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, far from it; but it isn’t the absolute good, either, and certainly not the definitive good.

Michel Foucault

Introduction

As the epigraph suggests, 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 toward which restorative justice gestures. 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 inverting the priorities of traditional legal discourse. Whereas the traditional Western legal discourses of justice theory and utilitarianism, or efficiency, emphasize the so-called public interests triggered by crime, restorative justice emphasizes the private interests that 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

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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 about human nature and the function of criminal punishment, 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 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 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 that can account for and respond to the lived needs and experiences of human beings, and one that, 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 that 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. The modern restorative justice movement developed out of victim-offender mediation programs begun in Mennonite communities in Canada and the United States during the 1970s. 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. The 1990s saw enormous growth in restorative justice programs throughout the world. Much of this growth took place in small victim-offender mediation programs, but systemic adoption of restorative justice practices has also occurred in many U.S.

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3 Michael L. Hadley, The Spiritual Roots of Restorative Justice 1-25 (SUNY Press 2001). 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.” John Braithwaite, Restorative Justice & Responsive Regulation 5 (Oxford University Press 2002). 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 note 3, at 152; Zehr, supra note 4, at 38-39.

states, Europe, and other regions.\(^7\) 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 offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.”\(^10\) This definition captures the practice of restorative justice, but before exploring the practice further, 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 identified.\(^11\) Perhaps the best way to understand restorative justice is by contrasting the way restorativists view the social significance of crime and the role of criminal law with how crime and criminal law are understood by the traditional legal discourses of efficiency theory and justice theory. I will explore crime and criminal law from all three perspectives below, comparing and contrasting as I progress. While there are some ways

\(^7\) Braithwaite, supra note 3, at 8-10; Umbreit et al., supra note 6, at 259-263.

\(^8\) Braithwaite, supra note 3, at 11.

\(^9\) See Braithwaite, supra note 3, at 15; Zehr, supra note 4, at 62-3.

\(^10\) Braithwaite, supra note 3, at 11

\(^11\) Id. at 15-16; Zehr, supra note 4, at 44-57
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 relies on 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.” Restorativists often oppose this notion of crime to an understanding of crime as an offense against the state, a view they attribute to the traditional legal discourses. This opposition is, on one level, too stark. Traditional justice theory does not merely treat crime as an offense 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 the community.” 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. This is an inversion of the way both traditional justice theory and utilitarianism

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12 ZEHR, supra note 4, at 19.
13 Id. at 21.
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
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 interests 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 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.

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 offense 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

18 Id.
19 Id.
20 Id. at 364.
21 Id. at 365.
22 Id.
23 Id.
24 ZEHR, supra note 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
because of this abstraction, traditional legal discourse misperceives the actual interests of both victims and community, or, rather, traditional legal discourse attributes to victims and communities an inflated need for retribution that is not supported by empirical studies.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{25} McCold, \textit{supra} note 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. \textit{See Id.} This understanding of criminal justice as a reassertion of state power whether one accepts it or not, at least provisionally explains restoratists’ 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 Michel Foucault identifies as discourses of ‘discipline’ which emerged 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.” \textsc{Michel Foucault, Discipline and Punish: The Birth of the Prison} 137-38 (Alan Sheridan Trans., Vintage Books 1995).

\textsuperscript{26} Braithwaite, \textit{supra} note 3, at 16. Braithwaite writes that retributive emotions are natural and “easy to understand from a biological point of view,” but that “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.” \textit{Id.}
be more restorative.”\textsuperscript{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.”\textsuperscript{28} And, finally, restorativists contend that “doing justice in this way sufficiently meets the needs of the wider society for crime control.”\textsuperscript{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.\textsuperscript{30} Restorative justice, therefore, begins with a concern for the ‘needs’ of victims, offenders, and the community.\textsuperscript{31} According to restorativists, a crime triggers unique needs in each

\begin{itemize}
  \item \textsuperscript{27} McCold, \textit{supra} note 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. \textit{Id.} at 381.
  \item \textsuperscript{28} \textit{Id.} at 372 (emphasis added).
  \item \textsuperscript{29} \textit{Id.} (internal quotations omitted).
  \item \textsuperscript{30} “Community” is, of course, not a precise term and can connote exclusionary practices as well as inclusive ones. In his essay \textit{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 that 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 Pettit and offers the concept of ‘dominion,’ defined as “the assurance of rights and freedoms,” as an alternative to the concept of ‘community.’ Unlike what Braithwaite and Pettit identify as a liberal articulation 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 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, \textit{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).
  \item \textsuperscript{31} ZEHR, \textit{supra} note 4, at 13, 14-17.
\end{itemize}
of these ‘stakeholders,’ all of which are inadequately addressed in the traditional justice system\textsuperscript{32}.

The traditional justice system, at least in its modern incarnation, tends to remove the victim from the criminal process\textsuperscript{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\textsuperscript{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\textsuperscript{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 right

\textsuperscript{32} Id. at 14-17, 22-24.

\textsuperscript{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 Wisc. L. Rev. 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.

\textsuperscript{34} ZEH, supra note 15, at 30-32; Gabbay, supra note 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 note 25, at 21-22.

