van Ness, *supra* n. 43, at 4.

⁶⁴ Zehr, *supra* n. 4, at 17.

⁶⁵ Zehr, *supra* n. 4, at 70 ch. 1 n. 2; Strang, *supra* n. 25, at 25-26; Gabbay, *supra* n. 15, at 385. For more information on the practice of reintegrative shaming see <http://www.aic.gov.au/rjustice/rise/>.

⁶⁶ see Martin Wright and Guy Masters, *Justified Criticism, Misunderstanding, or Important Steps on the Road to Acceptance?*, in *Restorative Justice: Theoretical Foundations* 50, 61 (Elmar G.M. Weitekamp and Hans-Jurgen Kerner, eds., Willan Publishing 2002).

relationships with other community members.⁶⁷ In places where community service projects treat the young offender “decently, develop skills and raise self-esteem,” it is not uncommon for the youth to “continu[e] voluntarily after completing the compulsory hours.”⁶⁸ Finally, restorative justice addresses and acknowledges the more traditional needs of offenders including opportunities for treatment for addictions or other problems, community support and encouragement, and, in some cases, temporary restraint.⁶⁹

Crime triggers needs in the community as well as the victim and offender, and these needs are also addressed very differently in restorative justice than in the traditional model. As has already been discussed, restorativists tend to delineate between *micro* and *macro-communities*.⁷⁰ Again, as mentioned above, this delineation is based on the degree to which members are directly affected by the crime.⁷¹ *Micro-communities* are comprised of those who are closest to the victim and the offender, and *macro-communities* are composed of those who make up the rest of society, both local and national.⁷²

The needs triggered in *micro-communities*, according to McCold, include: a need for an “acknowledgement of the costs,” “opportunities to help/way[s] to be constructive,” “reassurance that [the crime] was not their fault,” to “let others know that they condemn the behavior,” to “reinforce boundaries of acceptable behavior,” and a need to “acknowledge their own injuries.”⁷³ The needs of *micro-communities* are addressed in whatever forum in which the victim and offender meeting takes place.⁷⁴ Typically, the ways in which these needs are satisfied is by giving individuals an opportunity to be heard and a venue in which to confront the offender regarding his behavior and the way it has impacted them.⁷⁵ While it is clear how the needs of the *micro-community*, as articulated by McCold, are better served in this setting than in the traditional justice paradigm, not every model of restorative justice allows for this type of inclusion of the community at the encounter stage of the procedure. For instance, some systems rely

⁶⁷ *see Id.*

⁶⁸ *Id.*

⁶⁹ Zehr, *supra* n. 4, at 17.

⁷⁰ McCold, *supra* n. 16, at 365.

⁷¹ *see* McCold, *supra* n. 16, at 364. (“The injuries, needs, and obligations of the personal ‘microcommunities of care’ of victims and offenders are distinct from those of the wider, indirectly affected community.”)

⁷² *Id.* at 365. The line between *micro* and *macro-communities* is definitely a blurry one, and certainly raises many questions regarding how primary and secondary stakeholders are defined, but the fluid nature of these definitions pre-figures some of the philosophical distinctions I will make between utilitarianism and Kantian justice theory, on the one hand, and restorative justice on the other. Restorative justice practitioners are much less invested in clearly defined boundaries, and much more concerned with the *lived* impacts of crime on victims, offenders, and communities which are arguably much less clear than traditional legal discourse might wish them to be.

⁷³ *Id.* at 369.

⁷⁴ Zehr, *supra* n. 4, at 44-51.

⁷⁵ Zehr, *supra* n. 4, at 50-52.

solely on a victim-offender conference.⁷⁶ Likewise, there are systems, such as family group conferences, which involve victims, offenders, and their families or other significant individuals, but not the more expansive *communities of care* delineated earlier. The restorative justice literature does not speak directly or very often about how the needs of *micro-communities* are better served by restorative justice in these less-inclusive models, though there is an argument to be made that these *communities of care* are better served whenever the victim and offender themselves are better served. McCold characterizes the more inclusive restorative justice practices of peace circles, family group conferences, and community conferencing as being “fully restorative” models, and conversely characterizes victim-offender mediation as being only “mostly restorative.”⁷⁷

As stated before, McCold’s model separates *macro-communities* into two subcategories, the locality/neighborhood/township and state/society, and each of these has distinct needs that are triggered by a crime.⁷⁸ The needs of localities include: “reassurance [that] what happened was wrong,” to “know something is being done about it” and that “steps are being taken to prevent its reoccurrence,” that “offenders will be held accountable,” for the “victim and offender to return to the community,” and a “sense that justice was done.”⁷⁹ McCold argues that many of these needs are met by the mere fact that a restorative gathering of victim, offender, and community takes place.⁸⁰ In other words, in McCold’s view, the knowledge that something is being done about the criminal event goes a long way toward healing the injuries of the members of localities in which a crime has occurred.⁸¹

Unfortunately, when he attempts to explain the needs of the state/society that are triggered by crime, McCold’s distinctions between ‘needs’ and ‘solutions’ seem to blur. For instance, when talking about the injury of ‘disorder’ which a crime causes, McCold characterizes the ‘need’ of the state/society as being “empowered problem solving communities.”⁸² This seeming inability to define and distinguish the needs of macro-communities and communities in general, especially those of the state and society, is not unique to McCold and is symptomatic of the underlying inversion of priorities which

⁷⁶ Zehr, *supra* n. 4, at 47.

⁷⁷ McCold, *supra* n. 16, at 401. Of course, other writers might characterize things differently; what McCold proposes is a ‘mid-range’ theory or ‘purist’ model of restorative justice versus what he calls a maximalist model. The details of this debate are beyond the scope this paper. Suffice to say that the purist model is more holistic in approach, and the maximalist model seeks to augment existing justice practices. Of course, as mentioned in the beginning of this paper, restorative justice theory is always playing catch up with practice; the literature is by and large struggling to shape a vocabulary for what is happening in practice. Therefore, it runs the gamut and there are very few who make the clear distinctions advocated by McCold.

⁷⁸ *Id.* at 365.

⁷⁹ *Id.* at 370.

⁸⁰ *Id.* at 400.

⁸¹ *Id.*

⁸² *Id.* at 371.

restorativists make at the outset, private over public.⁸³ Restorativists maintain a core belief that healing local ruptures is, in the end, the best way to heal the larger societal wounds caused by crime, and that the role of the state is to provide the resources to support those practices which will best heal those ruptures, that is, restorative practices.⁸⁴ The social need for order is best served by a system which actively works to reintegrate offenders into society as stable productive citizens; this reduces recidivism and creates a greater sense of trust in the institutions which administer justice due to the appearance of a fairer system.⁸⁵ Beyond the need to have order re-established, restorative justice theory does not seem to embrace the idea that the state or society at large has other legitimate needs that are triggered by crime. This is one of the core departures which restorative justice makes from both utilitarianism and justice theory, each of which identify very strong macro-level social/moral needs which are triggered by crime. It is not that restorative justice ignores these needs, rather restorativists argue that these needs are met by healing the local ruptures which occur in the lives of the victim, the offender, and the micro-communities of care which surround those individuals; in other words, if the cells of the social body are cared for, the organism will thrive.

Unlike the *needs* of the larger community and society, restorativists clearly articulate the societal and community *obligations* which are triggered by crime. First and foremost, the community has an obligation to support victims of crime and help them meet their needs.⁸⁶ The community is further obliged to support efforts to reintegrate offenders into the community, to take an active role in defining offender obligations

⁸³ For instance, Zehr states that crime triggers a *need* in communities for “encouragement to take on their obligations for the welfare of their members, including victims and offenders, and to foster the conditions that promote healthy communities.” Zehr, *supra* n. 4, at 18. On a linguistic level, this is a conflation of two uses of the word ‘need’. For example, when an individual says, “I need to eat something,” the word *need* expresses the urgent want of the subject of the sentence, *I*. Conversely, when, out of frustration, an individual says, “you *need* to calm down,” she is using the word *need* not to describe the urgent want of the subject of the sentence, *you*, but her own subjective desire. In other words, the use of the word ‘you’ in this sentence eclipses the true subject of the sentence and the true meaning, which is, “*I need you to calm down.*” Likewise, when McCold says that crime triggers a *need* in society for “empowered problem solving communities,” he is not so much expressing the subjective need of society as he is expressing restorativists’ desire for society to empower the micro-communities of which society is comprised. The structure of the sentence eclipses the true subject and meaning, which is, “*Restorativists need society to empower communities to problem solve.*” (This illustration suffers, of course, from the obvious metaphysical question of whether societies can have ‘subjective needs.’ That will have to wait for my next article.)

⁸⁴ *see* Zehr, *supra* n. 4, at 3.

⁸⁵ Gabbay, *supra* n. 15, at 366, 371-372. Admittedly, the recidivism statistics are not unequivocally supportive of the claims restorativists make; there are specific crimes for which restorative justice actually seems to have the opposite effect on recidivism, drunk driving for example. Overall, however, recidivism studies provide fairly strong support for the potential of restorative processes. *Id.* at 366-367.

