Article

Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States

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INTRODUCTION

Today, it is common to describe a "bipartisan consensus" on the American criminal justice system.[1] Policymakers "across the aisle" agree that particular rules and institutions, such as abstract adjudication and determinate sentencing, should change as they confront a crisis of incarcerated people who are not reformed by their encounters with the system.[2] A critical literature unpacks this consensus by distinguishing its "left" and "right" articulations. Reformers on the political left, critical criminal law scholars argue, theorize social and environmental causes of crime and propose remedies motivated to address the racial,

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1. *See, e.g.*, Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 534 (2012). Podgor puts the point dramatically: "Perhaps what has been the most impressive aspect of this movement [to stop overcriminalization] is that it has no political or ideological colors. Its voice comes from the left, the right, Democrats, Republicans . . . ." *Id.*

2. A recent, if incremental, example: in December 2018, a large majority of the Senate voted to relax some federal mandatory minimum sentencing laws and enable some federal prisoners to earn earlier release. First Step Act of 2018, S. 756, 115th Cong. (2017) (enacted).

class-based, and gendered inequalities and violence perpetuated by the penal system.[3] By contrast, reformers on the political right are seen primarily as advancing economic rationalities encapsulated in the term "neoliberalism": cost-benefit analysis, public choice theory, and managerial and actuarial logics applied to social problems—what Allegra McLeod calls "neoliberal penal reform" and describes as "decarceration as a component of a regressive fiscal program";[4] or what Hadar Aviram calls "fiscal prudence rather than humanitarian concern" and argues stands to retrench a "neoliberal framework."[5] Summarizing such analyses, Benjamin Levin describes the (radical) left as offering "ideological critique of neoliberalism," including how the criminal justice system reflects structural inequalities, whereas the center and right care mostly about using resources efficiently—"right sizing" the penal system so that public costs are calibrated more precisely to public goods.[6]

These arguments hold important explanatory power—they illustrate how this present moment of so-called bipartisan reform may in practice conserve rather than transform existing systems. This Article, however, asks: how is this analysis of centrist and right-wing economic motivations incomplete? By describing mainstream penal reform as a series of rational calculations, left analysts stand to miss how economic and moral logics are often deeply intertwined. Or to put this inquiry an-

3. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 272–73 (2018).

4. Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 656 (2017).

5. HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 58, 98 (2015). This neoliberal framework, Aviram explains, includes "the retreat of the state from its caretaking function, the despair of rehabilitative goals, and the focus on profitable and managerial goals." *Id.* at 98. For other critiques of the bipartisan consensus and specifically its focus on fiscal concerns, see generally MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); Katherine Beckett, Anna Reosti & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 250 (2016); Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559 (2015); and Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125 (2017).

6. Levin, *supra* note 3, at 273.

other way, if, as critical scholars argue, bipartisan criminal justice reform is constrained by limited forms of public redistribution and little structural transformation—that is, if bipartisan reform is "still neoliberal"—then this Article suggests we should investigate American neoliberalism not simply for its economic but also for its moral character.

To illustrate some of the moral logics animating penal reform, this Article pursues a genealogy of restorative justice—a decarceral strategy that today elicits support across the aisle. Restorative justice is a mediative process that invites offenders to directly experience the effects of their crime through conversations with victims (as well as through conversations with family and community members convened into "conferences" or "circles"), and then to deliberate about how to repair such effects through emotional, spiritual, and material reparations.[7] It originated (in its contemporary form) in the last decades of the twentieth century primarily (but never exclusively) on the political left. But in the United States it has only ever limped along at the margins of the criminal justice system. This is because its found-

7. In this Article, I describe restorative justice as a mediative process, although I recognize that restorative justice differs from classic forms of civil mediation. Significantly, in most restorative processes an offender must concede the alleged harm as a precondition to dialogue with a victim. Some restorative processes, however, "allow for acceptance of responsibility to emerge" through a continuing set of facilitated conversations "rather than requir[e] [responsibility] to be established at the outset." Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 625 (2002). As such, restorative processes vary in how much mediation, dispute resolution, and consensual agreement they incorporate. For example, participants engaged in a violent conflict may themselves attempt to reach a consensus about what harm occurred. Or, more commonly, the fact of harm is stipulated, and an offender and victim may instead attempt to reach a consensus about what sort of restitution the offender should offer to meet the victim's needs. Or harm is stipulated, and a victim along with community members and criminal justice professionals may deliberate about restitution and jointly reach a decision that an offender may accept. For an argument to expand the range of cases where restorative justice looks more like mediation (that is, a process where parties can "discuss the facts of the case, relative culpability, and a range of outcomes"), see M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. Rev. 123, 155 (2016).

ing theorists and practitioners rejected, as far as they could, either a rational or pathologized penal subject.[8] Restorativists instead willed a different human into being: what John Braithwaite calls a "virtuous actor"[9]—that is, a moral agent who has lost her way, often in the face of excessive individualism and social disintegration, yet who may re-biography herself as an accountable, redeemable subject especially when reintegrated into "communities of care."[10] For this reason, restorativists often argue that deterrent strategies (which presume a rational actor) and incapacitative strategies (which presume a pathological actor) should be the exception, not the rule.[11] Restorativists would instead institutionalize strong disciplinary forms of informal social control designed to inspire ethical feeling and moral accountability, which in turn requires keeping offenders, as far as possible, "in communities." This is why restorative justice is potentially significantly decarceral.

In the United States today, restorative justice is gaining supporters on the political right, including among Republican policymakers, evangelical conservative Christians, and libertarian organizations funded by the Charles Koch Foundation.[12] As

8. *See, e.g.*, JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 23 (2014) (describing the late twentieth century "common sense" understanding of criminals that fueled mass incarceration: that "most criminals have a high and unchanging potential for criminal activity, including violence").

9. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 61 (1999).

10. John Braithwaite & Kathleen Daly, *Masculinities, Violence and Communitarian Control*, *in* JUST BOYS DOING BUSINESS?: MEN, MASCULINITIES, AND CRIME 189, 201 (Tim Newburn & Elizabeth A. Stanko eds., 1994).

11. *See* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 42 (2002); Braithwaite, *supra* note 9, at 60–67; *see also* RON CLAASSEN, RESTORATIVE JUSTICE - FUNDAMENTAL PRINCIPLES 2 (1996) ("Restorative Justice prefers that offenders who pose significant safety risks and are not yet cooperative be placed in settings where the emphasis is on safety, values, ethics, responsibility, accountability, and civility. They should be exposed to the impact of their crime(s) on victims, invited to learn empathy, and offered learning opportunities to become better equipped with skills to be a productive member of society. They should continually be invited (not coerced) to become cooperative with the community and be given the opportunity to demonstrate this in appropriate settings as soon as possible."); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 221 (1990) ("What do we do with the 'dangerous few'? Do we incarcerate?").

12. *See infra* Part III.

an uptick in legislation suggests, restorative justice is also increasingly promoted from within state institutions. For example, between 2010 and 2015, fifteen states enacted or updated restorative justice statutes[13]—lawmaking that Shannon Sliva argues cannot be predicted by political party affiliation.[14] Of course, and notwithstanding this activity, there is no such thing as bipartisan restorative justice. Restorativists on the left and right have very different views about, for example, the mediation of violent versus nonviolent crime, state versus community control over mediative processes, and the relationship between individual harm and structural change.[15] But in all versions of restorative justice—and driving its institutionalization—proponents agree that crime is often foundationally an interpersonal harm that requires intensely personalized and relational processes in response. As such, this Article also asks: why is restorative justice's ethic of relationality mainstreaming now?

The answer is complex. Over the last several decades, policy elites have combined an economistic approach to crime control with a particular moral strategy: legitimating sovereign power through populist punitivity, costs be damned.[16] Today, however, the American penal state is confronting the limits of "harsh justice."[17] Rather than double down on the moral righteousness of punishment *or* retreat to post-war rehabilitative and welfarist penal policies, restorative justice potentially enables something different. It invites policymakers to institutionalize spaces of ethical feeling and action where offenders can experience personal transformations through values such as responsibility, forgiveness, and grace. Restorative justice appeals today across the

13. SHANNON M. SLIVA, RESTORATIVE JUSTICE LEGISLATIVE TRENDS, https://www.rjcolorado.org/_literature_153668/Restorative_Justice_Legislation_Trends [https://perma.cc/PN6V-WBJF].

14. Shannon M. Sliva, *Finally "Changing Lenses"? State-Level Determinants of Restorative Justice Laws*, 98 PRISON J. 519, 535 (2018) ("The hypothesis that a higher percentage of Democratic [compared to Republican] legislators would be associated with more supportive restorative justice legislation was rejected.").

15. Many left restorativists describe struggles for restorative justice and struggles for structural transformations as advancing the same overarching social and political ends. *See infra* notes 165–70, 292–304 and accompanying text.

16. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 131–35 (2001).

17. *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

aisle, I will thus argue, because it offers a distinctively moral form of neoliberalism.[18] It offers a way of living under late capitalist conditions that is not competitive or self-interested, but intensely solicitous and caring, and caring not just for the self but especially for others: offenders, victims, families, community members, mediators, prosecutors, social workers are all supposed to restore interpersonal relationships and—through these relationships—produce new (or old) forms of social cohesion necessary to scale back the penal *and* the social state.[19] Or to put this argument another way, today libertarian reformers increasingly claim that skepticism of state intervention in social welfare systems *and* in penal corrections should be mutually reinforcing political commitments.[20] Such reformers, however, know well that accomplishing effective community self-regulation requires a private sphere saturated with moral-relational values, not simply rational atomized individualism.