\textsuperscript{35} Gabbay, supra note 15, at 360 note 35.
the wrong.\textsuperscript{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.\textsuperscript{37} Furthermore, restorativists contend that the victim needs to play a central role in 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{40} There is no existing mechanism in

\textsuperscript{36} See ZEHR, supra note 15, at 30.
\textsuperscript{37} ZEHR, supra note 4, at 65-66.
\textsuperscript{38} ZEHR, supra note 15, at 25.
\textsuperscript{39} ZEHR, supra note 4, at 14-17; Strang, supra note 25, at 20-25.
\textsuperscript{40} Strang, supra note 25, at 22.
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. Finally, although it is not emphasized in the restorativist literature, civil suits are often prohibitively expensive for a victim to pursue, a cost which further burdens the victim without necessarily providing the types of restoration the victim seeks. 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 involves an exclusion of the offender. The offender is

\(^{41}\) Id. at 28-29.
positioned outside society, as in *People v. Offender*, and has every incentive to reject the concerns of society for 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 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.\(^{47}\)

\(^{42}\) *ZEHR*, *supra* note 15, at 33.

\(^{43}\) *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 his representation, but for all practical purposes a defendant does not participate in his own defense except to the extent his attorney feels it is necessary or advisable.

\(^{44}\) *ZEHR*, *supra* note 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* note 4, at 16.

\(^{46}\) Gabbay, *supra* note 15, at 368.

\(^{47}\) *ZEHR*, *supra* note 15, at 33; Gabbay, *supra* note 15, at 368.
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, one can argue, as Anthony 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

⁴⁸ ZEHR, supra note 15, at 37.
⁵⁰ ZEHR, supra note 4, at 20, 28.
⁵¹ Id. at 16.
⁵³ Id. at 118
process’ demonstrates to the convicted criminal that “she ought to accept the verdict.”\textsuperscript{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.\textsuperscript{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 that 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. 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. This does, incidentally, highlight the fact that restorative justice practices may be ill-suited to fact-finding and guilt-determination.\textsuperscript{56} This doesn’t mean that there is no place for restorative reforms in these arenas, but restorative practice and theory is primarily focused on the role stakeholders play in the imposition of

\textsuperscript{54} \textit{Id.} at 119
\textsuperscript{55} JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 121 (Rev. Ed., 1990).
\textsuperscript{56} See Gabbay, \textit{supra note} 15, at 365 (saying that pleading guilty is the “initial precondition for a restorative process”).
sanctions. This may limit the situations in which restorative justice can be implemented, but given the percentage of convictions that arise out of plea-arrangements, restorative justice practices remain applicable to a significant number of the offenders who enter the criminal justice system.57

Restorative practice often involves apology or other formal acknowledgements of the harm one has caused.58 Acknowledging responsibility under a restorative model plays out 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.”59 The active involvement of offenders in crafting the restitution required means that ‘punishment’ under a restorative justice model takes on significance for offenders which cannot be hoped for in the traditional justice system.60

59 ZEHR, supra note 15, at 42.
60 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,
“Putting right” under the restorative justice model also involves attempting to reintegrate offenders into the community. Restorative justice views the moment of punishment as an opportunity for potential transformation in the offender’s life. 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. 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. 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. 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, and perhaps community members.”


61 ZEHR, supra note 4, at 29; Umbreit et al., supra note 6, at 256.
62 ZEHR, supra note 4, at 17; Braithwaite, supra note 3, at 3.
63 ZEHR, supra note 4, at 16.
64 Id. at 59; Van Ness, supra note 43, at 4.
65 ZEHR, supra note 4, at 17.
offender. This means that a restitution agreement for, say, a youth who committed vandalism might involve traditional community service such as painting over grafittied 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. 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 relationships with other community members. In places where community service projects treat the young offender respectfully and engage him in activities that develop skills and raise his self esteem, it is not uncommon for the youth to voluntarily continue after satisfying the hours required by the court. Finally, restorative justice addresses and acknowledges the more traditional needs of offenders, including opportunities for treatment for addiction or other problems, community support and encouragement, and, in some cases, temporary restraint.

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

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66 Id. at 70 ch. 1 note 2; Strang, supra note 25, at 25-26; Gabbay, supra note 15, at 385. For more information on the practice of reintegrative shaming see http://www.aic.gov.au/rjustice/rise/.
68 See id.
69 Id.
70 ZEHR, supra note 4, at 17.
macro-communities.\textsuperscript{71} Again, this delineation is based on the degree to which members are directly affected by the crime.\textsuperscript{72} 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.\textsuperscript{73}

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,” “let[ting] others know that they condemn the behavior,” “reinforce[ing] boundaries of acceptable behavior,” and a need to “acknowledge their own injuries.”\textsuperscript{74} The needs of micro-communities are addressed in whatever forum in which the victim and offender meeting takes place.\textsuperscript{75} 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 affected them.\textsuperscript{76} 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

\textsuperscript{71} McCold, supra note 16, at 365.
\textsuperscript{72} See id. 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.”).
\textsuperscript{73} 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.
\textsuperscript{74} Id. at 369.
\textsuperscript{75} ZEHR, supra note 4, at 44-51.
\textsuperscript{76} ZEHR, supra note 4, at 50-52.
community at the encounter stage of the procedure. For instance, some systems rely solely on a victim-offender conference.\textsuperscript{77} 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.”\textsuperscript{78}

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.\textsuperscript{79} The needs of localities include “reassurance [that] what happened was wrong,” “know[ing] something is being done about it” and “steps are being taken to prevent its reoccurrence,” knowing that “offenders will be held accountable,” for the “victim and offender to return to the community,” and a

\textsuperscript{77} ZEHR, supra note 4, at 47.