⁸⁶ Zehr, *supra* n. 4, at 66.

when appropriate (through participation in the encounter), and to offer opportunities for offenders to make amends.⁸⁷ Finally, the community has a responsibility for the “welfare of its members and the social conditions and relationships which promote both crime and community peace.”⁸⁸ This last obligation is not an obligation which arises out of a particular criminal event, *per se*, but one which restorativists see as ongoing; that is, the obligation to support and help create the types of meaningful life opportunities which will engender a sense of belonging in all members of the community and thereby alleviate the feelings of alienation and disempowerment which are the lived social experience of a large percentage of individuals who engage in criminal activity.⁸⁹ This is, obviously, a tall order, but restorativists tend to see their project as one that is not strictly limited to the criminal justice system, but as an attitude or way of exercising power in the world which can lead to larger societal adjustments and embraces a more communitarian understanding of the role of government.⁹⁰

Now that we have a basic understanding of who and what restorative justice seeks to ‘restore’, it is useful to explore how and why restorative justice tries to accomplish this. As mentioned before, restorative justice is practiced differently in different places and a thorough exploration of the various incarnations is beyond the scope of this paper. That said, there are identifiable principles and values which, in a broad sense, inform restorative justice practice and are useful to this discussion.⁹¹ In his essay, *The Shape of Things to Come: a Framework for Thinking about a Restorative Justice System*, Daniel Van Ness identifies three principles and four values which can be used to “assess the restorative character of a system that incorporates restorative as well as other values.”⁹² These same principles and values can be used as a starting point for understanding what restorative justice practice looks like and why. The three principles he lays out are as follows:

- (1) justice requires that we work to restore victims, offenders and communities who have been injured by crime;
- (2) victims, offenders, and communities should have opportunities for active involvement in the restorative justice process as early and as fully as possible;
- (3) in promoting justice, the government is responsible for preserving order and the community for establishing peace.⁹³

These principles are a succinct restatement of our previous discussion of the roles of various stakeholders in a restorative justice system. The four values Van Ness proposes as indicative of restorative justice are *encounter, amends, reintegration, and inclusion*.⁹⁴

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Zehr, *supra* n. 15, at 52-57.

⁹⁰ Walgrave, *supra* n. 30, at 85.

⁹¹ Van Ness, *supra* n. 43, at 2

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Van Ness's thorough exploration of the meaning of these values provides a useful tool for understanding what the components of a restorative system look like.⁹⁵

Encounters involve the bringing together of "the offender, the victim and community members who have also been [directly] touched by the crime, the victim, or the offender."⁹⁶ Van Ness identifies the key elements of these encounters as being *meeting, narrative, emotion, understanding, and agreement*.⁹⁷ *Meeting* usually consists of an actual face-to-face meeting between the stakeholders, although in some cases, such as murder, the meeting would involve a surrogate victim such as a family member.⁹⁸ *Narrative* refers to the process by which the stakeholders talk about "what happened, how it affected them, and how to address the harm."⁹⁹ *Emotion* is central to understanding one way in which restorative justice differs from the traditional justice system.¹⁰⁰ The traditional justice system does not make room for emotional expression; it emphasizes rational argument, which may be informed by emotion or may persuade through underlying appeals to emotion and compassion, but cannot function as a vehicle for the expression of emotional states.¹⁰¹ Restorative justice views the expression and exploration of emotions as key to understanding the effects of the crime and, more importantly, how those effects might be addressed through restitution, reparation, apology, and other forms of amends.¹⁰² The element of *understanding* refers to the ways in which both victims and offenders come to understand the other through the encounter and how each comes to understand the crime and its significance in each of their lives, and, finally, their coming to understand how things can be "put right."¹⁰³ Finally, the element of *agreement* is the hoped-for end result of the encounter; once the stakeholders have been given the opportunity to "explore the personal, material, and moral/spiritual repercussions of the crime, they design an agreement that is specific to their situation and is practical."¹⁰⁴

If *encounters* are restorative justice's most "distinctive restorative process," then *amends* are its most "distinctive outcome."¹⁰⁵ *Amends* refers to the steps which an offender takes to put things right. Van Ness identifies four key elements of offenders'

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* Although Van Ness doesn't discuss this, there are other possible reasons for involving a surrogate in the meeting between offender and victim, especially in situations involving crimes of domestic violence where a meeting holds the potential of reifying the power imbalance of the relationship between the abuser and the abused, thus re-victimizing rather than healing the victim. *see* Braithwaite, *supra* n. 2, at 152; Zehr, *supra* n. 4, at 38-39.

⁹⁹ Van Ness, *supra* n. 43, at 3.

¹⁰⁰ *Id.*

¹⁰¹ *see Id.*

¹⁰² *see Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

amends to their victims: *apology, changed behavior, restitution, and generosity*.¹⁰⁶ Van Ness notes that a genuine *apology* is a “significant way of making amends” because it acknowledges the offender’s wrongdoing and “places the offender in the powerless position of waiting to find out whether the victim will accept the apology.”¹⁰⁷ The next element, that of *changed behavior*, involves not only agreeing not to engage in the harmful behavior again, but also changing behavior on a larger scale such that it becomes less likely that the harmful behavior will occur again. For instance, the types of changed behavior that emerge from an encounter may involve things like going back to school, getting a job, or seeking counseling for addiction.¹⁰⁸ *Restitution* is the most obvious and common way of making amends. It often involves some type of material compensation, whether paying the victim or returning property, but it can also be accomplished by providing in-kind services.¹⁰⁹ Finally, the element of *generosity* often emerges from encounters and refers to offenders agreeing to go beyond a “strictly proportionate response of restitution to something more” which may involve doing free work for an agency of the victim’s choosing, or some other means of imposing more than the minimum reparation on themselves.¹¹⁰

The next value Van Ness focuses on is that of *reintegration*. As mentioned before, because both victims and offenders may be stigmatized by the crime, restorative justice seeks to reintegrate both into their communities as “whole, contributing members.”¹¹¹ The process of reintegration embraces three key elements: *respect, material assistance, and moral/spiritual direction*.¹¹² Van Ness understands *respect* through John Braithwaite’s work on reintegrative shaming which proceeds from the premise that the unwanted alternative to reintegration is stigmatization; stigmatization occurs “when the shame is never lifted.”¹¹³ Braithwaite’s work points to evidence which suggests that “unacknowledged shame contributes to violence,” and that acknowledging shame, by allowing offenders to express genuine remorse, can play a productive role in “encouraging normative behavior.”¹¹⁴ For both Van Ness and Braithwaite, “reintegration means that beyond – and more profound than – any shame the offender feels is a fundamental respect by others for the offender.”¹¹⁵ *Material assistance* refers to actual

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 5

¹¹³ *Id.*

¹¹⁴ Gabbay, *supra* n. 15, at 385.

¹¹⁵ Van Ness, *supra* n. 43, at 5. This notion of fundamental respect for the offender as an individual is one of the ways in which restorative justice is most compatible with Kantian notions of the individual and justice theory. However, what has grown out of that Kantian and Enlightenment tradition is a justice system which emphasizes prison as the punishment norm, a method of penalty which tends to systematically stigmatize offenders. So, to the extent that Kantian notions of equal dignity may be compatible with the fundamental respect for individual offenders that restorative justice embraces, that

assistance to victims and offenders which is needed as a consequence of crime or as a consequence of the traditional criminal justice system, so that restorative practice includes providing material assistance for victims as an aspect of reintegration or following incarceration imposed by a traditional court.¹¹⁶ Finally, *moral/spiritual direction* is a part of reintegration for both victims and offenders. This stems from the notion that crime produces moral and spiritual crises in both the victim and the offender, and that religious communities of care can be central to the process of reintegration.¹¹⁷

Finally, Van Ness identifies *inclusion* as the most important fundamental value of restorative justice. By *inclusion*, he means giving the stakeholders the opportunity to “participate meaningfully in the subsequent justice process.”¹¹⁸ The more inclusive a justice system is, the more restorative that system is. The key elements of inclusion are *invitation*, *acknowledgment of interests*, and *acceptance of alternative approaches*.¹¹⁹ *Invitation* means exactly that, whatever entity is responsible for the process invites the stakeholders to participate in that process. *Acknowledgment of interests* means that the interests of stakeholders (victim, offender, community) are genuinely taken into account and that these stakeholders are substantively involved in the process. Finally, a restorative system is one that is open to the *acceptance of alternative approaches* to criminal justice including forms of encounter such as mediation, conferencing, and circles, as well as alternate forms of amends such as restitution or apology. Van Ness identifies *inclusion* as the most important value and measure of a particular systems restorative nature; the more focused a system is on traditional notions of the state’s and society’s interests, the less inclusive, and thus restorative, that system can be.¹²⁰ According to Van Ness, by focusing on inclusion restorative justice practitioners ensure that “whatever legitimate interests the State may have in the crime, and it does have some, these do not become the only focus of the processes established.”¹²¹

In sum, restorative justice is more of a practice or process than a theory, although an examination of that practice reveals the fundamental values and principles of restorative justice. First, restorative justice views crime as primarily a rupture in interpersonal relationships which requires that the criminal justice system implement a type of inversion of the traditional concern with public needs over private, and embrace a more expansive notion of the ‘private.’ Second, a proper response to crime is one which involves, to a significant extent, the voluntary participation and input of the stakeholders in identifying and crafting a response to the crime. And, finally, that response to the crime is one which seeks to repair the ruptures in social fabric which cause and are caused by crime in such a way that the social fabric is strengthened through society’s

understanding of equal dignity has been de-emphasized in the modern criminal justice and penal system.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 5-6.