This Article begins by elaborating the terms "restorative justice" and "neoliberalism" conceptually to trace points of convergence and divergence between them. Part II unpacks the development of restorative justice in the United States genealogically, starting in the 1970s with its modern institutional roots in the community mediation movement and its attack on centralized, expert state adjudication. In the 1980s and 1990s, as civil mediation morphed from community empowerment into market-managerial practices, early restorativists infused criminal mediation with an intrinsically moral-relational dimension. They set relationality *against* retributive, rehabilitative, and deterrence-based theories of incarceration, which influential restorative theorists also tethered to left-progressive efforts to challenge status quo social and economic inequalities. This moral-relational dimension made restorative justice far more marginal than civil

18. I borrow this term (and a heuristic distinction between "market neoliberalism" and "moral neoliberalism") from ANDREA MUEHLEBACH, THE MORAL NEOLIBERAL: WELFARE AND CITIZENSHIP IN ITALY 19–20 (2012).

19. *See id.* at 6–7.

20. *See, e.g.*, Shaila Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This.*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html [https://perma.cc/N768-2UUP] (describing the views of Marc Levin who spearheaded criminal justice programming as part of the libertarian Texas Public Policy Foundation and co-founded the think tank Right on Crime).

mediation in American judicial institutions, but it also made restorative justice available for new translations.

Part III examines these translations. Around the millennium, a number of criminal law scholars proposed fusing restoration with retributivism so that practices of apology and forgiveness could temper rather than decenter traditional punishment theories. Important Christian conservatives evolved their own version of retributive-restorative justice consistent with political commitments to small government, voluntary care, and personal transformation against sin. As the crisis of mass incarceration chipped away at American faith in penal harshness, these reformist ideas became broadly available for bipartisan policy uptake—influencing, for example, efforts to enact statewide victim-offender mediation in Texas that yoke arguments for healing and relationality together with arguments for cost-cutting and a smaller social state.

This Article thus offers a cautionary tale about American restorative justice consistent with arguments that doubt today's bipartisan consensus. It also, however, complicates left criticisms of that bipartisan consensus. When left scholars set humanitarian concerns against efficiency, particular arguments follow: often we criticize economic logics and debate strategic partnerships with clear expectations about the limits of fiscally oriented reform. By contrast, this Article illustrates how a reform agenda characterized by repeated arguments about fiscal prudence may at times rely deeply on moral-relational ideals—ideals that do not necessarily contradict but for some may instead *advance* political commitments to shrinking state care and public provisioning. As such, restorative justice invites political rivals to support values such as relationality and mutual aid that they may genuinely share—*at the same time* as these values may be ruthlessly competing for very different overarching normative political, economic, and social visions.

I. RESTORATIVE JUSTICE AND NEOLIBERALISM: A CONCEPTUAL SKETCH

In the United States, modern restorative principles originated in experiments in informal justice in the 1970s, which shared ideas in common with a broader attack on the criminal justice system—ideas that in the 1980s paradoxically helped to consolidate the harsh penal regime that Americans have today.

For example, early restorativists expressed skepticism about professional state-administered treatment and rehabilitation. Instead, they commended governing through community and devolving responsibility from state to private actors to manage questions of crime and justice. In this Part, I lay out basic restorative principles—subsidiarity, active responsibilization, and an ethic of relationality—as they were articulated by founding scholars working in multiple national contexts. To make sense of potential synergies between restorative justice and neoliberalism, I then offer a perspective on neoliberalism that does not reduce primarily to a set of coherent arguments about rational economics.

A. RESTORATIVE JUSTICE

Subsidiarity first.[21] In 1977, Norwegian criminologist Nils Christie published a still-foundational essay, *Conflicts as Property*.[22] Christie argued that advanced industrialized states deprive citizens of a critical resource—conflicts—which citizens rightfully "own" and should be entitled to use to elaborate their own norms and social relationships.[23] To that end, Christie extensively criticized professional, statist forms of expertise and called instead for "lay-oriented" courts that would stage intensely personalized encounters between victims and offenders.[24]

21. I use the term subsidiarity here not simply to suggest decentralization but also to capture some of its meaning as a moral principle rooted in Catholic social thought, namely, that people should balance personal responsibility and dignity with the common good through plural social processes, associations, and forms—and that government should therefore take care not to replace the ends of individuals and smaller associations. For an extensive explication, see Joseph Drew & Bligh Grant, *Subsidiarity: More than a Principle of Decentralization—A View from Local Government*, 47 PUBLIUS: J. FEDERALISM 552 (2017). *See also* Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509 (2010); David Golemboski, *Federalism and the Catholic Principle of Subsidiarity*, 45 PUBLIUS: J. FEDERALISM 526 (2015).

22. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977); *see, e.g.*, Braithwaite, *supra* note 9, at 5 (calling *Conflicts as Property* "[t]he most influential text of the restorative tradition").

23. Christie, *supra* note 22, at 3–4, 7–8.

24. *Id.* at 10–11.

This theory of subsidiarity—redistributing responsibility for crime and justice from the state to associations of private actors—presupposed a corresponding theory of subjectivity. Christie, and the many restorativists who followed him, envisioned active, engaged citizens who could govern themselves to a far greater extent than the state allowed. Christie criticized how the then-dominant ethos of rehabilitation reduced offenders to "object[s] for study, manipulation and control."[25] Whatever externalizing theory the professional applied to understand crime, Christie argued—be it biology, personality, or even, as Christie was more sympathetic to, class—the focus on social explanation took interpersonal conflicts away from the parties themselves.[26] Christie wanted to ask more of offenders. He presumed a moral agent, rather than a dependent or pathological subject, who could meaningfully experience blame and accountability and therefore could actively discuss and make reparations—processes that Christie advocated wholly apart from any "interest in the treatment or improvement of criminals" or reduced recidivism rates (he was instead after citizen engagement and bottom-up norm elaboration).[27] John Braithwaite, another foundational restorative theorist, made a similar claim: "restorative justice involves a shift from *passive responsibility* to which offenders are held by professionals for something they have done in the past to citizens taking *active responsibility* for making things right into the future."[28]

Restorativists also want to ask more from victims. If state criminal justice systems make offenders into "things," they erase victims entirely, Christie argued.[29] Victims are "so thoroughly represented," he elaborated, that they lose doubly in the professional system: "first *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life."[30] Restorativists thus reject the idea that the state—as the proper institutional representation of "society" or

25. *Id.* at 5.

26. *Id.* ("They are class conflicts—also. But, by stressing this, the conflicts are again taken away from the directly involved parties.").

27. *Id.* at 9.

28. John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 28 (2004).

29. Christie, *supra* note 22, at 5.

30. *Id.* at 3.

the public good—should stand for victims. They instead envision (not uncontroversially) victims who *want* to take personal responsibility for directly communicating the effects of a criminal act through highly personalized and affective narratives.

Finally, relationality. Restorativists argue for decentralized problem-solving by active participants because they conceptualize crime as foundationally a cause and effect of broken relationships. What is to be "restored" are the interpersonal relationships broken—or created—by crime. As such, restorative justice seeks to "transcend the merely rational to speak to vital concerns of human conscience" such as love, forgiveness, and grace.[31] Hence, in restorative interventions, "superimposed upon the stick and the carrot lies 'the sermon.'"[32] As Adam Crawford explains, "[t]he motivation evoked here is rooted not in evading a punishment or seeking to obtain a reward but in avoiding feeling bad or fostering commitments to do the right thing."[33] However the process begins (perhaps through offender and victim calculations of self-interest), the restorativist's hope is always that it will involve genuine transformations in self and social relationships.

Restorativists thus want "less state, greater de-professionalization and a returning of conflicts to their 'owners.'"[34] But they make this case for privatizing justice through the logics of morality and relationality as much or more than through economics—through self-interest *and* mutuality, through the stick/carrot *and* the sermon. Many early theorists grounded these double principles in a range of value systems including Mennonite peacebuilding and New Left traditions of participatory democracy, localism, and community self-management.[35] But given broader political trends in the United States and elsewhere in the late twentieth century, some restorativists also began to observe uneasily that their "anti-state appeal" coincided "with a

31. John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders*, 34 BRIT. J. CRIMINOLOGY 139, 155 (1994).

32. Adam Crawford, *Situating Restorative Youth Justice in Crime Control and Prevention*, 2007 ACTA JURIDICA 1, 18.

33. *Id.*

34. Adam Crawford, *The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting*, *in* RESTORATIVE JUSTICE AND THE LAW 101, 112 (Lode Walgrave ed., 2002).

35. *See infra* Parts II.A–B.

neo-liberal assault upon the welfare state."[36] To understand how early restorativists could simultaneously be critical of neoliberalism and yet share some basic presuppositions in common, the following section sets forth a perspective on neoliberalism that does not "imagin[e] *Homo economicus* at the center of the story."[37]

B. MARKET NEOLIBERALISM, MORAL NEOLIBERALISM

I use the term neoliberalism in this Article with some hesitation—it's a slippery analytic that for some readers may threaten to obfuscate rather than clarify existing social problems and practices. Its primary expounders such as Friedrich Hayek and his circle of intellectual collaborators (which included Charles Koch) aimed "to bring about the rehabilitation of the idea of personal freedom especially in the economic realm," a task that they reasoned would require "purging traditional liberal theory of certain accidental accretions which have become attached to it in the course of time" (such as a national collectivist ethos).[38] Numerous scholars in turn have theorized how this "revival"[39] of liberalism intentionally reinvented it through new

36. Crawford, *supra* note 34, at 113.

37. Bethany E. Moreton, *The Soul of Neoliberalism*, 25 SOC. TEXT 103, 106 (2007). *See generally* MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM (2017); BETHANY MORETON, TO SERVE GOD AND WAL-MART: THE MAKING OF CHRISTIAN FREE ENTERPRISE (2010).