\textsuperscript{78} McCold, supra note 16, at 401. 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 of this paper. Suffice to say that the purist model is more holistic in approach, and the maximalist model seeks to augment existing justice practices. 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, the analyses run the gamut and there are very few who make the clear distinctions put forward by McCold.

\textsuperscript{79} Id. at 365.
“sense that justice was done.”

McCold argues that many of these needs are met by the mere fact that a restorative gathering of victim, offender, and community takes place. 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.

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.” 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 restorativists make at the outset, private over public.

Restorativists maintain a core

80 Id. at 370.
81 Id. at 400.
82 Id.
83 Id. at 371.
84 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.” ZEH, supra note 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
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.  

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. But 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 their minimal discussion of 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

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.)

85 See id. at 3.
86 Gabbay, supra note 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.
victims of crime and help them meet their needs.\textsuperscript{87} The community is further obliged to support efforts to reintegrate offenders into the community, to take an active role in defining offender obligations when appropriate (through participation in the encounter), and to offer opportunities for offenders to make amends.\textsuperscript{88} 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.”\textsuperscript{89} This last obligation is not an obligation which arises out of a particular criminal event, \textit{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.\textsuperscript{90} 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.\textsuperscript{91}

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

\begin{footnotes}
\footnote{\textsuperscript{87} ZEHR, \textit{supra} note 4, at 66.}
\footnote{\textsuperscript{88} Id.}
\footnote{\textsuperscript{89} Id.}
\footnote{\textsuperscript{90} ZEHR, \textit{supra note} 15, at 52-57.}
\footnote{\textsuperscript{91} Walgrave, \textit{supra note} 30, at 85.}
\end{footnotes}
restorative justice practice and are useful to this discussion. 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.” 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.

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*. 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.

*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.” Van Ness identifies the key elements of these encounters as being

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92 Van Ness, supra note 43, at 2
93 Id.
94 Id.
95 Id.
96 Id. at 3.
97 Id.
meeting, narrative, emotion, understanding, and agreement. 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. Narrative refers to the process by which the stakeholders talk about “what happened, how it affected them, and how to address the harm.” Emotion is central to understanding one way in which restorative justice differs from the traditional justice system. 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. 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. 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.” Finally, the element of agreement is the hoped-for end result of the encounter; once the stakeholders

98 Id.
99 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 revictimizing rather than healing the victim. See Braithwaite, supra note 3, at 152; Zehr, supra note 4, at 38-39.
100 Van Ness, supra note 43, at 3.
101 Id.
102 See Id.
103 See Id.
104 Id.
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.”

If encounters are restorative justice’s most “distinctive restorative process,” then amends are its most “distinctive outcome.” Amends refers to the steps which an offender takes to put things right. Van Ness identifies four key elements of offenders’ amends to their victims: apology, changed behavior, restitution, and generosity. 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.” 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. 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. 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

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105 Id.
106 Id.
107 Id. at 4.
108 Id.
109 Id.
110 Id.
agency of the victim’s choosing or some other means of imposing more than the minimum reparation on themselves.¹¹¹

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.”¹¹² The process of reintegration embraces three key elements: respect, material assistance, and moral/spiritual direction.¹¹³ 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.”¹¹⁴ Braithwaite’s work points to evidence that 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.”¹¹⁵ 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.”¹¹⁶ Material assistance refers to actual assistance to victims and offenders that is needed as a consequence of crime or as a

¹¹¹ Id.
¹¹² Id.
¹¹³ Id. at 5
¹¹⁴ Id.
¹¹⁵ Gabbay, supra note 15, at 385.
¹¹⁶ Van Ness, supra note 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. Unfortunately, Kant’s insistence on retribution (see infra section III) fits very well into the modern justice system which emphasizes prison as the punishment norm, a 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 understanding of equal dignity has been de-emphasized in the modern criminal justice and penal system.
consequence of the traditional criminal justice system, so that restorative practice includes providing material assistance for offenders as an aspect of reintegration or following incarceration imposed by a traditional court. 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 humanistic or religious communities of care can be central to the process of reintegration.

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.” 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. Invitation means exactly that, whatever entity is responsible for the process invites the stakeholders to participate in that process. Acknowledgement 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 peace 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 system’s restorative nature; the more focused a system is on traditional notions of the state’s and

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117 Id.
118 Id.
119 Id.
120 Id. at 5-6.
society’s interests, the less inclusive, and thus restorative, that system can be.\textsuperscript{121} 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.”\textsuperscript{122}

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 that involves, to a significant extent, the voluntary participation and input of the stakeholders in identifying and crafting that response. And, finally, a restorative response to the crime seeks to repair the ruptures in social fabric that cause and are caused by crime in such a way that the social fabric is strengthened through society’s 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.”\textsuperscript{123}

\section*{II. Restorative Justice v. Utilitarianism and 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

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\textsuperscript{121} Id. at 6. \\
\textsuperscript{122} 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 note 16, at 381. \\
\textsuperscript{123} BRAITHWAITE, supra note 3, at 3.
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added up for the citizenry in the aggregate.” ¹²⁴ 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.¹²⁵ 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.¹²⁶