¹²⁰ *Id.* at 6.

¹²¹ *Id.* Of course, as mentioned before, restorativists tend to view the interests of the state as minimal, limited primarily to the re-establishment of order. McCold, *supra* n. 16, at 381.

practice of criminal justice. As Braithwaite writes, “[c]rime is an opportunity to prevent greater evils, to confront crime with a grace that transforms human lives to paths of love and giving.”¹²²

II. Restorative Justice v. Utilitarianism, and Law & Economics/Efficiency Theory

The moral theory of utilitarianism advances the notion that “the supreme principle of morality . . . is the principle of utility or ‘greatest happiness,’ which mandates actions that produce the greatest sum of happiness (or pleasure or preference-satisfaction) as added up for the citizenry in the aggregate.”¹²³ In practice, utilitarianism depends upon the ability to make “interpersonal comparisons of utility,” so that one can determine ‘right action’ and establish policies that will promote utility.¹²⁴ Of course, given the subjective quality of ‘happiness’ or ‘satisfaction’, it is very difficult (one could argue impossible), to reliably measure utility and even more difficult to compare utilities. Efficiency theory, the basic theoretical underpinning of law and economics, emerged as a solution to the problem of comparing utilities.¹²⁵

The predominant approach to efficiency theory utilized in legal analysis is Kaldor-Hicks efficiency. This approach essentially states that a social state is Kaldor-Hicks efficient if the winners gain enough that they *could compensate* the losers, even if they don’t.¹²⁶ Efficiency theory’s ability to calculate the ‘utility’ of a particular arrangement relies on the notion that individuals reveal their utilities (their ‘preferences’ or ‘satisfactions’ or ‘happineses’) through their behavior in the marketplace.¹²⁷ If an individual gets a high degree of utility from a particular good or practice, then that individual will reveal this utility in her ‘willingness and ability to pay’ for that good or practice.¹²⁸ Therefore, the aggregate welfare of individuals can be measured by looking to the market, and policies which increase the aggregate wealth or are ‘wealth maximizing’ are the policies which should be pursued because wealth maximization roughly equals ‘utility maximization.’¹²⁹ The policies which will maximize wealth (and utility) are those that are maximally efficient – that is, those policies which, through the operation of the market, allocate resources in the hands of those individuals who ‘value’ them most as measured by their willingness and ability to pay.¹³⁰

Of course, the notion that willingness and ability to pay is a proxy for utility precludes measuring the ‘utility’ of individuals who are impoverished; the conflation of

¹²² Braithwaite, *supra* n. 2, at 3.

¹²³ Richard W. Wright, excerpt from *Justice and Reasonable Care in Negligence Law*, 47 *American Journal of Jurisprudence*. 143, 4 (2002). (citing Bentham).

¹²⁴ *see* Murphy, *supra* n. 51, at 182.

¹²⁵ *Id.*

¹²⁶ *Id.* at 186.

¹²⁷ *see Id.* at 182; Jeffrey L. Harrison, *Law and Economics in a Nutshell* 56 (3d ed., West 2000).

¹²⁸ *see* Harrison, *supra* n. 127, at 37.

¹²⁹ *Id.*

¹³⁰ Murphy, *supra* n. 51, at 37.

‘willingness’ and ‘ability’ means that if policy makers rely on efficiency theory to measure the ‘social good’, the preferences of the poor with regard to certain goods, practices or even rights, such as justice, will rarely be taken into account. At first blush, this may appear to be inconsistent with the original intent of utilitarianism, but a brief look at Mill’s formulation of the function of justice confirms that this approach fits very well with his understanding of the greatest good:

All persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse. And hence all social inequalities which have ceased to be considered expedient, assume the character not of simple inexpediency, but of injustice, and appear so tyrannical, that people are apt to wonder how they ever could have been tolerated¹³¹

As is apparent from this brief quote, injustice for Mill is merely that which has become inexpedient, that is, inefficient. In fact, in Mill’s view of human activity, the right to equality of treatment, or justice, may be a concept which only exists in negation; in other words, what is ‘socially expedient’ is all that matters, and the concept of ‘justice’ emerges merely as a kind of *post hoc* rationale for changing practices when what was ‘socially expedient’ becomes inexpedient.¹³² Utility seen in the light of ‘recognized social expediency’ meshes quite well with the efficiency theorists’ notion of ‘willingness and ability to pay’ and its apparent exclusion of the poor and disenfranchised from the calculus of efficiency.¹³³ Kaldor-Hicks efficiency is essentially utilitarianism filtered through the lens of the marketplace; one group’s wealth (utility) can be sacrificed for the benefit (wealth/utility maximization) of the society as long as the benefit to society outweighs the burden to the group, even if it is ‘socially inexpedient’ to compensate the burdened group.¹³⁴ Again, this is utilitarianism and law and economics painted in the broadest strokes, tending toward a very monolithic description of both theories, but one could say that what this treatment lacks in complexity it makes up for in efficiency.

When it comes to criminal law, the efficiency theorist is worried about only one thing: deterrence.¹³⁵ Deterrence is the primary concern because the role of all law under

¹³¹ John Stuart Mill, *Utilitarianism* 60 (Batoche Books 2001).

¹³² To be fair, Mill gestures toward a theory of rights in *Utilitarianism*, which he suggests take on a quality that is different in kind from other utilities because of the basic need for security in our possessions and ourselves, but it is clear from his analysis that the notion of ‘rights’ essentially boils down to a *really strong* preference or ‘utility’ and has no basis in any other moral, or rational, claims. *Id.* 131 at 51-53.

¹³³ In fact, on one level, the notion of ‘willingness and ability to pay’ is a ‘socially expedient’ concept in and of itself; it allows for an analysis of the ‘success’ of a particular social state (efficiency) which ignores the actual misery of large swaths of the society. If the market is doing well, the society as a whole is doing well, even if the wealth of that society is balanced on the backs of a sizable minority whose suffering, or disutility, is invisible to the techniques of measurement being employed.

¹³⁴ Harrison, *supra* n. 127, at 343.

¹³⁵ Murphy, *supra* n. 51, at 118

efficiency theory is to encourage efficient behavior and discourage inefficient behavior; criminal law, therefore, is a way of ensuring that ‘exchanges’ will be efficient.¹³⁶ Efficiency theory/utilitarianism is concerned with two types of deterrence: *special* and *general*.¹³⁷ *Special* deterrence refers to the hoped-for deterrent effect on a specific offender; in other words, utilitarians hope that the experience of being punished will deter an offender from engaging in criminal conduct again in the future.¹³⁸ *General* deterrence refers to the hoped-for deterrent effect on the population at large; seeing an offender punished for a crime will ideally deter people from committing crimes themselves.¹³⁹ Punishment then, becomes a way of showing, as Justice Holmes said, “the law keeps its promises.”¹⁴⁰ Every time someone is punished for a crime, it reinforces the credibility of the state’s deterrence threat and “maintains or even strengthens its ‘price system’ on conduct and the incentives and disincentives built into that system.”¹⁴¹

Efficiency theory conceives of criminal justice as serving, and being justified by, three principles. First, criminal law creates incentives for market exchanges when transaction costs are low by raising the “price” (via penalties) of transfers of property without the consent of the owner.¹⁴² Second, criminal law discourages behavior that creates undesirable externalities. This relies on a theory that people “generally place a high value on personal autonomy and the right to choose,” so “a rule penalizing those who harm others without their consent can be squared with efficiency.”¹⁴³ When it comes to explaining the criminalizing of “victimless” activities such as prostitution or the sale of illegal drugs, utilitarians resort to either a notion that the parties are not fully competent, so a type of coercion is inherent in the exchange which results in allocatively inefficient outcomes, or they explain it by saying that the ‘cost’ to the victim outweighs the benefits to the offender.¹⁴⁴ Finally, efficiency theorists explain/justify criminal law as raising the ‘price’ of certain behavior so that people change their behavior, if not their preferences.¹⁴⁵ Under this theory, the demand (or preference) for a particular type of behavior becomes much less because the behavior is stigmatized by being criminalized.¹⁴⁶ The result is not just that people move to different points on the demand curve, but that there may be an actual shift in demand altogether.¹⁴⁷

In the end, efficiency theory has a difficult time accounting for the existence of criminal law as distinct from tort law. After all, both are merely ways of encouraging efficient market transactions. And, in fact, criminal law essentially differs only to the extent that it utilizes prison as a punishment, prison being the backstop for those

¹³⁶ Harrison, *supra* n. 127, at 204.

¹³⁷ Murphy, *supra* n. 51, at 118.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 119.

¹⁴¹ *Id.*

¹⁴² Harrison, *supra* n. 127, at 202-207.

¹⁴³ *Id.* at 210.

¹⁴⁴ *Id.* at 213-215.

¹⁴⁵ *Id.* at 218.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

criminals who cannot pay the ‘fines’ which are the ideal form of punishment in an efficiency world because they involve the least administrative costs. Classic utilitarianism has a slightly easier time of describing criminal law as it exists because ‘utility’ can theoretically stand in for any human value from the preference for a particular type of food to the notion of human liberty. Therefore, utility and disutility can be used to explain the behavior of criminals and victims alike, and adjusting criminal sanctions so that there is a greater chance of disutility than utility maximization for the criminal reduces crime and maximizes utility for the society at large.