38. FRIEDRICH HAYEK, THE FORTUNES OF LIBERALISM: ESSAYS ON AUSTRIAN ECONOMICS AND THE IDEAL OF FREEDOM 192, 237, 238, 244 (Peter G. Klein ed., 1992). Hayek explained that "Americans have done me the honour of considering the publication of *The Road to Serfdom* [1944] as the decisive date" of the "rebirth of a liberal movement." *Id.* at 192. He, however, made clear that he roots the genesis of these ideas in the larger endeavor of the members of the Mont Pelerin Society, a group of like-minded intellectuals that Hayek founded and co-convened. *Id. See generally* Rachel S. Turner, *The 'Rebirth of Liberalism': The Origins of Neo-Liberal Ideology*, 12 J. POL. IDEOLOGIES 67 (2007). *See also* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009). Charles Koch attended Mont Perlin Society meetings. On Hayek's influence on Koch, see, e.g., JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 173 (2017).

39. HAYEK, *supra* note 38, at 237.

political, legal, and epistemic understandings of the purpose and functions of markets.[40]

In this Article, I engage with the term neoliberalism as it is now commonly used on the legal left—namely, as an analytic both to trace and criticize how public and private institutions distribute market-managerial discipline to address public problems and mold individual subjectivities.[41] Hence, when critical criminal law scholars describe reforms as neoliberal, they broadly invoke governance practices that have expanded over the last forty years as a counter to New Deal and Keynesian-style institutions and especially as a counter to their redistributive potential. In brief, these practices endeavor to outsource a range of social and political functions to nonstate actors. Outsourcing embodies a procedural and a substantive dimension. If the question is: "Who has the institutional legitimacy and competence to provide a particular good or service, including crime control or adjudication?," a neoliberal approach to governance generally favors communities, corporations, families, and individuals over state institutions. If the question is: "How should these nonstate actors order themselves?," a neoliberal approach answers through market ideals such as efficiency and individual rationality.

Hence, from this perspective, to describe criminal justice reforms as neoliberal has distinctive (not slippery) meaning: it is to anticipate that such reforms will supplant some of the heavy-

40. *See* Turner, *supra* note 38, at 78. I should add: scholars have different accounts of what justifies the prefix "neo" in neoliberalism. Some illustrate how whereas nineteenth century liberal theorists posited that free markets occur "by dint of nature," neoliberal theorists understand market rationality "as *achieved and normative*, as promulgated through law and through social and economic policy." Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 694 (2006). Other scholars suggest that the key distinction is epistemic: that neoliberal thinkers, unlike their classical liberal predecessors, define the market as an "engine of epistemic truth," an information processor necessary to supplant the limits of rational human cognition. Philip Mirowski, *Hell Is Truth Seen Too Late*, 46 BOUNDARY 2 at 1, 5–12, 7 (2019); *see also* Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357. Finally, others propose that what makes neoliberalism distinctive from earlier liberalisms is simply that "it comes after the twentieth-century welfare state and is therefore confronted with the task of either overcoming its structures or adapting them to new ends." COOPER, *supra* note 37, at 314.

41. *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism,* 77 LAW & CONTEMP. PROBS. 1, 16 (2014).

handedness of the carceral state with, for example, public-private risk-management strategies benchmarked by an increase in cost savings (or in other net utilities)—but not through the direct provisioning of public goods and services to offenders understood as dependent subjects claiming state care and redistribution. As Marie Gottschalk puts this argument, today mainstream penal reform is "infused with the core tenets of neoliberalism," which means "that the only penal reforms worth pursuing are ones that save money and reduce recidivism."[42]

I will call all this *market neoliberalism*.[43] I suggest that as an analytic, market neoliberalism fails to fully capture right-wing penal reform, particularly the rise of restorative justice within it. The question I thus pose is: how should we think of *moral-relational* values within deregulatory governance projects? By moral-relational values, I mean affective, other-oriented commitments encapsulated in terms like "care," "empathy," "mutual aid," and "altruism"—values that, in essence, comprise the opposite of atomized, rational, calculating individualism.

To be sure, many scholars theorize neoliberalism as a moral construct. But their arguments are not exactly what I am after. For example, prominent scholars have suggested that under neoliberalism, individuals must assume moral responsibility to care for themselves—and must do so according to market logics. Perhaps most famously, Wendy Brown reasons that the neoliberal state cultivates, institutionalizes, and rewards practices that comprehensively configure human beings as *homo œconomicus*, casting virtually "all dimensions of human life . . . in terms of a market rationality" and "conducted according to a calculus of utility."[44] Brown describes this as a transformation of what it means to be moral: under neoliberalism moral autonomy becomes the capacity to care for one's own needs and interests, and moral behavior becomes rational calculations about costs, benefits, and outcomes.[45] Ronen Shamir reasons much the same. Neoliberalism, he argues, exhaustively transfigures deontological

42. GOTTSCHALK, *supra* note 5, at 79.
43. MUEHLEBACH, *supra* note 18, at 19–20.
44. Wendy Brown, *Neo-liberalism and the End of Liberal Democracy,* 7 THEORY & EVENT, no. 1, 2003, ¶ 9.
45. *Id.*

social-moral concerns into instrumental ones.[46] As such, moral governance does not demand obedient subjects that comply with authoritative rules of law as much as subjects who willingly internalize self-responsibilization—that is, actors "whose moral quality is based on the fact that they rationally assess the costs and benefits of a certain act as opposed to other alternative acts" and who therefore properly bear the consequences of these actions.[47] In these accounts, neoliberalism *means* that the moral has de-differentiated from the economic: economic processes have become moralized as morality has become indistinguishable from economic processes.

In this Article, I pursue a different inquiry: namely, how do *moral-relational* values—care of the *other*, not simply care of the self—play out in neoliberal governance projects unfolding on the ground? Here I turn to Andrea Muehlebach, who examines the rise of voluntarism in the social services sector in Italy.[48] Challenging arguments penned by Brown and others, Muehlebach describes the expansion of governance programs that limit state welfare and public provisioning by devolving responsibility for care from the state onto individuals, families, and communities.[49] Yet, she illustrates how the appeal and institutional power of such governance programs come *not* from the fact that economic rationalities constantly instrumentalize moral-relational ones[50]—that is, *not* from transforming care and service provision into rational self-interested utility calculations.[51] To the contrary, these programs knit together what we might think of as opposites—self-interest and compassion, instrumentality and solidarity, *homo œconomicus* and *homo relationalis*—yet opposites contained in the same overarching belief system.[52]

46. Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC'Y 1, 14 (2008).

47. *Id.* at 7 (quoting Thomas Lemke, *'The Birth of Bio-politics': Michel Foucault's Lecture at the Collège de France on Neo-liberal Governmentality*, 30 ECON. & SOC'Y 190, 201 (2001)).

48. *See generally* MUEHLEBACH, *supra* note 18.

49. *Id.* at 24.

50. *Id.* at 23–25.

51. *See generally* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976).

52. MUEHLEBACH, *supra* note 18, at 6–9; Andrea Muehlebach, Complexio Oppositorum*: Notes on the Left in Neoliberal Italy*, 21 PUB. CULTURE 495, 499 (2009).

They tether *homo œconomicus* to a web of moral-relational ideals. And they suggest that how deregulatory and fiscally conservative political projects play out may depend crucially on the distribution of empathy and altruism, not simply market rationality.[53]

I will thus use Muehlebach's term *moral neoliberalism* to describe a different facet of contemporary bipartisan penal reform. In the story I tell, actors bent on advancing "economic freedom" and "less state" are underwritten by robust other-oriented forms of Christian morality and values such as empathy and forgiveness. The confluence of these forces has produced a version of restorative justice that today is embraced on the libertarian and conservative right. It has some early roots, but as we shall see, it was for a long time marginal—many prominent early restorativists instead hoped to advance left redistributivist politics.

II. RESTORATIVE JUSTICE IN THE SHADOW OF AMERICAN PENAL TRANSFORMATIONS: 1970s–2000s

"In the beginning," Paul McCold observes, "mediation was restorative justice, and restorative justice was mediation."[54] I begin with restorative justice's modern institutional roots in American community mediation both because it is accurate and because it prefigures three (sometimes overlapping, sometimes competing) aspirations for mediation that continue to repeat throughout restorative justice today. The first is structural, namely, aspirations to use mediation to promote social justice and societal transformations. The second is relational, namely, aspirations to use mediation to nurture the expression of values

53. I should add: scholars such as Brown theorize how neoliberalism—described as an "expressly amoral" market rationality—intersects with extrinsic moral belief systems such as neoconservatism. Brown, *supra* note 40, at 692, 702. Muehlebach's argument is different: she argues that neoliberalism itself welds together oppositional logics, fabricating economic man and relational man into a single moral vision. Muehlebach, *supra* note 52, at 495–96. In this Article, I use Muehlebach's term moral neoliberalism as analytical frame to describe particular contemporary criminal justice practices unfolding on the ground, but I do so without intervening in this conceptual disagreement about an extrinsic versus intrinsic relationship between neoliberalism and moral systems.

54. Paul McCold, *The Recent History of Restorative Justice: Mediation, Circles, and Conferencing*, *in* HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 23, 24 (Dennis Sullivan & Larry Tifft eds., 2006).

such as empathy, care, and other-oriented spiritual commitments. The third is about economic liberty and efficiency, namely, aspirations to use mediation to enable individuals to bargain to solve their own problems and, in so doing, to save judicial resources and rationalize public systems.[55]

In this Part, my overarching argument is as follows: community mediation failed to maintain a bottom-up and structurally oriented vision. But it helped spawn two distinct strands of mediation. The first is civil mediation, which institutionalized in the 1980s and 1990s, penetrating, even transforming, American justice institutions. The second is restorative justice, which achieved a low-level presence in the 1990s and aughts and is expanding its institutional reach now. Civil mediation's success within state institutions reflected its transformation into a set of economic ideals: individual interest-maximization, efficiency, and cost savings. By contrast, restorative justice's persistent noneconomic moral-relational ambitions meant that it stayed marginal but also generatively indeterminate—capable of multiple articulations by reformers across a political spectrum attracted to restorative justice precisely for its moral power.