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.¹²⁷ 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 ‘happinesses’) through their behavior in the marketplace.¹²⁸ 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.¹²⁹ Therefore, the aggregate welfare of individuals can be measured by looking to the market, and policies that increase the aggregate wealth or are ‘wealth maximizing’ are the policies that should be pursued because wealth maximization roughly equals

¹²⁵ See Murphy & Coleman, supra note 55, at 182.
¹²⁶ Id.
¹²⁷ Id. at 186.
¹²⁹ See Harrison, supra note 128, at 37.
‘utility maximization.’\textsuperscript{130} The policies that will maximize wealth (and utility) are those that are maximally efficient – that is, those policies that, through the operation of the market, allocate resources to those individuals who ‘value’ them most.\textsuperscript{131}

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 ‘willingness’ and ‘ability’ means that if policymakers 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. This is inconsistent with the original intent of utilitarianism, but a brief look at Mill’s formulation of the function of justice reveals the way in which utilitarianism can be interpreted in a manner consistent with efficiency theory:

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 tolerated . . .\textsuperscript{132}

The concept of injustice, according to Mill, seems merely to be that which has become inexpedient, that is, inefficient. In fact, under this view of human activity, the right to equality of treatment, or justice, may be a concept that 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 \textit{post hoc} rationale for changing practices when what was

\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textsc{Murphy & Coleman}, \textit{supra} note 55, at 37.
\textsuperscript{132} \textsc{John Stuart Mill}, \textsc{Utilitarianism} 60 (Batoche Books 2001).
‘socially expedient’ becomes inexpedient.133 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.134 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.135 Again, this is utilitarianism and law and economics painted in the broadest strokes, tending toward a very monolithic description of both theories, but one might 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: efficient deterrence.136 Criminal law is a way of ensuring that ‘exchanges’ will be efficient.137 Efficiency theory/utilitarianism is concerned with two types of deterrence: special and general.138 Special deterrence refers to the hoped-for deterrent effect on a specific offender; in other words, utilitarians hope that the experience of being punished

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133 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. at 51-53.

134 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) that 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.

135 HARRISON, supra note 128, at 343.

136 MURPHY & COLEMAN, supra note 55, at 118

137 HARRISON, supra note 128, at 204.

138 MURPHY & COLEMAN, supra note 55, at 118.
will deter an offender from engaging in criminal conduct again in the future.\textsuperscript{139} 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.\textsuperscript{140} Punishment then becomes a way of showing, as Justice Holmes said, that
“the law keeps its promises.”\textsuperscript{141} 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.”\textsuperscript{142}

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.\textsuperscript{143} Even when transaction costs are not low, if people
“generally place a high value on personal autonomy and the right to choose, . . . a rule
penalizing those who harm others without their consent can be squared with
efficiency.”\textsuperscript{144} Second, criminal law discourages behavior that creates undesirable
externalities. 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
supposedly victimless crime offends others and that the disutility of those others

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 119.
\textsuperscript{142} Id.
\textsuperscript{143} HARRISON, supra note 128, at 202-207.
\textsuperscript{144} Id. at 210.
outweighs the benefits to the immediate participants in the “victimless” crime.\textsuperscript{145} Finally, efficiency theorists explain/justify criminal law as an attempt to alter the utility of certain behavior so that people change their preferences.\textsuperscript{146} Under this theory, the demand (or preference) for a particular type of behavior becomes much less because the behavior is stigmatized by being criminalized.\textsuperscript{147} 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.\textsuperscript{148}

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 criminals who cannot pay the ‘fines’ which are the ideal form of punishment in an efficiency world because they involve the least administrative costs.

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.\textsuperscript{149} Finally, and perhaps most importantly, recidivism seems to be decreased for offenders who participate in a restorative justice process.\textsuperscript{150}

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

\textsuperscript{145} Id. at 213-215.
\textsuperscript{146} Id. at 216-218.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Gabbay, \textit{supra} note 15, at 369
\textsuperscript{150} Id. at 369
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.\footnote{Strang, supra note 25, generally; BRAITHWAITE, supra note 3, at 47-51.} 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.\footnote{Wright, supra note 124, at 4.} 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.\footnote{Strang, supra note 25, generally; BRAITHWAITE, supra note 3, at 47-51 (regarding participant satisfaction); Strang, supra note 25, at 20 (citing surveys which suggest that the public is more amenable to nonpunitive responses to crime than is generally assumed).}

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.\footnote{Gabbay, supra note 15, at 368-69.} Cases which are diverted from standard court proceedings will result in an avoidance of all the costs incurred during those proceedings.\footnote{\textit{Id.} at 368.} Of course, restorative processes require economic resources as well, but these are often substantially

\footnote{151 Strang, \textit{supra} note 25, \textit{generally}; BRAITHWAITE, \textit{supra} note 3, at 47-51.} \footnote{152 Wright, \textit{supra} note 124, at 4.} \footnote{153 Strang, \textit{supra} note 25, \textit{generally}; BRAITHWAITE, \textit{supra} note 3, at 47-51 (regarding participant satisfaction); Strang, \textit{supra} note 25, at 20 (citing surveys which suggest that the public is more amenable to nonpunitive responses to crime than is generally assumed).} \footnote{154 Gabbay, \textit{supra} note 15, at 368-69.} \footnote{155 \textit{Id.} at 368.}
lower.\textsuperscript{156} For example, a diversion program in the city of Chilliwack in British 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.”\textsuperscript{157} This results in an approximate yearly savings of $260,000 annually, not an insignificant savings on a local level.\textsuperscript{158} 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.”\textsuperscript{159} These figures obviously represent a small sample, and cannot be taken to indicate the levels of savings that would result on a large scale if restorative justice procedures were 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.\textsuperscript{160} 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.