There are at least a few ways in which restorative justice appears to be compatible with utilitarianism and efficiency theory. First, the needs of stakeholders may parallel notions of utility. Second, there are potential administrative cost savings which may accompany restorative justice processes.¹⁴⁸ Finally, and perhaps most importantly, recidivism seems to be decreased for offenders who participate in a restorative justice process.¹⁴⁹

Restorative justice’s concern for the needs of stakeholders can, to some degree, be recast as utility. For example, the restoration of the victim and community and transformation of the offender could be defined as ‘utilities’ which the stakeholders derive through a voluntary, or at least cooperative, exchange. Whether restorative justice results in an increase in utility for the stakeholders is an empirical question, of course. There are studies which bear out the notion that stakeholders are, by and large, more satisfied with their treatment in restorative processes than in those of the traditional justice system.¹⁵⁰ So, restorative justice seems, at least in this regard, to promote utility. However, this does not take into account the notion that utilitarians are concerned not with individual utility, per se, but with aggregate utility.¹⁵¹ Again, whether restorative justice would promote aggregate utility is an empirical question, but several studies of participant satisfaction and surveys of the public’s willingness to accept the implementation of more restorative practices suggest that it is time to put this claim to the test on a more systematic level.¹⁵²

Efficiency is, to a large degree, concerned with the administrative costs of punishment. Restorative justice has the potential to reduce costs in two ways, by lowering the administrative costs of procedures and by avoiding, in many cases, the high costs of incarceration.¹⁵³ Cases which are diverted from standard court proceedings will result in an avoidance of all the costs incurred during those proceedings.¹⁵⁴ Of course, restorative processes require economic resources as well, but these are often substantially lower.¹⁵⁵ For example, a diversion program in the city of Chilliwack in British

¹⁴⁸ Gabbay, *supra* n. 15, at 369

¹⁴⁹ *Id.* at 369

¹⁵⁰ Strang, *supra* n. 25, *generally*; Braithwaite, *supra* n. 2, at 47-51.

¹⁵¹ Wright, *supra* n. 123, at 4.

¹⁵² Strang, *supra* n. 25, *generally*; Braithwaite, *supra* n. 2, at 47-51 (regarding participant satisfaction); Strang, *supra* n. 25, at 20 (citing surveys which suggest that the public is more amenable to nonpunitive responses to crime than is generally assumed).

¹⁵³ Gabbay, *supra* n. 15, at 368-69.

¹⁵⁴ *Id.* at 368.

¹⁵⁵ *Id.* at 368-69.

Columbia, Canada, implemented to “deal with first time youth and adult offenders in certain categories of offenses,” found that the “total cost of a case referred to the restorative justice program was \$80,” while the “cost of dealing with the same case through the court system would total \$2,649.50.”¹⁵⁶ This results in an approximate yearly savings of \$260,000 annually, not an insignificant savings on a local level.¹⁵⁷ Another study in Henderson County, North Carolina found that there was a “two-thirds reduction in the number of trials due to the operation of a restorative process, leaving a substantial impact on the county level.”¹⁵⁸ These figures obviously represent a small sample, and cannot be taken to indicate the levels of savings that would result on a large-scale when restorative justice procedures are implemented, but there is at least an indication that restorative justice processes would result in administrative savings. Finally, instituting alternatives to imprisonment can result in significant savings to local governments. For instance, Genesee County, New York reported a savings of \$3,990,000 since 1981 through the use of community service sentencing as a substitute for imprisonment.¹⁵⁹ Obviously, if further studies of the costs involved in restorative processes bore out these initial findings of substantial savings, this would be yet another way in which restorative justice could be seen as furthering efficiency/utilitarian goals.

Finally, because utilitarianism and efficiency are both focused on deterrence, the recidivism rate of those offenders who participate in restorative processes is relevant. Most studies show that participation in restorative processes decreases the rate of recidivism.¹⁶⁰ So, restorative justice seems to be effective at increasing specific deterrence. Additionally, restorative justice may, in theory, have an impact on general deterrence. Because there is a perception of procedural fairness, community members may be inclined to report crimes that would normally go unreported under a traditional justice model.¹⁶¹ This increased cooperation from the community in policing might have the effect of increasing the chance of being caught, thereby causing the rational would-be criminal to differently weigh the costs and benefits of offending and tipping the scale toward not engaging in criminal behavior.¹⁶²

Although restorative justice’s focus on stakeholder needs does parallel the notion of utility, the emphasis on the needs of the particular individuals involved in the restorative process does not square with utilitarianism generally. Utilitarianism is concerned with maximization of utility in the aggregate, regardless of the effects of any given social arrangement on the utility of individuals or distinct groups. In fact, the utility of one group can be sacrificed as long as the aggregate utility of society as a whole is maximized. The same holds true for efficiency: the wealth of any given group is not as important as wealth maximization in the aggregate. So, while there is an apparent parallel between the notion of stakeholder needs and utility, these terms signify very

¹⁵⁶ *Id.* at 369.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* This figure represents the avoidance of “\$70 per day per inmate for the aggregate sum of 57,000 jail days.”

¹⁶⁰ *Id.* at 366.

¹⁶¹ *Id.* at 386-391.

¹⁶² *Id.*

different notions of value. Restorative justice privileges the wants and needs of individuals in the criminal justice process, while utilitarianism privileges the supposed wants and needs of society as a whole.

Additionally, there is at least one significant way in which restorative justice exceeds the capacity of law and economics, as a normative discourse, to explain the law and its function in society. Restorative justice adopts self-transformation as a primary goal of restorative practices.¹⁶³ The notion of self-transformation, or of practicing some type of care for the self which exceeds pure preference satisfaction goes almost wholly unaddressed in utilitarianism and efficiency.¹⁶⁴ One can argue that the term ‘utility’ encompasses all understandings of positive self-transformation embraced by restorative justice. However, as I argue in the final section of this paper, treating ‘utility’ as a kind of cipher which, on its own or through negation, can stand in for all of human emotional experience stretches the word to the point of meaninglessness. Utility cannot possibly signify in all the ways utilitarians claim because language simply does not work this way; the signified always exceeds the signifier. Furthermore, to claim that utility, or the efficiency theorists ‘value’, can signify in this way is to drain all life from human expression; imagine a world where one person says to another on the occasion of the death of a loved one, “Sorry for the disutility you are experiencing.”

Utility has a utility of its own and both utilitarianism and efficiency theory do a very good job of explaining certain realms of human behavior, but these discourses fail miserably at explaining other realms. Restorative justice is one mode of legal discourse which utilitarianism simply cannot account for without intellectual maneuvers that distort the practice of restorative justice in ways that are irreconcilable with the lived meanings of those practices.

III. Restorative Justice v. Kantian Justice

The genealogy of our modern notion of justice can be traced directly to the philosophy of Immanuel Kant.¹⁶⁵ This theory of justice takes as its starting point the equal freedom of all humans to pursue their own ends (a meaningful life) to the extent that their pursuit of a meaningful life does not impinge on the equal freedom of other individuals.¹⁶⁶ Justice is divided into two distinct categories: distributive and

¹⁶³ Zehr, *supra* n. 4, at 17.

¹⁶⁴ Mill does speak of the use of the ‘higher faculties’ as being more satisfying and giving more happiness than the lower pursuits, but this seems less like an embrace of self-transformation and more like a post hoc attempt to respond to critics who cast utilitarianism as hedonistic and concerned only with animal pleasures. Also, the high/low distinction contains implicit understandings of social ordering which do not lend credence to the assertion that Mill somehow embraced self-improvement and transformation as an active practice for everyone or as a value distinct from any given individual’s understanding of utility. Mill, *supra* n. 131, at 10-13.

¹⁶⁵ Richard W. Wright, *The Principles of Justice*, 75 Notre Dame L. Rev. 1859, 1860 (2000). (tracing our notion of justice through Kant and Locke and ultimately to Aristotle).

¹⁶⁶ *Id.* at 1877.

interactive.¹⁶⁷ Distributive justice is concerned with the just allocation of the resources people need in order to go about their lives including food, clothing, shelter, education, and any other resources.¹⁶⁸ Distributive justice requires some type of criterion by which society allocates resources, and that criterion may be different depending on the resource or the society.¹⁶⁹ For instance, basic food and shelter may be distributed according to a criterion of need whereas BMWs may be distributed according to a meritocracy as revealed through success in the marketplace. Interactive justice is concerned with the security an individual possesses in her person and her possessions, in large part without regard to distributive justice concerns.¹⁷⁰ Unlike distributive justice, interactive justice does not require any “comparative criterion” because all individuals have equal rights to negative freedom, that is, security in their possessions and person.¹⁷¹ At the same time, determining whether one’s interactive justice rights have been violated necessarily requires an examination of the facts of a particular interaction.¹⁷² In other words, everyone has an equal right to security in one’s possessions and one’s person, but if those rights are interfered with, the individual responsible can be held liable.¹⁷³

Criminal law is clearly an interactive justice concern.¹⁷⁴ In Kantian justice, crime is understood as a violation of the categorical imperative which states: “[a]ct only according to that maxim by which you can at the same time will that it should become a universal [moral] law,” or, as Kant also formulated it, “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”¹⁷⁵ Therefore, the goal of punishment is to “restore the moral right.”¹⁷⁶ Put another way, crime triggers an obligation on the part of the state to mete out a ‘just’ or ‘deserved’ punishment on the offender so that he may repay a kind of moral debt which is due and owing.¹⁷⁷

Restorative justice is compatible with Kantian justice in at least a couple important ways. First, the burdens imposed on offenders in restorative justice practice can be reconciled with certain Kantian understandings of punishment. Second, and more importantly, the practice of restorative justice can be seen as coextensive with Kant’s insistence on the equal dignity of each individual in that it treats all stakeholders, including offenders, in a manner which is respectful of their personal autonomy.