55. Several scholars have offered similar descriptions. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15–22, 24 (1994) (distinguishing among different aspirations for mediation including party satisfaction and cost reduction; social justice including by facilitating "the organization of relatively powerless individuals into communities of interest"; and personal empowerment and recognition through moral development); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709, 714–17 (1988) (distinguishing among the following aims for mediation: the rational delivery of dispute resolution services; social transformation; personal growth and development); Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 445–58 (1989) (distinguishing among the following proponents of mediation: the establishment bar and legal elites who wish to rationalize adjudication; access to justice proponents who wish to help the socially disadvantaged utilize state resources; and quality proponents who wish to empower individuals and communities to resolve their own conflicts); *see also* Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOT. J. 217, 220 (1995) (arguing that "those of us who continue to hold a commitment to mediation as a progressive means for socially transformative ends must be ever-vigilant about our practices and the uses to which they might be put").

A. THE COMMUNITY MEDIATION MOVEMENT AND THE RISE OF CIVIL MEDIATION

The community mediation movement began on the political left. In the late 1960s and 1970s, lawyers and activists proposed reclaiming popular control over conflict resolution, often influenced by their experiences of the civil rights movements and struggles for social and economic justice as well as by New Left commitments to participatory democracy. Small experiments emerged around the country. In 1976, for example, Raymond Shonholtz launched the San Francisco Community Boards,[56] which his contemporaries described as a prototype for the movement.[57] Shonholtz repeatedly argued that lay—not formal, statist—practices of conflict resolution could return politics to the grassroots.[58] Hence, for example, the Community Boards held mediations in public in order to create opportunities "to promote consciousness-raising."[59] Others like Paul Wahrhaftig, whose work on bail reform propelled his interest in community mediation, reasoned that through bottom-up dispute resolution "poor people and minorities [can] increase their influence over the institutions and forces that shape their lives."[60] Individualized

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56. *See* Justin R. Corbett, *Raymond Shonholtz: Community Mediation Visionary*, NAFCM (Jan. 9, 2012), http://blog.nafcm.org/2012/01/raymond-shonholtz-community-mediation.html [https://perma.cc/HZ4A-XCKJ].

57. Larry Ray, *The Alternative Dispute Resolution Movement*, 8 PEACE & CHANGE 117, 124 (1982); Paul Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 75, 89–92 (Richard L. Abel ed., 1982). Howard Zehr, a founder of the American restorative justice movement, *see infra* Part II.C, likewise complimented the Community Boards for "implementing a problem-solving, community-oriented vision of justice." ZEHR, *supra* note 11, at 216.

58. Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 201, 205–08 (Sally Engle Merry & Neal Milner eds., 1995); Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 15–17, 26–28 (1984) [hereinafter Shonholtz, *Neighborhood Justice Systems*].

59. JENNIFER E. BEER, FRIENDS SUBURBAN PROJECT, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION 218 (1986).

60. PAUL WAHRHAFTIG, COMMUNITY DISPUTE RESOLUTION, EMPOWERMENT AND SOCIAL JUSTICE: THE ORIGINS, HISTORY AND FUTURE OF A MOVEMENT 63 (2004).

complaints, he argued, often reflect community problems and require collective action to solve them.[61] Richard Hofrichter, a critical scholar, likewise conjured transformations from below: through mediation, he suggested, disputants could question the formal legal system in ways that inspire "extralegal methods of protest and organization of the community around collective interests."[62] In sum, mediation once embodied radical structural ambitions.

Scholars trace the origins of restorative justice to these community-based experiments because many tried not to distinguish between civil and criminal conflict. Here, criminal mediation developed without a singular overarching theory. Some proponents, like Shonholtz, encouraged communities to recover crime control against government intervention: "the greater the reliance on police and agency coercion and fear mechanisms, the more likely it is that neighborhoods will suffer a decrease in social responsibility (that is, neighborhood atrophy) and an increase in the levels of fear and insecurity (that is, unacceptable behavior)."[63] Indeed, the most radical "hoped that mediation would provide a genuine alternative to the criminal justice system."[64] Other proponents reasoned more modestly that "relational" conflict—be it civil or criminal—was more satisfactorily, fairly, and efficiently resolved through informal, community-based interventions.[65]

An important example of this relational approach, "neighborhood justice centers" emerged in the late 1970s to mediate a variety of civil and criminal disputes.[66] Funded by the federal government, these centers aimed (among other ends) to "contribute to the reduction of tension and conflict in . . . communities."[67]

61. *Id.* at 26; *see also* Wahrhaftig, *supra* note 57, at 93–94.

62. Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 57, at 207, 243.

63. Shonholtz, *Neighborhood Justice Systems*, *supra* note 58, at 16.

64. BEER, *supra* note 59, at 203.

65. *See* Ray, *supra* note 57, at 117.

66. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: EXECUTIVE SUMMARY: FINAL EVALUATION REPORT (1980); *cf.* Wahrhaftig, *supra* note 57, at 88 (questioning whether an early prominent DOJ-funded experimental neighborhood justice center was, in fact, "grassroots" as it was often publicized).

67. NAT'L INST. OF JUST., *supra* note 66, at 1.

They mediated criminal disputes that typically involved assault and harassment charges among neighbors, family members, and intimate partners.[68] By 1982, there were roughly 180 community mediation centers in the United States that heard civil and criminal cases operating on similar models.[69] Larry Ray illustrates common cases: "A hot iron flew across the room, barely missing the boyfriend. Enraged, he grabbed the ironing board and chased the woman around the house," or "yelling at the neighborhood children, the elderly man poised a shotgun out his front window."[70] Proponents hoped that these mediation centers could provide a kind of "community"—standing in for "traditional institutions such as the extended family, neighborhoods, churches"—that may have once managed these sorts of relational conflicts in lieu of the state.[71]

Within the community mediation movement, structural ambitions withered first. As one activist community mediator conceded, "[f]or the most part, there is little sign of broader thinking among [mediation] users. . . . Mediation is a solution to personal discomfort and invasions of private space. The object is to be left alone, not to begin organizing."[72] Even more, by the 1980s, the left structural case for mediation had generated trenchant left critique. Scholars criticized the San Francisco Community Boards for adopting a depoliticized style oriented around training and service delivery—paradoxically empowering mediators at the expense of the parties through professional relations of

68. *Id.* at 9.

69. *See* Ray, *supra* note 57, at 122; *see also* LARRY RAY, ABA SPECIAL COMM. ON ALT. DISPUTE RESOLUTION, DISPUTE RESOLUTION PROGRAM DIRECTORY (1983). For other early descriptions of community mediation that spanned civil and criminal conflict, see generally DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 89–163 (1977); Albie M. Davis, *Community Mediation in Massachusetts: Lessons from a Decade of Development*, 69 JUDICATURE 307 (1986); and Robert C. Davis, *Mediation: The Brooklyn Experiment*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 154 (Roman Tomasic & Malcolm M. Feeley eds., 1982) (describing a particularly significant early criminal program that commonly mediated felony assault and burglary arrests).

70. Ray, *supra* note 57, at 117.

71. *Id.* at 118; *see also* Shonholtz, *Neighborhood Justice Systems*, *supra* note 58, at 11.

72. BEER, *supra* note 59, at 220. Disputants, she observed, "are distinctly uninterested in the links between their problems and other people's except to validate the truth of their own claims. Those who do see the connection usually find it one more reason for hopelessness." *Id.*

management and control.[73] Nor, they argued, were disputants discovering bases of social solidarity such as working-class backgrounds or common experiences of subordination.[74] More generally, left socio-legal scholars levied the following indictments: that mediation relies on techniques of individual dispute resolution to manage structural contradictions including by disciplining confrontational politics through "harmony ideology";[75] that in modern centralized states there is no such coherent social thing called "community," and if it exists anywhere, it's probably full of hierarchy, inequality, and coercion;[76] and that informal processes invariably reconstitute professional state control and, worse, extend that control to manage marginalized populations (often through an illusion of voluntarism).[77] In sum, a growing left socio-legal consensus argued that community mediation was unlikely to achieve anything approximating real community control over conflict resolution and democratic participation.

73. *See, e.g.*, Barbara Yngvesson, *Local People, Local Problems, and Neighborhood Justice: The Discourse of "Community" in San Francisco Community Boards, in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 58 at 379, 381–82, 397–99.

74. *Id.*; *see* Laura Nader, *When Is Popular Justice Popular?, in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 58, at 435, 436–40; Judy H. Rothschild, *Dispute Transformation, the Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program, in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 58 at 265, 286–91; Douglas R. Thomson & Frederic L. DuBow, *Organizing for Community Mediation: The Legacy of Community Boards of San Francisco as a Social-Movement Organization, in* THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 58 at 169, 171, 179–96.

75. Laura Nader, *The ADR Explosion - The Implications of Rhetoric in Legal Reform*, 8 THE WINDSOR Y.B. OF ACCESS TO JUST. 269, 269 (1988); *see also* Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 57, at 267, 280–95.

76. *See, e.g.*, Sally Engle Merry, *Defining "Success" in the Neighborhood Justice Movement, in* NEIGHBORHOOD JUSTICE, *supra* note 69, at 172, 173–79; Sally Engle Merry, *The Social Organization of Mediation in Nonindustrial Societies*, *in* 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 17, 28–33 (Richard L. Abel. ed., 1982). *See generally* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 115–37 (1983) (describing how different traditions and understandings of "community" are operationalized in informal justice institutions).

77. *See, e.g.*, CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT (1985); RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE (1987); Abel, *supra* note 75, at 270–80; Hofrichter, *supra* note 62, at 237–40. For early catalogues of these and other criticisms, see STANLEY COHEN, AGAINST CRIMINOLOGY 217–19 (1988) and Maureen Cain, *Beyond Informal Justice*, 9 CONTEMP. CRISES 335, 336–40 (1985).