\textsuperscript{156} Id. at 368-69.
\textsuperscript{157} Id. at 369.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. This figure represents the avoidance of “$70 per day per inmate for the aggregate sum of 57,000 jail days.”
Most studies show that participation in restorative processes decreases the rate of recidivism.\textsuperscript{161} 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.\textsuperscript{162} 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.\textsuperscript{163}

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 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.

\textsuperscript{161} Id. at 366.
\textsuperscript{162} Id. at 386-391.
\textsuperscript{163} Id.
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.\textsuperscript{164} 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.\textsuperscript{165} 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

\textsuperscript{164} \textit{Zehr, supra} note 4, at 17.
\textsuperscript{165} 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. \textit{Mill, supra} note 132, at 10-13.
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.\textsuperscript{166} 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.\textsuperscript{167} Justice is divided into two distinct categories: distributive and interactive.\textsuperscript{168} 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.\textsuperscript{169} 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.\textsuperscript{170} 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.\textsuperscript{171} Unlike distributive justice, interactive justice does not require any “comparative criterion” because all individuals have equal rights to

\begin{itemize}
\item \textsuperscript{166} Richard W. Wright, \textit{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)
\item \textsuperscript{167} \textit{Id.} at 1877.
\item \textsuperscript{168} \textit{Id.} at 1883.
\item \textsuperscript{169} \textit{Id.} at 1887.
\item \textsuperscript{170} \textit{Id.} at 1888-90.
\item \textsuperscript{171} \textit{Id.} at 1887.
\end{itemize}
negative freedom, that is, security in their possessions and person. 172 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. 173 In other words, everyone has an equal right to security in one’s possessions and one’s person, and if those rights are interfered with, the individual responsible can be held liable. 174

Criminal law is clearly an interactive justice concern. In Kantian justice, crime is understood as a willful, external-freedom-affecting 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 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 who has willfully breached the rules of social order so that he may repay a kind of moral debt which is due and owing to society. 177

Restorative justice is compatible with Kantian justice in at least a couple of important ways. First, the burdens imposed on offenders in restorative justice practice

172 Id. at 1890.
173 Id. at 1890-91.
174 Id.
175 Id. at 1866-67 (internal quotes omitted). It is important to point out that since the categorical imperative is the foundation of all morality for Kant, there are many violations of the categorical imperative that would not rise to the level of a crime. Only those willful violations that invade or threaten others’ equal external freedom qualify as crimes. However, for the purposes of this paper one need only understand the basic concept that crime is for Kant, above all else, a moral wrong.
176 Gabbay, supra note 15, at 381.
177 MURPHY & COLEMAN, supra note 55, at 121, 123-124.
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.

Kant’s understanding of punishment, broadly construed, can be taken to mean “any unpleasant burden imposed on the offender.”

This means that things like restitution, community service, or participation in rehabilitation could be located on a kind of punishment continuum. If so, this augmented notion of punishment could go some distance toward aligning restorative practices with the values of Kantian justice.

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. 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.

More significantly, though, 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,

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178 Gabbay, supra note 15, at 378.
179 Id.
180 Id.
181 Murphy & Coleman, supra note 55, at 123-124.
not an instrument for achieving other practical ends,” criminal punishment is, in fact, instrumental in Kant’s formulation.182 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 dispenses with 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 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, including, to the extent possible, offenders.188 Additionally, restorative practice respects

182 Gabbay, supra note 15, at 373
183 Id.
184 MURPHY & COLEMAN, supra note 55, at 121.
185 Id.
186 See Wright, supra note 124, at 5.
187 MILL, supra note 132, at 53
188 McCold, supra note 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
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

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189 BRAITHWAITE, supra note 3, at 15.
190 ZEHR, supra note 4, at 65.
192 Restorative justice does look 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
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 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 the needs of local communities that 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 way Foucault’s thinking can illuminate some of the theoretical assumptions underlying restorative justice practices.

For Kant, criminal justice is the means by which society restores the moral order; the criminal act has unbalanced the moral universe, and the only way to rebalance it is to punish the offender. For restorativists, criminal justice is the means by which society restores the social order; the criminal act has ruptured a web of interdependent social relationships, and the way to repair that rupture is to restore the social fabric. Both theories rely on fundamental assumptions about the equal freedom and equal dignity of individuals. However, Kantian justice presumes foreknowledge of what will restore order 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 note 15, at 382.
on a transcendent moral plane, namely punishment, and assumes that what restores moral order will restore the social order. The real needs of individuals and the actual effectiveness of punishment are less important. Restorative justice does not speak to an abstract moral order except to the extent that restorativists respect the equal dignity and equal freedom of both victims and offenders. Restorativists then set about trying to figure out what response to crime will satisfy the actual needs of victims and successfully reintegrate offenders into society. So the word “justice” in restorative discourse connotes a much more historical, empirical, and subjective notion of what it means, and what must be done, to “right a wrong.”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

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, supra note 4, at 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 what we accept as true, 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 note 15, at 375.