¹⁶⁷ *Id.* at 1883

¹⁶⁸ *Id.* at 1887.

¹⁶⁹ *Id.* at 1888-90.

¹⁷⁰ *Id.* at 1887.

¹⁷¹ *Id.* at 1890.

¹⁷² *Id.* at 1890-91.

¹⁷³ *Id.*

¹⁷⁴ The practice of law is generally concerned with interactive justice; law as policy may take on distributive justice concerns, but the practice of law is by and large an issue of interactive justice. After all, that’s what cases are all about.

¹⁷⁵ Wright, *supra* n. 165, at 1866-67. (internal quotes omitted)

¹⁷⁶ Gabbay, *supra* n. 15, at 381.

¹⁷⁷ Murphy, *supra* n. 51, at 121, 123-124.

Kant's understanding of punishment, broadly construed, can be taken to mean "any unpleasant burden imposed on the offender."¹⁷⁸ This means that things like restitution, community service, or participation in rehab could be located on a kind of punishment continuum.¹⁷⁹ If so, this augmented notion of punishment could go some distance toward aligning restorative practices with the values of Kantian justice.¹⁸⁰ In addition, some argue that Kantian justice is reintegrative in nature, that the offender's punishment serves to pay a 'debt' owed to society, without which the offender would be less than a full citizen, or rather, has taken something from all the other citizens which he must repay to restore their equal dignity, and thus become equal with them once again.¹⁸¹ Therefore, if reintegration can be articulated within a Kantian framework as a goal separate and apart from the repaying of a "moral debt," then the ways in which restorative justice attempts to restore offenders to the community can be seen as an extension of the Kantian project. So, there are at least a couple of ways in which restorative justice practice could be recast in terms of Kant's understanding of punishment.

More significantly, restorative justice can be viewed as coextensive with Kant's notion of equal freedom, or equal dignity. Restorative justice takes Kant's second formulation of the categorical imperative, to treat people as ends and not means, and applies it to criminal offenders. Despite Kant's claim that "punishment is an end in itself, not an instrument for achieving other practical ends," criminal punishment is, in fact, instrumental in Kant's formulation.¹⁸² Rather, the exercise of penal power on the body of the prisoner is the means by which 'moral order' is restored.¹⁸³ Somehow here, and nowhere else in Kant's thinking, the ends justify the means; the prisoner is used as a means toward the larger goal of repairing the rupture in the universal moral fabric that has occurred as a result of the offender's action.¹⁸⁴ Kant, of course, handily disposes of this objection by positing that the offender, as a rational creature, chose his punishment by engaging in criminal behavior, or rather, he would see the wisdom of the punishment were he, as a rational being, to reflect upon it.¹⁸⁵ This explanation, although clever, rings false and is reminiscent of, or prefigures, the rule utilitarian notion that a true utilitarian does not prefer his own 'utility' to that of another, but sees the need to sacrifice his own happiness, freedom, or even life for the cause of aggregate utility maximization.¹⁸⁶

While Kant cannot seem to abandon what Mill might call his "thirst for retaliation," restorativists seek to respect the autonomy of offenders.¹⁸⁷ Restorative justice does this first by insisting that the participation of all stakeholders be voluntary,

¹⁷⁸ Gabbay, *supra* n. 15, at 378.

¹⁷⁹ *Id.* at 378.

¹⁸⁰ *Id.*

¹⁸¹ Murphy, *supra* n. 51, at 123-124.

¹⁸² Gabbay, *supra* n. 15, at 373

¹⁸³ *Id.*

¹⁸⁴ Murphy, *supra* n. 51, at 121.

¹⁸⁵ *Id.*

¹⁸⁶ *see* Wright, *supra* n. 151, at 5.

¹⁸⁷ Mill, *supra* n. 131, at 53

including, to the extent possible, offenders.¹⁸⁸ Additionally, restorative practice respects the equal dignity of offenders by encouraging their genuine participation in the dialogue during the encounter, including the telling of their story, and by fostering a practice of respectful listening.¹⁸⁹ Finally, perhaps the most important way restorative justice respects the equal dignity of the offender is by meaningfully including him in the crafting of what restitution or punishment will be imposed.¹⁹⁰ Throughout the process, restorative justice treats the offender as an individual with equal dignity and equal freedom. Thus one might argue that restorativists are more Kantian than Kant in the context of criminal punishment.

There are, however, several ways in which restorative justice does not align with the Kantian theory of justice, some of which have already been mentioned. First, the word ‘justice’ itself signifies very differently in the two discourses. Second, while Kantian justice theory emphasizes the criminal’s offense against society as a whole and the laws of the state, restorative justice sees crime as a disruption of much less abstract interpersonal relationships which define and bind *micro-communities*.¹⁹¹ Third, traditional justice seeks equity in the treatment of similarly situated criminals whereas restorative justice takes a much more individualistic approach to criminal process and criminal punishment. Fourth, Kantian justice is primarily backward looking while restorative practices tend to be much more forward looking.¹⁹² Finally, and most importantly, Kantian justice is focused on retribution whereas restorative justice is focused on restoration and transformation.

As stated above, the word ‘justice’ signifies very differently in these two discourses. Justice, as Kant uses it in the criminal context, is retributive and largely refers to repairing a rupture in the ‘moral order’. On the other hand, the word justice, as it is used in the discourse of restorativism has much more to do with repairing a rupture in the ‘social order.’ Again, ‘social order,’ as understood through a restorative lens is

¹⁸⁸ McCold, *supra* n. 16, at 372 quoting R. Claasen, *Restorative Justice Principles and Evaluation Continuums*, paper presented at National Center for Peacemaking and Conflict Resolution (May 1995). (“Restorative justice prefers responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion, since healing in relationships and new learning are voluntary and cooperative processes.”). At the same time, Zehr points out that “[v]oluntary participation by offenders is maximized; coercion and exclusion are minimized. However, offenders may be required to accept their obligations if they do not do so voluntarily.” Zehr, *supra* n. 4, at 65. This is, of course, a very loose understanding of the word *voluntary*, and restorativists may be better served by using words like *cooperative* when describing the participation of offenders.

¹⁸⁹ Braithwaite, *supra* n. 2, at 15.

¹⁹⁰ Zehr, *supra* n. 4, at 65.

¹⁹¹ McCold, *supra* n. 16, at 365.

¹⁹² Restorative justice definitely looks back to the offense as that which gives rise to the offender’s obligations to victims, but it is forward-looking, and perhaps more compatible with utilitarianism, in the sense that it treats sanctions as instrumentally useful in promoting other goals, such as “reducing crime and increasing public welfare.” Gabbay, *supra* n. 15, at 382.

qualitatively different from the ‘social order’ as understood through a Kantian or traditional justice theory lens. Traditional justice theory, and Kant, is much more concerned with the perceived retributive needs of society at large, and much less concerned with needs of local communities which define and shape the subjectivity of *individual* victims and offenders. This distinction is a significant one, and becomes especially important in my discussion of the parallels between restorative justice and Foucault’s thought. When Kant uses the word justice it connotes a transcendent and universal value; when restorativists use the word it connotes a much more historical, socially derived, and subjective notion of what must be done in order to “right a wrong.” This doesn’t mean that the Kantian connotations are entirely absent from the word in restorative discourse, but it does reflect a thread of thought that emerges throughout restorative discourse which understands what is given to us as transcendent and universal to be equally historically and socially derived.¹⁹³

In addition, Kantian justice theory makes a clear and definitive distinction between public and private wrongs.¹⁹⁴ So much so that it largely separates the two in the realm of legal discourse; public wrongs are addressed through criminal actions and private wrongs are addressed through civil actions.¹⁹⁵ Therefore, Kantian justice gives over the criminal conflict to the state to prosecute.¹⁹⁶ This separation is not completely antithetical to restorative practices, but it is in conflict with those practices to the extent that restorative justice aspires to solutions that are arrived at by stakeholders as opposed to legal professionals.¹⁹⁷

Furthermore, Kantian justice seeks equity in the treatment of crimes; punishment is tailored to the crime and not the criminal.¹⁹⁸ The result, ideally, is equal punishment of

¹⁹³ For example, though Howard Zehr himself is a Mennonite and approaches the benefits of restorative justice from a biblical as well as psychological and political perspective, he is careful to point out in the introduction to his *The Little Book of Restorative Justice* that his framework for restorative justice is limited and shaped by his own historical subjectivity, that of a “white, middle-class male of European ancestry, a Christian, a Mennonite.” Zehr, 7. This acknowledgement of the historicity of his own “voice and vision” is indicative of a larger tendency in the restorative justice movement to acknowledge the historical nature of truths, and the limits of speaking in terms of transcendent universals, a value which is fundamentally at odds with the universalizing and totalizing embrace of Reason as an instrument of Truth which is embodied in the Enlightenment tradition, both historically and to this day.