Over time, relational ambitions became less salient as well. In the 1980s and 1990s, a different set of institutional advocates and academic interlocutors untethered civil mediation from early grassroots experiments, describing instead how it could rationalize judicial systems by minimizing transaction costs and maximizing individual interests.[78] In 1980, Congress passed the Dispute Resolution Act to encourage "expeditious, inexpensive, equitable, and voluntary resolution of disputes."[79] In 1990, Congress enacted the Civil Justice Reform Act to improve judicial efficiency and economy, through various processes including mediation.[80] That same year, Congress also encouraged administrative agencies to use ADR to yield "decisions that are faster, less expensive, and less contentious."[81] Responding to such developments, Carrie Menkel-Meadow declared that the legal establishment's use of ADR to "reduce caseloads and increase court efficiency" had crowded out competing visions and values.[82] About a decade later, Judith Resnik argued that American courts had transformed themselves in response to ADR. Judges have become "suspicious of adjudication," she observed, and prefer ADR processes that are "committed to the utility of contract and look[] to the participants to validate outcomes through consensual agreements."[83]

This is civil mediation understood as market neoliberalism—the state devolving responsibility for dispute resolution and translating it into practices such as efficiency and interest maximization. Readers know the critique: it is 1984 vintage Owen Fiss. Fiss defended adjudication, which he described as a

78. For a review, see Silbey & Sarat, *supra* note 55, at 446–50, 479–84 (describing the role of "the establishment bar and legal elites" in shaping ADR, particularly as a technology that promotes interests over rights).

79. Dispute Resolution Act, Pub. L. No. 96-190, § 2(a)(6), 94 Stat. 17, 17 (1980).

80. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, § 102, 104 Stat. 5089, 5089 (1990).

81. Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 2(3), 104 Stat. 2736, 2736 (1990). For a review of this legislation and the transformation of ADR, see also OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 99–100 (2005).

82. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991).

83. Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 176 (2003).

public social process, against mediation, which he assailed as reproducing freedom-of-contract ideology.[84] Tellingly, when scholars responded to Fiss by arguing that mediation also embodies *moral-relational* values—for example, community cohesion, healing, and a relational understanding of justice as something people give to one another rather than receive from the state[85]—Fiss replied that this account was not wrong, just "beside the point."[86] Given the 1980s Reagan-style assault on the American welfare state, Fiss predicted that mediation could mainstream only as part of "the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms."[87] In other words, Fiss ventured that powerful actors would either instrumentalize or refuse whatever moral-relational values mediation could possibly encompass in order to advance their own economic self-interest.

As I have argued elsewhere, many American mediation scholars themselves never relinquished more salutary and complex social visions, repeatedly proposing to combine efficiency with relational principles.[88] But Resnik and Fiss were clearly correct to observe that the American civil judiciary used ADR to expand market-managerial practices—not love, healing, and reconciliation. Moreover, after the 1980s, few American ADR scholars continued to theorize community-based mediation. And without a kind of "collective private" that could stand for the normative role of the state, many also ceded to their Fissian critics conflict they deemed to trigger the public's interests. Such con-

84. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). For an extensive elaboration of this argument, see Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143 (2009).

85. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 (1985).

86. Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1669–70 (1985).

87. *Id.* at 1672 (internal quotation omitted).

88. *See* Amy J. Cohen, *ADR and Some Thoughts on the "Social" in Contemporary Legal Thought*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 454 (Justin Desautels-Stein & Christopher Tomlins eds., 2017); Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91 [hereinafter Cohen, *The Family*].

flicts included, for example, matters of "fundamental constitutional rights"[89] and "[r]acial discrimination"[90] and, crucially, they included *crime*. That is, many mediation scholars described crime as a question of public social order, and therefore properly subject to adjudicatory systems, not interpersonal harm and therefore subject to mediation.[91] As such, and as the community mediation movement dissipated, criminal mediation developed largely outside of the work of American legal scholars—and largely outside of centrist American legal, penal, and political power.

B. THE RISE OF CRIMINAL MEDIATION AS RESTORATIVE JUSTICE

It would take until the 1990s for restorative justice to solidify into its own academic and programmatic movement. Here, I trace a second genealogy, namely that of scholars and practitioners whose arguments for alternative dialogic processes emerged specifically from criticisms of the American penal system. Many shared with community mediation proponents "[a] deep distrust of state power; a profound cynicism about professional motives; . . . [and] a concern for the 'self-determination' and 'empowerment' of the poor and minority groups."[92] But criminal justice academics and activists had more distinctive targets: they attacked ideals such as rehabilitation and individualized behavioral treatment—ideals, they argued, that legitimated prisons as salutary institutions when, in fact, they "repress[ed] blacks, the poor, the young and various cultural minorities."[93] Encapsulating this critique, a report published by the American Friends Service Committee, a nonprofit Quaker organization, argued that "getting the justice system off our backs" means empowering people to "avoid using the criminal justice system to solve

89. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 17, 76–77, 192 (1987).

90. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985).

91. In 1997, for example, Carrie Menkel-Meadow observed that criminal mediation was intensely controversial among ADR professionals. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1907 (1997).

92. GARLAND, *supra* note 16, at 56.

93. *Id.* at 55.

social problems."[94] Its authors hoped that "[a] web of available community services, controlled by those who need and use them, could persuade people to turn to these agencies, rather than to the police, for assistance in social disturbances and family disputes."[95]

Among criminal justice reformers and mediation proponents, *restorativists* coalesced around a distinctive claim: specifically, that crime represents a rupture in personal and social relationships, not an offence against an abstract state.[96] In this section, I illustrate how, within the emergent restorative justice movement, arguments about structural transformation, moral-relational values, and market freedom continued to compete and intertwine. Here I tell mostly an American story—even as restorative justice developed simultaneously (and often more robustly) in Canada, New Zealand, Australia, the United Kingdom, and other countries in Europe—because I am interested in tracing how structural, relational, and economic justifications combine in American restorative justice theory and practice in different ways over time.

In this section, let me begin with the economic. In 1977, Randy Barnett, an American law professor and one of the first scholars to use the term restorative justice, theorized it as part of broader libertarian transformations in the economy including deregulation.[97] "Today," Barnett explained, "there is an increasing desire to allow each individual to govern his own life as he

94. AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 170 (1971).

95. *Id.* at 166. On the role that the American Friends Service Committee played in trying to establish community mediation programs as alternatives to the criminal justice system, see BEER, *supra* note 59, at 203–05. *See also* Wahrhaftig, *supra* note 57, at 75–77, 85–88, 93–95.

96. Many early theorists elaborated this claim by describing how premodern and indigenous legal systems blurred distinctions between tort and crime. For a review of these arguments and a critical analysis of how such "origin stories" function in restorative theory and practice, see Kathleen Daly, *Restorative Justice: The Real Story,* 4 PUNISHMENT & SOC'Y 55, 61–64, 71–73 (2002).

97. Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 284–91 (1977). Tony Marshall suggests that the first use of restorative justice is often ascribed to Randy Barnett. Tony F. Marshall, *Restorative Justice: An Overview*, *in* A RESTORATIVE JUSTICE READER 30 (Gerry Johnstone ed., 2003). Others credit Albert Eglash with coining the term. *See* Albert Eglash, *Beyond Restitution: Creative Restitution*, *in* RESTITUTION IN CRIMINAL JUSTICE 91, 91 (Joe Hudson & Burt Galaway eds., 1975).

sees fit provided he does not violate the rights of others."[98] Crime, he argued, is not an offence against society; rather it is "an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused."[99] As such, Barnett reasoned that socially oriented state interests involved in managing crime—"deterrence, reformation, and disablement"—should occur only as an *effect* of material restitution.[100]

Barnett thus articulated criminal dispute resolution as a set of market practices. He proposed to monetize the relationship between offender and victim, theorizing them both as rational actors. As such, the offender could "self-determin[e]" his sentence: "The harder he worked, the faster he would make restitution. He would be the master of his fate and would have to face that responsibility."[101] Likewise, the offender and victim could "negotiate a reduced payment in return for a guilty plea" through arbitration or facilitated conversation.[102] And once guilt was established, private companies could perform numerous functions saving public money (for example, companies could sell victim crime insurance, create and manage noncustodial or custodial work opportunities for unemployed offenders, and engage in debt-collection).[103]

Although widely cited and anthologized by restorativists for its bold anti-punitive vision ("What then is there to stop us from overthrowing the paradigm of punishment and its penal system . . . ?," Barnett asked), his specific proposals did not inspire action.[104] They were too radical for policymakers who—even as

98. *Id.* at 284.

99. *Id.* at 287–88.

100. *Id.* at 282–83.

101. *Id.* at 294.

102. *Id.* at 290.

103. *Id.* at 288–91, 298.