¹⁹⁵ The arguable exceptions to this are civil suits brought by government agencies and those 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.
over the criminal conflict to the state to prosecute.\textsuperscript{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.\textsuperscript{197}

Furthermore, Kantian justice seeks equity in the treatment of crimes; punishment is tailored to the crime and not the criminal.\textsuperscript{198} The result, ideally, is equal punishment of all offenders found guilty of equal offenses.\textsuperscript{199} The nature of the restorative 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.\textsuperscript{200} 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.\textsuperscript{201} Furthermore, as Braithwaite suggests, “[r]estorativists must abandon both equal punishment for offenders

\textsuperscript{196} Wright, \textit{supra} note 166, at 1878.
\textsuperscript{197} ZEHR, \textit{supra} note 4, at 37.
\textsuperscript{198} Gabbay, \textit{supra} note 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 strives for equal treatment for similarly situated offenders seems to be an accurate characterization.
\textsuperscript{199} See \textit{id}.
\textsuperscript{200} \textit{Id.} at 394 (citing Braithwaite and others).
\textsuperscript{201} Strang, \textit{supra} note 25, at 28-29.
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.”

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. 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. 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. 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. 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

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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. 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.

IV. Restorative Justice and Foucault

As we have seen, neither utilitarianism nor Kantian justice theory does an adequate job of descriptively or normatively accounting for the emergence of a system of restorative justice. Elements of each theory can be found in the practice of restorative justice, but the richness and complexity of restorative justice cannot be fully expressed in the vocabulary of either of these traditional legal discourses. The main reason neither discourse can adequately explain restorative justice is that restorativists fundamentally depart from traditional definitions of crime and the purpose of the criminal justice system. As has been discussed, both utilitarianism and Kantian justice theory deduce the definition of crime and the techniques of criminal justice from the universal claims each makes about human nature. Utilitarianism declares that human beings are rational;
rational beings weigh benefits and burdens in decision making; criminal activity does not result in a maximum amount of utility, therefore one must curb criminal activity; and the way one does that is by adjusting the burdens of criminal activity so that the rational offender is deterred. Kant declares that human beings are rational; Reason leads one to the categorical imperative as grounds for a universal morality; certain violations of the categorical imperative are crimes and disrupt a universal moral order to such a degree that society must restore the moral balance; and the way one rebalances the moral order is by inflicting punishment on the offender. Restorativists share certain fundamental principles with both theories, for instance, the notion that human beings are rational beings capable of choosing courses of behavior. Restorativists also take Kant’s respect for the equal dignity and equal freedom of individuals as a core principle, exceeding Kant in this regard by treating offenders with a degree of respect that cannot be found in retributivism. However, as much as these foundational principles inform the boundaries within which restorativists believe any criminal justice system must operate, restorativists do not define crime and the practice of criminal justice in terms of a transcendent notion of human nature, but rather in terms of the social practices, relationships, and institutions that constitute and inform the lived experience of individuals.

If, as I have suggested, the traditional legal discourses are incapable of fully articulating the theoretical underpinnings of a restorative justice practice, then a discussion of restorative justice may require a new vocabulary that can augment those traditional discourses. I believe the thinking of French philosopher and historian Michel Foucault (1926-1984) provides a vocabulary, a set of tools, with which one can distinguish where the differences lie between restorative justice and traditional legal
discourse while beginning to lay the groundwork for a new legal discourse. Foucault is not explicitly invoked in current restorative literature, but the thoughts he develops in his work offer an intriguing theoretical foundation for a discussion of restorative justice.

There are three fundamental Foucauldian concepts which resonate in a restorativist context and provide a jumping-off point from which to begin constructing a theoretical framework of restorative justice. First, there is a spirit of critique present in the restorativist literature that is strikingly Foucauldean, a desire to de-naturalize the way in which punishment operates in our modern criminal justice system. Second, restorativists understand the shaping and formation of individuals in a way that parallels Foucault’s notion of subjectivation. Finally, both the restorativists’ understanding of identity formation and the Foucauldean subject employ a shared conception of the way that power operates within individuals and human relationships.

Restorativists adopt an attitude of critique that is similar to that of Foucault. Foucault asserts that the task of philosophy is critique, which he defines in the following way:

this criticism is not transcendental, and its goal is not that of making a metaphysics possible: it is genealogical in its design and archaeologlogical in its method. Archaeological – and not transcendental – in the sense that it will not seek to identify the universal structures of all knowledge or of all possible moral action, but will seek to treat the instances of discourse that articulate what we think, say, and do as so many historical events. And this critique will be genealogical in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do, or think.210

In essence, Foucault’s project is one of historicizing that which we take to be a given. His assertion, and he is far from alone in this, is that our understanding of who we are as human beings is always historical and always shifting, and our practices are equally historical and contingent. This attitude of critique parallels the claims restorativists make when speaking of punishment. The fundamental restorativist suggestion is that the way criminal justice is practiced in Western society is not the only way criminal justice can be or has been practiced, that there are alternatives which may, in fact, more adequately address and reflect the actual needs of victims and, ultimately, society. De-naturalizing our current criminal justice system is the restorativists’ first step toward beginning a discussion about how we might re-imagine the role of our criminal justice system.