¹⁹⁴ Gabbay, *supra* n. 15, at 375.

¹⁹⁵ The arguable exception to this are civil suits brought by citizens as a statutory remedy when an agency refuses to enforce a regulation, such as one which limits pollution, though even here there is a distinct group of individuals who have standing to bring the suit – the public at large is not a party to the suit.

¹⁹⁶ Wright, *supra* n. 165, at 1878.

¹⁹⁷ Zehr, *supra* n. 4, at 37.

¹⁹⁸ Gabbay, *supra* n. 15, at 373-374. This point is debatable given the actual sentencing practices of courts which take into account many individualized facts and mitigating circumstances in the sentencing phase, but the broader point that traditional justice theory

all offenders found guilty of equal offenses.¹⁹⁹ Restorative justice is, by design, more individualistic in its treatment of crime, focusing on particular acts as opposed to broad categories of criminal behavior.²⁰⁰ In addition, the nature of the process, an encounter between victim and offender in which they cooperatively arrive at an agreement as to what would constitute adequate reparation, is bound to result in similarly situated offenders being treated differently. This is a concern to some in the field, and there is much discussion about how to ensure that restorative processes respect the rights of offenders.²⁰¹ However, by and large, what is seen as the ‘unequal’ treatment of offenders by traditional justice theorists is seen by restorativists as a flexible system which is more respectful of the needs of victims who often require the opportunity to show mercy and forgiveness in order to move past the crime.²⁰² Furthermore, as Braithwaite suggests, “[r]estorativists must abandon both equal punishment for offenders and equal justice . . . for victims as goals and must seek to craft a superior fidelity to the goal of equal concern and respect for all those affected by the crime.”²⁰³

Another significant difference between Kantian justice and restorative justice is the temporal focus of each system. Kantian justice is primarily backward-looking, focusing on the crime and the measure of punishment or pain which must be inflicted on the offender in order to balance out the offense against a universal moral imperative.²⁰⁴ Restorative justice, on the other hand, is primarily forward-looking and individualistic, seeking a way for victims and offenders to move on from the criminal event and restore themselves to a more whole sense of self.²⁰⁵ For victims, this process literally involves a ‘re-storying’ of the self, constructing a narrative that can incorporate the reality of the crime, but shift the focus to a future that is not defined in terms of their status as victim.²⁰⁶ For offenders this involves accepting responsibility for their past behavior, but also constructing a notion of self that can serve them more positively in the future.²⁰⁷ Kantian justice is only concerned with the future of the offender to the extent that the offender is appropriately punished, and Kantian justice gives no thought whatsoever to the victim, past, present, or future.

Most importantly, as has already been discussed, Kantian justice is primarily concerned with retribution while restorative justice is primarily concerned with

strives for equal treatment for similarly situated offenders seems to be an accurate characterization.

¹⁹⁹ *see Id.*

²⁰⁰ *Id.* at 374; Strang, *supra* n. 25, at 37.

²⁰¹ Gabbay, *supra* n. 15, at 394(citing Braithwaite and others).

²⁰² Strang, *supra* n. 25, at 28-29.

²⁰³ John Braithwaite, *Holism, Justice, and Atonement*, Utah L. Rev. 389, 395 (2003).

²⁰⁴ Gabbay, *supra* n. 15, at 373.

²⁰⁵ *see Zehr, supra* n. 15, at 25, 44, 186-87.

²⁰⁶ Howard Zehr, *Journey to Belonging*, in *Restorative Justice: Theoretical Foundations* 21, 24 (Elmar G.M. Weitekamp and Hans-Jurgen Kerner, eds., Willan Publishing 2002). (“trauma involves the destruction of meaning; transcendence of trauma involves the recreation of meaning.”)

²⁰⁷ *see Zehr, supra* n. 15, at 39-43.

reintegration.²⁰⁸ Of course, Kant argues that the offender's payment of his debt to society is the only way reintegration can be accomplished. Unfortunately, this understanding of reintegration applies even if the punishment is death.²⁰⁹ Restorative justice embraces what one might call a much more vital notion of reintegration; reintegration involves restoring the lives of stakeholders through dialogue and transformation. This is a process that seeks to transform individuals from objects defined by the discourse of the criminal justice system (victims, offenders) to subjects restored to the living relationships of community from which they derive and construct their own meaning.²¹⁰

IV. Restorative Justice as an Expression of a New Legal Discourse

As we have seen, neither utilitarianism nor Kantian justice theory do an adequate job of descriptively or normatively accounting for the emergence of a system of restorative justice. Analogues for each theory can be found in the practice of restorative justice, but the richness and complexity of restorative justice cannot be expressed in the vocabulary of either of these traditional legal discourses. At first glance, the problem of reconciling restorative justice with traditional legal discourse seems to be one of semantics. However, as has been discussed, the difference in vocabulary is more than a difference of degree; it is a fundamental difference in the way words signify in restorative justice as compared to the two traditional discourses. Ultimately, the goals of restorative justice cannot be reconciled with those of utilitarianism and Kantian justice theory because restorative justice is speaking a language which cannot be translated into the language of utility or retribution.

Restorative justice seeks to restore individuals, both victims and offenders, to a relationship with themselves and others which will allow for growth and transformation; the 'meaning' of that transformation is individual and communal, in other words interpersonal, and does not necessarily refer to some higher order.²¹¹ Conversely, while utilitarians and Kantians articulate value and meaning in very different terms, both discourses treat meaning as relatively fixed or, at least, as functioning in a very particular way within an *a priori* universal order under which all notions of value and all existence can, and indeed must, be subsumed. Therefore, both discourses, in their own way, treat law as instrumental to reinforcing and defending universal and all-encompassing truths which claim to account for and justify all of human behavior. For utilitarians and

²⁰⁸ Gabbay, *supra* n. 15, at 373.

²⁰⁹ Kant famously states, "Even if civil society were to dissolve itself by common agreement of all its members . . . the last murderer remaining in prison must be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice." Murphy, *supra* n. 55, at 120.

²¹⁰ See Zehr, *supra* n. 15, at 18.

²¹¹ Zehr, *supra* n. 206, at 23-24.

efficiency theorists, that order is ‘social expediency’ or efficiency; for Kantians that order is the categorical imperative derived through practical reason.²¹²

The contrasts between restorative justice and the two traditional discourses on this level are striking. First of all, restorative justice does not contain the same impulse toward totalization. Secondly, and relatedly, restorative justice is not concerned with using criminal punishment to re-constitute a pre-ordained order; restorative justice is concerned with restoring individuals and communities which, by definition, consist of local orders of meaning. These fundamental differences between the traditional legal discourses and restorative justice can be at least provisionally accounted for by exploring the notions of the subject and theories of subject formation which are embraced by each theory. Utilitarianism and Kantian justice theory both conceive of the subject in a classical Enlightenment sense, as a transcendent and rationally self-interested individual; reason and rationality are the unifying principle underpinning subjectivity in both discourses. Restorative justice, on the other hand, embraces a notion of the subject which is much more akin to Michel Foucault’s; that is, the individual, and the systems of rationality within which individuals operate and express themselves, are historically derived and constructed, and intimately connected to power relationships.²¹³ The subject is always being recreated and reconstructed, both actively and passively, through power relationships with others (and institutions) as well as one’s relationship to oneself.²¹⁴

According to utilitarianism all human motivation and experience, throughout human history, can be reduced to the notions of utility and disutility.²¹⁵ To this extent, utilitarians have a transcendental understanding of the human subject; that is, there is a thread called ‘human nature’ which can be disentangled from all other threads and is presented as the authentic ahistorical human subject. This subject is a rationally self-interested maximizer of utility motivated by what efficiency theorists call ‘preference satisfaction.’²¹⁶ This basic assumption regarding human nature is the grounding of both utilitarianism and efficiency theory.

Kantian justice theory rests on an equally fundamental understanding of human nature, or at least an *a priori* notion of the boundaries within which subjectivity exists. According to Kant, each of us is a rational and autonomous actor motivated by the search for a meaningful life.²¹⁷ Reason and rationality are central to Kant’s understanding of human nature, for it is the faculty of reason which allows humans to arrive at the

²¹² Mill, *supra* n. 131, at 60; Roger Scruton, *Kant: A Very Short Introduction* 85 (Oxford University Press 2001).

²¹³ *see* Zehr, *supra* n. 15, at 52-57 (discussing the issue of power as it relates to offender identity construction); Anthony V. Alfieri, *Community Prosecutors*, 90 Cal. L. Rev. 1465, 1479 (2002); *compare with* Ascanio Piomelli, *Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 Utah L. Rev. 395, 436-39 (2004).

²¹⁴ Alfieri, *supra* n. 213, at 436-39.

²¹⁵ *see* Mill, *supra* n. 131, at 60.

²¹⁶ *see* Harrison, *supra* n. 127, at 49.

