

The Works of Jürgen Habermas: A Tool for Further Understanding the Theory and  
Practice of Restorative Justice

by

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at

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DALHOUSIE UNIVERSITY  
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The undersigned hereby certify that they have read and recommend to the Faculty of Graduate Studies for acceptance a thesis entitled “The Works of Jürgen Habermas: A Tool for Further Understanding the Theory and Practice of Restorative Justice” by Audrey Laurel Barrett in partial fulfilment of the requirements for the degree of Master of Laws.

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## **DEDICATION PAGE**

This thesis is dedicated to my father for instilling in me early on, the need to question, debate, and enter into my opponent's argument, to my mother for her constant love and support, and to my dear sweet Aziz for standing with me as we put theory into practice in strange and wonderful lands.

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## **ABSTRACT**

The theory of restorative justice has always lagged behind practice. As such, gaps in theory have existed over time and continue to exist today, particularly in terms of explaining “the magic” that occurs within the encounter process. By exploring the theories of Jürgen Habermas, it is suggested that new frameworks can be developed that can help theorists think about, and explain the experiences and outcomes central to restorative processes. This paper focuses on Habermas’ theory of universal pragmatics and communicative action as a means to better understand the mechanisms within the encounter process, and the conditions necessary, to give rise to common understanding, agreement, learning and strengthened relationships. It then examines Habermas’ concept of the lifeworld and the interplay with communicative action to shed light on restorative justice’s potential for community building through norm clarification, victim and offender reintegration and increased individual capacity.



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## CHAPTER 1 – INTRODUCTION

For centuries, justice has been figured through the symbol of a blindfolded Themis. She bears the scales of impartiality in one hand and a sword of power in the other, evoking this allegorical message: justice is possible when a neutral judge calculates a fair balance of accounts to arrive at decisions backed by the force of a sovereign power. The detached fairness of equally considered, yet enforced, judgments provides a basic rationale for the machinations of modern courtrooms and associated legal measures. Despite this rationale's dominance in criminal matters, the past few decades have witnessed calls for a return to justice located around different images and techniques, their message generally captured by Auerback's (1983) allusion to *Justice Without Law*. Initiatives around the various mantles of informal justice, neighbourhood justice, alternative dispute resolution and community justice have contested law's implicit mandate to secure justice.<sup>1</sup>

Pavlich, in the quote above, captures, quite poetically, a change that has been occurring in our thinking towards justice in recent times. A change that I might characterize as a kin to what Kuhn would call a scientific revolution.<sup>2</sup> In the case of restorative justice, however, the change is related to our concept of justice; a revolution of justice, one might say. In the last 30-40 years in the West, we have started thinking about doing justice differently. We have started to question our assumptions and definitions of justice, and have begun to give new meaning to the word and processes. This change has not occurred overnight, nor is it even close to approaching completion. For example, restorative justice theorists are still trying to answer some of the most basic questions regarding restorative justice, including fully and accurately defining what makes a process restorative in the first place.<sup>3</sup> Nonetheless, it is clear that restorative

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<sup>1</sup> George Pavlich, *Governing Paradoxes of Restorative Justice* (London: Glasshouse Press, 2005) at 1.

<sup>2</sup> Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

<sup>3</sup> Gerry Johnstone and Daniel W Van Ness, "The Meaning of Restorative Justice" in Gerry Johnstone and Daniel W Van Ness, *Handbook of Restorative Justice* (Devon, Willan Publishing, 2007) at 6.

justice is evolving as a theory of justice, and transforming the face of our justice systems in both theory and practice.

With this paper, I hope to further contribute to the development of this dynamic and steadily evolving redefinition of justice. In particular, I hope to contribute specifically to the theoretical side of the “redefinition”, especially as it relates to the process of achieving restorative justice. Much has happened in terms of practice in restorative justice over the last 30 to 40 years, but fully *understanding* this practice has been slower in coming about. I specifically intend to approach the existing theory with a perspective informed by the writings of the German philosopher and sociologist Jürgen Habermas.<sup>4</sup>

Before delving into the work of Habermas and examining how it may help us better understand the restorative process, let me first take some time here in Chapter One to briefly reflect on the practice and theory of restorative justice, how it has evolved to date and examine how this has led to some of the gaps that still exist in its ever evolving theory. It is these gaps that I will then discuss and begin to address in Chapters Two and Three with the use of Habermas’ theories.

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<sup>4</sup> Some who know Habermas’ work may see this as a rather daunting task, given the complex and often demanding aspects of his writing. And some may feel that any paper with such a theoretical focus, whether it includes Habermas or not, is daunting or simply boring. However, I wish to assure the reader that the theoretical perspectives explored and discussed in this paper are both accessible and necessary. The paper was very much written with a diverse audience in mind, including those familiar with working with theory and those who are not.

## ***1.1 Restorative Justice's Roots in Practice***

When one traces the history of restorative justice, it can be seen that the movement has its roots predominately in practice as opposed to theory. In fact, practice has always developed ahead of theory in restorative justice history.<sup>5</sup>

The original restorative justice practices in large part grew out of a need to do something different given that the traditional ways were either flawed or were simply not working. Although academic discussion on the need to approach and 'do' justice differently stretches back to the 1950s, and authors such as Randy Barnett,<sup>6</sup> Nils Christie<sup>7</sup> and Albert Eglash<sup>8</sup> began writing about restoratively oriented approaches in the late 1970s, academic literature on restorative justice was not abundant in the early days of the re-emergence of restorative justice.<sup>9</sup>

According to Gavrielides:

... the contemporary practical concept of RJ was 're-born' not of academic theory, but of practitioners' intuitive recognition that the court was not meeting the needs of litigants, combined with a number of other factors such as their wish to reduce the backlog of cases.<sup>10</sup>

Practice, by far, formed the greatest part of the foundation of the modern restorative justice movement, in particular, the practices of Victim Offender Reconciliation

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<sup>5</sup> Paul McCold, "Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model" (2000) 3(4) *Contemporary Justice Review* 357 at 359.

<sup>6</sup> Randy Barnett, "Restitution: A New Paradigm of Criminal Justice" (1977) 87(4) *Ethics: An International Journal of Social, Political, and Legal Philosophy* 279.

<sup>7</sup> Nils Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1.

<sup>8</sup> Albert Eglash, "Beyond Restitution: Creative Restitution" in Joe Hudson and Burt Galaway, eds., *Restitution in Criminal Justice* (Lexington, MA: DC Heath and Company, 1977).

<sup>9</sup> Theo Gavrielides, "Restorative Justice Theory and Practice: Addressing the Discrepancy", online: European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2007 (HEUNI) < <http://www.heuni.fi/uploads/8oiteshk6w.pdf> >. Last Updated November 4, 2011 at 21.

<sup>10</sup> *Ibid.* at 21.

Programs (VORP) or Victim Offender Mediation (VOM), Family Group Conferencing, and Sentencing Circles.<sup>11</sup> A brief description of each is provided below.

### 1.1.1 VOM/VORP

In the early practices of VOM/VORP, programs involved a mediator who would normally set up a face-to-face meeting with the victim and offender regarding a specific wrong in the criminal justice context.<sup>12</sup> The purpose of this face-to-face meeting was to allow both parties to talk about how the crime affected them, to share information, and to find a means between the two of them to address the harm caused by the crime. This normally resulted in a mutually accepted written restitution agreement.<sup>13</sup>

The role of the mediator in this face-to-face meeting was not to impose their solutions to the problem, but instead to act as a neutral third party and guide the parties through the process, encouraging them to engage in dialogue, focus on and explore the harms caused by the crime and support them in finding their mutually agreed upon solution.<sup>14</sup>

The typical VOM/VORP process most often was commenced by a referral to a mediator (often a trained volunteer or social worker) by the courts or police.<sup>15</sup> The mediator assigned to the case would then contact the victim and offender involved and set

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<sup>11</sup> Paul McCold, “The Recent History of Restorative Justice: Mediation, Circles, and Conferencing” in Dennis Sullivan and Larry Tift, eds., *Handbook of Restorative Justice: A Global Perspective* (New York, Routledge, 2006) at 24.

<sup>12</sup> Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1995) at 161; Mark Umbreit, Robert B Coates and Betty Vos, “Victim Offender Mediation: An Evolving Evidence-Based Practice” in Dennis Sullivan and Larry Tift, eds., *Handbook of Restorative Justice: A Global Perspective* (New York, Routledge, 2006) at 52.

<sup>13</sup> Zehr, *supra* note 12 at 161; Paul McCold, “Primary Restorative Justice Practices” in Allison Morris and Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001) at 41;

<sup>14</sup> Zehr, *supra* note 12 at 161; <sup>14</sup> Mark Umbreit, “A Humanistic Mediation Model: Moving to a Higher Place”, online: VOMA Quarterly, Fall/Winter, 1996 < <http://www.voma.org/docs/vomaq96.html> > . Last Updated November 4, 2011.

<sup>15</sup> Zehr, *supra* note 12 at 162-163.

up an in-person meeting with each separately to explain the process, answer any questions the parties may have, determine whether each was ready and willing to participate in a face-to-face meeting, and generally build trust and rapport with the parties.<sup>16</sup> For a face-to-face meeting to occur, the mediator had to know that each party was agreeing to participate voluntarily.<sup>17</sup>

Once the mediator determined that both parties were ready for the face-to-face meeting, one would be set up. As mentioned, this meeting was a chance for both parties to engage in dialogue. Both parties got a chance to ask questions to discover from the other just what happened and why.<sup>18</sup> Both got to tell their story.<sup>19</sup> Furthermore, the victim was able to make fully known the nature and extent of his or her injuries while the offender was encouraged to understand, accept and carry out his or her obligations.<sup>20</sup> Through this dialogue, the parties began to understand the harm caused and discuss how to repair the wrong.<sup>21</sup> They were encouraged to mutually develop a satisfactory restitution agreement that became the sentence or part of it and could be enforced by the courts. The restitution agreement often involved a financial component but did not have to. It could have instead included some type of community service or service to the victim.<sup>22</sup>

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<sup>16</sup> *Umbreit et. al.*, *supra* note 12 at 54; Mark Umbreit and Howard Zehr, "Restorative Family Group Conferences: Differing Models and Guidelines for Practice" (1996) 60 *Federal Probation* 24 at 27; Mark Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (San Francisco: Jossey-Bass, 2001) at 37-47.

<sup>17</sup> *Umbreit et. al.*, *supra* note 12 at 54; *Umbreit Handbook*, *supra* note 16 at 45.

<sup>18</sup> *Umbreit Zehr*, *supra* note 16 at 27; *Umbreit Handbook*, *supra* note 16 at 51-53.

<sup>19</sup> *Zehr*, *supra* note 12 at 161.

<sup>20</sup> David Cayley, *The Expanding Prison: Crisis in Crime and Punishment and the Search for Alternatives* (Toronto: Anansi, 1998) at 221.

<sup>21</sup> *Ibid.* at 226.

<sup>22</sup> *Zehr*, *supra* note 12 at 161; *McCold*, *supra* note 13 at 41; *Umbreit Handbook*, *supra* note 16 at 54-57.

After the face-to-face meeting, the mediator would contact (monitor) the parties again to follow-up with the offender on the compliance with the agreement and would inform the victim of the progress with the case.<sup>23</sup> Furthermore, the mediator might contact either party in regard to support or services that might have been requested during the meeting.<sup>24</sup>

### *1.1.2 Family Group Conferencing (FGC)*

Whereas VOM emerged in North America as a result of practices and experiences of the Mennonite community, Family Group Conferencing emerged on the other side of the globe in New Zealand in the late 1980s as a result of the practices and values of the Maori people of New Zealand.<sup>25</sup> The Maori residents of New Zealand experienced the effects of European colonization, including the imposition of Western justice, and social service systems, but they were able to maintain some of their traditional values and culture, and began to insist that these cultural values be included in the justice and social service system when applied to Maori people.

A modern conference process would involve first, pre-conference contact often by phone by the facilitator or case-worker with potential participants to explain the purpose and process of the conference, elicit participation and identify additional key persons who should be included in the process.<sup>26</sup>

Once the participants were determined and the process explained, a conference would be convened by the case worker at a time and place convenient to all. The

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<sup>23</sup> *McCold, supra* note 13 at 41; *Umbreit et. al., supra* note 12 at 55; *Umbreit Handbook, supra* note 16 at 58-59.

<sup>24</sup> *Umbreit et. al., supra* note 12 at 55.

<sup>25</sup> *Zehr, supra* note 12 at 257.

<sup>26</sup> *Umbreit Zehr, supra* note 16 at 27; Mark Umbreit, *Family Group Conferencing: Implication for Crime Victims* (U.S. Department of Justice, Office of Justice Programs, Office of Victims of Crime, 2000) at 2.

conferences themselves would vary somewhat depending on the wishes of the parties,<sup>27</sup> however, traditionally a conference would begin with introductions and a facilitator's scripted preamble that explains the overall purpose of the conference.<sup>28</sup>

The facilitator would then describe the offence in question and ask the young person whether they admit or deny involvement. For the conference to go forward, the offender must admit involvement or at the very least not deny it. If this requirement was satisfied the conference continued.<sup>29</sup> The discussion at that point would be opened up to all participants, starting normally with the offender<sup>30</sup> and then the victim, family members, the support persons and all others participating. Each individual is asked to share their story regarding the event and its impact on them.<sup>31</sup>

Once everyone had expressed their views on the event and its harm, the next phase of the conference focused on coming to agreement regarding how to repair the harm. Through this discussion a formal reparations agreement would normally be reached.<sup>32</sup>

After a conference had concluded, the offender would fully be expected to fulfill the actions agreed upon in the agreement. Community members would often take responsibility in monitoring the agreement's fulfillment.

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<sup>27</sup> *McCold*, *supra* note 13 at 45.

<sup>28</sup> David Moore and John MacDonald, *Community Conferencing Kit* (Transformative Justice Australia, undated) at 18 of script; Gabrielle Maxwell, Allison Morris and Hennessey Hayes, "Conferencing and Restorative Justice" in Dennis Sullivan and Larry Tiffit, eds., *Handbook of Restorative Justice: A Global Perspective* (New York, Routledge, 2006) at 93.

<sup>29</sup> *Umbreit*, *supra* note 26 at 2; *McCold*, *supra* note 13 at 45; *Moore et. al.*, *supra* note 28 at 12.

<sup>30</sup> *Umbreit Zehr*, *supra* note 16 at 27.

<sup>31</sup> *Ibid.* at 25.

<sup>32</sup> *Umbreit*, *supra* note 26 at 3; *Moore et. al.*, *supra* note 28 at 24.



### 1.1.3 Sentencing Circles

Circle processes were the most recent of the restorative practices to emerge.<sup>33</sup>

Circles were and still are processes central to North American Aboriginal culture and world view and are used in many traditional aspects of their life.<sup>34</sup> The first use of circles in the North American justice system, however, was in 1990 as part of a pre-sentence hearing held by Justice Barry Stuart of the Territorial Court of Yukon.<sup>35</sup> Part of the impetus for their creation was similar to the cultural clash that occurred in New Zealand, where Aboriginal world views and formal justice systems were largely inconsistent, and a need for incorporating traditional Aboriginal concepts and practices existed.<sup>36</sup>

Sentencing circles traditionally, in fact, took the form of a series of circles. Often times this series would start with separate circles for both the victim and the offender. These initial circles would take place separately so that the victim and offender each had their own safe place to be given an explanation of what was to happen throughout the process, to ask questions, and to express any fears and anxieties about the process or about the incident in question.<sup>37</sup> These initial circles were also places it could be determined if this was an appropriate case to be sent for a sentencing circle (it was important for example to determine that the offender sincerely wanted to be part of the

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<sup>33</sup> Barbara Raye and Ann Warner Roberts, "Restorative Processes" in Gerry Johnstone and Daniel W Van Ness, *Handbook of Restorative Justice* (Devon, Willan Publishing, 2007) at 215.

<sup>34</sup> *Ibid.* at 215; *McCold*, *supra* note 13 at 48. Although there are various Aboriginal tribes across Canada with their own distinctive worldviews, some elements seemed to hold relatively constant, such as the use and centrality of the circle.

<sup>35</sup> Irene Plett, *Restorative Justice in Urban Aboriginal Communities* (Alberta, Canada: Canadian Forum on Civil Justice, 1999) [unpublished Report] as cited in *McCold*, *supra* note 11 at 29; *Raye et. al.*, *supra* note 33 at 215.

<sup>36</sup> *Zehr*, *supra* note 12 at 257, 260; Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples: Don't Fence Me In." in Royal Commission of Aboriginal People, *National Round table on Aboriginal Justice Issues* (Ottawa, ON: Minister of Supply and Services of Canada, 1993) at 161-183.

<sup>37</sup> Barry Stuart, "Guiding Principles for Peace Making Circles" in Gordon Bazemore and Mara Schiff, eds., *Restorative Community Justice* (Anderson Publishing: Cincinnati, 2001) at 221.

process and whether he was willing to take accountability and contribute to the healing of others as well as himself. – guilty plea necessary, issues for the larger circle identified).<sup>38</sup> Once these preparation circles had been conducted and it is determined that the case was appropriate for a sentencing circle, a larger circle would be called. This Large Circle would bring together the victim and his or her support group, the offender and his or her support group, court officials including the judge, prosecutor and defence counsel, as well as interested members of the larger community.<sup>39</sup> In the beginning, the circle was facilitated by the presiding judge, but this practice gave way to the circle being led by ‘Keepers of the Circle’.<sup>40</sup> Participants typically sat in a circle formation and sometimes sat in two circles – the inner circle for the victim, offender, court official and close family and the outer circle for the larger community.<sup>41</sup>

The process itself was rich with traditions, symbols and rituals. The circle would usually begin with a prayer and or a traditional ceremony. Then participants would be asked to introduce themselves and express how they were feeling.<sup>42</sup> Time was taken at this point to ease into the discussion, help people get to know and trust one another and build relationships. The Keepers of the Circle would want to create a safe and open space for the expression of emotions and truth-telling.

Both as part of tradition, as well as to order the process and regulate the dialogue so that everyone was given the chance to express themselves freely without pressure or

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<sup>38</sup> *McCold*, *supra* note 13 at 51; *Stuart*, *supra* note 37 at 221.

<sup>39</sup> *Raye et. al.*, *supra* note 33 at 215; *McCold*, *supra* note 13 at 50.

<sup>40</sup> Keepers were not neutral third parties as in the other restorative process, but instead respected persons connected to the event and or the community. The Aboriginal world view, it is said, did not deal with bias by designating the facilitator as a neutral, removed party, but instead required that the keeper love each party equally; *McCold*, *supra* note 13 at 51; Heino Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum” in Allison Morris and Gabrielle Maxwell, eds., *Restorative Justice for Juveniles: Conferencing, Mediation, and Circles* (Portland: Hart Publishing, 2001) at 161.

<sup>41</sup> *McCold*, *supra* note 13 at 51.

<sup>42</sup> *McCold*, *supra* note 13 at 51.

interruption, a talking piece was used.<sup>43</sup> This often took the form of some sacred object.<sup>44</sup> Only the person holding it would be permitted to speak. Everyone else was to respectfully listen. The talking piece was passed around the circle, allowing everyone the chance to speak without forcing them to do so.

Within the discussion of the Large Circle, participants were encouraged to express their feelings and opinions and tell their story. Sharing stories was an important aspect of circle process.<sup>45</sup> Respected community persons, often elders in the community, would give their opinions and points of view, as well as speak on traditional stories and teachings as a way of providing guidance and wisdom to the dialogue.<sup>46</sup>

Through dialogue, the underlying issues within the community as well as those particular to the offender would be discussed,<sup>47</sup> and a consensus would be reached as to what should be recommended or what remedy could be undertaken to address these issues, as well as what sentence would be appropriate for the offender.<sup>48</sup> This did not have to include incarceration and could include other support related undertakings such as getting drug abuse or anger management counselling. Community members would also often commit to certain actions to support both the victim and the offender and potentially address some of the underlying issues at the community level.

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<sup>43</sup> *Raye et. al.*, *supra* note 33 at 215.

<sup>44</sup> *McCold*, *supra* note 13 at 51.

<sup>45</sup> Barry Stuart and Kay Pranis, "Peacemaking Circles: Reflections on Principal Features and Primary Outcomes" in Dennis Sullivan and Larry Tiftt, eds., *Handbook of Restorative Justice: A Global Perspective* (New York, Routledge, 2006) at 122; Aboriginal cultures were originally, and still in large part are, oral cultures that share their values, traditions and teachings through stories. Bringing this aspect of culture into the circle created significant power.

<sup>46</sup> *McCold*, *supra* note 13 at 50-51.

<sup>47</sup> *Stuart et. al.*, *supra* note 45 at 130.

<sup>48</sup> Unearthing the issues within the community as well as within the offender's life that lay at the root of the incident is an extremely important process within circles. *McCold*, *supra* note 13 at 50.

The final circle or circles to be held were the “follow up circles”. These circles would bring some or all of the parties from the Large Circle back together periodically to see what progress was being made and to ensure the commitments made in the circle were being honoured.<sup>49</sup>

It was through all three of these novel and alternative practices, or ways of doing justice (VOM/VORP, FGC, and Sentencing Circles), that the movement of restorative justice was born or resurrected in the West.

## ***1.2 The Need for Theory***

As mentioned earlier, although there was some, there was not an abundance of academic writing in the early restorative justice movement, nor was there much in the way of theoretical frameworks. As a result, most of the processes described above evolved through simple trial and error, new *attempts* at ‘doing’ justice in a different way. Even as theory began to develop, it seemed to forever continue to lag behind practice. As McCold writes:

The evolution of restorative justice as a paradigm is more a kin to a process of discovery rather than invention. Practice has always led the theoretical developments, as a kind of social physics was being uncovered.<sup>50</sup>

Despite this continued lag, what began to propel theory forward and close the gap to some extent between practice and theory was the desire to know how the original

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<sup>49</sup> *Stuart, supra* note 37 at 223.

<sup>50</sup> *McCold, supra* note 5 at 359.

practices worked and more importantly to some, how they could be replicated in different contexts.<sup>51</sup>

In order to answer the question of replication, an equally important question needed to be answered: What is restorative justice? As Paul McCold again notes:

In the evolution of restorative justice, practice has preceded theory. Mediation, circles and conferencing were used to respond to criminal cases *before there was an understanding that these practices were restorative justice*. Each practice developed independently and each eventually influenced the others.<sup>52</sup> [emphasis added]

In the early practice stages of restorative justice, practitioners did not even know that they were practicing this thing we now refer to as restorative justice.<sup>53</sup> Practitioners were simply responding to the fact that things in the system employed at the time were not working well, and that something needed to change; new approaches needed to be taken.<sup>54</sup> As it was mentioned, only later when the desire arose to know how the practices worked and how they could be replicated did restorative justice theory really begin to emerge.

There existed patterns among the three original practices that gave rise to some theorists calling them each ‘restorative justice’. But there were many other practices that were also originally called restorative justice that didn’t share the same elements and underlying principles. For example, the judicial imposition of rehabilitative or treatment measures are sometimes referred to as ‘restorative’. Much about the underlying meaning

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<sup>51</sup> Daniel Van Ness and Karen Strong, *Restoring Justice*, 2d. ed. (Cincinnati: Anderson Publishing Co., 2002) at 15-36.