Similarly, restorativists’ understanding of how identity is structured parallels Foucault’s idea of the subject and subject formation. Foucault rejects the notion of a “fixed, unchanging human nature that transcends history and is the source for shaping or making sense of history.” Instead, Foucault asserts that the identities of individuals (subjects) are constituted and constantly being recreated, both actively and passively, through relationships with others, institutions, and oneself; subjectivity is a product of complex social interactions. Again, although Foucault is never explicitly invoked, this assumption regarding identity construction is implicit in the way restorativists approach the roles of victim and offender in a restorative system.

First, restorative justice begins with a concern for the victim. One of the criticisms restorativists level against the existing criminal justice system is that

\[\text{211} \quad \text{Ascanio Piomelli, Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering, 2004 Utah L. Rev. 395, 417 (2004)}\]
\[\text{212} \quad \text{Id. at 436-39.}\]
eliminating victims from the process is a re-victimization – it reinforces a sense of powerlessness that victims experienced at the hands of the offender.\textsuperscript{213} A central tenet of restorative justice is that allowing the victim to participate in the process gives the victim a sense of empowerment in defining her ‘self,’ an ability to re-cast herself as something other than a victim. In other words, it allows the victim to restore a relationship with herself and the world that was disrupted by the offender’s act, namely a sense of control, a sense of autonomy, and a sense of security in her surroundings.\textsuperscript{214} Implicit in this understanding of the value of victim involvement in the criminal justice process is the Foucauldian idea that human identity or subjectivity is an always shifting locus of intersecting relationships both with oneself and with others.

The same conception of human subjectivity is present in the restorativists’ concern with offender involvement. One of the basic critiques that restorative justice makes is that our current system of punishment does not work to re-integrate offenders into society. From the moment of arrest, the criminal justice system inscribes and reinforces a series of identities on the offender which become increasingly difficult to escape; the 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 allows and encourages offenders to find their own meaning, to re-create themselves within the context of community and through

\begin{footnotesize}
\begin{enumerate}
\item Gabbay, \textit{supra note} 15, at 360 note 35.
\item Zehr, \textit{Supra} note 205, at 24 (“trauma involves the destruction of meaning; transcendence of trauma involves the recreation of meaning”)
\end{enumerate}
\end{footnotesize}
transformative practices. Restorativists suggest that if the criminal justice system were to re-define the institutional relationship with offenders and alter the expectations implicit in those relationships, then this shift in and of itself would go a long way toward actually transforming the offenders’ identity and, ultimately, lead to greater success at reintegrating offenders into society. A criminal justice system that defines offenders as outside society can only produce individuals who understand themselves as outside of society. Again, the implicit assumption is that identity is fluid and constructed through social relationships.

Finally, as mentioned above, the parallels between the restorativists’ understanding of identity construction and the Foucauldian idea of the subject point to a shared conception of the way power functions in human relationships and subjectivity. Foucault asserts that all human relationships involve “relations of power.” Foucault has been widely misunderstood on this point, so it is useful to pause and unpack what Foucault means by “relations of power.” First, it is important to disentangle the word ‘power’ from its historically negative connotations. Foucault asserts that “we all know that power is not evil,” and goes on to cite the pedagogical institution as an example:

I see nothing wrong in the practice of a person who, knowing more than others in a specific game of truth, tells those others what to do, teaches them, and transmits knowledge and techniques to them. The problem in such practices where power – which is not in itself a bad thing – must inevitably come into play is knowing how to avoid the kind of domination effects where a kid is subjected to the arbitrary and unnecessary authority of a teacher, or a student put under the thumb of a professor who abuses his authority. I believe that this problem must be framed in terms of rules

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215 See Wright & Masters, supra note 67, at 61.
of law, rational techniques of government and ἔθος, practices of the self and freedom. 217

Of course, a full explication of Foucault’s theories of power and subject formation are beyond the scope of this paper. However, Foucault’s understanding of the teacher-student relationship as an acceptable use of power begins to illuminate what Foucault means when he says that all human relationships are “relations of power.” All human relations involve a give and take, a push and pull, and those relationships shape and inform our identity, our subjectivity. 218

Since power is present in all human relationships, the fundamental ethical question for Foucault becomes how does one use one’s power? Ethics, or “practices of the self and freedom,” is, for Foucault, a practice of self-control. In his discussion of ethics, he returns to the Greeks who he describes as problematizing the freedom of the individual as an ethical problem: “ἔθος was a way of being and of behavior.” 219

Foucault asserts that individual freedom is of great importance to the Greeks: “[n]ot to be a slave (of another city, of the people around you, of those governing you, of your own passions) was an absolutely fundamental theme.” 220 In fact, Foucault identifies non-slavery as one of the key components of ethical behavior, specifically the individual’s struggle to not be a slave to his or her appetites and passions. 221 It is at this point that Foucault’s discussion of power and ethics intersect. One behaves unethically when one abuses one’s power, when “one exceeds the legitimate exercise of one’s power and