²¹⁷ *see* Scruton, *supra* n. 212, at 114. (“Kant was the prophet of ‘Enlightenment Universalism.’ He believed in a single, universal human nature, to which appeal should be made when examining the legitimacy and authority of our local arrangements.” Kant further believed that “practical reason is valid for all people everywhere”)

categorical imperative which should guide us in all our pursuits.²¹⁸ While ends are not necessarily dictated by reason, Kant's epistemology takes as its fundamental premise that our understanding, as transcendental subjects, is bounded by the universal and *a priori* structures of reason.²¹⁹ Kant's claims about human history are more teleological than the Utilitarians, in that Kant sees human history as leading to the moment of the Enlightenment at which time humanity was awakened from its 'dogmatic slumber.'²²⁰ This understanding of reason underpins Kantian justice theory, and human subjectivity is presented as properly defined and limited by reason and rationality.²²¹

In terms of criminal law, these fundamental notions about rationality and its relationship to subjects lead to a particular type of subjectivation of offenders: both theories cast criminals as having freely chosen whatever punishment is meted out. Utilitarianism, by casting criminal law as a means of raising the price on certain unwanted behavior, assumes that criminals rationally weigh the costs and benefits before engaging in criminal behavior.²²² Kant does this by reasoning that the offender, as a rational being, understands (or would understand upon reflection) that the punishment is deserved because the punishment has been imposed according to moral principles derived from reason.²²³ Therefore, punishment is justified.²²⁴

Foucault rejected the idea of a "fixed, unchanging human nature that transcends history and is the source for shaping or making sense of history."²²⁵ Instead he understood subjects as existing within and formed by a complex web of institutional, social, and cultural power relations, such that the subject is, in essence, a locus at the intersection of these various power relations.²²⁶ As such, subjectivity is always unstable

²¹⁸ *Id.* at 85.

²¹⁹ *see Id.* at 36-37, 114; Amy Allen, *Foucault and Enlightenment: A Critical Reappraisal*, Constellations 180, 185-86, Volume 10, No. 2, 2003.

²²⁰ *see* Scruton, *supra* n. 212, at 113 ("Indeed, it was Kant who first ventured to define Enlightenment, as 'the liberation of man from his self-imposed minority,' adding that this minority lies 'not in lack of understanding, but in a lack of determination and courage to use it without the assistance of another.'"); *Id.* at 25 (Kant used the phrase 'dogmatic slumber' to describe the state of mind from which he was aroused when faced with the skepticism of Hume's work.).

²²¹ *see Id.* at 114, 85; Allen, *supra* n. 211, at 184.

²²² Harrison, *supra* n. 127, at 201-207.

²²³ Murphy, *supra* n. 51, at 121.

²²⁴ Certainly, there is an argument to be made that Kant allows for different forms of subjectivity through his distinction between moral and legal culpability. Especially in relation to criminal law, one could argue that a 'mens rea' requirement goes a long way toward rectifying the problem of applying one standard of rationality to all individuals. However, it is my contention that Kant's understanding of Reason is still very problematic when it comes to reconciling it with restorative justice because Kantian justice theory presumes that a particular type of rationality is necessary, in a normative sense, for any legal system. Scruton, *supra* n. 212, at 114.

²²⁵ Piomelli, *supra* n. 214, at 417.

²²⁶ *see Id.* at 417, n. 79, 80. (quoting Foucault from *An Aesthetics of Existence in Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984* at 3, 14 (Lawrence D.

and always being reconstituted. Power and systems of knowledge (epistemes) are closely related in Foucault's thinking, in that exercising power is a strategy within these epistemes, or truth claims, aimed at influencing the actions and behavior of others.²²⁷ Foucault referred to the adoption of these power-knowledge systems as 'disciplines' and much of his career was spent examining the institutional disciplines which both enact and recreate these disciplinary discourses including prisons, schools, asylums, hospitals, the military.²²⁸ Thus, individuals are always being subjected to disciplinary, or normalizing, power.²²⁹ For Foucault, disciplinary power creates subjects who are subjected "both from without by the normalizing force of humanistic discourses and practices, and from within by the self-disciplining impulses that humanism has taught them to internalize."²³⁰ This means that one exists in relation to the cultural, social, and institutional forms of power which are either acting directly upon oneself or which one has internalized to an extent that one is self-defining in terms of those very same historically contingent understandings of what it means to be human.

Some of Foucault's critics have taken his understanding of subjectivity to exclude all possibility of agency or resistance.²³¹ However, as is apparent in Foucault's later work, resistance is one of the primary forms of power with which he is concerned; rather, according to Foucault, relations of power cannot exist in the absence of freedom which gives rise to the possibility of resistance.²³² He defines the "exercise of power as a way in which certain actions may structure the field of other possible actions."²³³

Kritzman ed., Alan Sheridan et al. trans., 1988); Michel Foucault, *The Ethics of the Concern for Self as a Practice of Freedom* in *Ethics: Subjectivity and Truth* 281, 283 (Paul Rabinow ed., Robert Hurley trans., The New Press 1997).

²²⁷ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* 11-17 (Pluto Press 1994); Michel Foucault, *Truth and Power*, in *Power* 111, 131 (James D. Faubion ed., Robert Hurley trans., The New Press 2000). ("The important thing here, I believe, is that truth isn't outside power or lacking in power: contrary to a myth whose history and functions would repay further study, truth isn't the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves. Truth is a thing of this world: it is produced by virtue of multiple forms of constraint. And it induces regular effects of power.")

²²⁸ Michel Foucault, *The Subject and Power* in *Power* 326, 339 (James D. Faubion ed., Robert Hurley trans., The New Press 2000).

²²⁹ Amy Allen, *The Anti-Subjective Hypothesis: Foucault and the Death of the Subject*, *The Philosophical Forum* 113, 116, Volume XXXI, No. 2, Summer 2000.

²³⁰ *Id.* at 116.

²³¹ *Id.* at 116-117.

²³² Foucault, *supra* n. 228, at 342; Michel Foucault, *The History of Sexuality: An Introduction* 95-96 (Robert Hurley trans., Vintage Books 1990); additionally, I want to acknowledge the importance of Saul Newman's article *Stirner and Foucault: Toward a Post-Kantian Freedom* (2003) in pointing me toward Foucault's essay *The Subject and Power* and helping me to formulate this concise discussion of the role of freedom in Foucault's notion of power relations, at <http://www3.iath.virginia.edu/pmc/text-only/issue.103/13.2newman.txt>.

²³³ Foucault, *supra* n. 228, at 343.

Additionally, he asserts that “[p]ower is exercised only over free subjects, and only insofar as they are ‘free.’ By this we mean individual or collective subjects who are faced with a field of possibilities in which several kinds of conduct, several ways of reacting and modes of behavior are available.”²³⁴ He goes so far as to say that “[w]here the determining factors are exhaustive, there is no relationship of power: slavery is not a power relationship when a man is in chains, only when he has some possible mobility, even a chance of escape.”²³⁵ That is to say, a power relationship does not exist where the field of possible action is entirely determined, “since without the possibility of recalcitrance power would be equivalent to a physical determination.”²³⁶ Violence (and at the other end of the spectrum, consent) can be “instruments or results” of power, but “they do not constitute the principle or basic nature of power.”²³⁷ So, for Foucault, freedom is at the heart of the power relations which permeate, construct, define, and delimit the individual subject living in a society; therefore, those same power relations offer up the opportunity for one to recreate, reconstruct, redefine, and, in a word, resist the forms of subjectivation which are externally imposed and internally reiterated by the “disciplines” or discourses of a particular historical moment.²³⁸

This exploration of the notion of ‘freedom’ in Foucault’s later work serves as a frame for understanding Amy Allen’s argument as to why there is, as Foucault’s critics have suggested, an apparent absence of the subject as a self-constituting agent in Foucault’s earlier works. Allen argues that Foucault’s early works are investigations into the “conditions of possibility for modern subjectivity” or, put another way, the “historical *a priori* of subjectivity in the modern era.”²³⁹ In other words, Foucault was shifting the focus of critique from the subject as “constituent” of discourse to an analysis of how subjects are “constituted” in the present cultural and historical context in order that he might “grasp the subject’s points of insertion, modes of functioning, and system of dependencies.”²⁴⁰ This approach, which highlights the “points of insertion” available to the subject, then makes it possible to approach the notion of resistance to the contingent historical discourses (power-knowledge relations) and raises the possibility that modern subjects could be differently constituted.²⁴¹ As Foucault himself put it, modern criticism does “not deduce from the form of what we are what it is impossible for us to do and to know; [] it [] separate[s] [] out, from the contingency that has made us what we are, the

²³⁴ *Id.* at 342.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 341.

²³⁸ *see Id.*, at 339; Allen, *supra* n. 229, at 116.

²³⁹ Allen, *supra* n. 229, at 123, 124. This ‘historical *a priori*’ would include, for modern subjects, the theories of reason put forth by Kant, so that Kant’s understanding of the subject becomes inflected in the modern era as a constituting discourse of the subject. In this way, Kant’s theory of subjectivity is somewhat self-fulfilling because our understanding of ‘self’, as a rational being, is passed on as the ‘truth’ of subjectivity and consequently *becomes* the ‘truth’ of subjectivity, at least temporarily.