<sup>52</sup> *McCold, supra* note 11 at 24.

<sup>53</sup> *Maxwell et. al., supra* note 28 at 91-92.

<sup>54</sup> *Van Ness et. al., supra* note 51 at 15-36; *Gavrielides, supra* note 9 at 21.

and outcomes of restorative justice practices needed to be explained. As such, a definite need for research and theory existed.

As a result, theorists at this time began to examine and articulate the common elements of practice that were essential or important to its success including, preparing the victim and offender, of a particular offence, for, and engaging them in, a face-to-face dialogue to discuss the offence that occurred, the consequences of that offence, and the harms that it caused, and to come to a consensus on what could be done to make things right.

This identification of essential elements was an important step in the development of restorative justice theory, not only in understanding what was needed to successfully replicate, but also to differentiate processes that claimed to be restorative but really had little in common with the original practices. Articulating what restorative justice was was no easy task however. Although there were common patterns, there were also some significant differences between the early practices, and having theorists (and practitioners) agree on what restorative justice was, and what it was not, proved quite contentious. Simply deciding on a common definition took much time and debate. For years, and even to this day to some extent, there is not full agreement on what constitutes restorative justice or how one should define it.<sup>55</sup>

### *1.2.1 Defining Restorative Justice*

Agreeing on a definition of restorative justice was (and still is) an important theoretical step towards answering the question ‘What is restorative justice?’ and further,

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<sup>55</sup> *McCold, supra* note 5 at 358.

how it can be replicated. Some of the proposed definitions included the following. The first from Howard Zehr:

[Viewed from a restorative perspective] crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.<sup>56</sup>

In 1990, Burt Galaway and Joe Hudson offered another definition, as an approach to crime that required the following core elements:

[F]irst, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves; second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute; third, the criminal justice process should facilitate active participation by the victims, offenders, and their communities in order to find solutions to the conflict.<sup>57</sup>

Later in the 1990s, Kevin Minor and J.T. Morrison proposed the following:

Restorative justice may be defined as a response to criminal behavior that seeks to restore the losses suffered by crime victims and to facilitate peace and tranquility among opposing parties.<sup>58</sup>

And in the same year, John Haley defined restorative justice as:

In short, restorative justice is a process through which remorseful offenders accept responsibility for their misconduct to those injured and to the community that, in response allows the reintegration of the offender into the community. The emphasis is on restoration: restoration of the offender in terms of his or her self-respect, restoration of the relationship between offender and victims, as well as restoration of both offenders and victims within the community.<sup>59</sup>

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<sup>56</sup> Zehr, *supra* note 12 at 181.

<sup>57</sup> Joe Hudson and Burt Galaway, *Criminal Justice, Restitution and Reconciliation* (Monsey, NY: Criminal Justice Press., 1990) at 2.

<sup>58</sup> Kevin Minor and J.T. Morrison, "A Theoretical Study and Critique of Restorative Justice" in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, New York: Criminal Justice Press and Kugler Publications, 1996) at 117.

<sup>59</sup> John Haley, "Crime Prevention Through Restorative Justice: Lessons from Japan" in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, New York: Criminal Justice Press and Kugler Publications, 1996) at 352.

Finally, in 1996, 1998 and 1999 respectively, three additional definitions were offered.

The first by Tony Marshall, who simply articulated that:

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.<sup>60</sup>

The second by Jennifer Llewellyn and Robert Howse:

Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships. That is, relationship in which each person's rights to equal dignity, concern and respect are satisfied.<sup>61</sup>

And the third by Mark Umbreit, who suggested that:

Restorative justice provides a very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than simply a violation of abstract laws against the state. Those most directly affected by crime -- victims, community members and offenders -- are therefore encouraged to play an active role in the justice process. Rather than the current focus on offender punishment, restoration of the emotional and material losses resulting from crime is far more important.<sup>62</sup>

Despite all of these attempts at an exact definition of restorative justice, many theorists have expressed a disappointment in the fact that the definitions offered have been more descriptions of restorative justice than definitions.<sup>63</sup> Furthermore, each have simply been descriptions of the same multi-dimensional practice from different angles.

Despite the dissatisfaction of theorists, however, one description has seemed to come out

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<sup>60</sup> Tony Marshall, "The Evolution of Restorative Justice in Britain" (1996) 4(4) *European Journal of Criminal Policy and Research* 21; Tony Marshall, *Restorative Justice: An Overview* (London: Home Office Research Development and Statistics Directorate, 1999) at 5.

<sup>61</sup> Jennifer Llewellyn and Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 1.

<sup>62</sup> Mark Umbreit, "Avoiding the Marginalization and 'McDonaldization' of Victim-Offender Mediation: A Case Study in Moving Toward the Mainstream" in Gordon Bazemore and Lode Walgrave, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey, New York: Criminal Justice Press, 1999) at 213.

<sup>63</sup> Llewellyn et. al., *supra* note 61 at 20-21.



above the others as the primary ‘definition’ of restorative justice, that of Tony Marshall’s.<sup>64</sup>

Numerous definitions have been offered since Marshall’s, however, Marshall’s continues to be the one that is referred to most.<sup>65</sup> The attachment of meaning to practice continues, as theorists carry on their search and articulation of a definition that fully captures the concept of restorative justice.

### *1.2.2 Participants within the Process*

In addition to agreeing on a definition for restorative justice, the question of who should be included within the process was also an important theoretical issue in answering the question of what restorative justice is and how it can be replicated.<sup>66</sup> Most practitioners would agree that the victim and the offender, along with a facilitator should be part of the process, however, there was significant debate over whether ‘community’ should be involved in the process, and if so, who and what is community.<sup>67</sup> VOM and VORP practices originally only brought victim, offender and mediator together.<sup>68</sup> FGC on the other hand often brought together the family of the victim and offender, as well as relevant professionals, in addition to victim, offender and facilitator.<sup>69</sup> The group got larger still in sentencing circle processes, where Aboriginal culture valued a holistic

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<sup>64</sup> *McCold, supra* note 5 at 358.

<sup>65</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York: Criminal Justice Handbook Series, 2006) at 6.

<sup>66</sup> A good overall discussion regarding this debate as it related to VORP and VOM practices can be found in *Umbreit et. al., supra* note 12 at 53.

<sup>67</sup> *Zehr, supra* note 12 at 257. There was also further debate as to whether certain professionals should be included in the processes, or whether participation should be restricted only to victim, offender and ‘community’.

<sup>68</sup> *Umbreit et. al., supra* note 12 at 53; *Umbreit Zehr, supra* note 16 at 25; *Zehr, supra* note 12 at 256;

<sup>69</sup> *Umbreit Zehr, supra* note 16 at 25.

approach that included the participation of members of the larger community.<sup>70</sup> As you can see from the practices of Aboriginal Peoples in New Zealand and North America, community was an essential part of the process. The community brought perspective and voices that were necessary to properly come to the consensus that was needed.<sup>71</sup> VOM and VORP practitioners, on the other hand, felt that if community was needed at all, the mediator, or neutral third party could provide that perspective.<sup>72</sup>

Some theorists argued that as many stakeholders as possible who were affected by the incident should be brought into and included in the process. While others thought this was not needed and complicated the process unnecessarily.<sup>73</sup>

In the late 1990s, an important piece of conceptual work by Paul McCold was published that, although aimed at supporting the claim that process/participation should be a key measure of “restorativeness”, nevertheless also provided a theoretical framework or typology that helped theorists answer the debate on which parties should be included in a restorative process.<sup>74</sup> McCold provided the following diagram:

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<sup>70</sup> *Johnstone, supra* note 3 at 8; *Zehr, supra* note 12 at 260; [as well as judges in the case of sentencing circles].

<sup>71</sup> *Umbreit Zehr, supra* note 16 at 25.

<sup>72</sup> *Umbreit et. al., supra* note 12 at 53.

<sup>73</sup> *Umbreit et. al., supra* note 12 at 53; *Zehr, supra* note 12 at 256; Raye et. al., *supra* note 33 at 214.

<sup>74</sup> Although this typology has not fully stopped the debate which continues to some extent today. *McCold, supra* note 5. See also Bruce Archibald, “Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy - A Modest Contribution for Criminal Law and Restorative Justice” (2008) 16 *Cardozo Journal of International and Comparative Law* 1-85 for an additional perspective on a theoretical framework or typology on restorative justice participants.

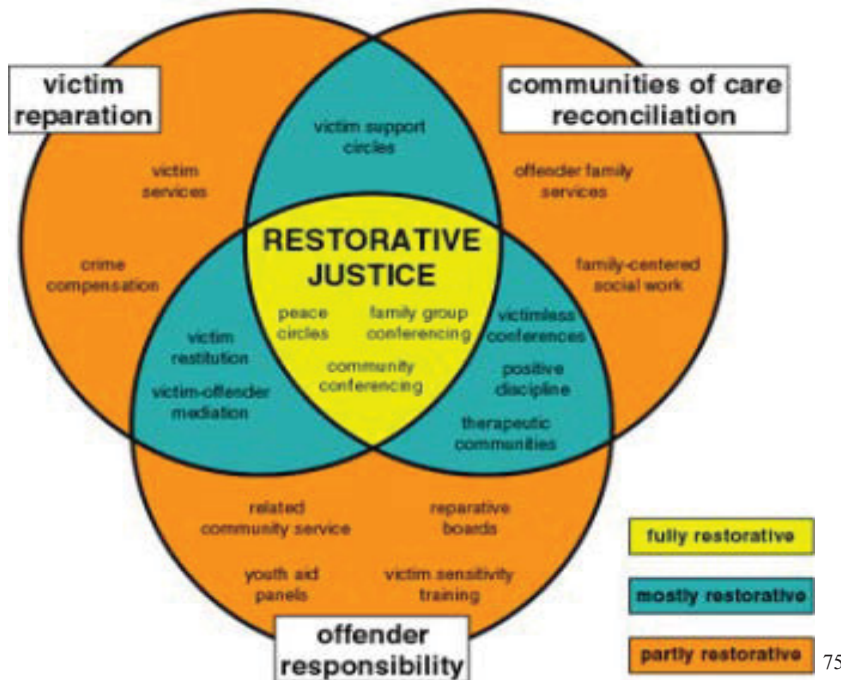


Figure 1 McCold's Typology. Type of restorative justice processes that result from the various configuration of participants. Fully restorative processes include victim, offender and community.

As you can see, McCold creates a circle for each of the 3 primary stakeholders in restorative processes. Where all 3 entities are represented or present at the process (where the circles overlap), McCold suggest these are considered *fully* restorative practices (these practices include Peace Circles, Family Group Conferencing and Community Conferencing). Where only two of the three parties are present, McCold refers to these as still restorative, but qualifies them as *mostly* restorative practices (these practices include, among others, Victim Support Circles, Victim Offender Mediation, Truth and Reconciliation Commissions, and Victimless Conferences). Where only one of the parties is present, again McCold considers these still to be restorative in nature (that is, as long as the practice is based on restorative values or principles that will be discussed below) but again qualifies them as only '*partly*' restorative (these practices

<sup>75</sup> McCold, *supra* note 5 at 401.

include, among others, Victim Services, Crime Compensation, Offender Family Services, Family-oriented Social Work, Related Community Service, and Victim Sensitivity Training).<sup>76</sup>

In support of this inclusion of community to render a practice fully restorative, theorists offered various arguments as to why community was essential, including, on the one hand that community should be included in the process because they brought support, necessary information and solutions to the process.<sup>77</sup> In addition, community provided the necessary legitimate influence or informal social control to steer wrongdoers back on a more appropriate path.<sup>78</sup> On the other hand, theorists also argued that community should be included because it too felt the consequences of crime and conflict and stood to benefit from the process.<sup>79</sup> In addition, theorists also claimed that restorative processes contributed to community building.<sup>80</sup> This was as a result of the process 1) aiding in norm affirmation and value clarification, 2) empowering community, through a sense of collective ownership of the problem, and 3) increasing the capacity and skills to deal with and resolve conflict<sup>81</sup>. Furthermore, it was argued that each restorative process helped individuals within a community get to know each other and understand each other better. This ability to see things from each other's perspective strengthened the bonds and relationships between individuals within the restorative process. By strengthening the bonds and relationships that connected those individuals together, the community as a whole was thereby strengthened.<sup>82</sup>

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<sup>76</sup> *McCold*, *supra* note 5 at 401.

<sup>77</sup> *Umbreit Zehr*, *supra* note 16 at 25.

<sup>78</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

<sup>79</sup> *Umbreit et. al.*, *supra* note 12 at 59; *Umbreit Zehr*, *supra* note 16 at 25.

<sup>80</sup> *Umbreit Zehr*, *supra* note 16 at 25; *Zehr*, *supra* note 12 at 160.

<sup>81</sup> *Zehr*, *supra* note 12 at 260-261.

<sup>82</sup> *Zehr*, *supra* note 12 at 260-261.

Although McCold's conceptual piece, along with other theorist's reasoning as to why community needs to be included, has not completely closed the door on the debate of who should be present in restorative processes, the understanding and meaning these arguments and concepts brought to the practice was important and provided practitioners with a way of thinking and talking about the issue that is meaningful to all.

### *1.2.3 Conditions*

Finally, the issue of what conditions were necessary within the process for it to work, as well as the outcomes the process was to achieve needed to be addressed by theory to explain what restorative justice was and how it could be replicated.

As practitioners and theorists discussed what worked and what did not, a picture began to appear regarding the essential conditions of a restorative process. Theorists suggested that the process needed to be informal and flexible, the parties needed to participate on a voluntary basis (as opposed to being forced or coerced),<sup>83</sup> there needed to be an environment where the parties with a stake in the incident could come together safely<sup>84</sup> and discuss the incident in a way that everyone had an equal voice, was treated with dignity and respect; an environment that was inclusive and participatory. In addition, theorists articulated that in order to have the kind of dialogue needed in restorative processes – one that could create healing, accountability and transformation - the wrongdoer in a process needed to take responsibility or accountability for his/her actions as a prerequisite of a restorative process going forward. At minimum there needed to be an acknowledgement of the basic facts of a case before a restorative process

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<sup>83</sup> *Umbreit et. al., supra* note 12 at 54-55.

<sup>84</sup> *Ibid.* at 54.

could take place.<sup>85</sup> As such, the participants would need to be prepared prior to the meeting in a way that they understood what the process would look like as well as what was expected of them and what they could expect from the process. Finally the process would end with an agreement that was brought about by the consensus of all involved. Following the face-to-face part of the process, there would need to be some follow up to ensure the agreement was complied with.<sup>86</sup>

Other issues, such as the role and needs of victims and offenders was discussed by theorists in the early days and helped practitioners understand how better to interact with these parties. The role of facilitators was also examined and helped define practices and approaches for facilitators.<sup>87</sup> The structure of institutionalized restorative justice programmes was discussed, as were the benefits that arose out of using restorative justice processes. All of this theory and research fed back into practice and the two became completely interwoven.

Given the initial practices of restorative justice, along with the forgoing outlined theoretical discussions and developments that followed, what can we say restorative justice look like today?

### ***1.3 Restorative Justice Landscape Today***

Generally it can be said of practice, that despite having three distinct models of restorative justice in early days, many practitioners have collapsed the three and taken the best of each and hopefully left the less useful aspects behind. As mentioned in McCold's

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<sup>85</sup> United Nations Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matter* (ECOSOC Res. 2000/14, UN DOC. E/2000/ING/2/Add. 2, 2000) at 35.

<sup>86</sup> Umbreit *et. al.*, *supra* note 12 at 54.

<sup>87</sup> *UN Handbook*, *supra* note 65; *McCold*, *supra* note 13 at 64; Mark Umbreit and Marilyn Peterson Armour, *Restorative Justice Dialogue: An Essential Guide for Research and Practice* (New York: Springer Publishing Company, 2011) at 239.

typology, fully restorative practices now bring victim(s), offender(s) and community together in a face to face encounter.<sup>88</sup> With that said, however, practitioners hold fast to the flexibility aspect of restorative justice and acknowledge that if all three entities are not able to come together other restoratively oriented processes are still possible.<sup>89</sup>

### *1.3.1. The Process*

Given this flexibility, restorative practices today still take many different forms, although the underlying principles remain relatively constant. One common form, and the practice that I will use for the basis of my discussion in subsequent chapters, includes three general phases: preparation, face-to-face encounter, and follow-up.<sup>90</sup>

In the preparation phase, facilitators meet with the parties in the incident to learn the facts of what happened, find out how the parties are feeling, explain what the restorative process looks like, as well as its goals and potential outcomes, and determine if the parties are willing and ready to participate in such a process. For the offender to be said to be ready to participate he or she must take responsibility for his or her actions in question before the process can go ahead. During the preparation phase, facilitators work to build some level of relationship and trust with the parties, as well as gather the relevant information they need to determine if the case is in fact an appropriate case for restorative justice. During this phase facilitators also work to determine the full extent of who has been affected by the incident as well as the full extent of how they have been affected.<sup>91</sup>

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<sup>88</sup> VOM/VORP practices often now include community in some form, *Umbreit et. al., supra* note 12 at 54.

<sup>89</sup> The Nova Scotia program explicitly authorizes a range of process options – see Bruce Archibald and Jennifer Llewellyn, “The Challenges of Institutionalized Comprehensive Restorative Justice: Theory and Practice in Nova Scotia” (2006) 29 Dalhousie L.J. 297.

<sup>90</sup> Nova Scotia Restorative Justice Program, *Module 6: Case Management and Facilitation* (Nova Scotia: Best Practice Learning Companion, 2005) [Draft].

<sup>91</sup> *Ibid.*

Once a facilitator has sufficient information to make a determination that a restorative process is appropriate in the circumstances, they move next to the second phase, the face-to-face encounter. The encounter process itself generally has three phases as well. First, the parties affected by the incident come together each to tell their stories and come to some understanding about what happened. They answer the important question of ‘What happened?’, from each person’s perspective. Second, the parties then shift their focus to examine the consequences of those actions. What harm and damage has been caused by the wrongdoer’s actions. What affect has his or her actions had on others and on him- or herself. The parties answer the question, ‘How has it affected you?’. At this stage the parties may also discuss other contributing or underlying issues that gave rise to the wrong. Finally, in the third phase, the parties turn their attention to examining what can be done to address harm and move forward in a different way. What actions can be taken to address the harm and damage caused, and to restore relationships that have been affected. Here, the parties answer the question, ‘What can be done to make things right, or at least better?’.<sup>92</sup> This usually results in a written agreement that all parties agree to and reduce to writing for signature.<sup>93</sup>

After an encounter has taken place and an agreement arrived at, the follow-up phase commences where parties implement the agreement and take the actions they have agreed to. Facilitators during this phase oversee that the actions agreed to are, and in fact, taking place and within the time period agreed to. The fulfillment of the agreed is communicated to all parties when it is completed.<sup>94</sup>

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<sup>92</sup> Zehr, *supra* note 12.

<sup>93</sup> *NSRJ Program*, *supra* note 90.

<sup>94</sup> *Ibid.*



The parties involved in a process like this are normally all the parties who have been directly affected by, or have a stake in the incident or its resolution. These generally include the primary and often secondary victims, the offender, family members and friends of both victim and offender. In addition, community members who have been either directly or indirectly affected by the incident, or who have a stake in the outcome are also invited to participate. The guiding principle in determining who should participate in the restorative justice process include, inviting all those who have been affected, as well as those who can provide the greatest level of support and positive influence.<sup>95</sup>

In addition to the steps of the process, and the parties included, the principles typically underpinning and guiding this process include, amongst others, accountability, voluntariness, inclusion, equality, respect, openness, and truth-telling.<sup>96</sup>

Accountability, in that an offender or wrongdoer needs to take responsibility for what he or she has done and admit that he or she has in fact committed the act in question.<sup>97</sup> Accountability as well, in that the parties hold each other accountable for issues raised and things discussed or said within the process (i.e. not being respectful, talking out of turn, not being honest and forthright).<sup>98</sup> Voluntariness, in that all parties participate willingly and are not coerced or forced into participating in the process.<sup>99</sup> Inclusion, in that all those affected or who have a stake in the process should be invited to

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<sup>95</sup> *Moore et. al., supra* note 28 at 13.

<sup>96</sup> *Llewellyn et. al., supra* note 61 at 73; *UN Handbook, supra* note 65 at 7-11; Nova Scotia Restorative Justice Program, *Part 1* (Nova Scotia: Best Practice Standard, 2005) [Draft] at 4-10; *Archibald et. al., supra* note 89.

<sup>97</sup> *Llewellyn et. al., supra* note 61 at 57-58.

<sup>98</sup> Kay Pranis, "Restorative Values" in Gerry Johnson and Daniel W Van Ness, *Handbook of Restorative Justice* (Devon, Willan Publishing, 2007) at 63.

<sup>99</sup> *Llewellyn et. al., supra* note 61 at 57-58, 64; *Pranis, supra* note 98 at 61-62.

participate.<sup>100</sup> Equality, in that everyone in the process has an equal voice and an equal chance to participate. Further, that coercion is not used within the process, but that everyone has equal standing and power.<sup>101</sup> Respect, in that the expression of all thoughts and emotions are welcome as long as they are expressed in a respectful manner.<sup>102</sup> Openness and truth-telling, in that open and honest expression is encouraged.<sup>103</sup> As above, that expression of all thoughts and emotions are welcomed as long as expressed with respect and sincerity.<sup>104</sup>

As mentioned above, this is only one of several forms a restorative justice process takes today. It is, however, a good example of what is occurring in the name of restorative justice in many jurisdictions around the world and provides the reader with a mental picture to imagine some of the experiences discussed below and referred to in later chapters.

Now that we have an example of what a full restorative justice process may look like today, let me explore what some of the restorative justice practitioners and theorists are experiencing in and through these processes, and how they make sense of it, as well as how these experiences have and have not been addressed and/or explained in theory.

### *1.3.2 Experiences and Outcomes*

There are several significant insights that practitioners and theorists have made about the practice of restorative justice that are pertinent to the discussion in the following chapters. Let me explain them briefly here.

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<sup>100</sup> *Pranis, supra* note 98 at 61-62.

<sup>101</sup> *Llewellyn et. al., supra* note 61 at 62; *Pranis, supra* note 98 at 61.

<sup>102</sup> *Llewellyn et. al., supra* note 61 at 62; *Pranis, supra* note 98 at 62.

<sup>103</sup> *Llewellyn et. al., supra* note 61 at 57; *Pranis, supra* note 98 at 61.

<sup>104</sup> *Llewellyn et. al., supra* note 61 at 62, 73; *UN Handbook, supra* note 65 at 7-11; *NSRJ Program, supra* note 96 at 4-10.

First, according to their experiences with restorative processes, practitioners and theorists report that the restorative process helps the parties involved come to a common understanding. More specifically, the process enables the participants to come to a common understanding about the incident in question, as well as about the harm caused. Once an understanding of these two issues is achieved, an agreement about what can be done to make things right or better can also be attained.