104. *Id.* at 294 (proceeding to consider and respond to potential objections). For popular restorative justice anthologies where Barnett's article appears, see A RESTORATIVE JUSTICE READER, *supra* note 97, at 46 and 1 RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY 34 (Carolyn Hoyle ed., 2010). Barnett also influenced Howard Zehr. For example, in 1985, Zehr wrote, "Randy Barnett has suggested that state-centered and punishment-centered assumptions constitute . . . a paradigm, and that this paradigm is in the process of breaking down. We may, he suggests, be on the verge of a revolution in our understanding of crime and justice." Howard Zehr, *Retributive Justice, Restorative Justice*, NEW PERSP. ON CRIME AND JUST., no.4, Sept. 1985, at 6.

they liberalized and commodified crime control—simultaneously intensified state punishment. For restorativists, the problem was different. Barnett's vision lacked the communitarian spirit and moral-relational commitments that they would use to knit together an alternative anti-statist movement. "When restitution is reduced to 'the cheque is in the mail,'" Braithwaite and Mugford argued, "matters of deep moral concern have been reduced to mere money, to the ubiquitous question 'how much?'"[105]

In the 1980s, the first American scholar-practitioners to implement restorativist ideals clearly prioritized relational values. They created "explicitly restorative mediation practices" distinct from "the first generation [community] mediation movement."[106] Often called Victim Offender Reconciliation Programs (VORPs), these practices reflected Christian peacemaking perspectives—not Barnett's market libertarianism. Like Barnett, VORP practitioners argued that crime is "a conflict between people, a violation against a person, not an offense against the state."[107] But they ranked restitution as an important yet secondary means of addressing the emotional and informational needs of victims and offenders.[108] "Our first goal is *reconciliation*," explained an early VORP training manual, "*we focus on the relational aspects of crime*. Attitudes, feelings, and needs of both victims and offenders must be taken very seriously. Healing is important."[109]

These early reformers, many affiliated with the Mennonite church, wished significantly to limit state incarceration (indeed, in the early 1980s some joined incipient movements for prison abolition).[110] Some reformers expressed ambivalence about

105. Braithwaite & Mugford, *supra* note 31, at 155.

106. McCold, *supra* note 54, at 24.

107. Zehr, *supra* note 104, at 12.

108. PACT: INST. OF JUSTICE & MENNONITE CENT. COMM. OFFICE OF CRIMINAL JUSTICE, THE VORP BOOK: A RESOURCE OF THE NATIONAL VICTIM OFFENDER RECONCILIATION RESOURCE CENTER III-7 (1984) [hereinafter THE VORP BOOK]; Mark Umbreit, *Mediation of Victim Offender Conflict,* 1988 J. DISP. RESOL. 85, 91 ("Rather than a primary emphasis upon restitution collection, many victim offender mediation and reconciliation programs first emphasize the importance of allowing enough time to address the frequent need for information about the offense and the related feelings of both parties. Restitution is an important additional goal, but for many programs, only primarily as a symbol of conflict resolution or 'reconciliation.'").

109. THE VORP BOOK, *supra* note 108, at II-5 (second emphasis added).

110. *See, e.g.*, JOSHUA DUBLER & VINCENT LLOYD, BREAK EVERY YOKE: RE-

working with the state, anticipating that restorative ideals need the "staying power of religious conviction" and preferred to work with offenders and victims that made their way into community centers and church basements.[111] Yet many forged partnerships with courts determined "to accept only certain kinds of cases which would have gone to jail otherwise."[112] Hence, early state-affiliated VORP programs prioritized referrals for felony property offenses such as burglary, theft, and armed robbery as well as negligent homicide and sometimes also assault.[113] Mark Umbreit, a Christian theorist who would become particularly renowned for his empirical writing on restorative justice, encouraged VORP practitioners to consider whether, given prison conditions and the possibilities of net-widening, it is "responsible . . . to offer any sentencing options—even VORP—unless it is a genuine alternative to incarceration."[114] In arguing for decarceral policies, Umbreit stressed that "[t]he Christian church is based on the fundamental concepts of love, forgiveness, and reconciliation."[115]

Thomas Noakes-Duncan argues that such VORP activism "marked a significant theological shift among Mennonites"—one that placed the "state as much as the church . . . under the reign of God's justice"[116] and inspired a generation of Mennonites that broke with more conservative tradition attentive to how Jesus embodied "radical political action."[117] In the 1970s, a strand of Mennonite activists "were becoming sensitized to 'structural

LIGION, JUSTICE, AND THE ABOLITION OF PRISONS (forthcoming 2019) (manuscript at 156–75) (on file with author).

111. Duane Ruth-Heffelbower, Presentation to the 4th Annual Restorative Justice Conference: Toward a Christian Theology of Church and Society as It Relates to Restorative Justice (Oct. 25, 1996), http://ruth-heffelbower.us/docs/speech.html [https://perma.cc/3PLW-WPLE].

112. THE VORP BOOK, *supra* note 108, at III-7.

113. *Id.* at III-9; MARK UMBREIT, CRIME AND RECONCILIATION: CREATIVE OPTIONS FOR VICTIMS AND OFFENDERS 100 (1985).

114. Mark Umbreit, *Introduction* to THE VORP BOOK, *supra* note 108, at I-1, I-5.

115. UMBREIT, *supra* note 113, at 77.

116. Thomas Noakes-Duncan, *The Emergence of Restorative Justice in Ecclesial Practice*, 5(2) J. MORAL THEOLOGY 1, 3 (2016).

117. LEO DRIEDGER & DONALD B. KRAYBILL, MENNONITE PEACEMAKING: FROM QUIETISM TO ACTIVISM 149 (1994) (quoting JOHN H. YODER, THE POLITICS OF JESUS 12 (1972)); *see also id.* at 150–53, 153 tbl.6.1.

sins'—patterns of social organization that perpetuated oppression" including social and economic injustice.[118] In 1971, a large Mennonite denomination adopted a statement calling on members to "confront those who because of their greed cause injustice and oppression" and to "identify with the oppressed and participate in ministries of love and service in their behalf."[119] Noakes-Duncan traces the rise of VORPs from within this peacemaking tradition—VORPs were meant to be "an alternative prophetic witness to the punitive criminal justice system."[120]

By all accounts, Howard Zehr pioneered this vision. In 1978, he founded the first American VORP in Elkhart, Indiana and soon became the Director of the Mennonite Central Committee's U.S. Office of Criminal Justice.[121] In 1985, when about thirty more VORPs had opened,[122] Zehr published a paper arguing for restoration against punishment defined as the intentional infliction of suffering,[123] or against, as Christie elaborated, punishment defined as "that suffering which the judge [finds] necessary to apply *in addition to* those unintended constructive sufferings the offender would go through in his restitutive actions *vis-à-vis* the victim."[124] Zehr and his colleagues thus aimed to draw a principled distinction between actions agreed upon or imposed with the aim of restoration and conflict resolution versus actions imposed with the aim "of causing suffering" (at least for offenders capable of assuming responsibility and open to moral suasion).[125]

118. *Id.* at 150.

119. *Id.* at 150 & n.27 (referencing a 1971 statement endorsed by the General Conference of the Mennonite Church).

120. Noakes-Duncan, *supra* note 116, at 17.

121. *See Howard Zehr, Curriculum Vita, Full Version,* E. MENNONITE UNIV., ZEHR INST. FOR RESTORATIVE JUSTICE, https://web.archive.org/web/20131015052157/http://emu.edu/cjp/restorative-justice/howard-zehr-cv/cv.pdf. The first ever VORP, which was also Mennonite affiliated, opened in 1974 in Kitchener, Ontario. For a detailed history, see Dean E. Peachy, *The Kitchener Experiment*, *in* MEDIATION AND CRIMINAL JUSTICE 14–24 (Martin Wright & Burt Galaway eds., 1989).

122. JOHN GEHM & MARK UMBREIT, NATIONAL VORP DIRECTORY (1985).

123. Zehr, *supra* note 104, at 3, 13.

124. Christie, *supra* note 22, at 10.

125. *See* WESLEY CRAGG, THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE 213 (1992). To be sure, actual experiences of restoration and punishment may blur as offenders assume significant compensatory burdens. For thoughtful analysis of how in restorative processes, participants often combine multiple justice aims that include retributive censure, rehabilitative interventions, and restoration, see Daly, *supra* note 96, at

Also like Christie, Zehr proposed direct negotiations between offenders and victims that would "encourage mutual aid, a sense of mutuality, of community, of fellowship."[126] To that end, he described offenders as active moral agents—*not* subjects to be acted upon either through rehabilitation ("terribly susceptible to abuse") or retribution ("one social injury replaced by another").[127] But instead as people who could appreciate the consequences of their actions and *want* to make things right.[128] This will to empower, he reasoned, would emerge through personal encounters with victims who also need to reclaim agency in the aftermath of crime. If victims could speak their needs and feelings—including for a statement of moral blamelessness and the possibility of forgiveness—then offenders could relinquish defensive rationalizations and practice accountability by repairing and vindicating the wrongs that victims experienced through extensive acts of reparations.[129] Or at least that was Zehr's vision: transformations in offender and victim subjectivity and, through subjectivity, *relationships*. Otherwise, he argued, reforms like "victim compensation" or "alternative sanctions" would only tinker at the edges of what may anyway be, he conceded, an impenetrable retributive state system.[130]

This moral-relational movement, which Zehr played a foundational role in creating, was never uniformly grounded in the political left—its deeply rooted religious commitments defy simple political categorization or singular interpretations. As Part III elaborates, politically conservative Christian writers contributed to early restorative theory.[131]

But Zehr himself explicitly and repeatedly linked interpersonal reconciliation to aspirations for social justice and structural transformations.[132] Based on readings of the Old and New

59–60.

126. Zehr, *supra* note 104, at 13.

127. *Id.* at 6, app. 15.

128. *Id.* at 13.

129. *Id.* at 1–3.

130. *Id.* at 3–4, 6; *see also* ZEHR, *supra* note 11, at 226.

131. See *infra* Part III.B.

132. Zehr also reminded his readers to consider "the politics of paradigm change." Zehr, *supra* note 104. "Make no mistake," he argued, "the criminal justice industry is big business, shot through with all kinds of self-interest, and will not be changed easily." *Id.* at 14.

Testaments, Zehr described restorative justice as *biblical justice*—a practice of living in right spiritual, social, and material relationships; that is, of restoring *shalom*.[133] Restoring *shalom*, he explained, requires confronting substantive injustice. Formal adversarial systems embed substantive inequalities: "Since the [formal] process aims to treat unequals equally, existing social and political inequities are ignored and maintained."[134] By contrast, restoring *shalom* does not seek formal equality before the law, but "to make things better."[135] In Zehr's words:

> Justice is not designed to make the status quo. Indeed, its intent is to shake up the status quo, to improve, to move toward shalom. The move toward shalom is not necessarily good news to everyone. In fact, it is downright bad news to the oppressor. This too stands in contrast to that [formally equal] justice which—by working to maintain "order"—works in fact to maintain the present order, the status quo, even when it is unjust.[136]

Zehr thus saw personal restoration working together with social transformations.