217 Id. at 298-99.
218 Piomelli, supra note 211, at 437-39.
219 FOUCALUT, supra note 215, at 286.
220 Id. at 285.
221 Id. at 285-288.
imposes one’s fantasies, appetites, and desires on others.” 222 Such a person is “the slave of his appetites;” in other words, he is not exercising proper control over his own behavior. 223 Thus the “care of the self” that Foucault identifies as the primary ethical concern entails re-defining one’s relationship to oneself and thus one’s relationship to others: “the postulate of this whole morality was that a person who took proper care of himself would, by the same token, be able to conduct himself properly in relation to others and for others.” 224

The criminal act is an abuse of power. A central concern for any criminal justice system is how to respond to this abuse of power, this imposition of the will of one individual on another. Any state response to crime will inevitably involve exercising power over the individuals involved, both the victim and the offender. By and large, our current system of justice exercises power over stakeholders by intervening on behalf of the state and punishing the offender. Restorativists argue that this intervention disempowers victims, fails to produce significant change in the way offenders exercise power, and, in fact, may unintentionally enhance and reinforce the offender’s tendency to abuse his power by placing him in a prison environment where criminal and antisocial techniques and strategies are perfected, perhaps for no other reason than that is how one survives prison. Restorativists suggest that a restorative justice system can better restore a balance of power within and between the individual stakeholders, and thus better restore healthy relationships across society as a whole. The centrality of the balancing of

222 Id. at 288.
223 Id.
224 Id. at 287.
power to restorative justice is explicitly referenced in this instructive passage by Howard Zehr:

When we become victims, the experience calls into question our most fundamental assumptions about who we are, who we can trust, and what kind of world we live in. These include our assumptions about the orderliness of the world, our sense of autonomy or personal control, and our sense of relatedness – where we fit in a web of social relationships. Our lives rest on these three pillars. We built these pillars as we built our lives, from childhood to adulthood, and now they have been knocked out from under us. The core trauma of victimization might be called the ‘three ds’ – disorder, disempowerment and disconnection. The journey from trauma to healing thus may mean revisiting issues we thought were long settled: empowerment, order, and connection.

Paradoxically, perhaps, offenders must travel a parallel road. I am convinced that offending behavior often arises out of unhealthy ways of coming to terms with these same ‘pillars’ of autonomy, order and relatedness. For a variety of reasons – one of which is trauma experienced as children – we may construct a world in which we establish a sense of autonomy by domination over others, an order based on violence and force, and a sense of relatedness rooted in distrust of others and kinship with fellow ‘outsiders.’ As with victims, the journey to healing for offenders means re-constituting these pillars, often in new ways. For offenders as well as victims, until these issues are settled, we cannot belong; for offenders as well as victims, the process of settling these issues is a journey of belonging. Since it involves relationships with others, the journey cannot be made alone.225

The central task for victims is to re-define their relationship to the world around them. This requires that victims regain a sense of power and control. As has been discussed throughout this paper, restorativists believe that a key to regaining that sense of self is to allow victims to exercise some power over the way in which justice is carried out, to have a say in what must be done to “right the wrong.” This does not mean that victims require the ability to invert the power relationship and take revenge on the offender. In fact, as has been discussed, restorativists argue that evidence suggests that while a desire for

225 Zehr, supra note 205, at 23-24.
revenge may be an initial response to crime, victims are much less retributive than commonly assumed. What restorativists do require of a criminal justice system is that victims not be completely left out, and thereby disempowered.

The passage above also makes sense of the ways restorative justice is resonant with Foucault’s understanding of subject formation. Subjects are shaped by their relationship to others and the internalized relationship to self that those relationships entail. Offenders have, at some point, whether through their own experiences of trauma or out of necessity or for some other unknown reason, developed a sense of self that involves the domination of others, the abuse of power. To restore a balance of power within society at large, any criminal justice system will somehow have to come to terms with how to assist in re-shaping the subjectivity of offenders, in other words re-casting their relationship to power. Restorativists consistently assert that this can only be achieved by allowing for and incorporating practices of self-transformation into the criminal justice system. These practices of a “care of the self,” to put it in Foucauldean terms, do not take place in a vacuum. Instead, restorativists argue, offenders need opportunities to acknowledge wrongdoing, to experience other ways of relating to others (including victims), and to re-imagine their relationship to themselves.

By adopting an attitude of critique, understanding individuals primarily in terms of social and institutional relationships as opposed to an abstract human nature, and placing the empowerment of victims and offenders at the center of their system of justice, restorativists implicitly invoke ideas that are central to the philosophy of Michel Foucault. This is not to say that restorative justice is fundamentally Foucauldean any

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226 Strang, supra note 25, at 18
more than it is Kantian or Utilitarian. In the final analysis, restorative justice is restorativist, and the richness of its practice cannot be exhausted by any one theoretical framework. What Foucault offers is a way of thinking about those parts of restorative justice that do not fit neatly into Kantian justice theory or utilitarianism, and a means of uncovering some foundational assumptions that have not been explored in discussions where the primary goal of restorativists is to justify their movement in terms of traditional legal discourse.

**Conclusion**

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 goal of this new legal discourse might be one of constant alertness to the possibility of new forms of legal practice that privilege 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; this is not a call to revolution. Revolution implies a final liberation and a final stability which, by the very terms of this new discourse, would be impossible; instead, this discourse would embrace the warning Foucault articulated in an interview when asked about the possible benefits of restorative justice:

> [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.⁵²²⁷

⁵²²⁷ FOUCAULT, supra note 2, at 399-400
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