This understanding seems to arise as a result of the telling of each party's story and their expression of emotions regarding how the incident made them feel.<sup>105</sup> By recounting and listening to each other's stories, the parties are able to see the events from another's eyes, to metaphorically stand in the other's shoes, and as a result develop empathy.<sup>106</sup> Being able to see things from the other's perspective and comprehend what that may feel like (which is possible because they too have felt these things) is part of the understanding that restorative practitioners are speaking of.<sup>107</sup> As suggested by Van Ness and Strong:

The use of meeting, narrative, and emotion leads to understanding. As David Moore has observed about conferencing, in this context of shared emotions, victim and offender achieve a sort of empathy. ... Likewise, for offenders, hearing the victims' story not only humanizes their victims but also can change the offenders' attitude about their criminal behaviour. Reaching this understanding establishes a productive foundation for agreeing on what happens next. ... Further, they do this through a cooperative process rather than an adversarial one.<sup>108</sup>

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<sup>105</sup> *Raye et. al., supra* note 33 at 217; Mara Schiff, *Satisfying the Needs and Interests of Stakeholders* in Gerry Johnstone and Daniel W Van Ness, *Handbook of Restorative Justice* (Devon, Willan Publishing, 2007) at 230; *Van Ness et. al., supra* note 51 at 59 – 61; *Llewellyn et. al., supra* note 61 at 52.

<sup>106</sup> Kay Pranis, "Restorative Justice, Social Justice and the Empowerment of Marginalized Populations" in Gordon Bazemore and Mara Schiff, eds., *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001) at 298-302; *Raye et. al., supra* note 33 at 217; *Schiff supra* note 105 at 230.

<sup>107</sup> *Llewellyn et. al. supra* note 61 at 51.

<sup>108</sup> *Van Ness et. al. supra* note 51 at 70.

Parties put together a common understanding of what happened and talk about how they experienced and how it made them feel. ... Both are given the opportunity to ask questions of the other, the victim can speak about the personal dimensions of the victimization and loss and the offender has a chance to express remorse. ... gives them greater insight into the harm they caused. ... Both victim and offender are confronted with the other as a person rather than a faceless, antagonistic force, permitting them to gain a greater understanding of the crime, of the other's circumstances and of what it will take to make things right.<sup>109</sup>

The fact that this empathy and ability to stand in another's shoes occurs is clear. Going back to the gap between theory and practice, however, it should be noted that the mechanisms by which this empathy and ability to stand in another's shoes is achieved however still remains. This is one of the areas where again theory has not caught up to practice.

A second experience that has been reported is that restorative justice processes give rise to strengthened social relationships. According to Kay Pranis:

Because restorative values emphasize those characteristics that support good relationships, the application of those values continuously strengthens relationships and deepens the connections among people. When people experience respect, equality and mutual care they become more likely to drop defences or protections, which are often the course of destructive or non-cooperative behaviour. They become open to recognizing common ground and acting in the common interest – a critical aspect of community.<sup>110</sup>

Relationship is at the heart of restorative justice theory and practice.

Acknowledging that we all live in a web of relationships and when wrongs occur, they cause harm to these relationships is a central tenet of the restorative justice movement.

That restorative justice processes give rise to strengthened social relationships is therefore not surprising, and is seen as an important experience within the process.

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<sup>109</sup> *Ibid.* at 59 – 61.

<sup>110</sup> *Pranis, supra* note 98 at 68.

A third observation that has been made and that is pertinent to the discussion in the following chapters is that learning, and a transformation of thinking and of behaviour, seem to take place as a result of the restorative process. Comments such as the following are recounted regarding the restorative process:

Stories are repeated of dramatic changes in attitude in which the victim and offender recognize within the other a common humanity, empathy develops and inner resolution takes place. But what animates proponents are not simply the transformations taking place in others; they are also and equally importantly, the transformation they begin to experience themselves ...<sup>111</sup>

And further,

From all this, the offender is expected to have a better understanding of their offending and its consequences, to become accountable for the offending in ways they understand and to contribute to repairing the harm they caused. The presence of the victim also means their justification for offending – ‘she could afford it,’ ‘he is insured’, ‘these people aren’t like us’ and so on – can be challenged. The restorative process, therefore, is able to touch – and perhaps change – the hearts and minds of offenders (and, coincidentally, of victims) and become the beginning of a new way of life.<sup>112</sup>

Although these changes and transformations are observed and experienced as very real, as with the observation of coming to a common understanding, why this happens or the mechanism through which it happens is not considered as much. In fact, according to Gordon Bazemore, it appears that to date explanations for the transformations seen, not only have not, but also cannot, easily be explained:

We cannot easily explain why such short term encounters might change behaviour. The experience of offenders in these interventions clearly produces some initial change in attitude, behaviour, and/or circumstances that may lead to something else that eventually impacts lawbreaking. If we are to learn how to

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<sup>111</sup> *Johnstone et. al. supra* note 3 at 16.

<sup>112</sup> Gabrielle Maxwell, “The Defining Features of a Restorative Justice Approach to Conflict” in Gabrielle Maxwell and James Liu, eds., *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (Wellington: Institute of Policy Studies, 2007) at 11.

focus restorative intervention for maximum impact on offenders without diminishing the emphasis on the needs of victims and community members, a theory of restorative intervention must articulate what that change, and that “something else” might be. ...<sup>113</sup>

It appears that although, it is unclear why it happens, there are nonetheless many instances of this learning and transformative potential reported as a result of the restorative process.

Although theory has evolved and contributed significantly to understanding the landscape and practice of restorative justice, it can be seen from the description of these experiences and lack of explanation as to how they come about, that there still remains a significant lag in theory behind practice. According to McCold, for restorative justice to emerge as a legitimate justice paradigm, an understanding not only of what occurs within the restorative process, but how it occurs (how it is operationalized) is needed.<sup>114</sup> Filling the gap in our understanding about how the restorative process gives rise to these experiences is therefore critically important. It is my proposal that one way to commence the dialogue necessary to begin to fill this gap is by looking at the theories of Jürgen Habermas. Habermas’ theories of dialogue and speech appear to have significant overlap with restorative justice theory to date. And although they will not *fill* the gap identified here, they nonetheless offer ways of understanding or framing the issue from which to further reflect on what restorative justice practitioners observe and experience but cannot yet explain. It is this conversation that forms the content of Chapter Two of this thesis.

In addition to offering ways of understanding and framing the issues of common understanding, strengthening of social relationships, and learning or transformation gap

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<sup>113</sup> Gordon Bazemore, “Restorative Justice and the Offender: The Challenge of Reintegration” in Gordon Bazemore and Mara Schiff, eds., *Restorative Community Justice* (Cincinnati: Anderson Publishing, 2001) at 110-111.

<sup>114</sup> *Ibid.* at 359.

in theory, Habermas' theories may also be helpful in helping us further think through other existing gaps in theory including how the restorative process gives rise to certain outcomes. For example, practitioners and theorists speak a great deal of the many significant outcomes the restorative process can potentially give rise to, including norm clarification, reintegration and building a stronger sense of community. Although theorists speak of these achievements that arise from the restorative justice process as with the aforementioned experiences, there appears to be a void in theory for explaining how and through what mechanisms these outcomes are arrived at. There appears to be much description in the literature about the potentials and what actions help to achieve them, but how they are achieved remains unclear.

One of those outcomes that should arise from the type of dialogue found in the restorative process is norm clarification. According to McCold:

One of the most consistently mentioned principles of restorative justice is that the process should provide the mechanism to question norms and alter existing social structures. While the possibility of structural reform is widely discussed, the programmatic considerations of this possibility are the least developed.<sup>115</sup>

Additionally, restorative justice processes are said to give rise to social reintegration. An outcome closely connected to the above-noted experience of strengthened social relationships:

In this process, harm can be repaired, offenders and victims can be reintegrated (or perhaps integrated for the first time), empathy can be fostered and relationships can be healed and formed. Fundamentally, community justice is

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<sup>115</sup> Paul McCold, "Restorative Justice and the Role of the Community" in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, New York: Criminal Justice Press and Kugler Publications, 1996) at 98.

about building and utilizing perceptions of connectedness to individuals and groups as a way to respond to and prevent crime and wrongdoing.<sup>116</sup>

A basic goal of the restorative justice campaign is to establish new forums and processes to which many criminal cases currently dealt with by conventional criminal justice forums and processes can be diverted either at the pre-trial or sentencing stage. One of the key distinctive features of these new forums and processes is that they are intended to promote restorative outcomes, such as reparation of harm to people and relationships, healing of victims, and reintegration of offenders.<sup>117</sup>

Another projected outcome of the restorative process is the building of personal capacity and confidence especially in regards to resolving conflict:

Why do proponents of restorative justice prefer this restorative justice process to the conventional criminal justice procedure? ... The process is seen as having the potential to achieve a range of other goals, including: increasing the participants' sense of personal efficacy and power; increasing the capacity of parties locked in conflict to 'recognise' the other party; and increasing the confidence, capacity and inclination of ordinary members of the community to resolve their own disputes and keep their own order.<sup>118</sup>

Finally, restorative justice is reported to give rise to a stronger sense of community:

Peacemaking circles ... achieve the same outcomes as the ancient sacred space of circles: respect for every voice, improved relationships, and strong connections to the larger community.<sup>119</sup>

And,

Through restorative processes community can be built, strengthened and transformed.<sup>120</sup>

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<sup>116</sup> Paul McCold and Benjamin Wachtel, "Community Is Not a Place: A New Look at Community Justice Initiatives" in John Perry, ed., *Repairing Communities Through Restorative Justice* (Lanham: American Counseling Association, 2002) at 42.

<sup>117</sup> Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Cullompton, UK: Willan Publishing, 2002) at 136.

<sup>118</sup> *Ibid.* at 140.

<sup>119</sup> *Stuart et. al.* supra note 45 at 121; Archibald also refers to this as individual and social capacity (human capital) development – see *Archibald*, supra note 74.

<sup>120</sup> Jennifer Llewellyn, "Building, Strengthening and Transforming Communities: Exploring the Possibilities for Restorative Justice in Jamaica" (2002) 27 *West Indian Law Journal* 77 at 94.



Despite the many reports of what happens in the restorative process and the claims that restorative justice should result in specific outcomes including norm clarification, reintegration, building personal capacity and community building, how the restorative process actually works and gives rise to these experiences and outcomes is still not well understood. As McCold describes:

Facilitators of restorative processes regularly observe a personal and social transformation occur during the course of the process. There is often the strong sense that something significant is occurring which has very little to do with the facilitator and operates at a subconscious level among participants.<sup>121</sup>

In fact, much of the underlying restorative mechanisms remain shrouded in a sense of mystery, and are often romantically referred to as the ‘magic’ of the circle.<sup>122</sup>

It is this something that gives rise to all the claimed benefits of restorative justice that I wish to deconstruct and give meaning to in this paper.

#### **1.4 Summary**

Although theory has lagged behind practice in the evolution of restorative justice, much meaning has nevertheless been connected to practice over the past 30-40 years. This theory has helped participants to engage more fully in restorative practices and have helped facilitators to provide and guide better processes that result in desired outcomes. These advancements in theory have made the practices of restorative justice more

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<sup>121</sup> *McCold, supra* note 5 at 359.

<sup>122</sup> Heather Strang, “Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration” in Allison Morris and Gabrielle Maxwell, eds., *Restorative Conferencing for Young Offenders* (Oxford: Hart Publishing, 2001) at 186; Michael Hadley, *The Spiritual Roots of Restorative Justice* (New York: State University of New York Press, 2001) at 10, 51; Harry Blagg, “Restorative Visions and Restorative Justice Practices: Conferencing, Ceremony and Reconciliation in Australia” (1998-99) 10 *Current Issues Crim. Just.* 5 at 11.

meaningful and rich, and have provided practitioners frameworks and language to talk to one another about what they are doing and how they are doing it (best practices).

With that said, there are still numerous aspects of restorative practices we do not understand or do not have the appropriate language or concepts to explain how they function. Despite the fact that the practice of restorative justice is relatively informal and less operationally technical than our current justice system, the meaning behind the practice is nonetheless rather internally complex and has remained highly contested.<sup>123</sup>

We still do not know, for example, the mechanism that functions at the heart of restorative justice processes that allow for the experience and outcomes described above (experiences of coming to understanding, learning and establishing strong relationships, and outcomes of norm clarification, reintegration and strengthened personal capacity). We know “something” happens, we can describe it to some degree, and we have an idea of the conditions necessary to make it happen, but the mechanism that allows for “the magic” to happen in restorative processes remains a mystery.

Additionally, contribution of and to community remains somewhat obscured. Theorists can say that community is an important stakeholder in restorative processes and that not only do they contribute to the process, but also receive significant benefit from being participants, including, for example increased capacity to solve conflicts, as well as an increased sense of interconnectedness and cohesion. But how community is strengthened and built through restorative processes, how it becomes more interconnected, stable and cohesive is not well examined or understood.

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<sup>123</sup> *Johnstone et. al. supra* note 3 at 8.

It is these gaps in theory that the remainder of this paper is going to address. It is hoped that through this paper further meaning and understanding can be brought to restorative practice.

Before moving to Chapter Two, I will explain the layout of the rest of the paper. First, in Chapter Two, I use Habermas concepts of universal pragmatics<sup>124</sup> and communicative action<sup>125</sup> to view the restorative process through a novel framework that may help us better explain the mechanisms at play in encounter and may help explain how restorative justice can therefore give rise to the experiences mentioned above. In Chapter Three, I will use Habermas' concept of the lifeworld, and the interplay between the lifeworld and communicative action, to again provide a novel framework that may help us explain how restorative justice processes give rise to and help build stronger communities. Finally in Chapter Four, I will conclude the paper by briefly examining some of the shortcomings of Habermas' theories as well as some areas of further research. Although I believe the following pages are an important advancement and addition to restorative justice theory, this paper only scratches the surface of Habermas' theories and how they might be employed in restorative justice theory and practice.

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<sup>124</sup> Jürgen Habermas, *Communication and the Evolution of Society*, trans. by Thomas McCarthy (Boston: Beacon Press, 1979) at c. 1, "What is Universal Pragmatics".

<sup>125</sup> Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, trans. by Thomas McCarthy (Boston: Beacon Press, 1984).

## CHAPTER 2 – EXPLAINING “THE MAGIC” OF THE ENCOUNTER

### 2.1 Introduction

In the previous chapter, I outlined one example of what the restorative justice process looks like today. An important aspect of that process is a commitment to the bringing together of all parties involved in a wrong in a face-to-face encounter to allow the parties to dialogue about the wrong committed and search for ways to make the wrong right. Despite encounter being at the heart of any restorative justice process what happens within or during the face-to-face restorative process remains to some extent ambiguous and unclear. Authors have described the experiences witnessed in encounters such as strengthened social relationships, personal transformation, learning, and coming to common understanding.<sup>126</sup> To date, however, there is little explanation of the mechanics of the encounter and how it produces the above-noted experiences. Theorists have instead often simply skimmed over this element with vague terminology, or have taken a romanticized approach and refer simply to “the magic” that happens within or during an encounter.<sup>127</sup> Still others clearly suggest that there is “something” going on, but acknowledge that we are still struggling to explain it. As mentioned in the previous chapter:

Practice has always led the theoretical developments, as a kind of social physics was being uncovered. Facilitators of restorative processes regularly observe a personal and social transformation occur during the course of the process. There is often the strong sense that *something significant* is occurring which has very

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<sup>126</sup> *Van Ness et. al.*, *supra* note 51 at 59-61, 70; *Raye et. al.*, *supra* note 33 at 217; *Schiff*, *supra* note 105 at 230; *Johnstone et. al.*, *supra* note 3 at 16; *Maxwell*, *supra* note 104 at 11.

<sup>127</sup> *Strang*, *supra* note 122 at 186; *Hadley*, *supra* note 122 at 10, 51; *Blagg*, *supra* note 122 at 11.

little to do with the facilitator and operates at a subconscious level among the participants.

...

Today we struggle to understand what it is we see, although those observing the transformations that can occur in restorative processes would agree, we “know it when we see it.” A shared language will eventually develop from how we interpret what we see and how we express those visions to others.<sup>128</sup>[emphasis added]

Although never writing on the topic of restorative justice, the theories of German philosopher and sociologist Jürgen Habermas may provide a helpful framework or perspective from which to explore, further examine and begin to understand the “something” that is occurring during the encounter process.

As such, these theories may help to further close the gap between restorative justice theory and practice. In particular I believe that Habermas’ linguistic or dialogue theories of universal pragmatics and communicative action may help us begin to articulate the mechanisms at work within language that explain how the important experiences witnessed in the encounter process are achieved. I have turned to Habermas’ concepts of universal pragmatics and communicative action in particular because these theories aim at explaining how language can be employed to achieve understanding and give rise to individuals coming to agreement and coordinating their action correspondingly. Given that the crux of encounter is to employ dialogue so that individuals can understand the harm that has occurred and together come to agreement regarding what measures need to be taken to right the wrong, the connections between the two theoretical constructs seemed highly relevant.

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<sup>128</sup> *McCold, supra* note 5 at 359, 363.

In order to demonstrate these connections, I will provide an explanation of Habermas' theory of universal pragmatics and communicative action, throughout which I will make reference to the different ways these theories align with restorative practices and experiences. Once I explain the theories, I will then turn to explore what Habermas describes as the learning and bonding potentials inherent in communicative action. I will relate these back to restorative justice, then turn to the conditions which are necessary, according to Habermas, to make all this happen. The conditions again align significantly to restorative justice practice and the connections will be made explicit. Finally, I conclude the chapter by tying these explanations together in a framework that helps explain the linguistic mechanism at play within the restorative process, as well as the necessary conditions for a restorative process.

It should be noted here at the outset that Habermas' theories are extremely rich and deep.<sup>129</sup> Habermas spent his entire professional life developing these theories. As such the following discussion will explore only a small part of his overall theories, to be used for the narrow purpose of helping further think about and reflect on the mechanisms at work within the restorative process.

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<sup>129</sup> It should be noted that Habermas' theories are complex, deep and expansive. As it can be seen from the title of his book *The Theory of Communicative Action: Reason and the Rationalization of Society*, Habermas is dealing with the expansive issue of the 'the rationalization of society' that is, whether and in what respects the modernization of society can be viewed as rationalization. This was a life's project for Habermas who draws on philosophers and social scientists from Kant and Weber to Toulmin and Parsons. My use of Habermas' theories, however, does not engage this overarching issue of rationalization of society. Instead, I am picking up on strands of dialogue theory that Habermas uses within his overall research project. As such, there is an immense amount of Habermas' theories that I purposely do not touch in any way. Instead, I am gently lifting out those strands of theory that apply most directly to the restorative justice context. In doing so, I hope not to misrepresent or misconstrue Habermas' ideas or concepts as I take them from the original context which they were meant. Furthermore, to make these complex theories accessible, I am also simplifying these strands of theory I am picking out. I may change the language and simplify the concept for ease of accessibility, but these are small parts of a very large research project and overarching theory. Thomas McCarthy, "Translator's Introduction" in Jürgen Habermas, *Communication and the Evolution of Society*, trans. by Thomas McCarthy (Boston: Beacon Press, 1979) at xvii.

## ***2.2 Habermas' Theories of Universal Pragmatics And Communicative Action***

The first and most general level of Habermas' theory deals with the role and function of language. Through his explanation of universal pragmatics, Habermas demonstrates how language is used universally to bring individuals to understanding with one another.

The second layer of Habermas' theory deals with the structure of thought, and how we interpret and engage with the world around us. According to Habermas, we perceive and engage with three different realms of reality: the objective realm, the subjective realm and the shared, social realm.

The third layer introduces us to the specific mechanics of speech. At this layer, Habermas explains that within speech we implicitly raise several validity claims, that of truth, sincerity and rightness. It is through individuals' agreement or disagreement with these implicit validity claims that one is able to come to understanding and agreement with another, and coordinate action. When we agree that the validity claims raised in speech are valid, it can be said that we have consensus on what is being said. When we do not implicitly agree that all the validity claims raised are valid, we request justification in the form of reasons as to why we should accept the claims offered; that is, why we should accept that what was said is true, sincere and right. If the justification is sufficient, then learning occurs and a consensus is reached based on the information and reasons offered. If the justification is not sufficient, the parties engage in further dialogue and reasoning until either they stop communication, or come to a consensus. This is the overall essence of Habermas theory of universal pragmatics and communicative action.

And it is this theoretical framework that I believe can provide insight into the experiences and outcomes witnessed through the restorative process.

To put things into the restorative justice context at this early point, let me remind the reader that in restorative justice we start from a position of conflict where there is a lack of understanding, consensus and coordinated action. It is in fact the lack of both consensus and coordinated action that leads to wrongdoings, crime and conflict in the first place (either a lack of consensus on what is true, truthful or right/socially acceptable). We therefore need a process like restorative justice or communicative action, as Habermas calls it, to bring about understanding, consensus and coordinated action; a realignment of behaviour and right relationships (or the right way to relate to one another) to restore peace. It is the framework of how this happens that Habermas might be able to assist with. Let me address, step by step, the various layers to provide additional information, context and explanation.

### *2.2.1 The Role and Function of Language*

According to Habermas, humans are rational, autonomous beings who relate and interact with the world through language.<sup>130</sup> To Habermas, language is much more than simply words and phrases. Not only does it convey meaning by way of symbols, but through language we are able, among other things, to relate to and influence others, establish interpersonal relationships, come to understanding about the world, others and

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<sup>130</sup> Habermas, *supra* note 125 at 8.



ourselves and coordinate action.<sup>131</sup> As such, Habermas' theories are much more interested in what language does than what it says.<sup>132</sup>

More than anything, Habermas proposes that the function of language is ultimately to reach understanding and coordinate action.<sup>133</sup> Habermas acknowledges that we use language to further conflict, competition and strategic action, however, to him these are simply derivatives of the original goal of language, that of reaching understanding and coordinating action.<sup>134</sup> In other words, when two or more persons talk to each other, they do so predominately to align their understanding so they can synchronize or organize their actions in a way that allows them to achieve their goal, whatever that goal may be. Thinking of it in a different way, when an individual speaks, they speak so as to be understood. People do not talk so as not to be understood, to do so would be irrational. When we express ourselves through speech then, we do so with the goal of being understood. Once we are understood, and once we understand the person we are speaking with, it can be said that we have reached a shared understanding and consensus.<sup>135</sup> Once we have reached this consensus,<sup>136</sup> we can thereafter act in a manner consistent with this shared understanding. The language Habermas uses for this shared understanding, consensus and resulting coordination of action is 'mutual intersubjectivity' or 'intersubjective recognition of the validity claim the speaker raises.'<sup>136</sup>

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<sup>131</sup> Habermas, *supra* note 125; Jürgen Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason, Vol. 2* (Cambridge: Polity Press, 1987) at 5, 120.

<sup>132</sup> James Finlayson, *Habermas: A Very Short Introduction* (New York: Oxford University Press, 2005) at 32; Maeve Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (Cambridge: The MIT Press, 1994) at 3.

<sup>133</sup> Habermas *supra* note 124 at 1; Habermas *supra* note 131 at 5; Finlayson, *ibid.* at 34.

<sup>134</sup> Habermas, *supra* note 124 at 1.

<sup>135</sup> Habermas, *supra* note 131 at 120; Finlayson *supra* note 132 at 34.

<sup>136</sup> Habermas, *supra* note 131 at 120.