For Zehr, social transformations become possible, even if only in small and localized ways, because biblical law operates not through command as much as through deliberation. In his words: "Old Testament law does not have the sense of rigidity and formalism that our law does. [It] points a direction, and it *must be discussed*."[137] Braithwaite elaborates this dialogic ambition: "the *shalom* way of thinking about justice," he explains, means that stakeholders empowered "to repair the harm of an injustice will produce outcomes that are more distributively satisfying to [them] than a process that seeks to deliver equal punishments to equal wrongs."[138] On this logic, restorative mediations "give little people chances to strike little blows against

133. *Id.* at 10–12; ZEHR, *supra* note 11, at 130–47.

134. ZEHR, *supra* note 11, at 79.

135. *Id.* at 140.

136. *Id.* Zehr writes further: "[t]he biblical approach to justice shows that restorative justice must often be transformative justice. To make things right, it may be necessary not merely to return to situations and people to their original condition, but to go beyond." *Id.* at 190.

137. Zehr, *supra* note 104, at 10 (emphasis added).

138. John Braithwaite, *Traditional Justice, in* RESTORATIVE JUSTICE, RECONCILIATION, AND PEACEBUILDING 214, 232 (Jennifer J. Llewellyn & Daniel Philpott eds., 2014).

oppression."[139] Zehr's aspirations thus recall community mediation: that direct egalitarian deliberations can help reveal how "socially structured cleavages" shape harm, conflict, and justice—inspiring greater feelings of social responsibility alongside personal responsibility for crime.[140]

Zehr, Umbreit, and other early restorativists had some small influence on state practice. In 2001, approximately 320 criminal mediation programs operated in the United States and Canada.[141] Most VORPs had become Victim Offender Mediations (VOMs)—a secularization meant to describe court-based processes rather than the more value-laden and religious goals of reconciliation.[142] It is hard to generalize about these highly localized programs. Carrie Menkel-Meadow, for example, recounts facilitated dialogue among victims, offenders, and family members taking place within progressive court systems, some of which, she suggests, also looked to indigenous American justice

139. Braithwaite & Mugford, *supra* note 31, at 158.

140. Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47, 55 (1998). Christie likewise envisioned robust deliberations that require lay people to debate:

> When the victim is small and the offender big—in size or power—how blameworthy then is the crime? And what about the opposite case, the small thief and the big house-owner? If the offender is well educated, ought he then to suffer more or maybe less, for his sins? Or if he is black, or if he is young, or if the other party is an insurance company, or if his wife has just left him, or if his factory will break down if he has to go to jail . . . .

Christie, *supra* note 22, at 8; *see also* W. Richard Evarts, *Compensation Through Mediation: A Conceptual Framework*, *in* CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 15, 17 (Burt Galaway & Joe Hudson eds., 1990) ("[T]he victim must repair the harm within his power to address. This may take the form of permitting compensation to be paid to him, reconciling himself to the injury, forgiving the perpetrator and contributing to a better social order that will not foster conditions under which crime arises.").

141. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 2. In 1994, the American Bar Association recommended that "federal, state, territorial, and local governments . . . incorporate publicly or privately operated victim-offender mediation/dialogue programs into their criminal justice processes." AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 1 (1994), https://www.americanbar.org/content/dam/aba/directories/policy/1994_am_101b.authcheckdam.pdf [https://perma.cc/RVL8-YB8S].

142. MARK UMBREIT & MARILYN P. ARMOUR, RESTORATIVE JUSTICE DIALOGUE 113–14 (2010).

practices for inspiration.[143] (Early experiments in Minnesota led by Kay Pranis are an apt example.[144]) At the same time, many early programs routinized, including by becoming part of the systemic logics they were supposed to challenge ("I am going to VORP that kid," prosecutors might threaten).[145] And most focused only on juveniles and minor crimes.[146] As scholar-practitioner Harry Mika recalls of this period, few restorative programs attempted to reach the core of the deeply racialized adult felony sentences that were increasingly comprising American mass incarceration.[147]

Despite its limited reach in practice, in the 1990s and early 2000s restorative justice inspired a good deal of criticism in

143. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?,* 3 ANN. REV. L. & SOC. SCI. 161, 167–68 (2007).

144. *See* Kay Pranis, *A State Initiative Toward Restorative Justice: The Minnesota Experience, in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 493, 494, 499–502 (Burt Galaway & Joe Hudson eds., 1996); Kay Pranis, *The Minnesota Restorative Justice Initiative: A Model Experience*, CRIME VICTIMS REP., May–June 1997, *reprinted in* NAT'L INST. OF JUSTICE, RESTORATIVE JUSTICE SYMPOSIA SUMMARY 7 (1998), https://ncjrs.gov/pdffiles1/nij/248890.pdf [https://perma.cc/HA5P-4SDT]. I should add that compared to countries such as Canada and New Zealand—where the modern genealogies of restorative justice are extensively intertwined with indigenous struggles—in the United States, there has been less cross-fertilization and fewer efforts to translate and institutionalize indigenous justice practices into formal state systems. For an overview of a pioneering act of institutionalization in New Zealand, see Amy J. Cohen & Ilana Gershon, *When the State Tries to See Like a Family: Cultural Pluralism and the Family Group Conference in New Zealand,* 38 POL. & LEGAL ANTHROPOLOGY REV. 9 (2015). In the United States, perhaps the most prominent example of indigenous borrowing followed from the Navajo Nation's creation of the Peacemaker Court in 1982. *See* Robert Yazzie & James W. Zion, *Navajo Restorative Justice: The Law of Equality and Justice*, *in* RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra*, at 157, 160, 171–73. Navajo nation courts applied a theory of justice meant "to restore an offender to good standing within a group" and generated interest on the part of both scholars and court administrators. *Id*. at 172; *see also* Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 AM. INDIAN L. REV. 297, 307–08 (1999–2000); Robert Yazzie, *"Life Comes from It:" Navajo Justice Concepts*, 24 N.M. L. REV. 175, 186–87 (1994). For critical analysis, see Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1005 (1997).

145. RUTH MORRIS, STORIES OF TRANSFORMATIVE JUSTICE 19 (2000).

146. Bazemore & Umbreit, *supra* note 141, at 2.

147. Telephone conversation between Amy J. Cohen and Harry Mika (Nov. 14, 2018).

scholarship. From outside the movement, legal scholars challenged both its economic and relational logics. From within, left restorativists worried about losing hold of an animating structural vision.

Legal scholars first. In a widely cited 1994 article, Jennifer Gerarda Brown pursued two lines of argument: she described mediation as private market bargaining, which she rejected as morally wrong to resolve public conflict. And she described how restorative justice aims to interject moral-relational feeling into mediation, which she rejected as the state contravening the ideals of individual liberalism.[148]

To briefly elaborate, Brown submitted that in mediation parties advance their own self-interest. Hence she reasoned that in VOMs victims will maximize restitution, offenders will maximize leniency, and prosecutors and other court officials may maximize settlement, potentially against the desires of victims and offenders.[149] Brown did not cite Barnett for this hell of self-interest; she simply rejected his overarching principles: "[a]llowing offenders to buy their way out of prison with monetary and nonmonetary compensation to victims unacceptably confounds the private goals of mediation and the public goals of criminal law."[150] (Albert W. Alschuler had earlier warned of public outrage and even personal vengeance if citizens perceived that an overburdened legal system was offering alternative processes "to encourage the victim and the victimizer to resolve their differences and go on their way."[151])

In 1994, however, Brown's central target was not Barnett (or arguments about efficiency and system rationalization), but rather Zehr and his colleagues and their fixation with *relationships* and restoration.[152] Here Brown suggested that when VOM does not collapse into a bargaining situation where everyone jostles around their own interests it's because restorative mediators

148. *See generally* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994).

149. *Id.* at 1268–69, 1271–72.

150. *Id.* at 1253.

151. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1810 (1986).

152. *See, e.g.*, Brown, *supra* note 148, at 1259–62 (on "Victim-Offender Reconciliation: The Christian Roots of VOM").

successfully advance fellow-feeling.[153] But "[i]n the United States," Brown countered, "both victims and offenders can be expected to care about their individual rights and desires."[154] The state should therefore remediate individual rights through formal procedure grounded in traditional penal theories: deterrence, rehabilitation, retribution, incapacitation—ends, she implied, that already represent majoritarian public morality.[155] It should *not* authorize private actors to mold the moral feelings of others according to an ethic of care.[156] For this reason, feminist critics blocked restorative justice "for cases of gendered violence in most world jurisdictions" by arguing, like Brown, against an ethic of relationality.[157] Feminist critics worried about restorative justice's disciplinary effects on female victims who may gift altruism and compassion when instead they need authoritative processes to adjudicate relationships, not heal relationships through reparations.[158]

153. *Id.* at 1277–81.

154. *Id.* at 1295.

155. *Id.* at 1301. Brown wrote:

> [T]he traditional goals of the criminal law represent the state's rationale for exercising coercive power to punish its citizens. VOM's inability to reconcile its effects with these traditional goals causes VOM to expand the reach of state coercion to achieve goals the public may not value. Meanwhile, VOM compromises the state's ability to use its coercive power to achieve retribution, incapacitation, and general deterrence.

Id.

156. *Id.* at 1273–82.

157. Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 609 (2005).