²⁴⁰ *Id.* at 122

²⁴¹ *Id.* at 124

possibility of no longer being, doing, or thinking what we are, do, or think.”²⁴² Foucault’s ethic, then, is one of exercising power as a means of transformation and re-creation, and an attempt to “get free of oneself.”²⁴³

At this point, it is important to note that the centrality of freedom in Foucault’s work bears some resemblance to the central position occupied by autonomy in Kant’s thinking. Both Foucault and Kant take as their object the way in which individuals freely act in the world toward themselves and others. Foucault’s ethics is based on a concern for self as a practice of freedom which prefigures one’s exercise of power over others.²⁴⁴ Kant’s moral law is also grounded in freedom: “the rational individual freely chooses out of a sense of duty to adhere to universal moral maxims.”²⁴⁵ One could even go so far as to say that Kant is implicitly concerned with power relations in his second formulation of the categorical imperative:

[man] is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.²⁴⁶

So, there is a kind of kinship between the thinking of these two philosophers who are sometimes cast as opponents.²⁴⁷ Both have a central concern for human freedom and autonomy. But the source and the implications of this freedom are conceived of very differently.

For Kant, “freedom is presupposed by absolute moral maxims,” whereas for Foucault “freedom is presupposed by power.”²⁴⁸ Kantian freedom is “metaphysical and transcendental” while Foucaultian freedom is “entirely of this world and exists in a complicated and entangled relationship with power.”²⁴⁹ The key to the difference between the two seems to be Kant’s stress on rationality, because Foucault’s notion of freedom, being entangled in power relations, is necessarily entangled in interests that are not rational in a Kantian sense; that is, they do not refer to a common universal moral code. It is not that Foucault is an anti-rationalist, but that he is suspicious of prescribed modes of rationality and their relationship to power.²⁵⁰ In fact, he locates this particular type of critical relationship to modes of rationality in Kant’s project itself:

²⁴² *Id.*

²⁴³ Paul Rabinow, Introduction to *Ethics: Subjectivity and Truth* xxx (Paul Rabinow ed., Robert Hurley trans., The New Press 1997).

²⁴⁴ Foucault, *supra* n. 226, at 287.

²⁴⁵ Newman, *supra* n. 232, at 2.

²⁴⁶ Wright, *supra* n. 165, at 1862 (quoting from Immanuel Kant, *The Metaphysics of Morals* 434-35 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797)).

²⁴⁷ Allen, *supra* n. 219, at 181.

²⁴⁸ Newman, *supra* n. 232, at 7.

²⁴⁹ *Id.*

²⁵⁰ Foucault, *supra* n. 232, at 328-29.

since Kant, the role of philosophy is to prevent reason from going beyond the limits of what is given in experience. But from the same moment – that is, since the development of the modern state and the political management of society – the role of philosophy is also to *keep watch over the excessive powers of political rationality*.²⁵¹

Foucault finds great value in Kant's practice of critique, and as Amy Allen argues, Foucault's own critical project is traceable to Kant's.²⁵² However, for Foucault critical thought entails a "constant checking," and therefore does not lend itself to the establishment of universalizing theories and laws.²⁵³ The problem with Kant, for Foucault, is that "he opens up a space for individual autonomy and critical reflection on the limits of oneself, only to close this space down by re-inscribing it in transcendental notions of rationality and morality that require absolute obedience."²⁵⁴ In other words, Kant doesn't go far enough for Foucault or, rather, Kant's thought, expanded upon by his intellectual heirs, has become a mode of political rationality, a discourse associated with particular power relations which reify the very 'dogmatic slumber' from which Kant wished to awaken. As Foucault wrote, "[t]he point, in brief is to transform the critique conducted in the form of necessary limitation into a practical critique that takes the form of a possible transgression."²⁵⁵ Seen from this angle, Foucault is not calling for a rejection of rationality, nor is his thought diametrically opposed to that of Kant; instead, he proposes a constant alertness to the relations of power, especially universalizing or totalizing power, which are inscribed or inflected in accepted modes of rationality.

Taking the concern for self as an exercise of power and freedom as a jumping off point, the parallels between Foucault's thought and restorative justice begin to become visible. First, the restorativist definition of crime can easily be recast in Foucauldian terms. Crime is not primarily a breach of a universal morality. Instead, crime is an instantiation of dynamic power relationships between and within individual subjects. As such, it is capable of inversion and transformation; that is, insofar as freedom is central to all power relations, freedom is central to the relationship between victim and offender as well as the relationships to self within each of them. Of course, the relationship between victim and offender does not exist in a vacuum, and it is informed and shaped by other relations of power and meaning: institutional, cultural, economic. But because crime is primarily a relationship of power between the victim and offender, it is at this 'point of insertion' where the relationships to other and self are most susceptible to inversion and transformation. Therefore, the victim and offender must be active participants in determining a response to the crime. To put this in restorativist terms, the relationship to self is central to the relationship to others and vice versa. Restorativists understand the

²⁵¹ *Id.* at 328. (emphasis added)

²⁵² Allen, *supra* n. 219, at 183. (characterizing Foucault's work as a kind of "continuation-through-transformation of the Kantian critical project" akin to the work of Jurgen Habermas.)

²⁵³ *see* Foucault, *supra* n. 232, at 327.

²⁵⁴ Newman, *supra* n. 231, at 9.

²⁵⁵ Allen, *supra* n. 219, at 190 (quoting Foucault, *What is Enlightenment?* in *The Foucault Reader* 32, 45 (Paul Rabinow, ed., Pantheon 1984).

process of ‘putting right’ as a transformative opportunity for both offender and victim.²⁵⁶ Finally, restorativists believe community change is a possible outgrowth of a restorative response to crime.²⁵⁷ In other words, “[t]he norms and practices of restorative justice hinge on empowering the objects of crime (victims) and the subjects of criminal justice (defendants) in the context of civic community and collaborative justice.”²⁵⁸

As discussed, ethical action, for Foucault, is about resistance, especially resistance to disciplinary modes of subjectivation. Similarly, restorative justice is about resisting the modes of subjectivation which are exercised within the criminal justice system. For example, the traditional criminal justice process transforms an offender into a convict, and then into an ex-convict who will likely re-offend because incarceration has forced him to adopt strategies and modes of subjectivity which reinforce and encourage the very modes of behavior which the traditional justice system purports to ‘correct’. A restorative system, on the other hand, embraces a response to crime which will allow and encourage offenders to find their own meaning, to re-create themselves within the context of community and through transformative practices.²⁵⁹ It emphasizes self-definition based upon a relationship to oneself and others which is derived from an ethic of care. One final indication that restorative justice and Foucauldian ethics share, if not a common genealogy, then at least a common concern comes from an interview Foucault gave near the end of his life. The interviewer prefaced his question by recounting Foucault’s concern, in his work, with “the role of penal practices in managing illegalities and controlling their general economy,” and then asked Foucault, “If prison were replaced by a very broad system of restoration [*amende*] (the Swedish tendency), would delinquency reproduce itself in the same way?” Foucault responded:

I think that a certain number of effects characteristic of prison – such as alienation from ordinary social life, dislocation from the family environment or from the group in the midst of which one lives, the fact of not working any longer, the fact that in prison the convict lives with people who will become the only resort once he has gotten out of prison – in short, everything that is directly connected with prison, may not be present in the case of another generalized system of punishment such as restoration. Not, at any rate, on the same scale and to the same serious degree.²⁶⁰

This response indicates that the merits of the practice of restorative justice were at least considered by Foucault himself, though there is no way of knowing where his thought would have taken him on the possible forms of penal practices.

Of course, there is no need to know exactly where Foucault himself would have gone because the work itself points to an opening, the ‘conditions of possibility,’ if you will, for a new understanding of how criminal justice might function within the Western

²⁵⁶ Zehr, *supra* n. 206, at 24.

²⁵⁷ Zehr, *supra* n. 4, at 68.

²⁵⁸ Alfieri, *supra* n. 214, at 1479.

²⁵⁹ *see* Wright, *supra* n. 66, at 61.

²⁶⁰ Michel Foucault, *supra* n. 1, at 399-400.

legal system. These ‘conditions of possibility’ are taken up, explicitly and implicitly, in the practice of restorative justice. In addition, within the practice of restorative justice, and the work of Foucault, the vocabulary of a new type of legal discourse is discernible, one which insists on the contingent nature of those practices which are presented to us as necessary, natural, and inevitable. The ethical concern of this new legal discourse might be one of constant alertness to the possibility of new forms of legal practice, ones privileging cooperation over domination, dialogue over rhetoric. It might be imbued with a type of vitality and agility that is absent from law in its present incarnations. This is not to suggest that the current legal system or even the traditional discourses must be displaced entirely. This is not a call to revolution, but a call to evolution, not in a teleological sense, but in the sense of being always open to new ‘conditions of possibility.’ Revolution implies a final liberation and a final stability which, by the very terms of this new discourse, would be impossible; instead, this discourse embraces the warning Foucault articulated with regard to restorative justice itself:

[O]ne must keep in mind that eventually a system of restoration will reveal its flaws, and society will have to make an effort to reconsider that particular penal system. Nothing is ever stable. Whenever an institution of power in a society is involved, everything is dangerous. Power is neither good nor bad in itself. It is something perilous. It is not evil one has to do with in exercising power but an extremely dangerous material, that is, something that can always be misused, with relatively serious negative consequences.²⁶¹

²⁶¹ *Id.*

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