As referred to above, if Habermas' theory of universal pragmatics at its core is a theory of communication that explains how we use speech to come to a shared understanding, consensus and coordinate action, one can, even at this initial stage, see then how this will be beneficial to explain the restorative justice encounter. That is, a dialogue process that is conducted as a means to express thoughts, feelings, and experiences, understand what happened, as well as the consequences of actions, and to come to a consensus and formal agreement regarding how best to address the harm caused.

Now that we have the big picture of what the theory is about, let me further break it down to demonstrate the *mechanisms* at play, as Habermas accounts for them, within this process.

### 2.2.2 *The Three-World Concept*<sup>137</sup>

To understand how language gives rise to a shared understanding and the coordination of action, we need to first explore Habermas' concept of the three worlds. In his book, *The Theory of Communicative Action*,<sup>138</sup> Habermas draws on the work of renowned psychologist Jean Piaget and explains that as we grow and develop as individuals, through the various developmental stages articulated by Piaget, we come to divide reality into three different realms or dimensions: into objective, subjective and social worlds.<sup>139</sup> According to Piaget, a child comes to understand the difference and the demarcation between the concrete physical world that she lives in, and the internal world of her thoughts, feelings and desires. As a child deals practically with objects and with

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<sup>137</sup> According to Habermas, "Speaker and hearer use the reference system of the three worlds as an interpretive framework within which they work out their common situation definitions." *Ibid.* at 120.

<sup>138</sup> Habermas, *supra* note 125.

<sup>139</sup> Habermas, *supra* note 125 at 52, 68; Habermas, *supra* note 131 at 120.

herself, this line becomes more and more clear. Additionally, the child further makes the distinction between these first two realms and the third realm of the shared social world. As the child interacts with others, and additionally sees others interacting with the physical world, this understanding of the social world forms, and again the demarcation becomes strengthened.<sup>140</sup>

Beyond understanding the separation between these three worlds, children come to understand that they can view the world from a variety of perspectives. Initially, they only engage the world from their own internal perspective, that is, they only acknowledge that the world can be seen through their eyes; how they see themselves, how they see others, and how they see the physical world. Over time, however, they come to realize that the “worlds” can be seen from other subjective perspectives. That is, you can see the world from someone else’s perspective or through someone else’s eyes. Other sociologists have expressed this perspective as ‘taking the attitude of the other’,<sup>141</sup> that is, they can see themselves through another’s eyes (alter), they can see the other through the other’s eyes, they can see the interaction between self and other through another’s eyes (3<sup>rd</sup> person), and they can see the physical world through another’s eyes.<sup>142</sup> As children grow they also become more reflective. Taking the perspective of themselves (or other) and looking back on their own thoughts and behaviour.

This ability to take various perspectives or ‘take the attitude of the other’ is an important mechanism within the restorative process.<sup>143</sup> It is what allows parties to

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<sup>140</sup> *Habermas, supra* note 125 at 68; *Habermas, supra* note 124 at 66-67.

<sup>141</sup> See *Habermas, supra* note 131 at 9-15, 37 for Habermas’ exploration of Mead’s “taking the attitude of the other.”

<sup>142</sup> *Habermas, supra* note 125 at 69; *Ibid.* at 35.

<sup>143</sup> Tugendhat, very poetically explains this ability to take the attitude of the other in the following way:  
It is the task not only of the actor but of the artist as well to find the sort of expression that will arouse in others what is going on in himself. The lyric poet has an experience of beauty with an

empathize with others, and metaphorically stand in the shoes of another when the different parties are ‘telling their stories’. This in turn has been linked to the ability to come to understanding with another. As I mentioned earlier in Chapter One, being able to see things from the other’s perspective and comprehend what that may feel like (which is possible because they too have felt these things) is part of the understanding that restorative practitioners speak of.<sup>144</sup> Once participants are able to stand in another’s shoes, the ability to reflect back on their own thoughts, feelings and behaviour is also key.

The recognition of the above-noted separate realities or three worlds is important to Habermas because he suggests that we use language slightly differently depending on what realm we are engaging with.<sup>145</sup> In other words, what language achieves, or the work language does, depends on what ‘world’ we are talking about. For example, when we use language to relate to the objective world, the role language plays is to represent facts that exist (i.e. “the flower is green”). When we use language to relate to the subjective world, the role of language plays is to express our inner intentions (i.e. “I like the flower” or “I want to eat now”). And when we use language to relate in relation to the social world, we use language to establish legitimate interpersonal relationships or establish appropriate behavioural expectations (“I really appreciate you Carol” or “What you did was inappropriate, Brad”).<sup>146</sup>

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emotional thrill to it, and as an artist using words he is seeking for those words which will answer to his emotional attitude, and will call out in others the attitude he himself has.

Ernst Tugendhat, *Self-Consciousness and Self-Determination* (Cambridge, Mass, 1986) at 147-49 as cited in *Habermas, supra* note 131 at 15.

<sup>144</sup> See my discussion at pages 26-27 of this paper.

<sup>145</sup> *Habermas, supra* note 124 at 28-29, 33.

<sup>146</sup> *Ibid.* at 28, 67; *Habermas, supra* note 125 at 68, 69, 278. It should be noted that in fact in every speech act there exists a threefold relationships between the utterance, the external world, the internal world and the shared social world by way of the existence of all three validity claims in each utterance. However,

Furthermore, being able to take the different perspectives described above is also necessary for us to use language in these ways. To ultimately come to understanding about facts, intentions and appropriate behavioural expectations it is necessary to be able to not only see things through your eyes, but to also envision how the individual you are talking to is perceiving each of the three worlds. That is, in order to come to understanding and coordinate action, you must understand how you view the facts, intentions and norms, as well as how another party views facts, intentions and norms. Only when this is understood can the positions be synchronized and actions coordinated.<sup>147</sup>

This will become further clarified below as we continue to piece the various aspects and layers of Habermas' theory together to get a cohesive whole.

In relating this back to the restorative justice process again, each of these functions of language corresponding to the three worlds is essential. First, it is important within an encounter for each of the parties directly involved to discuss what actually happened in terms of facts (objective world – asking the question, ‘What happened?’<sup>148</sup>). Second, it is also important for each of the participants to express their inner feelings and intentions to let others know how they feel, what effect the wrongdoing had on them, what they want done about it, and what they can do to make it better (subjective world – asking questions such as ‘How has it affected you’, or ‘What were you thinking at the time and how did it make you feel?’<sup>149</sup>). Finally, at the heart of every encounter is the

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given that each speech act thematizes only one validity claim, the function of speech differs depending on which validity claim or which ‘world’ is emphasized see *Habermas, supra* note 124 at 67.

<sup>147</sup> *Habermas, supra* note 125 at 12-13, 69-70.

<sup>148</sup> International Institute For Restorative Practices, “Restorative Questions I & II” (Bethlehem: The IIRP Bookstore, 2011).

<sup>149</sup> *Ibid.*

aim of acknowledging wrongs that have occurred, establishing appropriate behavioural expectations and developing legitimate interpersonal relationships (shared, social world – asking questions such as ‘How did the behaviour affect others? Who was harmed?’). When all of these things have been addressed, it is the larger goal of a restorative justice process to reach an agreement regarding what actions should be taken to repair the harm and establish right relationships for all those involved.<sup>150</sup> Additionally, in order to come to this understanding and agreement, it is necessary not only for each individual participant to view these three worlds from their own perspective, but it is necessary for each participant to see things from each of the other participants’ perspective, only then can there be a shared understanding and consensus or agreement.

### *2.2.3 Validity Claims and Argumentation*

Once we realize that we think and approach our reality from these different worlds and from these different perspectives (self, other or alter, and 3<sup>rd</sup> party), we can then explore Habermas’ next layer that further explains the specific mechanics or structures in speech that allow us to come to understanding with each other, and organize and coordinate our behaviour or actions.

First, Habermas explains that dialogue can be broken down into the smallest unit of speech which he calls an “utterance” or “speech act.”<sup>151</sup> Our conversations are made up of hundreds of these discreet speech acts. Second, Habermas asserts that within every one of these utterances or speech acts we raise what he calls “validity claims”.<sup>152</sup>

Validity claims are simply claims that what we are saying is legitimate or applicable.

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<sup>150</sup> Zehr, *supra* note 12.

<sup>151</sup> Habermas, *supra* note 124 at 1-2, 26, 31.

<sup>152</sup> *Ibid.* at 2, 28.

According to Habermas, whenever we speak, we raise three inherent validity claims: truth, sincerity, and rightness.<sup>153</sup> By raising these validity claims, every time we utter a phrase, we are in essence asking those we are engaged in speech with to accept that 1) what we are saying is true, 2) that the intentions and feelings we are expressing are sincere and truthful, that they can be trusted, and 3) that what we are saying (and hence thinking) is normatively right or appropriate.<sup>154</sup> Habermas calls these explicit or implicit assertions “validity claims” because we are asking those we are engaged in speech with to accept the claims we are raising. When we implicitly offer these validity claims within our conversations (within each discreet speech act), we are asking the person we are speaking with, to take a yes or no position to the claim we’ve offered. “Yes”, you accept my claims, or “no” you do not.<sup>155</sup> This can also be done implicitly (by ‘going along’ with another) or explicitly by verbalizing the agreement.

This again fits with the practice of restorative justice in that there are underlying principles of openness, truth-telling, respect and accountability within the process as discussed in Chapter One. These principles translate into practice by encouraging open and honest expression (truth, truthfulness or sincerity and rightness). In fact the expression of all thought and emotions are welcomed as long as expressed with respect, sincerity and truthfulness. When expression is not open and honest, persons within the process are encouraged to hold each other to account. The restorative justice process is a

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<sup>153</sup> *Ibid.* at 2-3, 28-33. There is in fact a fourth validity claim that is raised in each speech act, that of comprehensibility. We expect or claim that each of our utterances is understandable, however, this claim seems to be so basic that Habermas does not dwell on it for any great length.

<sup>154</sup> *Ibid.* at 2-3, 28, 32-33.

<sup>155</sup> *Habermas, supra* note 125 at 38; “[E]very new utterance is a test: the definition of the situation implicitly proposed by the speaker is either confirmed, modified, partly suspended, or generally placed in question.”; *Habermas, supra* note 131 at 121.

place where parties can confront one another, get questions answered and gain insight.

Remember, for example the quote from Van Ness and Strong in Chapter One:

Parties put together a common understanding of what happened and talk about how they experienced and how it made them feel. ... Both are given the opportunity to ask questions of the other, the victim can speak about the personal dimensions of the victimization and loss and the offender has a chance to express remorse. ... gives them greater insight into the harm they caused. ... Both victim and offender are confronted with the other as a person rather than a faceless, antagonistic force, permitting them to gain a greater understanding of the crime, of the other's circumstances and of what it will take to make things right.<sup>156</sup>

Returning back to Habermas' theories, you might notice that these validity claims correspond with the three worlds explained above. For example, the claim that a speech act is true relates to facts in the physical or external world. Only facts can be true, feelings and intentions, that arise from within us, from our internal world, on the other hand, can be sincere or truthful. Finally, utterances that can be claimed to be right or normatively appropriate come from our shared or social world. How we relate to one another or behave with one another can be appropriate, as opposed to true or truthful.<sup>157</sup>

Thomas McCarthy summarizes this interconnection of validity claims and worlds nicely:

In speaking we relate to the world about us, to other subjects, to our own intentions, feelings and desires. In each of these dimensions we are constantly making claims, even if usually only implicitly, concerning the validity of what we are saying, implying, or presupposing – claims for instance regarding the truth of what we say in relation to the objective world; or claims concerning the rightness, appropriateness, or legitimacy of our speech acts in relation to the shared values and norms of our social lifeworld; or claims to sincerity or authenticity in regard to the manifest expressions of our intentions and feelings.<sup>158</sup>

Although all three validity claims exist in each utterance spoken, that is in everything we say, Habermas suggests that within each speech act one validity claim is actually

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<sup>156</sup> *Van Ness et. al.*, *supra* note 51 at 70.

<sup>157</sup> *Habermas*, *supra* note 124 at 28-33.

<sup>158</sup> *McCarthy*, *supra* note 129 at xii.



emphasized or ‘thematized’ above the others.<sup>159</sup> That is, we usually make either facts, intentions and feelings, or norms and interpersonal relations explicit or centrally thematic. For example, when a victim within an encounter explains that the offender punched him in the stomach, the victim is emphasizing or thematizing the propositional or truth (objective) element of the statement. The victim is still also raising the sincerity and normative claims within such a statement, however, such claims remain implicit or in the background, while the truth claim is explicitly thematized. When the victim suggests, however, that he was frightened when he was hit by the offender, the victim is instead emphasizing or thematizing the expressive (subjective) element of his statement. Again, the other validity claims are raised, but they remain implicit whereas the expressive validity claim is clearly explicit. Finally, when the offender’s mother, in response to hearing an account of the events, tells the offender that he was wrong to have struck the victim, and that he should apologize and never do such a thing again, the interactive or normative element of the utterance is being thematized. In each of these utterances, the three validity claims are being raised and offered to be taken as accepted; it is simply that one of the three claims has been made explicit, whereas the other claims are only indirectly expressed.<sup>160</sup>

Relating this aspect of Habermas’ theory to restorative encounter, it is interesting to note that this thematization seems to occur at two levels within a face-to-face process. First, this thematization can be seen in individual speech acts within the dialogue that occurs in the encounter such as those I have provided as examples above. Second, the thematization can also be seen on a larger scale within the various phases of an

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<sup>159</sup> Habermas, *supra* note 124 at 53-59, 66; Habermas, *supra* note 131 at 120.

<sup>160</sup> Habermas, *supra* note 124 at 53-59; Habermas, *supra* note 131 at 120-121.

encounter, where the subject-matter and overall discussion seems to be thematized around specific claims. For example, at the commencement of most encounter processes, participants begin by recounting the facts that surrounded the incident at the center of the restorative justice process. This phase of the encounter can be said to be centered on, or emphasize truth claims. Of course, there may be speech acts within this phase that thematize other validity claims, but generally most of the speech during this phase emphasizes truth claims about what happened. The second phase of many encounter sessions focuses on how people felt and the harm they may have experienced as a result of the incident. This phase of the encounter could therefore be said to emphasize truthfulness or sincerity claims. The final phase of the encounter process focuses on what can be done to repair the harm and restore the relationships that have been damaged. This phase of the encounter process seems then to emphasize the normative or rightness claim.<sup>161</sup>

So far then, we have seen that dialogue can be divided into discreet speech acts that have a structure implicit to them that corresponds to the objective, subjective and social world, and that universally inherent in these speech acts are validity claims of truth, sincerity and rightness. Although all three of these claims are raised in each speech act, only one claim gets emphasized or thematized at any given time.<sup>162</sup> This theoretical basis is important however, the key to Habermas' theory, and what allows individuals to come to understanding with each other through language, is the fact that validity claims

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<sup>161</sup> There is time to talk about the facts, about how people feel and about what wrongs were committed and how such wrongs should be rectified. Although there is a natural rhythm within an encounter process that often flows from facts, to feelings, to restoring relationships, an encounter is never fully compartmentalized. At any time during the dialogue participants can express speech acts that thematize any of the three validity claims.

<sup>162</sup> *Habermas, supra* note 124 at 66; *Habermas, supra* note 131 at 120.

are raised as *claims* (as opposed to absolutes).<sup>163</sup> Because these claims are not absolute, but are instead simply assertions or propositions, they are open to be challenged, criticized, defended and revised through a process Habermas refers to as “argumentation.”<sup>164</sup>

For every utterance, validity claims are raised, therefore, whenever we engage in dialogue a hearer has three possible courses of action upon hearing an utterance: 1) they may accept the statement and the validity claims associated with it (take a ‘yes’ or acceptance position in relation to the claims raised), 2) they may reject the statement and challenge the claims made (take a ‘no’ or rejection position to the claims raised) – at it at this stage that the process of argumentation<sup>165</sup> is then engaged, or 3) they may leave the issue undecided.<sup>166</sup>

If a hearer accepts an utterance and validity claim as offered, there is no challenge, and thus no justification required. It is assumed that the parties both agree with the claim, and there is understanding and consensus with what was said. If, on the other hand, the hearer does not accept that claim as offered, the speaker must provide justification as to why the claim should be accepted. It is at this point that the claim can be said to be problematized and challenged and the speaker is expected to offer reasons for why the hearer should accept the statement as true, sincere and/or right. If the speaker

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<sup>163</sup> Habermas, *supra* note 124 at 63; Habermas, *supra* note 125 at 9

<sup>164</sup> Habermas, *supra* note 124 at 64; Habermas, *supra* note 125 at 22-42.

<sup>165</sup> Habermas defines argumentation as follows:

We use the term argumentation for that type of speech in which participants thematize contested validity claims and attempt to vindicate or criticize them through arguments. An argument contains reasons or grounds that are connected in a systematic way with the validity claim of a problematic expression. The ‘strength’ of an argument is measured in a given context by the soundness of the reasons; that can be seen in, among other things, whether or not an argument is able to convince the participants in a discourse, that is, to motivate them to accept the validity claim in question.

Habermas, *supra* note 125 at 18

<sup>166</sup> *Ibid.* at 38.

can justify, defend and ground their claim with reasons, the discourse ends with a consensus that the claim raised was valid. If, on the other hand, the hearer continues to reject and challenge the claim made, the discourse or “argument”<sup>167</sup> continues with the offering and criticizing of reasons, or the parties may decide to leave the issue undecided for the time being.<sup>168</sup> Such argumentation continues until the criticized validity claims are vindicated through reasons, unless left undecided.

This corresponds again with my comments earlier regarding the underlying principle of accountability within the restorative process. If what is said by one party is not seen to be true, sincere, or right, others within the process are expected to hold the party accountable and challenge the individual. If the speaker can say why what he said was in fact true, sincere, or right, then others come to understand and continue on to other issues. If no adequate reasons are given by the speaker then he or she is expected by the others holding the speaker accountable to reflect and change his or her position.

When one ‘grounds a claim’, as Habermas calls it, one is simply providing a justification or pointing to the appropriate evidence that supports the claim. This “grounding” takes slightly different forms depending on the validity claim being challenged and defended. For example, in order to ground or justify a truth claim, one

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<sup>167</sup> It should be noted that this process of argumentation does not need to be a sophisticated process. Nor do the positions taken by the hearer need to be made explicit. For example, the hearer obviously is not likely to say, “John, I do not accept the validity claim of sincerity you have offered”. And often times, individuals do not even explicitly state the rejection in a manner such as: “John you’re being insincere”. Often times instead, the acceptance or rejection of a validity claim and the speech act it was raised within, is implicit and subtle in the hearer’s response.

Additionally, the terminology that Habermas uses - “argumentation” conjures up images of a yelling match. Other terms, such as debate or deliberate, could be employed here and may convey the meaning in a better way. Regardless of what term is used, however, the process is still the same and often occurs in subtle, rudimentary ways: If a hearer rejects an utterance and challenges the claims raised, the speaker must be able to justify, or ground the statement with sufficient reasons to alter the opinion of the hearer and redeem the statement made. Only with reasons can the validity of the statement be redeemed; no other type of force or coercion is acceptable.

<sup>168</sup> *Habermas, supra* note 125 at 25, 38-39.

must establish the existence of a state of affairs, that is, give evidence that a fact is indeed this, as opposed to that. In order to ground a claim of rightness, one must establish the acceptability of actions or norms, or establish the preference of a particular value, that is, give evidence that supports the action taken in a given situation in light of legitimate expectations. As for a claim of sincerity, Habermas suggests that such claims cannot be grounded *per se*, but instead only shown. To show sincerity, one must establish the transparency of self-presentation or, in other words, show that they can be trusted by acting in a consistent manner.<sup>169</sup> Although each claim requires a slightly different type of reason to be grounded, each claim is nonetheless justified with reasons. And according to Habermas:

The strength of an argument is measured in given context by the soundness of the reasons; that can be seen in, among other things, whether or not an argument is able to convince the participants in a discourse, that is, to motivate them to accept the validity claim in question.<sup>170</sup>

It is this process of argumentation – criticism of validity claims raised, followed by a justification or grounding of the claim through reasons – that is the mechanism at the heart of individuals coming to understanding and coordinating their action, and is thus suggested to be the mechanism at the heart of encounter as well. This raising and debating of validity claims allows for what Habermas terms “intersubjectivity” or mutual agreement.<sup>171</sup> Let me take a moment to more fully explain what Habermas means by the term ‘intersubjectivity’.

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<sup>169</sup> *Ibid.* at 15, 25, 39, 41.

<sup>170</sup> *Ibid.* at 18.

<sup>171</sup> *Ibid.* at 14, 25, 27, 35, 50; *Habermas, supra* note 124 at 63.

As you can see from the discussion to this point, we approach reality as three separate realms – the physical, the internal and the social. When individuals raise claims in relation to these three worlds through their speech, the goal is to convey meaning and achieve understanding about these three worlds, usually with one world being stressed. If the validity claims are accepted, it can be said that there is agreement as to how these three worlds are being perceived by both the speaker and the hearer, that is, they perceive the same facts to be true, they understand each others' feelings and intentions and share the same normative frame. This matching or synchronization of the perceived worlds of the speaker and the hearer is what Habermas refers to as 'intersubjectivity'. Once there is a matching of this perception of the three worlds, it can be said that there is consensus and persons can, based on this consensus, coordinate their behaviours and actions.<sup>172</sup>

In summary then, the process of validating a claim is 1) a problematic utterance in which a certain thematized validity claim is raised and challenged; 2) a grounding or defending of the raised validity claim with reasons; 3) a testing of those reasons to determine if the claim rightfully stands or not; 4) and a) potentially a modifying or rejection of the claim if the grounding proved insufficient or b) accepting the claim as valid based on the reasons given. If the result of this process is the last alternative, i.e. accepting the claim as valid based on the reasons given – then it can be said that the parties have come to understanding through intersubjectively recognizing the validity claims raised.<sup>173</sup>

In a discourse like a restorative justice encounter, when all parties are engaging in speaking and listening, this process repeats itself over and over again (either acceptance

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<sup>172</sup> Habermas, *supra* note 125 at 14, 25, 50, 69-70.

<sup>173</sup> *Ibid.* at 25-26; Habermas, *supra* note 131 at 121.

of a validity claim, a rejection of a claim which results in argumentation, or a neutral reaction to leave the claim unchallenged and undecided for the time being) as the parties work through different issues and topics, and understanding is achieved through intersubjectively recognizing validity claims the parties reciprocally raise.<sup>174</sup>

As seen throughout this discussion, this process of coming to understanding through intersubjectively recognizing validity claims fits squarely with the process involved within restorative justice encounters and may be a good perspective to begin to help us understand how individuals come to understanding and are able to emphasize and stand in each other's shoes. Although Habermas terms the process of questioning and defending validity claims 'argumentation', it is important to remember that there is nothing forceful or aggressive about the process, it is based entirely on the giving and accepting (or challenging) of reasons. No force or coercion is permitted, other than the force of the stronger argument or better reasons.<sup>175</sup>

Because the restorative justice process is meant to be an open process where participants are free to speak their minds in a respectful manner, if someone disagrees with the statement of another, whether in regards to the truth of the statement, the sincerity of the statement or the appropriateness of the statement, the encounter not only allows for, but also encourages, that person to freely disagree with and challenge what the other says (hold to account). This is exactly what Habermas describes as criticisable validity claims and argumentation. The encounter is an open forum to express oneself,

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<sup>174</sup> Habermas, *supra* note 131 at 121-122.

<sup>175</sup> Habermas, *supra* note 125 at 25-28. Indeed, "power imbalances" among participants in restorative processes which may result in a weaker party purportedly agreeing with a "restorative" outcome while having silent reservations is an issue that is frequently discussed and addressed.

challenge others respectfully and defend one's thoughts and beliefs with reason through discourse.

### ***2.3 Communicative Action and the Experiences of Learning and Bonding within the Restorative Justice Process***

In addition to helping us think about how understanding, empathy, and agreement are achieved through the restorative process, Habermas' theory may also help us begin to think about other gaps that exist in restorative justice theory including understanding how the learning that is observed in the restorative process may come about. According to Habermas, when communicative action is employed (i.e. the raising of criticisable validity claim, followed by a justification or grounding of the claim through reasons with no force other than the force of the better argument), a learning potential exists. Let me explain briefly.

#### *2.3.1 Learning Potential*

Because validity claims are subject to challenge and need to be defended, or at least be defensible, the process of argumentation provides a space for claims to be altered and improved if in their original form they fail (that is, we can correct failed attempts). Argumentation thus allows participants the opportunity to learn;<sup>176</sup> that is, identify mistakes or failed claims and improve upon them based on valid reasons given. For example, if a hearer challenges a validity claim, and the speaker cannot defend it with reasons, according to Habermas the claim should be modified or abandoned. If the hearer offers reasons in her challenge, it is more likely that the claim can be modified to one that can be grounded by the hearer's reasons. If no reasons exist to sustain even a modified

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<sup>176</sup> *Ibid.* at 25.



claim, the claim should simply be abandoned. Habermas suggests that in cases where there are no reasons to ground a claim and it is not modified or abandoned, the speaker who put forth the claim deceives him- or herself and can be said to be acting irrationally.<sup>177</sup>

Through this learning process of abandoning or modifying unsustainable claims individuals acquire insight and overcome self-deception and difficulties in comprehension. This process of abandoning or modifying claims that are not justified results in a transformation in thinking and “knowing”. This learning potential in discourse based solely on the strength of reasons is likely a core element of “the magic” that can be witnessed in the encounter. Although not “magic”, the act of individuals modifying their claims, as well as their corresponding behaviour, so that they can come to mutual understanding and coordinate action through intersubjectively recognizing validity claims the parties reciprocally raise, is nonetheless rather extraordinary.

The repeated stories mentioned in Chapter One of changes in attitude “in which the victim and offender recognize within the other a common humanity”<sup>178</sup> as well as the idea that the restorative process is “able to touch – and perhaps change – the hearts and minds of offenders (and, coincidentally, of victims)”<sup>179</sup> may be explained in part by this modifying or abandoning of unsustained validity claims.

If this is in fact one of the mechanisms at play within the restorative process, then it can give us a potential starting place to begin to address Bazemore’s concern that “we cannot easily explain why such short term encounters might change ... attitude, behaviour

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<sup>177</sup> *Ibid.* at 18-19, 22.

<sup>178</sup> *Johnstone et. al.*, *supra* note 3 at 16.

<sup>179</sup> *Maxwell*, *supra* note 112 at 11.

and/or ... impacts lawbreaking”<sup>180</sup> as well as some idea of the “something significant” that McCold suggests occurs.<sup>181</sup>

Further still, Habermas’ theories also potentially help our understanding regarding the strengthening of social relationships through the restorative process. Let me explain what Habermas refers to as the bonding or binding force to help us think about this aspect.

### *2.3.2 Binding or Bonding Force*

In addition to the learning potential that is present in communicative action, Habermas suggests there is also a bonding potential (that creates an obligatory relationship between speaker and hearer) that exists in this type of speech. On one level, the raising of validity claims brings about an interpersonal relationship that is bound together by the reciprocal obligation of each speaker to justify or ground the claims he or she has raised, and for hearers to accept these claims unless they have good reasons to challenge them. Habermas refers to this as illocutionary or rationally motivated binding force of communicative action.<sup>182</sup> Each participant implicitly offers a “warranty” that if challenged, they can provide reasons to support the claim raised. An individual in this case is bound then by the requirement that she act rationally. If she raised a validity claim, she must (i.e. she has the obligation to, based in rationality) provide reasons that support that claim, and a hearer too must accept such claims, i.e. she has an obligation to accept such claims, unless she has good reasons to reject them.<sup>183</sup> Furthermore, based on the reasons provided within the testing of validity claims, the illocutionary binding effect

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<sup>180</sup> Bazemore, *supra* note 113 at 110-111.

<sup>181</sup> McCold, *supra* note 5 at 359.

<sup>182</sup> Habermas, *supra* note 124 at 41-62, 63 Habermas, *supra* note 125 at 34, 278.

<sup>183</sup> Cooke, *supra* note 132 at 12-13.

results in a speaker regarding a question as settled when a satisfactory answer is given, dropping an assertion when it proves to be false; and following his own advice when he finds himself in the same situation as the hearer.<sup>184</sup>

Above and beyond the illocutionary force of speech, Habermas' communicative action allows for a second kind of bonding to occur. On this second level, individuals are bound due to the need to act consistently in regards to normative or regulative speech acts agreed to or accepted within dialogue. If a speaker has, for example, commanded or directed a hearer to do something, and the hearer has accepted (i.e. accepted the normative validity claim raised in the speech act), the hearer then is morally obliged to comply with the command or directive. If, on the other hand, the speaker has, for example, made a promise or an announcement and the hearer has accepted (i.e. again accepted the normative validity claim raised), the speaker this time is bound morally to act in a manner consistent with the promise or announcement made. Similar moral obligations also appear when dealing with agreements, contracts, advice, warnings, etc.<sup>185</sup>

At both levels, relationships are established or re-established through this bonding potential because as parties engage in communicative action and come to agreement over and over again on truth, sincerity and rightness claims, they begin to form a common understanding and 'knowing' of each other. They know what each other is thinking, feeling, and experiencing because they are agreeing on the thoughts, feelings, and values through the claims raised. Furthermore, parties begin to trust one another as a result of their coordinated action and their compliance with agreed upon normative or regulative

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<sup>184</sup> Habermas, *supra* note 124 at 62-64.

<sup>185</sup> Habermas, *supra* note 124 at 63. It may be good to remind the reader here that, although I am speaking of individual speaker's and hearer's throughout the discussion, within the restorative process there are numerous participants, and thus numerous speakers and hearers who each individually take their turns in these roles as the process takes place.

speech acts. If we agree as a group to behave in a certain manner and comply with this agreement, then trust will be built. If we do not comply, we feel the guilt that comes from others holding us to account. It is this ‘knowing’, trusting and being able to hold to account in the process that gives rise to strengthened social relationships.

Each aspect of this binding or bonding potential seems to align with the experiences of restorative justice participants and practitioners. For example, the compliance with agreed upon normative or regulative speech acts seems to accord with the experience given by Johnstone:

Proponents of restorative justice claim that people are far more likely to do things they have agreed to do, than to do things which they have been ordered to do.<sup>186</sup>

Furthermore, according to McCold and Wachtel:

For community justice initiative to be effective they must capitalize on the fact that people act in a certain way because they want to avoid experiencing the external shame of disapproval by people they care about and because of the internal shame experienced through conscience.<sup>187</sup>

In terms of the increase in knowing and trusting leading in turn to strengthened social relationships, as was noted in Chapter One by Kay Pranis:

Because restorative values emphasize those characteristics that support good relationships, the application of those values continuously strengthens relationships and deepens the connections among people. When people experience respect, equality and mutual care they become more likely to drop defences or protections, which are often the course of destructive or non-cooperative behaviour. They become open to recognizing common ground and acting in the common interest – a critical aspect of community.<sup>188</sup>

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<sup>186</sup> *Johnstone, supra* note 117 at 136.

<sup>187</sup> *Supra* note 116 at 42.

<sup>188</sup> *Pranis, supra* note 98 at 68.

Habermas' bonding or binding potential may also then be an element of the magic that takes place in encounter.

Whereas the transformative power of speech allows individuals within an encounter to learn and grow in their thinking and 'knowing', the binding power of speech allows individuals within an encounter to become connected to one another, to come into relationships not only based on collectively coming to a common understanding about a situation, but also collectively coming to mutual agreement on thoughts, feelings and behaviour.

Although I do not believe that Habermas' binding or bonding force in any way *fully* explains the strengthening of social relationships seen as a result of restorative practices it is suggested here that it may nevertheless contribute in significant part to the strengthening of social relations due to both the rational and moral force found in communicative action.

To conclude my discussion of Habermas' theory of universal pragmatics and communicative action, let me end by briefly discussing the last element that relates back, and can enlighten our thinking of the restorative process: Habermas' conditions of communicative action – the ideal speech situation.

#### ***2.4 Habermas' Ideal Speech Situation and its Alignment with Restorative Justice Conditions***

According to Habermas' theories of universal pragmatics and communicative action, the mechanism that enables individuals to come to understanding is the raising of criticisable validity claims and intersubjective recognition of those claims either by

implicit acceptance or explicit agreement through argumentation based on reasons, supporting or grounding the claims made.<sup>189</sup> Although language can be used in this manner to come to understanding this is not the only way language can be employed. There are other forms of dialogue that do not lead to understanding and coordinated action.<sup>190</sup> As such, in order to employ speech in a manner that permits individuals to come to understanding, Habermas asserts that certain conditions must be present. He refers to these necessary conditions as the ideal speech situation.<sup>191</sup>

For individuals engaged in discourse to be able to come to understanding several conditions are necessary. The first of these conditions is that everyone who is capable of speech and who has a stake in the outcome of the situation (associated with or affected) be entitled to take part in the discussion and argumentation.<sup>192</sup> This allows for the broadest array of potential arguments and reasons to be raised, considered and tested. Furthermore, it brings all those associated with a specific situation into relationship and brings them through the reciprocal recognition of validity claims regarding the specific situation.

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<sup>189</sup> Habermas, *supra* note 125 at 25-26.

<sup>190</sup> For example, speech can also be used strategically. As opposed to coming to understanding and coordinating action, persons acting strategically exert influence on others in whatever way they can (not usually through the force of the better argument) to achieve their ends. Instead of being oriented to communication action and consensus, strategic actors are oriented to their own success and only cooperative in-so-far as it helps them achieve their own individual goals. Habermas, *supra* note 125 at 87-88, 285-286. Additionally speech can also be used dramaturgically, where the goal again is not coming to understanding and coordinating action, but instead simply to present oneself to the public. In different words, a speaker wishes to present some portion of his subjective self to a public audience, in a performance like way. Habermas, *supra* note 125 at 85-86, 90-91. In both of these types of speech, Habermas suggests that validity claims are suspended or are irrelevant. Habermas, *supra* note 124 at 41.

<sup>191</sup> It should be noted that the ideal speech situation is a concept that Habermas has moved away from in recent years, at least to the extent that the ideal speech situation cannot as such establish truth. Jürgen Habermas, *On the Pragmatics of Communication*, ed. by Maeve Cooke (Cambridge: The MIT Press, 1998) at 343-382. This may be due to some extent to the fact that in reality it is improbable that we can ever perfectly achieve the ideal speech situation. What is suggested instead is that we acknowledge it as an unattainable ideal, but nonetheless strive to approximate it as best as possible, as opposed to fully achieve it. Habermas, *supra* note 125 at 25. Today, Habermas instead refers to the conditions necessary for communicative action as “discourses”. Cooke, *supra* note 132 at 31.

<sup>192</sup> Cooke, *supra* note 132 at 31, 33.

The second condition follows from the first, that is, that everyone involved in the discussion is equally entitled to question any assertion, to introduce new topics, to express attitudes, needs and desires, etc.<sup>193</sup> This requirement of equality, again enables all potential arguments and reasons to be voiced and considered. It prevents individual voices from dominating the discourse and skewing the reasons raised in argument. Consequently, the third condition includes that no relevant argument is to be suppressed or excluded.<sup>194</sup> Intersubjectivity and common understanding comes about only when criticisable validity claims are accepted based solely on the strength of the better argument.<sup>195</sup> If relevant reasons are suppressed, intersubjectivity and agreement cannot be achieved. For the same reasons, the other side of the coin is also true; no validity claim is exempt in principle from critical evaluation in argumentation.<sup>196</sup> Only through the giving and understanding of reasons regarding each validity claim raised can the establishment of an intersubjective relationship occur.

The final condition again follows from those already set out: that all participants participating in the discourse be oriented to understanding.<sup>197</sup> In other words, all participants must be motivated only by the concern for the better argument.<sup>198</sup> This condition is somewhat more complex than those set out above, and has been explained by Habermas in conjunction to what he calls “strategic action”.

According to Habermas, communicative action is based on participants oriented to coordinating action and coming to understanding solely through rational discourse; that

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<sup>193</sup> *Cooke, supra* note 132 at 33.

<sup>194</sup> *Cooke, supra* note 132 at 32.

<sup>195</sup> *Habermas, supra* note 125 at 25.

<sup>196</sup> *Cooke, supra* note 132 at 33.

<sup>197</sup> *Habermas, supra* note 125 at 286.

<sup>198</sup> *Cooke, supra* note 132 at 33.

is, achieving consent based on rationally motivated assent through the giving of reasons. Because consensus is achieved only as a result of force of reasons, it excludes all other force either from within the process or external to it.<sup>199</sup>

Strategic action on the other hand involves actors oriented, not to coming to understanding, but to achieving that actor's goal. In other words, an individual acting strategically is acting in a goal-directed manner to achieve their self-serving ends. Such an actor is oriented, not to coming to understanding, but to his own success, and behaves cooperatively only to the extent that such behaviour "fits with his egocentric calculus of utility."<sup>200</sup> In strategic action, a party does not base consensus on rational reasons, but instead on deceit, coercion, force, or possibly simply the withholding of relevant information. Because they use force instead of reason, individuals within strategic action need not obtain agreement about the world from the hearers, that is they are not dependent on the recognition of others. As such the validity claims raised in communicative action speech are suspended, and instead of engaging with the hearers, those who act strategically can treat other persons simply as though they are objects as opposed to persons to form relationships with.<sup>201</sup>

For communicative action to occur then, it is important that participants be oriented to coming to understanding and not oriented to strategic action. If this condition is not fulfilled, consensus might be reached, but understanding will not have been.<sup>202</sup> Only through grounding by way of reasons, can understanding and intersubjectivity occur.

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<sup>199</sup> *Habermas, supra* note 125 at 25.

<sup>200</sup> *Habermas, supra* note 125 at 88.

<sup>201</sup> *Habermas, supra* note 125 at 87-88, 285-286; *Habermas, supra* note 124 at 41.

<sup>202</sup> *Habermas, supra* note 125 at 287.



The conditions that are required for understanding to occur then are 1) bringing all those with a stake in the issue into the discourse, 2) equal opportunity to speak, 3) no relevant voice or perspective suppressed or excluded, 4) no issue or perspective is exempt from being challenged, 5) the only force is the force of reasons or the better argument, and 6) participants must not act strategically, but must be oriented to understanding.

As with other aspects of Habermas' theories, these conditions align significantly with the conditions theorists have suggested necessary for the restorative justice process.

Habermas' first condition of bringing all those with a stake in the issue into the discourse can be seen in the accepted definition provided in Chapter One by Tony Marshall.<sup>203</sup>

Furthermore, this condition can be seen in the underlying restorative principle of inclusion mentioned in Chapter One. As suggested in Marshall's definition above, all those affected or who have a stake in the process should be invited to participate in the restorative justice process. This includes the direct and indirect victim(s), offender(s), as well as the surrounding community. We include all these parties because, as Llewellyn and Howse explain:

Once we understand that harm is experienced by all parties to the relationship damaged by the wrongdoing/conflict, it is clear why a restorative approach demands participation by each party. First, if restorative justice seeks to repair harm it is imperative that each party be involved in the process in order to explain the nature and extent of the harm they experienced, and, further, to be a part of deciding how best to repair the harm. Second, in a more general sense, restorative justice seeks to restore relationship between the parties and thus must bring all the parties together as a first step towards that end.<sup>204</sup>

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<sup>203</sup> *Marshall, supra* note 60 at 5.

<sup>204</sup> *Llewellyn et. al., supra* note 61 at 44.

If the mechanism for coming to understanding and coordinating action involves the acceptance of validity claims (regarding the objective, subjective and social world) based on the best reasons given to ground those claims, as we can see from Llewellyn and Howse's comment, it is imperative that each party be involved in the process in order to raise their perspectives of the three worlds in relation to the event and provide their validity claims and underlying reasons, as well as reasons why others' perspectives may or may not be valid. To get the full picture of what is true, truthful, and right we need the input of all those involved. Furthermore, in order to legitimately, without force, and based solely on the better argument come to agreement and coordinate action, all those affected by the action must be included. Without being involved in the accepting of validity claims, there will be no mutual understanding, no learning, no binding effect and ultimately no agreement.

Habermas' second condition of equal opportunity to speak can be seen in the underlying restorative principle of equality. As mentioned in Chapter One, everyone in the process has an equal voice and an equal chance to participate. This principle forms not only a part of the conditions set in place by facilitators who guide the process and ask *all* those involved the questions of 'what happened', 'what were you thinking and feeling', and 'what do you think needs to be done about it', but can also be seen in the physical layout of the encounter which usually takes place takes the form of a circle where everyone within the circle has equal status, equal standing and an equal voice in the process.

This restorative principle of equality also therefore aligns with Habermas' third condition that no relevant voice or perspective is suppressed or excluded. If everyone in

the process is given the chance to speak, and is asked the questions noted above that form the structure of the restorative justice process, then no voice or perspective is suppressed. This condition also feeds into the restorative principle of openness and truth-telling. As mentioned, both in this chapter and in the previous one, open and honest dialogue is encouraged.<sup>205</sup> Open in the sense that all relevant issues can be brought into the discussion and no perspective is suppressed. Again as Llewellyn and Howse explain:

This engagement is achieved when room is made for the parties to tell their stories, relay their experiences, and when they are listened to with respect. This imperative of personal narrative means that what is to be included and excluded in the process is limited only by the bounds of respect set on the encounter itself.<sup>206</sup>

In terms of honesty, this restorative principle aligns with Habermas' fourth condition, that no issue or perspective is exempt from being challenged. As mentioned above, open and honest discussion also includes the restorative principle of accountability. Facilitators within the restorative justice process promote and encourage open and honest dialogue based on truth-telling,<sup>207</sup> but if participants feel that a person is being less than true, is insincere or is not behaving properly then participants are expected to hold one another accountable. If participants do not agree with what another participant is suggesting (in it being true, sincere or right) then participants can and should challenge what is being said and hold one another to account. From Habermas' perspective this would require the giving or justifying by way of reasons.

Habermas' fifth condition of the only force is the force of reasons or the better argument can be seen in the principle of respect which is central to restorative processes.

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<sup>205</sup> *Llewellyn et. al., supra* note 61 at 57; *Pranis, supra* note 98 at 61

<sup>206</sup> *Supra* note 61 at 62.

<sup>207</sup> *Llewellyn et. al., supra* note 61 at 57.

As mentioned earlier in this chapter, all thoughts and emotions are welcome within encounter as long as they are expressed in a respectful manner. Respectful in this context refers to participants not being oppressive, rude or using tactics like name-calling. Furthermore, respect refers to the lack of use of violence, or threat of violence.<sup>208</sup>

Finally Habermas' sixth condition that participants must not act strategically, but must be oriented to understanding can be seen in the requirement that offenders must take responsibility and acknowledge what happened prior to the restorative justice process occurring. Although not a guarantee, the requirement that offender's must take responsibility for their actions and 'own up' to what they did before the process occurs steers the participants to a more cooperative orientation. Unlike mediation, where participants generally do not have to comply with this requirement, and where participants are therefore more oriented to personal success, restorative justice processes foster a more collaborative, consensus building approach that focuses on coming to understanding and agreement. As suggested by Van Ness and Strong:

The use of meeting, narrative, and emotion leads to understanding. As David Moore has observed about conferencing, in this context of shared emotions, victim and offender achieve a sort of empathy. ... Likewise, for offenders, hearing the victims' story not only humanizes their victims but also can change the offenders' attitude about their criminal behaviour. Reaching this understanding establishes a productive foundation for agreeing on what happens next. ... *Further, they do this through a cooperative process rather than an adversarial one.*<sup>209</sup> [emphasis added]

Furthermore, facilitators within the process are trained to address situations where force or coercion appear (often when power imbalances between the parties exist).

Finally, as mentioned above, parties themselves are encouraged according to the principle

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<sup>208</sup> *Llewellyn et. al., supra* note 61 at 67.

<sup>209</sup> *Van Ness et. al. supra* note 51 at 70.

of accountability to call out participants who employ deceit, coercion, insincerity or the withholding of information within the process.

Although there are other important conditions and principles that underlie the restorative process, all those conditions are necessary, according to Habermas' theory, for coming to understanding, consensus and agreement, learning and bonding through communicative action align with and are given attention within the restorative encounter. As such, the proposal that Habermas' theories provide a good framework to potentially better understand the restorative justice process is further strengthened. The overlap between the theories is significant, and as such, Habermas' communicative action may provide an essential perspective in better understanding the mechanics and the "magic" of restorative justice encounter.

### ***2.5 Explaining the Encounter Process***

Knowing that Habermas' theories are offered here solely as a beginning perspective to help us start to understand the encounter process, what are the implications of his articulation of universal pragmatics and communicative action on restorative justice theory and practice? I believe they are twofold: 1) they provide a framework and set of mechanisms within speech that help us begin to understand how we relate to one another with language, how we are able to come to a consensus and a shared understanding of the world, 2) they provide us with a set of conditions needed to achieve these outcomes.

### 2.5.1 Framework to Understand the Encounter Process

The ultimate or end goal of a restorative justice encounter process is for the parties to come to understanding with each other, come to consensus and agreement on what actions can be taken to right the wrong and address the harm that has been caused and then finally to coordinate their actions, so that this agreement can be fulfilled and the parties can move forward. Along the way, within this process, individuals get the chance to confront and challenge each other, learn from each other and overall try to establish right relationships of equal dignity, respect and care.<sup>210</sup> This is all done through a dialogue process that brings all the parties with a stake in the issue.

According to Habermas, the ultimate function of language, when used in the form of communicative action, is to bring individuals to understanding and coordinate their action. As you can see, Habermas' framework of communicative action aligns almost perfectly with what occurs within a restorative justice encounter process.

First, it is important to acknowledge that Habermas' theories deal with speech and dialogue, which are at the heart of every restorative justice process. By applying the speech act theory and Habermas' dialogue framework to the encounter process, it can be said that each participant raises the three validity claims every time they speak within the restorative process. As mentioned above, the first phase of the encounter process is the recounting of each participant's story of the event in question. As such, when each participant speaks about what happened (recounts their story about what happened)<sup>211</sup> they are raising the three validity claims in each of their speech acts, that is they are claiming that what they are saying about the event is true, that they are being sincere and

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<sup>210</sup> *Llewellyn et. al., supra* note 61 at 1, 39, 71.

<sup>211</sup> See also Habermas' comments on narrative, *Habermas, supra* note 131 at 136.

what they are saying about the event is normatively appropriate in the context. Despite raising all three claims, they are predominately thematizing the truth claim, while the other remains in the background, being raised implicitly. Each participant takes their turn explaining the situation and raising their claims with each utterance. But at the same time have the opportunity to question or challenge the others' claims regarding what happened in a space of open and honest dialogue, holding each other accountable. Discussion ensues and through the discourse claims are raised, questioned and argued (giving of reasons) or agreed upon and accepted. There is no coercion or force within this process other than the force of the better argument. Through the process of argumentation, participants come to gradually agree on a common definition of the situation. In this case a common definition of the facts of the incident.

Participants are also asked about how the incident made them feel, the consequences of the harm and the impact on their lives. Each time they speak, they are again raising all three validity claims, but are now predominately thematizing the expressive claim – speaking about their subjective world. It is during this aspect of the process that all the parties can express their needs, desires and feelings. Victims are able to make fully known the nature and extent of his or her injuries. Upon hearing the consequences of their actions on the victim and/or the community, the offender may express regret and remorse because he or she is able to take the attitude of the other and see their subjective world experience through the victim's eyes. Through the accepting, criticizing and engaging in argument regarding the claims raised, the parties come to understanding regarding the other's subjective world.

Throughout this process, speakers will thematize normative claims as well, either in regards to discussing the wrong at the center of the restorative justice process or when articulating other thoughts, statements or behaviours that they feel should be identified as inappropriate. Although the encounter focuses on a specific event or wrong that can be thematized and discussed, the process also encourages participants to consider the surrounding context. Thematized normative claims are also raised when the discussion turns to what is needed to right the wrong.

As a result of being able to criticize claims raised, challenge thoughts, feelings, values, and behaviours present in the process, individuals are able to challenge 1) false beliefs about what happened, why it happened, 2) stereotypes and prejudices regarding other persons in the process and how they feel, as well as 3) norms and through this come to understanding with one another and coordinate their action so as to fulfill the agreement they have reached.

Furthermore, this challenging and criticizing of claims gives rise to the learning potential Habermas refers to. That is, individuals modify or abandon claims (thoughts, feelings and values) that are unsustainable. When thoughts, feelings and values are challenged and there exist no reasons to justify or ground them, logically they must be changed or discarded. As mentioned this results in a change in thinking and “knowing” and can help individuals acquire insight, overcome self-deception and difficulties in comprehension. So when an offender is faced with a victim who gives reasons that demonstrate that they are not insured, are not wealthy or have great financial responsibility and grew up in the same neighbourhood with the same socio-economic conditions and challenges as the offender, the offender’s original thoughts and feelings of



‘she could afford it, ‘he is insured’, ‘these people aren’t like us’<sup>212</sup> should be modified or abandoned. A change in thought, attitude and, potentially, behaviour therefore takes place as learning occurs and claims are modified or abandoned throughout the restorative process.

Another element that fits into this change is the suggestion that we approach facts, feelings and values from a variety of perspectives. That is, we can see these three worlds through another’s eyes. We can stand in the shoes of another and see their own perspective of facts, their own feelings and values. Furthermore, we can even stand outside ourselves and imagine what others believe we think, feel and believe. This ability to take perspectives of another along with the process of argumentation that results in the learning or transformative potential allows us to more deeply come to understanding and achieve an intersubjectivity that gives rise to empathy and changes in the “hearts and minds” of participants.

Finally, what keeps participants true to not only the process of justifying claims through reasons, but also to the normative and regulative claims they have agreed to as well as the ultimate agreements they have reached is what Habermas refers to as the binding or bonding potential. As parties repeatedly agree on validity claims, as mentioned, in particular the normative and regulative claims, a knowing and trusting of each other grows and with it so does the strengthening of relationships within the process.

In the last phase of the process once a common understanding is established regarding the objective world (facts), the subjective world (feelings and intentions), and the social world (normative right and wrongs, and what is needed to right the wrong) in relation to the particular event in question, the parties can then determine what agreement

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<sup>212</sup> Maxwell, *supra* note 112 at 11.

they can come to so as to coordinate their action in terms establishing right relationships regarding those involved.

As you can see from the above explanation, Habermas' theories provide us with a language and framework to be able to articulate and explain phenomena that practitioners "knew when they saw them". I propose that it is a promising framework that requires further research, testing and articulation.

In addition to providing a framework to understand the mechanics of encounter, Habermas' theories also provide us with the conditions necessary for these mechanics to function and the resulting experiences to be seen.

By understanding the ideal conditions required for individuals to come to understanding, consensus, and for individuals to coordinate their actions, theorists and practitioners alike will be able to articulate and put into action practices and measures that will better facilitate the restorative justice process. That is, they can better put into place practices that will facilitate participants coming to a common definition of the wrong that occurred, understanding and empathizing with each other (establish intersubjective understanding of the other) regarding how the incident impacted them and coming to a final common consensus or agreement regarding what is required to make right the relationships that had been damaged. In many cases the conditions articulated by Habermas in his ideal speech situation are already found as core principles within restorative justice practices. If this is the case, understanding through this framework exactly why these elements are important will only strengthen and reinforce them and provide the further justification for keeping them as essential elements of the process.

Additionally, we can further evolve the theory related to practice by giving additional meaning to our actions.

In particular we can see, based on these conditions, the importance of the principle of inclusion and the bringing of not only victim(s) and offender(s) but also the surrounding community into the process. Furthermore, we can see the importance of the restorative principles of equality, respect, openness and truth-telling. Finally these conditions reinforce the requirement of a wrongdoer taking responsibility and admitting the wrong before the restorative process takes place. Although it does not fully ensure that parties will be oriented to understanding and not strategic action, it at least supports and fosters this requirement/state of affairs in a significant way.

Having this framework and corresponding necessary requirements is important in that it allows us to contribute to the theory by providing deeper meaning to the different elements of the encounter process. Habermas' theories give us the framework to understand the pragmatic side of language, that is, what work language does within the restorative justice process. Most importantly it allows us to articulate how language permits and fosters coming to understanding, learning, the establishment of interpersonal relationships, coming to mutual agreement and coordinating our actions and behaviours, all essential element in restorative justice thinking. Furthermore, we can better understand the conditions necessary for all this to take place.

Habermas' framework therefore provides us at least one possible explanation of the mechanics at work within the restorative process and the necessary conditions that allow it to function as it does. It helps us start to understand the "something significant"

that practitioners suggest they know when they see it, but to date have difficulty explaining.

## ***2.6 Summary***

As can be seen from the foregoing discussion, there is significant overlap between Habermas' theories of universal pragmatics and communicative action, and restorative justice theory. What communicative action gives rise to corresponds with experiences participants and practitioners report arise in the restorative justice process, that is, common understanding, consensus or agreement, learning, and an establishment or strengthening of social relationships. Furthermore, the conditions Habermas suggests are needed to give rise to these experiences again correspond to the conditions and principles underlying the restorative process.

Thinking about restorative justice from this perspective provides us with at least one explanation of the mechanics and the 'magic' within the restorative process. This will not be the only perspective or framework from which to view restorative processes, however, it at least provides a starting point for further discussion that will potentially move restorative justice theory a little closer to filling the gap between theory and practice.

## **CHAPTER 3 – STRENGTHENING COMMUNITY**

### ***3.1 Introduction***

In the previous chapter I explored the encounter process within restorative justice and examined how Habermas' theories of communicative action and universal pragmatics may be a tool or theoretical framework that can help us better understand the mechanics at play in that process, as well as the conditions necessary for these mechanics to work. Through such a framework one might get a better possible perspective of the "magic" that happens within the encounter, and can see how individuals come to common understanding, come to agreement and coordinate action, as well as see the learning and bonding potential inherent in such processes. In the current chapter I would like to continue the discussion from the previous chapter, but look at it in a slightly broader context. Instead of focusing on the potential for individuals that is inherent in the restorative justice process, I want to focus more broadly on the potential for community that is also inherent in restorative justice. One of the insights of restorative justice is that it is a forum and a tool to build stronger community. What I will examine in this chapter is how this potential might work, and what is the mechanism that permits or fosters this strengthening of community. To do this, I will draw again on Habermas' theories of universal pragmatics and communicative action that I have discussed in the previous chapter, but I will draw on additional concepts that Habermas has articulated related to these theories. In particular I will focus on Habermas' articulation of the concept of the lifeworld, the interplay between lifeworld and communicative action, as well as his writing on the rationalisation of the lifeworld which examines the increased use of

communicative action in the “reproduction of society” i.e. socialization, social integration and cultural reproduction.

As with the previous chapter, I will first explore and explain Habermas’ theories and concepts. In particular I will explain Habermas’ concept of the lifeworld, as well as the interplay between the lifeworld and communicative action. Throughout this explanation I will again make reference to the different ways these concepts relate back to the restorative justice context, particularly how they align and may explain certain outcomes of the restorative process including, for example, norm clarification, reintegration and building of personal capacity. Where possible, I will illustrate by way of example. I will then turn to examine how these concepts take us further towards potentially explaining how the restorative process gives rise to strengthened community. To do this I will briefly look at what community is, the current sense of decline of community, and Habermas’ articulation of how this decline has come about. I will then tie all these concepts together and relate them back to the restorative process and the current gap in restorative justice theory regarding the goal or claim of strengthening of community. Before any of this, however, let me briefly remind the reader again of the current gap in restorative justice theory in regards to community and the claim to community development that I will address later on.

### ***3.2 Restorative Justice’s Claim to Strengthening Community***

A very strong theme in restorative justice theory and practice is an understanding that as humans we exist as individuals within a larger society and community, and that our existence is very much tied up in our relationships and connections to others. We do

not exist simply as isolated individuals, but live in a web of relationships.<sup>213</sup> Some within restorative justice conversations would acknowledge these relationships and their importance, but would start from the perspective of (and focus on) the autonomous individual as a starting point.<sup>214</sup> Others, however, take the relationships themselves as the focus (as opposed to the individual) of central importance.<sup>215</sup>

Regardless of whichever perspective one takes, it is clear that we live in relationships; within the larger context of families, communities, and societies. What is also clear is that, as such, when wrongs occur, the harm felt is felt within these broader contexts. Not only do both individuals at the centre of a dispute (and the relationships they constitute) suffer harm and need to be repaired, but individuals and relationships within the larger community suffer harm and thus require attention.

As was discussed in Chapter One, restorative justice theorists have examined these harms to community. Just as with individual victims at the centre of a wrong, communities (and individuals within community) need to be reassured of their safety, they need to regain their autonomy and be empowered through learning to deal with disputes and resolving them themselves. Theorists suggest it is through this building of capacity, through norm clarification, repairing and re-establishing of relationships and

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<sup>213</sup> The concept of ubuntu is often discussed in relation to restorative justice, which roughly translates as “I am because you are” or “my humanity is tied up in your humanity.” *Llewellyn et. al., supra* note 61 at 12. When explaining this concept to groups I often explain it as follows: I am who I am because of the relationship I have or am involved in. I am Audrey Barrett, the daughter of Clarence and Lucy, the sister of Danny, the colleague of Ms. X, the spouse of Y, etc. My identity is formed from the web of relationships I have. In addition, I also explain the broader sense of ubuntu, that given our interconnectedness, when one of us in the human family suffers, we all suffer.

<sup>214</sup> Habermas I believe, if he were to engage in restorative justice discourse, would fall into this camp.

<sup>215</sup> *Llewellyn et. al., supra* note 61.

bonds and through reintegration of victims and offenders that communities are build up and strengthened.<sup>216</sup>

As much as it can be demonstrated that these aims can be achieved through restorative justice, explaining *how* they are achieved has been less than commonplace.

As Perry notes in Chapter One of his book *Repairing Communities Through Restorative Justice*:

The process of achieving these goals is both simple and complex. It is simple to do, and very hard to describe ...<sup>217</sup>

Perry here expresses a similar situation as McCold did in the quote I provided in the previous chapter. It appears that restorative justice seems to be missing some underlying framework or explanations that explain or describe exactly what it is practitioners and participants are doing when they enter into restorative justice processes. We can see the results, and we know what is required to achieve these results, however, we do not fully know or cannot fully explain how what we do works; the mechanisms at play that allow individuals to achieve the results or tap into the potential found in restorative processes. My goal then in this chapter is to make these goals potentially less difficult to describe. As mentioned, to do this I will again turn to the theories of Jürgen Habermas. I believe his work can be used as a tool or starting framework that can help us better understand and begin to potentially fill in the gap found here in restorative justice theory. In particular I believe Habermas' description of "the lifeworld" can be useful.

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<sup>216</sup> Umbreit Zehr, *supra* note 16 at 25; Umbreit *et. al.*, *supra* note 12 at 59; Zehr, *supra* note 12 at 260-261.

<sup>217</sup> John Perry, *Repairing Communities Through Restorative Justice* (Lanham: American Counseling Association, 2002) at 13.



### **3.3 Habermas' Articulation of the Lifeworld**

#### *3.3.1 The Lifeworld Defined*

Defined in its simplest terms, Habermas' concept of the lifeworld is said to be the store of things taken for granted. It is composed of those things (ideas, know-hows, concepts, skills, practices, etc) that are 'intuitively familiar' and unquestioned.<sup>218</sup> The concept of the lifeworld can be difficult to define or articulate at times because it tends to be fluid and 'shadowy' in nature.<sup>219</sup> Because the lifeworld is composed of all that we intuitively 'know' and presume, by definition, we as actors within the lifeworld are unable to ever *fully* grasp *all* that we 'take-for-granted'.<sup>220</sup> With that said, however, we can still define the concept in broad strokes, even if we can never completely articulate the full content of the lifeworld. One way to get an understanding of the lifeworld is to contrast it with Habermas' concept of communicative action. The two concepts or ideas are complementary in that one can be defined by examining the boundaries of the other.<sup>221</sup>

As we know from the previous chapter, communicative action is a dialogue process that deals with concepts, ideas, facts, values and feelings that are relevant and potentially in dispute in a specific situation (within our speech we raise validity claims that are thematized and require reasons and justifications to sustain them). The lifeworld on the other hand is the stock of shared assumptions and knowledge that forms the

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<sup>218</sup> *Habermas, supra* note 131 at 124, 130-133; Habermas' concept of the lifeworld is not unique. The concept of the lifeworld was developed and discussed by other philosopher's such as Husserl, Schutz and Wittgenstein, and Habermas draws on their writings greatly in his own and builds on many of their ideas.

<sup>219</sup> *Ibid.* at 132.

<sup>220</sup> *Ibid.* at 124.

<sup>221</sup> *Ibid.* at 119.

backdrop or “horizon” to that specific situation.<sup>222</sup> It is the ‘respository of shared meanings and understandings that underlie the situation at issue,’ but are only indirectly relevant.<sup>223</sup>

### 3.3.2 Key Characteristics of the Lifeworld

There are several key characteristics that differentiate the lifeworld from an action situation where communicative action is employed that should be noted.

First, unlike action situations involving communicative action, the lifeworld is composed of ‘knowledge’ that is unproblematic. Whereas action situations where communicative action is employed are constituted by claims that are questioned and require justification, the lifeworld is composed of the trivial and unquestioned aspects of ourselves, our society and our culture. As such the lifeworld is always unproblematic and unthematized.<sup>224</sup> When a situation arises and specific facts, values or feelings become potentially problematic, they become thematized and no longer form part of the lifeworld or background, instead they are brought into focus and can be dealt with through communicative action (validity claims and justifications based on reasons).<sup>225</sup> As Habermas explains:

The lifeworld is given to the experiencing subject as unquestionable. “By the everyday lifeworld is to be understood that province of reality which the wide-awake and normal adult simply takes for granted in the attitude of common sense. By this taken-for-grantedness, we designate everything which we experience as unquestionable; every state of affair is for us unproblematic until

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<sup>222</sup> Habermas, *supra* note 125 at 13, 70, 82, 100; *Ibid.* at 122-124. “Communicative actors are always moving within the horizon of their lifeworld; they cannot step outside of it. As interpreters, they themselves belong to the lifeworld, along with their speech acts, but they cannot refer to “something in the lifeworld” in the same way as they can to facts, norms, or experiences.” *Ibid.* at 126.

<sup>223</sup> Finlayson, *supra* note 132 at 51-52.

<sup>224</sup> Habermas, *supra* note 125 at 82, 100; Habermas, *supra* note 131 at 124-125, 131

<sup>225</sup> Habermas, *supra* note 125 at 70, 82, 100; Habermas *supra* note 131 at 124-125, 130-133.

further notice.” The unproblematic character of the lifeworld has to be understood in a radical sense: qua lifeworld it cannot become problematic, it can at most fall apart. The elements of the lifeworld with which we are naively familiar do not have the status of facts or norms or experiences concerning which speakers and hearers could, if necessary, come to some understanding.<sup>226</sup>

Second, the lifeworld is both shared and stable. It is stable because it is unquestioned and unproblematic, and as such it is presumed to be guaranteed.<sup>227</sup> As soon as an element of the lifeworld becomes relevant to a situation, it loses its unquestioned solidarity and as such loses its identity as part of the lifeworld. Instead it becomes an element or subject of an action situation and communicative action; problematized as a fact, as the content of a norm or a feeling, desire, etc. As soon as it becomes problematizable, it no longer forms part of the lifeworld.<sup>228</sup>

The lifeworld is also shared in that it is not private but is composed of an intersubjective cultural stock of knowledge; a type of pre-understood, unexamined collective consciousness.<sup>229</sup> As Habermas puts it, a pre-interpreted world that is always already; the totality of sociocultural facts or cultural tradition.<sup>230</sup>

The unquestioned ground of everything given in my experience, and the unquestionable frame in which all the problems I have to deal with are located.<sup>231</sup>

Just as one can gain knowledge of one’s own lived experience, one can assume the feelings, motivations, values etc. of others within the social group from shared lived experiences.

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<sup>226</sup> Habermas, *supra* note 131 at 130-131.

<sup>227</sup> Habermas, *supra* note 125 at 13; *Ibid.* at 130-133.

<sup>228</sup> Habermas, *supra* note 131 at 125, 130-133.

<sup>229</sup> *Ibid.* at 131.

<sup>230</sup> Habermas, *supra* note 125 at 13; *Ibid.* at 125.

<sup>231</sup> A. Schutz and T. Luckmann, *The Structures of the Lifeworld* (Evanston, 1973) at 4, as cited in Habermas, *supra* note 131 at 131.

By exploring the different characteristics of the lifeworld, one can begin to see the important role it plays as the indirect context within which we as humans relate to the world, ourselves and each other. We can see that it is the background against which we engage in communicative action that allows us the stability and space to focus on some aspects of our world, thematize and criticise them, learn, come to understanding and coordinate action.<sup>232</sup> The lifeworld is essential in this way because every element of every situation cannot be addressed and agreed upon anew in every discussion. Instead, based on past experience and ‘learned’ or pre-interpreted ideas about our world, our society and ourselves, we presume a very large degree of knowledge when we encounter one another, and we use this shared basis to deal with specific issues that are immediately relevant and potentially problematic.<sup>233</sup>

We can also therefore see the important significance the lifeworld plays within restorative justice processes. If the lifeworld did not exist, we could not come to agreement about anything because *everything* would be contentious and need to be resolved through communicative action or the restorative process. By having the lifeworld as a backdrop, restorative justice participants can instead focus on the main incident or wrong that has been committed and deal with it alone through the restorative process; allowing participants to learn from one another, understand one another and come to an agreement about what actions need to be taken, all the while relying on the shared information of the lifeworld to act as a stabilizing force of non-contentious and unquestioned context (until that part of it becomes relevant and problematic).<sup>234</sup>

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<sup>232</sup> *Habermas, supra* note 125 at 100; *Habermas, supra* note 131 at 125, 130-133.

<sup>233</sup> *Habermas, supra* note 131 at 125-126, 131-133.

<sup>234</sup> As restorative justice practitioners, viewing the restorative process through this framework can help us remember that there is a stock of ‘knowledge’ that participants share. They have more in common than not.

### 3.3.3 The Line between Lifeworld and Communicative Action

It can also be seen from the discussion above that there is a somewhat blurry line at the junction between lifeworld and communicative action. To clarify this as much as possible, let me turn to Habermas who explains this line between the lifeworld and communicative action as follows:

Situations do not get ‘defined’ in the sense of being sharply delimited. They always have a horizon that shifts with the theme. A *situation* is a segment of *lifeworld contexts of relevance* [Verweisungszusammenhänge] that is thrown into relief by themes and articulated through goals and plans of action; these contexts of relevance are concentrically ordered and become increasingly anonymous and diffused as the spatiotemporal and social distance grows.<sup>235</sup>

What Habermas is referring to here is the fact that every action situation has a ‘horizon’ of presumption and taken-for-grantedness that underlie it and that actors rely on indirectly in coming to understanding regarding a thematized issue. The further one gets away from a situation, in an abstract sense, the less that aspect of the lifeworld relates, even indirectly, to that specific situation. The bulk of knowledge becomes further removed and more distant.<sup>236</sup>

So for example, in a restorative justice process dealing with a young offender who vandalized a business man’s store by breaking windows and spray painting the walls, the discussion of the wrong that was committed and the harm done is part of the action situation being dealt with through communicative action (validity claims made and

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As such, we can refer participants back and remind them of this shared knowledge from time to time to stabilize the process. For those, however, that we facilitate processes for that have vastly different narratives, we must give time and patience. For if individuals have significantly different narratives (comes from different ethnic groups, social classes, etc.), they will have less in common (less shared understanding, and intersubjectivity). With these individuals, more problematizing of issues and rejecting of validity claims will occur, so more time and patience will be needed as they give reasons, learn and come to understanding with each other and consensus about a situation.

<sup>235</sup> *Ibid.* at 122.

<sup>236</sup> *Ibid.* at 122-124.

justified), but at the edges of the action situation are relevant taken-for-granted. For example, the parties all likely take for granted that this was a criminal offence and that the young offender would be punished in some manner if he went to court. The presumption is indirectly relevant to the action situation but is not in dispute and likely not even mentioned; it instead sits at the edge of the horizon. Further out on the horizon are other assumptions less relevant to the situation like the fact that it rained the day of the incident in question or the business man has a university education, etc. These aspects of the horizon of the lifeworld can be contrasted with issues within the action situation that no longer form part of the lifeworld because they are problematized and dealt with through communicative action. For example, how much replacing the broken windows will cost, or the young offender feels that graffiti is an art, or if “punishment” is the right response.

Where the horizon lies between the action situation and the lifeworld will always be blurry to some extent. What is important to keep in mind is that we know that it shifts for each different action situation that arises, and we know it provides that stable background context we need to engage in communicative action regarding a problematized action situation.

### ***3.4 The Function of the Interplay of Lifeworld and Communicative Action***

Now that we have a sense of what the lifeworld is, let us turn our attention to the important issue of what the function of it is, or more specifically, the function of the interplay between lifeworld and communicative action.

According to Habermas, the lifeworld, in tandem with communicative action gives rise to and acts as, as we have seen already, a stabilizing mechanism against social

disintegration and fragmentation. It also, however, acts as a reproduction and replenishing process.

In terms of the function of the interplay between lifeworld and communicative action as a stabilizing mechanism against social disintegration and fragmentation, I mentioned above that the lifeworld acts as the background against which we engage in communicative action. This provides a stable context within which parties can take one aspect, question it and come to consensus. Without the stability the lifeworld provides as a solid, cohesive, unquestioned base from which we can talk to each other, everything would be problematic and questioned at once and no consensus could be achieved – it would be too overwhelming for everyone.

As much as the lifeworld is the stable background for communicative action, the reverse side of the coin is that the process of communicative action reproduces and replenishes the lifeworld. As mentioned, any part of the web that is the lifeworld can be thematized and brought into focus to be questioned and justified with reasons through communicative action. All of it cannot, however, be thematized at once. Revision and change occur within the lifeworld, but in a piecemeal manner. As elements of the lifeworld become relevant to a particular situation they become thematized and enter the domain of communicative action.<sup>237</sup> Once a common definition and intersubjectivity is established as a result of communicative action, however, these justified validity claims feed back in and replenish the lifeworld, and become the presumption that then forms the backdrop to later situations.<sup>238</sup> This revision and replenishing (or perhaps reinforcing) of the lifeworld can only happen one action situation at a time though. As a social

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<sup>237</sup> *Ibid.* at 124-125, 131-132.

<sup>238</sup> *Ibid.* at 137-138.

community we presume that the world as we know it will continue as such until an aspect of understanding or knowledge is brought into focus and problematized. Until that time, however, our shared bulk of knowledge remains unshaken.<sup>239</sup> With that said, it does not mean that the lifeworld cannot be changed and revised in total; it simply means that these changes and revisions happen gradually and not all at once.<sup>240</sup>

This interplay between understandings achieved through communicative action replenishing the lifeworld is the vehicle through which traditions are passed on, modified, and/or reinforced. “The lifeworld serves as the medium for the transmission and improvement of all kinds of knowledge: technical, practical, scientific, and moral”.<sup>241</sup> As Habermas explains:

In coming to an understanding with one another about their situation, participants in interaction stand in a cultural tradition that they at once use and renew; in coordinating their actions by way of intersubjectively recognizing criticisable validity claims, they are at once relying on membership in social groups and strengthening the integration of those same groups; through participating in interactions with competently acting reference persons, the growing child internalizes the value orientations of his social group and acquires generalized capacities for action.<sup>242</sup>

In summary then, we have the lifeworld that provides the expansive background for all we know and do. This enormous background does not stay static. Instead, as mentioned, bit by bit through our continuous interactions, we bring small aspects of it into focus and make it relevant to our present situation. Once these aspects come into focus and become relevant they can leave the realm of the lifeworld and become involved

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<sup>239</sup> “Everyday communicative practice is not compatible with the hypothesis that everything could be entirely different”; *Ibid.* at 131-133.

<sup>240</sup> *Finlayson, supra* note 132 at 52.

<sup>241</sup> *Finlayson, supra* note 132 at 53.

<sup>242</sup> *Habermas, supra* note 131 at 137.



in the process of communicative action where parties engage and test their presumed knowledge. Depending on the results of their criticizing, giving and responding to reasons, they may revise their earlier ideas or they may instead be reinforced in what they had originally believed. Once a consensus has been achieved and the parties move on to other topics and issues, this new or reinforced knowledge feeds back into the background and enters again into the realm of the lifeworld.

Applying this to the context of the restorative justice process, we can say that, as mentioned above, the incident or wrong that has been committed, and the dialogue surrounding it, is the thematized and problematic action situation that no longer forms the content of the lifeworld because it has become questioned. Through the restorative justice process, facts, feeling and values (arising out of the validity claims of truth, sincerity and norms) become clarified, and/or revised, and common understanding, coordinated action, learning and can potentially be achieved. These outcomes then feed back into the lifeworld as shared stock of knowledge, agreement on future action and interaction with one another, and personal beliefs and behaviours. Restorative justice processes, as good examples of communicative action, then contribute not only to clarification and understanding amongst participants, but also form part of shared experience, shared knowledge, and socialization. Through restorative processes, this shared knowledge is not only reinforced but also revised piece by piece and then added back into our unquestioned assumptions until it becomes problematic again.

### 3.4.1 *The Structure of the Lifeworld*

Although the lifeworld and communicative action are complementary concepts, the lifeworld has a different overall structure that is related to, but that does not mirror the three-world concept described in the previous chapter. As Habermas explains:

The category of the lifeworld has, then, a different status than the normal world-concepts dealt with above. Together with criticisable validity claims, these latter concepts form the frame or categorical scaffolding that serves to order problematic situations – that is, situations that need to be agreed upon – in a lifeworld that is already substantively interpreted. With the formal world-concepts, speakers and hearers can qualify the possible referents of their speech acts so that they can relate to something objective, normative, or subjective. The lifeworld, by contrast, does not allow for analogous assignments; speakers and hearers cannot refer by means of it to something as “something intersubjective.” Communicative actors are always moving *within* the horizon of their lifeworld; they cannot step outside of it. As interpreters, they themselves belong to the lifeworld, along with their speech acts, but they cannot refer to “something in the lifeworld” in the same way as they can to facts, norms and experiences.<sup>243</sup>

Instead of the three worlds of physical, internal and social, the lifeworld functions at a higher plane and is structured instead as culture, society and personality.<sup>244</sup> By culture, Habermas refers to the stock of knowledge that underlies an individual’s understanding of the world. By society, Habermas means the accepted order that individuals know and use to regulate their membership in social groups. And by persons or personality, Habermas refers to the competences we have as individuals that allow us to speak and act in this world and which enable us to reach understanding with others while asserting our own identities.<sup>245</sup>

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<sup>243</sup> *Ibid.* at 125 – 126.

<sup>244</sup> *Ibid.* at 134-138.

<sup>245</sup> *Ibid.* at 138.

Understanding the structure of the lifeworld is important in that it further helps to explain the interplay between the lifeworld and communicative action, and more specifically, helps explain how communicative action feeds back and replenishes and reproduces the lifeworld.

Going back to the interaction between communicative action and the lifeworld then, in feeding back and replenishing the lifeworld within these structural components, it can be said that communicative action, through the raising and justifying of claims of truth, truthfulness and rightness in each of these domains, enables and promotes cultural reproduction, social integration and socialization and personality development.<sup>246</sup> This claim harkens back to the claim that I suggested at the beginning of Chapter Two, that Habermas is interested not in the semantics of language, but in the work language can do. According to Habermas, given the interplay between communicative action and the lifeworld, language does the work of 1) renewing cultural knowledge by enabling individuals to come to mutual understanding, 2) establishing social integration and solidarity through the coordination of action, and 3) socializing individuals by providing context and reference.<sup>247</sup>

Expanding this idea, we can say that the interplay between communicative action and lifeworld achieve socialization and personality development because the lifeworld first and foremost provides an individual with a context within which they develop. As a

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<sup>246</sup> “Action, or mastery of situations, presents itself as a circular process in which the actor is at once both the initiator of his accountable actions and the product of the traditions in which he stands, of the solidary groups to which he belongs, of socialization and learning processes to which he is exposed. Whereas, *a fronte* the segment of the lifeworld relevant to the situation presses upon the actor as a problem he has to resolve on his own, *a tergo* he is sustained by the background of a lifeworld that does not consist only of cultural certainties. This background comprises individual skills as well – the intuitive knowledge of how one deals with situations – and socially customary practices too – the intuitive knowledge of what one can count on in situations – no less than background convictions known in a trivial sense.” *Ibid.* at 135.

<sup>247</sup> *Ibid.* at 137.

person grows and matures, they understand themselves through these already established facts, social norms and their internal selves as well as reports from others' internal selves. When someone asks, 'Who am I?', they get the answer from the world(s) that provide them this context. From the physical world, they know things like, how to manipulate objects (i.e. build something, cook, play a musical instrument, etc.), where they live geographically, what they look like physically, etc. From the social world they learn what is appropriate behaviour and what is not, what norms are acceptable and what social institutions they need to abide by (i.e. who and how to marry, what laws exist that must be followed, how does one interact with others in this setting as opposed to that). From their, and others', internal worlds they come to understand feelings, emotions, desires, etc. These are all things learned through self-reflection, engagement with the external world, and then most importantly through the testing of these concepts through the continuous engagement in communicative action. Every time this individual engages in communicative action with others, who act as reference persons within this larger lifeworld structure, there is a continual learning process as validity claims are raised, defended and agreed upon regarding all these diverse issues. As time goes by, an individual's whole knowledge about themselves, their place in the world, and their capacity to engage in the world will evolve. This is the process of socialization.<sup>248</sup>

At the next level, social integration, as this individual engages over and over again, and aligns their claims with others and repetitively coordinates or synchronizes their behaviour with others in society, they reinforce social relationships through the bonding potential, restore unity in action and behaviour and as such integrate with the social group. Through communicative action, the bonds I spoke of in Chapter Two are

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<sup>248</sup> *Ibid.* at 136-137.

created, strengthened, and reinforced. Additionally, knowledge is shared, relationships are strengthened and a sense of collective consciousness arises. Furthermore, through the coordination of action individuals establish or re-establish unity of action and behaviour in terms of their social interaction with one another. They recognize themselves, and others correspondingly recognize them, as members of the social group. They are at the same time relying on the social group for acceptance, and strengthening it by providing themselves as part of the group and accepting others. These are the conditions that give rise to what we call social integration and cohesion.<sup>249</sup>

Finally, because these processes take place throughout a society, that collective knowledge and behaviour in the form of culture is strengthened, handed on, and reproduced.<sup>250</sup> Together through communicative action, parties engage in shared experiences which give rise to the shared stock of knowledge and collective consciousness of culture.

Through communicative action (that is through the raising and justifying of claims, i.e. the giving of reasons) we therefore sustain and replenish a lifeworld that provides us with social stability, a means to pass on/down our traditions, our values and our ways of living and thinking, and a means by which individually, we form personalities that are consistent with our larger social group.<sup>251</sup>

### *3.4.2 Application to Restorative Justice*

Now that we have an understanding of the function of the interplay between communicative action and the lifeworld, what does all this mean for restorative justice?

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<sup>249</sup> *Ibid.* at 136-137.

<sup>250</sup> *Ibid.* at 137.

<sup>251</sup> *Ibid.* at 64, 137-138.

First and foremost, if we assume that the restorative justice process is a form of communicative action, it can be said that such processes contribute to the higher plane components of the lifeworld including culture, social integration and person development. Through restorative justice processes, culture, behaviour that orders our social interactions with each other and personalities are revised or reinforced. This revising or reinforcing occurs in the following ways: 1) when people in the restorative process come to common understanding (about the physical world, the social world and their and other's internal world) they contribute to the shared experience and therefore shared knowledge and consciousness that exists within the lifeworld which Habermas refers to as culture, 2) when they intersubjectively recognize validity claims and coordinate their action they give rise to a unity that Habermas refers to as social integration, and 3) when they learn or are socialized, as a result of interacting with others as reference persons, they build their capacity, which Habermas refers to as personal development. Let me clarify this further through the use of examples.

Individuals in the restorative justice process are said to come to understanding with one another. This is reported in restorative justice literature<sup>252</sup> and is proposed to come about, as explained in Chapter Two, through the mechanics inherent within communicative action. As mentioned above, individuals can come to understanding about the physical world, the social world and their and other's internal worlds. If we take for example an individual's coming to understanding about something in the social world, we might refer to the scenario where within the restorative justice process, participants discussed whether it was right to spray-paint graffiti on a brick wall that forms part of a downtown store. If after the exchange of ideas, thoughts and feelings, it

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<sup>252</sup> See for example my discussion in Chapter One at pages 26-27.

was determined, based on reasons, that although some might think graffiti an art form, it should nonetheless not be done on the side of someone's private property, then it can be said that the individuals have come to an understanding about something in their social world. Through their discussions, participants were able to stand in each other's shoes and see each other's perspectives, and come to understanding about how another thinks and feels. Having collectively come to this understanding, the norm regarding 'not spray painting on private property' has either been reinforced or revised for each individual and sits with participants for future reference. It can also be said that this reinforcement or revising of the norm feeds back into the stock of knowledge in the lifeworld known as culture. It is culturally inappropriate to spray paint on someone's private property.

The example of coming to understanding about something in participants' social world, and the resulting cultural reproduction in the lifeworld, is a good example to use in regards to restorative justice, given that there is a significant amount of support in the literature, that restorative justice processes give rise to what they refer to as norm clarification. As mentioned in Chapter One by McCold:

One of the most consistently mentioned principles of restorative justice is that the process should provide the mechanism to question norms and alter existing social structures. While the possibility of structural reform is widely discussed, the programmatic considerations of this possibility are the least developed.<sup>253</sup>

Although not widely developed in programs, the principle is nonetheless pervasive. Using Habermas' framework of lifeworld and communicative action may help in pushing this principle further in practice.

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<sup>253</sup>McCold, *supra* note 115 at 98.

In addition to coming to understanding, individuals in the restorative justice process are also said to come to agreement (again, as a result of the raising and justifying of validity claims). They come to agreement in two senses. As explained in Chapter Two, participants come to agreement in the restorative process with each speech act through the taking of a yes or no position to the inherent validity claims that are raised. If participants take a no position, they engage in the process of argumentation until they reach a consensus/agreement. Participants also come to agreement in a larger sense, when they come to agreement about what actions need to be taken to right the wrong and an actual formal written agreement is drafted. This formal agreement can also be said to be a coordination of action, in that the parties agree on certain actions to be taken to right the wrong. As was also explained in Chapter Two, this agreeing to validity claims gives rise to a bonding or binding effect that creates or strengthens social relationships. If we take, for example, parties in a restorative justice process dealing with a youth who broke into a neighbour's house and stole some electronics, and at the end of the process it was formally agreed that:

1. The boy would not go on or in private property again without permission,
2. The boy would return to school on a regular basis,
3. The boy would return all stolen property or financially compensate the victim for it,
4. The boy would do yard work for the victim for a period of time,
5. A community member would tutor the boy to support him going back to school, and
6. The local grocer would provide the boy with a part time job.



This agreement and coordination of action would therefore restore unity regarding agreed upon behaviour and action, build trust and ‘knowing’ of one another (as well as build a sense of what can be expected of one another), and as such establish or replenish social coordination in the lifeworld in the realm of social integration.

This concept of social integration also links back to restorative justice literature, with reports such as the following which explicitly suggest that restorative justice processes give rise to victim and offender reintegration:

In this process, harm can be repaired, offenders and victims can be reintegrated (or perhaps integrated for the first time), empathy can be fostered and relationships can be healed and formed. Fundamentally, community justice is about building and utilizing perceptions of connectedness to individuals and groups as a way to respond to and prevent crime and wrongdoing.<sup>254</sup>

Through the coming to agreement on validity claims, and coming to ultimate agreement on what coordinated actions need to be taken to move forward, individuals restore unity and the sense of connectedness resulting in social integration.

Finally, individuals in the restorative justice process are also said to experience learning or socialization as a result of raising and justifying validity claims.<sup>255</sup> If we take for example here, a restorative justice process that deals with a young girl, who when she hears a schoolmate has said something bad about her, strikes the schoolmate out of rage. Learning might take place when the young girl hears the physical pain and suffering she caused the schoolmate. After hearing about the schoolmate’s injuries, the young girl may discover that physical violence is not the solution, and that she instead can learn to control her emotions and use words to solve her problems. This learning and

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<sup>254</sup> *McCold et. al., supra* note 116 at 42.

<sup>255</sup> This too can be found in much of the restorative justice literature, see for example my discussion in Chapter One at pages 28–29.

transformation of attitude and behaviour is a modification of the young girl's personality and capacity and as such feeds back into the lifeworld in the realm of personality development.

Such learning and building of personal capacity links back to the restorative justice literature as well. As was mentioned in Chapter One, restorative justice proponents suggest:

The process is seen as having the potential to achieve a range of other goals, including: increasing the participants' sense of personal efficacy and power; increasing the capacity of parties locked in conflict to 'recognise' the other party; and increasing the confidence; capacity and inclination of ordinary members of the community to resolve their own disputes and keep their own order.<sup>256</sup>

As can be seen here, Habermas' explanation of coming to common understanding, intersubjectively recognizing validity claims and coordinating action, and learning or socialization through communicative action feeds back into the life world as cultural reproduction, social integration and personal development. This theoretical framework aligns well with the experiences of participants within the restorative justice process and as such provides us with a potential structure in which to begin to understand the larger outcomes witnessed or reported through restorative processes. But the question most pertinent in this Chapter remains outstanding. How does the interplay between communicative action and the lifeworld give rise to restorative justice practitioners' intuition that it builds stronger community? I will turn to address that now.

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<sup>256</sup> *Johnstone, supra* note 117 at 140.

### ***3.5 Explaining the Strengthening and Building of Community***

As with the previous chapter, Habermas' concepts again give us both a novel framework and language to think about how restorative justice functions. I want to take the opportunity in the rest of this chapter to explain how this conceptual framework and language of the lifeworld and communicative action can be used as at least a starting point to help us understand how the restorative justice process helps build community. To begin this conversation, however, we first need a sense of what community is.

#### *3.5.1 What is Community?*

In order to understand how to address the above issue of building community, we must first briefly look at what community is before we can address how it is strengthened. There is much debate about this in restorative justice literature, but the definition I wish to use for this thesis is that offered by Paul McCold and Benjamin Wachtel:

What is community? Community is a feeling, a perception of connectedness – personal connectedness both to other individual human beings and to a group. Building community, then, involves building bonds between human beings. Where there is no perception of connectedness among a group of people, there is no community.<sup>257</sup>

#### *3.5.2 Decline of Community*

Unfortunately this sense of connectedness has decreased significantly in society today. Writers from all manner of disciplines, including restorative justice speak in depth about the lack of a sense of connectedness in our society today. Authors, from other

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<sup>257</sup> *Supra* note 116 at 40.

disciplines, such as Robert Putnam have written entire books on the subject.<sup>258</sup> Habermas too has, in fact, addressed this topic. In Volume Two of *The Theory of Communicative Action* Habermas looks in depth at the historical trend of how societies were cemented together. He begins by discussing how sacred ritual used to be the force that held community and society together and provided a sense of connectedness. He then describes how this gave way to communicative action as the mechanism of social cohesion. Communicative action, however, became overburdened with time and Habermas then describes how this has led to our situation today of lack of community and sense of connectedness.<sup>259</sup> Let me briefly expand on this discussion of Habermas' so we better understand his explanation of the mechanisms at play.

### *3.5.3 A Brief Historical Overview of Communicative Action and Social Cohesion*

Communicative action has not always played an important role in society. In volume two of the *Theory of Communicative Action*, Habermas draws on the work of George Herbert Mead and Emile Durkheim to explain that sacred ritual used to be the mechanism which sustained the lifeworld, reproduced culture, brought social cohesion and socialization.<sup>260</sup>

In early times the medium of social cohesion (united thinking and coordination of action) was the power of the sacred embodied in religious belief and reinforced through ritual practice.<sup>261</sup>

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<sup>258</sup> Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster Paperbacks, 2000).

<sup>259</sup> For additional discussion on this topic, see also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: MIT Press, 1998).

<sup>260</sup> Habermas *supra* note 131 at 43-111.

<sup>261</sup> *Ibid.* at 50-51.

The sacred provided a bundle of collective ideas and sentiments that gave rise to a collective consciousness. Within the sacred context persons put aside their own self interests and entered into a common union with other believers. The collective ideas, beliefs and sentiments were further strengthened and affirmed through repeated reunions, assemblies and meetings. Within these meetings individuals, who were already closely united, reaffirm their common sentiments through repeated ritual and ceremony; a repeated putting into effect of a consensus that is thereby reinforced and renewed. It was through the mechanism of ritual then that culture was renewed, society was integrated and individuals were socialized. Language played little, to no part, it was instead sacred symbols that were a unifying power and mechanism that held together and replenished the lifeworld. This was possible because the sacred encompassed and integrated all parts of life – family, social labour, hygiene, reproduction, etc. Transgression of any norms associated with these parts of life was viewed as sacrilege.<sup>262</sup>

As such, potential conflict was largely suppressed and the unity of the collective was secured by the awe and respect of the sacred. The sacred was not to be questioned or criticized, let alone be disobeyed. A sense of omnipotent godliness or holiness was respected and worshipped and in its form within ritual symbols was the glue that bound societies together.<sup>263</sup>

As social evolution progressed, language became more significant in everyday life. The symbolic rituals of the sacred began to take on a linguistic base; what Habermas refers to as the ‘linguistification of the lifeworld.’<sup>264</sup> The sacred transformed into

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<sup>262</sup> *Ibid.* at 52-55.

<sup>263</sup> *Ibid.* at 51.

<sup>264</sup> See Arie Brand, *The Force of Reason: An Introduction to Habermas' Theory of Communicative Action* (Wellington: Allen & Unwin, 1990) at 71-72:

religious worldviews that, although anchored in the archaic sacred, allowed for communication and dialogue in everyday life. The source or root in the sacred remained unquestioned, but discussion regarding situations in everyday life allowed for the giving of reasons. Religion in daily life came to have the form of cultural knowledge that could be discussed and reproduced through processes of coming to understanding.<sup>265</sup>

As this transformation continued, “the authority of the holy [has been] gradually replaced by the authority of an achieved consensus.”<sup>266</sup> Words that were once used in ritual and were endowed with sacred force became simply statements of everyday life that could be questioned and required justification. Habermas refers to this part of the process as a ‘turn towards the rational’ or the ‘rationalization of the lifeworld’.<sup>267</sup> He explains that:

the aura of rapture and terror that emanates from the sacred, the spellbinding power of the holy, is sublimated into the binding/bonding force of criticisable validity claims and at the same time turned into an everyday occurrence.<sup>268</sup>

Along with rationalization of the lifeworld came several other changes. The most important of which was differentiation or increased complexity of lifeworld structures. With the archaic sacred, comprehensive worldviews unified all aspects of life and individuals out of respect and awe of the sacred put aside their self interests and entered

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Worldviews are couched in language . Even though the realm of the sacred remains itself screened off from discourse in which normative claims can be fundamentally challenged, it can transmit its solidarity-creating energy to the newly differentiated institutions via linguistic means ... Thus primeval religious solidarity is transmitted via world view, which are sorted out over the ‘linguistic sorting machine’ to various situations. This is what Habermas calls the ‘liguistification of the sacred’, a process in which the ‘spellbinding and terrifying power of the sacred’ is transformed into the ‘binding/bonding force of criticisable claims to validity.’

<sup>265</sup> Habermas *supra* note 131 at 55-56, 60.

<sup>266</sup> *Ibid.* at 77.

<sup>267</sup> *Ibid.* at 77.

<sup>268</sup> *Ibid.* at 77.

into common union with other believers.<sup>269</sup> With the introduction of rationalization and the use of criticisable claims to validity, worldviews began to be questioned and became detached or disconnected from the institutions they once sustained. In their place justifications based on reason came to sustain such institutions. Individuals began to look at each other, as opposed to the sacred for legitimacy, and culture and personality became increasingly dependent on critical and innovative activities of individuals rather than on tradition. Values, norms and laws became more flexible and contextual. Specific institutions dedicated to culture (arts and humanities), socialization and education (schools) and society (government) evolved. Society as a whole became more individualistic.<sup>270</sup>

The power of the sacred shifted over to the power of communicative action.<sup>271</sup> Social integration and coordination, that were originally functions fulfilled by ritual practice, passed over to communicative action. In modern times we have come to rely on the raising of validity claims (along with the giving of reasons) to come to understanding, coordinate action and learn, that is, provide social cohesion.<sup>272</sup> Whatever remnants of the sacred were left, along with the tenets of religious belief, is today routinely questioned. They have little to no power in regards to social coordination and no real contribution to a collective consciousness (except in regards, possibly to a shared history.)<sup>273</sup>

As one can see from this short diversion into Habermas' history of social evolution, Habermas suggests that it has only been in relatively recent history that the lifeworld has come to be renewed and reinforced (culture reproduced, society integrated

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<sup>269</sup> *Ibid.* at 50-55.

<sup>270</sup> *Ibid.* at 88-91; *Brand, supra* note 264 at 107.

<sup>271</sup> *Habermas, supra* note 131 at 88-89, 93.

<sup>272</sup> *Ibid.* at 88-89,93.

<sup>273</sup> *Ibid.* at 89-90.

and unified and personal identities formed) and social cohesion has been achieved through communicative action.<sup>274</sup>

Unfortunately, the story does not end simply with the mechanism of communicative action taking the place of the sacred. In Habermas' earlier work of the *Structural Transformation of the Public Sphere*,<sup>275</sup> one can see that Habermas felt that the ideal social structure which employed communicative action could be found in the bourgeois public sphere around the 18<sup>th</sup> century. This was a time when the public was composed of private men who came together in coffee shops and public meeting houses to engage in critical public debate; where communicative action within public institutions provided for discursive formation of the will in the public sphere.<sup>276</sup> Collective consciousness, was fed by these critical public debates, and embodied in the state. It was a time in which the public sphere was 'communicatively shaped and discursively clarified' and where there was a constant potential for deliberation, reflection and critical spirit.<sup>277</sup>

Today we still have a sense of a collective consciousness embodied in the state and our democratic institutions. And there remains a sense that the legitimacy and power of these institutions is rooted in a critical public debate exercised by the people. However, several key developments have occurred to substantially weaken the role of communicative action in our society today.<sup>278</sup>

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<sup>274</sup> Habermas' analysis of this history is much more in depth than the brief summary I have provided here. See, *Habermas*, *supra* note 131 at c. V2, V3 for a more sophisticated analysis.

<sup>275</sup> Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. By Thomas Burger with the assistance of Frederick Lawrence (Cambridge: The MIT Press, 1989).

<sup>276</sup> *Ibid.*

<sup>277</sup> *Habermas*, *supra* note 131 at 81.

<sup>278</sup> *Ibid.* at 154. See also *Habermas*, *supra* note 259.



First, as a result of societies becoming larger and more complex, diverse and global they have become more fragmented. The coordination achieved by communication simply becomes overburdened. As a result the burden of coordination falls to other mechanisms that achieve the desired coordination, although in a manner very different from communicative action. According to Habermas, the burden of coordination falls to system structures such as money and power which steer the capitalist market and the state administration respectively. This steering occurs by way of instrumental action rather than communicative action. This, in and of itself, is not problematic given that these mechanisms ease the burden on communicative action, except that it leads to the second difficulty – that of, what Habermas calls, the colonization of the lifeworld.<sup>279</sup>

Because money and power do not result in understanding and consensus, but instead function instrumentally, coordination by way of strategic decisions are left to markets, or placed in the hands of expert administrators.<sup>280</sup> As such, although these systems are embedded in the lifeworld, they tend to displace and destroy the lifeworld.<sup>281</sup> When the lifeworld is colonized and interrupted by systems that do not allow for common meaning, this creates disequilibrium and instability.<sup>282</sup> Individuals and society as a whole, come to be swayed by influences that are not transparent to them. They act, not because of justified reasons, but simply because there are established patterns of instrumental action. In the end “the bases of action and decision are withdrawn from

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<sup>279</sup> *Ibid.* at 154-155, 165, 171.

<sup>280</sup> *Ibid.* at 171, 306.

<sup>281</sup> *Ibid.* at 173.

<sup>282</sup> *Ibid.* at 305

public scrutiny and possible democratic control.”<sup>283</sup> This results, according to Habermas, in numerous pathologies including anomie or a decrease shared meaning and mutual understanding, disintegration or the erosion of social bonds, alienation or a feeling of a lack of belonging, demoralization or a lack of taking responsibility for one’s actions and social instability or destabilization and fragmentation of social order.<sup>284</sup>

Habermas has a much more in-depth discussion and analysis in volume two of *The Theory of Communicative Action*. And although interesting and an important topic, even for restorative justice, a further analysis of this subject is beyond the scope of this paper. My goal in this section in this chapter is not to tackle solving the problems related to these pathologies on a national or societal level (although I believe that restorative justice may have a role to play on the national/societal level in addressing these), but is instead to propose that restorative justice, as an institutionalized form of communicative action can be a mechanism for social integration, cultural reproduction and socialization on a *local level*, and as such give rise to a collective consciousness and social cohesion. If the result of the colonization of the lifeworld is disintegration, alienation and social instability, and the cause of this is partly due to informal communicative action opportunities becoming overburdened, even though the issues may be too large and too complex to deal with at the societal level, I believe that increasing strong restorative justice programs can nonetheless have a positive effect and produce stronger community on the local or community level.

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<sup>283</sup> *Finlayson, supra* note 132 at 56.

<sup>284</sup> *Habermas, supra* note 131 at 142, 385-396.

### *3.5.4 The Lifeworld, Communicative Action and the Building of Community*

According to the above explanation, Habermas suggests that the ills we are seeing today of anomie, disintegration, alienation, demoralization and social instability (i.e. lack of community and sense of connectedness) are a result of our fragmented and colonized lifeworld. This in turn is as a result of the mechanism of communicative action being overburdened. Following this train of thinking, it could be said then that one way to begin to reverse this fragmentation and strengthen communities, the sense of connectedness and social cohesion is to engage purposefully and institutionally in communicative action.

If we assume, as suggested in Chapter Two that the restorative justice process is a form of communicative action (and a relatively robust one at that, I would suggest) then the intuition that restorative justice gives rise to strengthened community and a sense of connectedness makes sense. To break it down further let me fully connect the dots as I see them.

According to the discussion in Chapter Two and the earlier discussion here in Chapter Three, it can be said that communicative action, that is the raising and justifying with reasons of validity claims, which the restorative process is an example of, gives rise to common understanding, mutual agreement and coordinated action, and learning. This in turn feeds into the larger lifeworld as cultural reproduction, social integration, and personality development. In restorative justice language, we can say that common understanding, mutual agreement and coordinated action and learning result in norm clarification, strengthened relationships and participant reintegration, and behavioural and attitudinal transformation. When these three high level outcomes occur, that is when

individuals share cultural understanding, when their social interactions are coordinated and integrated and when their socialization is similar or shared (we can also say here – when individual lifeworlds overlap sufficiently – not totally by any means, but sufficiently – and coalesce into unproblematic background beliefs)<sup>285</sup> people feel a sense of strengthened connectedness and community. Restorative justice, therefore, may give rise to strengthened community by increasing the sense of connectedness that results from a strong sense of shared culture, social integration and shared experiences or common socialization. For further clarity, see the diagram below.

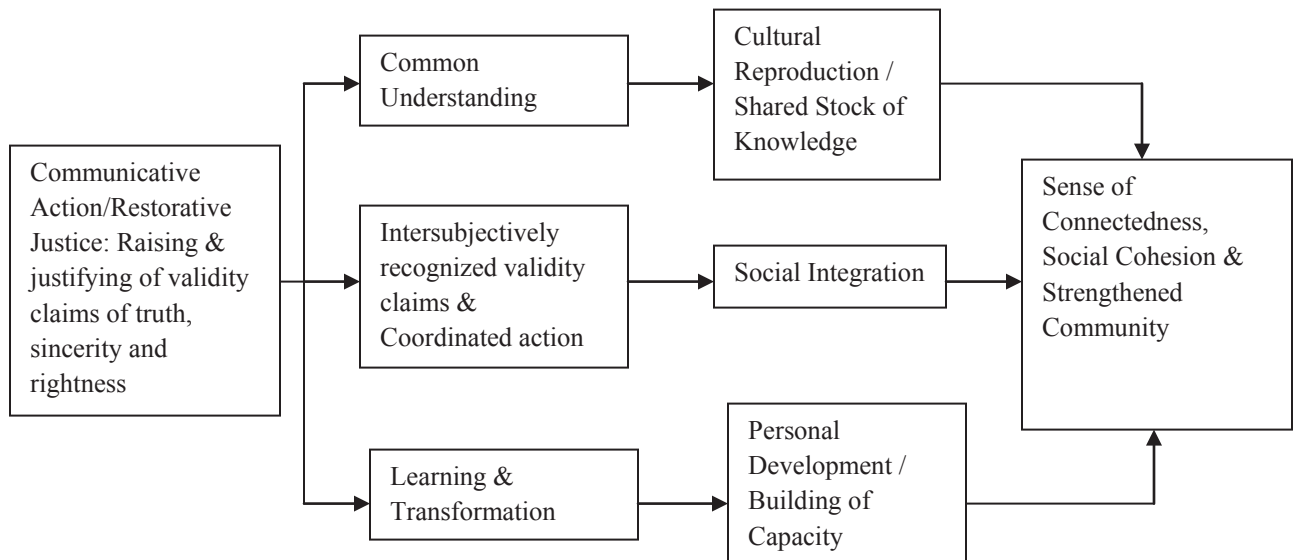


Figure 2 Interplay between communicative action and the lifeworld. Diagram illustrates the interplay between communicative action and the lifeworld, with communicative action resulting in common understanding, coordinated action and learning, which further gives rise to the replenishing of the lifeworld as cultural reproduction, social integration and personality development.

<sup>285</sup> One of the benefits of restorative justice is that it can facilitate the greater overlapping of lifeworlds – not that one has to adopt or take on the ideas of the other as their own, but instead simply can come to understanding of one another – gain insight and learn – a knowing of similarities and perspectives and differences when issues are thematized which are fed back into the lifeworld (richer understanding of each other).

The mechanism at play then is again communicative action (and restorative justice as an example of communicative action) – the raising of validity claims and the justifying with reasons – this in turn results in the replenishing of the lifeworld that can take the form of norm clarification, social integration and personal development, all three of which act as the glue that binds us together.

The more we can, through restorative processes come to common understanding, establish mutual agreement, coordinate action and learn, the more we increase our sense of connectedness by sharing cultural knowledge, becoming socially integrated and learning new capabilities from others.

### ***3.6 Summary***

At the beginning of this chapter, I mentioned that restorative justice has a strong claim that processes such as the one explained in Chapter One give rise to strengthened communities. Theorists suggest that this occurs through the building of individual's capacities, through norm clarification, repairing and re-establishing of relationships, and through the reintegration of victims and offenders. If you walk through the explanation of the interaction between the lifeworld and communicative action, as I have just explained it, you can see that these proposed factors that are suggested to give rise to community building align significantly with the lifeworld components that Habermas suggests that communicative action gives rise to. For example, as I have shown in the previous section, norm clarification is a form of cultural reproduction, reintegration of victims and offenders aligns with Habermas' lifeworld realm of social integration and cohesion, and capacity building relates or aligns with Habermas' lifeworld realm of

personality development. As such, Habermas' theories may again provide a framework to further understand the mechanics at play within the restorative justice process, and further understand how they can potentially give rise to the outcomes reported by practitioners and participants.

## CHAPTER 4 – CONCLUSION

Only by subjecting our preferences and projects to the test of debate do we come to understand what we know and still need to learn. Until we have to defend our opinions in public they remain opinions or half-formed convictions based on random or unexamined assumptions. We come to know our minds by explaining ourselves to others. In attempting to bring others around to our point of view carries, of course, the risk that we may adopt their point of view. We have to enter imaginatively into our opponent's arguments if only for the purpose of refuting them and we may end up being persuaded by those we sought to persuade. But one of such openness comes the opportunity to break out of our adversarial roles into new domains of solution.<sup>286</sup>

The above quote captures to some extent the thoughts and concepts proposed by Habermas in his theories of universal pragmatics and communicative action. Although the quote may be a simplistic representation of these theories, it nonetheless captures the essence. It also captures one of the essential threads that make up the tapestry of the practice of restorative justice. When parties enter into the restorative process they come with a bulk of shared information. But they would not be there in the first place if there was not dissonance between them in terms of this information and action based on such “misinformation”. Misunderstanding, conflicts, and crime arises when persons do not have a shared understanding of their physical, social and internal worlds. Crime, for example, is a violation of law and social norm. Either the offender did not have a shared understanding of what was legally and normatively acceptable, or he had that understanding and nonetheless chose to contravene it. Whichever is the case, this requires a response, and from a restorative justice perspective the best response is, through a process of dialogue, to come to an understanding of what happened, what the consequences of the incident were (i.e. what harm did it cause the parties) and a

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<sup>286</sup> Christopher Lasch, “The Lost Art of Political Argument” in Rolf Norgaard, ed., *Composing Knowledge: Readings for College Writers* (Boston: Bedford/St. Martin's, 1990) at 293.

consensus as to how best to address this harm through coordinated actions. Through this process, our misunderstandings, prejudices, opinions and ‘half-formed convictions’ get tested and challenged. We can begin to see things from another’s perspectives. New information and different ways of looking at things get brought into the discussion and we begin to come to understanding with one another; we learn from one another. We begin to revise our assumptions and taken-for-granted and in the process of this consensus building, we strengthen relationships with each other. The more we overlap our understanding of the world and of each other, the stronger the bonds that hold us together in community; the more this shared world, in terms of social interactions, becomes solidified and cohesive.

When parties enter into a restorative process they come with a significant amount of shared information – that background information that makes up the bulk of our knowledge in what Habermas calls the lifeworld. We come into a process of understanding that the earth is round and that the parties involved all live in country X and community Y. We all share a common understanding of many of the social norms we abide by. That we should wear these clothes and show up on time; that I am a woman and you are a man and that has certain expectations that go with it. And we all can imagine that if the victim was attacked, she might feel afraid of her attacker, that she might be confused, angry and scared.

But there are clearly things that we are in disagreement about. We have all sorts of half-formed ideas, biases and prejudices that lay there undisturbed until they are challenged. We may think that a young offender is a monster of a child. The offender



may believe that victim deserved it. There is obviously something amiss, otherwise the parties would not be there dealing with a conflict.

In the preceding chapters I have provided a new framework and language by exploring the theories and concepts of Jürgen Habermas, through which we may better be able to explain and understand the practice of restorative justice, at least in terms of encounter and the building and strengthening of community. I have looked in Chapter Two at the restorative justice process from a different perspective and examined how the experiences of common understanding, mutual agreement, learning and strengthened relationships may be explained by the process or mechanism of communicative action, as well as the conditions necessary to bring these experiences about. In Chapter Three, I further examined the restorative justice process, this time from the perspective of Habermas' lifeworld and its interaction with communicative action, and examined how this interaction may give rise to the outcomes seen to arise from the restorative process, including norm clarification, reintegration, socialization and personal capacity building, which all in turn seem to give rise to strengthened community. By doing this, I hope to have provided knowledge that may contribute to restorative justice theory and help further bridge some of the existing gaps between practice and theory.

In doing this, I should, however, point out some of the shortcomings that are present in this framework and language I have offered. As mentioned throughout the paper, I have employed the theories of Habermas in a rather limited way, as a starting point from which we can refine and grow this view. In view of the refining that now needs to be considered, let me note a few of the weaknesses that will need to be addressed in future uses of this perspective.

## ***4.1 Shortcomings***

As much as I believe that the preceding pages contribute to our understanding of restorative justice, I also believe that the frameworks provided through Habermas' theories are simply one reference point or angle from which to view the restorative process. Furthermore, although I think these theories provide a good and legitimate perspective, I will be the first to acknowledge that they have some significant shortcomings. This should not diminish the connections I have made in the previous pages, instead, I wish to simply acknowledge the contribution and state clearly that it is a beginning point that needs to be discussed, debated, and modified from here. To help start this discussion, I wish to address several areas where Habermas' theories fall short.

### *4.1.1 Rationality*

The first shortcoming I wish to note relates to Habermas' underlying assumption that we as humans predominately act rationally. This assumption runs through the core of Habermas' theories and forms the backbone of his larger life-long research project. Communicative action, the giving and justifying of claims through reasons, and the learning potential and bonding effect that is inherent with this type of dialogue all function as a result of this assumed rationality. Furthermore, the rationality that Habermas envisions is one characteristic of Western societies with a linear, logical style of thinking. There exist two dilemmas with this assumption however: 1) there exists a multitude of societies that employ restorative processes that do not embody or align themselves with this Western, linear type of thinking and rationality; 2) even individuals within those societies that do adhere to this type of linear thinking do not always act rationally. Let me explain each briefly.

There are an abundance of societies and cultures that do not adhere to a Western, linear type of thinking. Take for example African or Aboriginal cultures. These cultures tend to be much more circular and fluid in their modes of thinking. As Ryszard Kapuscinski puts it so beautifully in speaking about different perceptions of time:

The European and the African have an entirely different concept of time. In the European worldview, time exists outside man, exists objectively, and has measurable and linear characteristics. According to Newton, time is absolute: "Absolute, true, mathematical time of itself and from its own nature, it flows equably and without relation to anything external." The European feels himself to be time's slave, dependent on it, subject to it. To exist and function, he must observe its ironclad, inviolate laws, its inflexible principles and rules. He must heed deadlines, dates, days, and hours. He moves within the rigors of time and cannot exist outside the. They impose upon him their requirements and quotas. An unresolvable conflict exists between man and time, one that always ends with man's defeat – time annihilates him.

Africans apprehend time differently. For them, it is a much looser concept, more open, elastic, subjective. It is man who influences time, its shape, course, and rhythm (man acting, or course, with the consent of gods and ancestors). Time is even something that man can create outright, for time is made manifest through events, and whether an event takes place or not depends, after all, on man alone. If two armies do not engage in battle, then that battle will not occur (in other words, time will not have revealed its presence, will not have come into being).

Time appears as a result of our actions, and vanishes when we neglect or ignore it. It is something that springs to life under our influence, but falls into a state of hibernation, even nonexistence, if we do not direct our energy toward it. It is a subservient, passive essence, and, most importantly, one dependent on man.

The absolute opposite of time as it is understood in the European worldview.

In practical terms, this means that if you go to a village where a meeting is scheduled for the afternoon but find no one at the appointed spot, asking, "When will the meeting take place?" makes no sense. You know the answer: "It will take place when people come."<sup>287</sup>

The result of this is that different peoples conceive reality or the realities differently. Whereas Habermas breaks reality down into three worlds (objective,

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<sup>287</sup> Ryszard Kapuscinski, *The Shadow of the Sun*, translated from the Polish by Klara Glowczewska (Vintage International: New York, 2001) at 16-17.

subjective and shared), an African or Aboriginal person may not break reality down in this same way. The lines between objective and subjective may be much more blurred and flexible, and there may even be an additional world, such as the spiritual world. These differences are reflected to some extent in the speech and language of these cultural groups. For example, both Aboriginal and African societies use parables and stories to socialize individuals, reproduce culture and create social cohesion. However, one cannot raise the same validity claims of truth, sincerity and rightness in this type of speech. That is, one cannot necessarily give reasons to support that the crow spoke to the turtle and that he was sincere when it did. The framework that I have provided has a shortcoming in fully explaining the mechanics at play, yet restorative processes have their deepest roots in these cultures.

As mentioned, even within Western cultures, persons often times do not behave as rationally as Habermas' theories might suggest. Within restorative processes strong emotions such as anger, shame, bitterness, fear and anxiety are often very present. These emotions can make us very much irrational and inconsistent in what we say and do at times. As such, although Habermas' theories provide us with a starting framework it must be acknowledged that it would not be appropriate for all situations to explain the coming to understanding for people within a restorative processes and there is likely more going on than can be captures through Habermas' framework.

#### *4.1.2 Ideal Speech Situation*

A second shortcoming is the concept of the ideal speech situation. Habermas used this concept as a theoretical move (one that he has since himself moved away from) to complete and make sensible his ideas. In reality, however, the ideal speech situation is

just that: an ideal; something that we can strive for, but never fully attain. I do not believe that that should deter us from striving for such a situation, however, never fully achieving the ideal may have some impact on the results and is a shortcoming that should be noted.

Take the example of the condition of equality and having an equal voice in the process. We can put in place checks and balances and mechanisms to attempt to achieve as much equality as possible, however, full equality is often not achieved given the power dynamics often at play within restorative processes (think of the example of a husband who has committed domestic assault against his wife or a wealthy home-owner who was robbed by a young offender).

Another example is the condition that individuals be oriented to coming to understanding. Again, we put in place mechanisms to promote this condition such as the requirement that wrongdoers admit their wrongdoing and take accountability before a restorative justice process. However, individuals often oscillate between coming to understanding and acting strategically within a restorative process. Even if individuals are originally oriented to understanding because of emotions, fears and anxieties, they often do not maintain this orientation throughout. They go back and forth between oriented to understanding to strategic action. For example, when we feel threatened or when we feel that we can't trust the other person, we revert back to a defensive state or strategic orientation.

Achieving the ideal speech situation therefore may never be fully possible and understanding the ramifications of this would be important.

These are just two of the potential shortcomings of the framework Habermas' theories provide us, there may in fact be more and each should be examined and the ramifications of which should be considered. With that said, I nonetheless continue to suggest that the meaning these theories provide to restorative practices is important and valuable. Dialogue and debate on these issues should nonetheless continue.

#### ***4.2 Further Research and Study***

As much as exploring further shortcomings of Habermas is important I also want to reiterate that what I have provided in this initial paper is the basic framework (i.e. first layer) that arises from Habermas' work that could be applicable to restorative practice. Habermas' work is so deep and rich that one cannot possibly explore all the connections and association of how his work aligns with and informs restorative theory in one paper. There is a wealth of subsequent papers that could be written exploring not just the connections but also all the ramifications or implications that arise from restorative justice when such processes are viewed from this perspective.

Three types of subsequent research could be undertaken to begin with. The first is to get into more of the *specifics* of Habermas' theories and apply them to restorative justice. For example, Habermas deconstructs sentence structure and relates this to the different perspective an individual engages her world with. Someone more conversant in grammar may wish to look at these specifics and see how they further inform the restorative process. Another example is Habermas' concept of 'the generalized other' that was not discussed in this paper due to lack of time. However, it appears to be a very relevant concept to restorative justice that should be explored.

The second type of research is to *expand* Habermas' theories and apply them to restorative justice. For example, Habermas' work *Between Facts and Norms* touches on the larger concept of deliberative democracy which could be useful if extended to restorative justice thinking. It could be used to examine how restorative processes can contribute to and feed into the larger democratic structure to affect social organization and societal change.

Finally, it would be useful simply to deepen and further explore the associations already made in this paper and look further at the implications to restorative justice – such as further understanding the transformative and bonding potentials.

In closing, my hope is that this thesis will contribute to the thinking and understanding of restorative justice, and that the new perspective offered, arising out of Habermas' theories, will not only add insight and contribute to restorative justice thinking and theory, but also foster further dialogue and debate in this area. For as mentioned at the beginning of this chapter, “only by subjecting our preferences and projects to the test of debate do we come to understand what we know and still need to learn.”<sup>288</sup>

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<sup>288</sup> *Lasch, supra* note 286.

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