158. In the North American context, see, for example, Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Kelly Rowe, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855 (1985); Dianna R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 LAW & INEQ. 493 (1984); and Evelyn Zellerer, *Community-Based Justice and Violence Against Women: Issues of Gender and Race*, 20 INT'L J. COMP. & APPLIED CRIM. JUST. 233 (1996). *See also* AM. BAR ASS'N, *supra* note 141, at 2 ("Screening [for VOM] would also rule out mediation in most cases involving domestic violence."). There were, however, early exceptions. For authors advocating restorative approaches to domestic, intimate, and sexual harm, see, for example, Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peace-*

Brown and others were also troubled by the potential effects of relational processes on offenders.[159] They anticipated that some offenders would accept unduly harsh and onerous "restorative" sentences arrived upon collaboratively but with few due process protections.[160] Or perhaps accept onerous sentences arrived upon not so collaboratively: Richard Delgado, for example, conjured disciplinary mediations where a "hurt, vengeful victim" and a "middle-class, moralistic mediator" together "participate in a paroxysm of righteousness" against "an inarticulate, uneducated, socially alienated youth," likely an offender of color.[161] And what exactly, critical scholars continued to ask, comprises a "community" willing and able to support offenders and victims

making, 47 UCLA L. REV. 1 (1999); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332 (2000); Mary P. Koss, Karen J. Bachar & C. Quince Hopkins, *An Innovative Application of Restorative Justice to the Adjudication of Selected Sexual Offenses*, *in* CRIME PREVENTION: NEW APPROACHES 321 (Helmut Kury & Joachim Obergfell-Fuchs eds., 2003); and Joan Pennell & Gale Burford, *Feminist Praxis: Making Family Group Conferencing Work*, *in* RESTORATIVE JUSTICE AND FAMILY VIOLENCE 108 (Heather Strang & John Braithwaite eds., 2002). A parallel set of feminist debates was happening within civil mediation. Beginning in the 1980s, feminist critics argued that mediation was inappropriate for divorce and other civil family disputes when domestic violence had occurred in the underlying relationship. For a review of these debates, see Cohen, *The Family*, *supra* note 88, at 118–19.

159. *See* Brown, *supra* note 148, at 1265, 1282–91; *see also* Sharon Levrant, Francis T. Cullen, Betsy Fulton & John F. Wozniak, *Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?*, 45 CRIME & DELINQ. 3, 7–10 (1999).

160. *See* Brown, *supra* note 148, at 1282–91; Levrant, Cullen, Fulton & Wozniak, *supra* note 159. To be sure, restorativists themselves advanced arguments for procedural safeguards, proportionality, and protection of individual rights. *See, e.g.*, Daniel W. Van Ness, *Legal Issues of Restorative Justice*, *in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 263 (Gordon Bazemore & Lode Walgrave eds., 1999).

161. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 766, 768 (2000). Delgado's critique of informalism was deeply suspicious:

> The timing of VOM's advent is also curious . . . . Juries were beginning to contain, for the first time, substantial numbers of nonwhite members, and at least one scholar of color would soon encourage black jurors to acquit young black men, who are, in their view more useful to the community free than behind bars. Could it be that VOM arose, consciously or not, in response to the threat of jury nullification?

Id. at 770.

through beneficent self-regulation?[162] Numerous legal scholars thus defended state power against moral-relational mediation (even if sometimes reluctantly so, a posture Maureen Cain aptly described as "defensive formalism"[163]).

From within the restorative justice movement the most pressing challenges appeared different. Vexing questions centered less on concerns with the disciplinary effects of informal relational processes than on concerns with cooptation[164] and individuation.[165] Harry Mika, for example, argued that personalized, relational interventions had produced an "astructural bias" when restorative justice, like community mediation, *meant* to engage victims and offenders with "the structural sources of their collective difficulties."[166] As he put it:

> [C]rime and delinquency, and all forms of conflict for that matter, are linked to larger social issues that are often beyond the immediate control and manipulation of disputants. There are social problems in communities—unemployment, racism, violence, etc.—that give rise to conflict between individuals. How does the mediation process, or how does the VORP, mindful of its explicit *restorative, social justice goals*, address these larger issues?[167]

Dennis Sullivan and Larry Tifft made a similar claim, arguing that restorative justice was institutionalizing apart from attention to social and economic conditions:

162. *See generally* Robert Weisberg, *Restorative Justice and the Danger of "Community*,*"* 2003 UTAH L. REV. 343.

163. Cain, *supra* note 77, at 339.

164. *See* ZEHR, *supra* note 11, app. 2; *see also* Zehr, *supra* note 104, at 14 ("[W]ill VORP be just another alternative program, an alternative that becomes institutionalized, ossified, coopted until it is just another program, and perhaps not an alternative at all?"). Restorativists especially worried that material restitution would eclipse interpersonal reconciliation. Umbreit, for example, described the "greatest danger" facing the field as "a utilitarian and exclusive focus on simply determining restitution and payment" crowding out "opportunities for addressing the emotional issues surrounding crime and victimization, including even the possibility of forgiveness and reconciliation." MARC S. UMBREIT, ROBERT B. COATES & BORIS KALANJ, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 157–58 (1994).

165. *See* Harry Mika, *Mediation Interventions and Restorative Justice: Responding to the Astructural Bias*, *in* RESTORATIVE JUSTICE ON TRIAL: PITFALLS AND POTENTIALS OF VICTIM-OFFENDER MEDIATION 559 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

166. *Id.* at 559, 566.

167. Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2202 (1993) (emphasis added).

> [A]s we look over the landscape of existing programs of restorative justice, we continue to see *a lack of concern over the structural conditions, the political-economic foundations* that determine whether the personal integration and reintegration of a person into his or her community will be possible. . . . How can a person find support to heal amid social arrangements that have little or no ability to meet personal needs, indeed, that are structured to deny the meeting of essential needs?[168]

Some early left restorativists thus began to ask if restorative practice was too individuated, too personalized, too private,[169] and too disconnected from structural and redistributive concerns with economic and social inequality.[170] Others predicted that restorativists would "ultimately stand with libertarians on many issues, because they question the value of much government intervention."[171] Hence, we might ask, were restorativists summoning themselves into broader "policies of deregulation and market freedom" that scholars argue were transforming American criminal justice administration?[172]

C. AMERICAN PENAL TRANSFORMATIONS

Here I must pull back: the theory and practice of restorative justice described above, affiliated with scholars such as Zehr and Umbreit, emerged against the background of broad social and

168. DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES ix (2001) (emphasis added).

169. *See, e.g.*, GERRY JOHNSTONE, RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES 124 (2d ed. 2002) ("[M]any who were sympathetic towards the ideas of restorative justice . . . nevertheless criticized . . . victim-offender mediation for being too 'private' and for failing to involve the community . . . .").

170. *See, e.g.*, Dennis Sullivan & Larry Tifft, *The Transformative and Economic Dimensions of Restorative Justice*, 22 HUMAN. & SOC'Y 38, 43 (1998) (arguing that insufficient "attention is paid to social structural violence, that is, violence done to people through the exercise of power, and hierarchical social arrangements that support the maintenance of this power"); *see also* David Dyck, *Reaching Toward a Structurally Responsive Training and Practice of Restorative Justice*, 3 CONTEMP. JUST. REV. 239, 239 (2000) (cataloguing (largely North American) critiques of restorative justice for focusing "too much on the interpersonal dimensions of crime while largely ignoring the deeper roots of the trouble as found in class, race/ethnicity, and gender-based conflict").

171. Gordon Bazemore & Mara Schiff, *Understanding Restorative Community Justice: What and Why Now?*, *in* RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES 36 (Gordon Bazemore & Mara Schiff eds., 2001).

172. GARLAND, *supra* note 16, at 99–102.

political changes in the American penal system that make a political question about the relationship between restorative justice and "policies of deregulation and market freedom" in the 1990s intelligible but also, as a practical-institutional matter, then not terribly pressing. The question is intelligible because restorative justice shares core ideas in common with what David Garland describes as three key changes in the American penal system that meshed with a broader retreat from public welfarist interventions—namely, an attack on rehabilitation; governing through community; and the rise of the victim (all described below).[173] But before the millennium the question was not terribly pressing because leading restorative justice proponents interpreted each commitment in ways that made their own work marginal—that is, without the kind of mainstream institutional legibility likely to inspire assimilation. As long as the American penal state advanced a law-and-order agenda—based simultaneously on punishment and rational economics—restorative justice remained a fringe movement without any real left or *right* political power.

To briefly elaborate, Garland submits that from the 1970s onward, penal welfarism—a set of penal ideas and practices based on correctional concerns and professional rehabilitation—lost its status as "the overarching ideology of the system."[174] Penal welfarism reflected a modern statist ideal: that "social problems are best managed by specialist bureaucracies that are directed by the state, informed by experts, and rationally directed towards particular tasks."[175] In the 1970s, prominent retributivists such as Andrew von Hirsh led an attack on social purpose, proposing that criminal courts instead enact only proportional, uniform, equitable, desert-based sentences disconnected from concerns with offender "treatment."[176]

As we have seen, restorativists joined an attack on penal welfarism. Indeed, restorativists shared elements of retributivist theory, specifically how it configures offenders as responsible moral agents, rather than as deviant subjects in

173. For elaborations of these three (and other) transformations in American criminal justice administration, see *id.* at 8–20, 123–27.

174. *Id.* at 8.

175. *Id.* at 34.

176. *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

need of therapeutic interventions. But they rejected a model of deserved punishment not only because many shunned punitive intent, but also because they found desert theory too general and impersonal. As Kathleen Daly explains, "von Hirsch wants to limit the [desert-based] 'censure conveyed through punishment . . . [to the] person externally,'" and not entitle the state "to use its coercive powers to seek to induce moral sentiments of repentance."[177] Many restorativists argued exactly the opposite. They wanted criminal procedures to trigger personalized penitential feelings.

In the United States, neither measured retributivists advocating for equitable, proportional punishments, nor restorativists advocating for personalized, dialogic forms of accountability succeeded in practice. Policy elites instead translated retributivist theory into "harsh justice"[178] based on an image of an irredeemable criminal actor ("the threatening outcast, the fearsome stranger") and encoded it in rules such as mandatory minimums, three strike laws, and the elimination of parole.[179] But rules amplifying punishment did not exhaust the logics of criminal justice during this period. To the contrary, at the same time as the "state's power to punish [took] on a renewed political salience and priority," the state's capacity to engage in crime control also came "to be viewed as limited and contingent."[180] Here the criminal justice state, like many aspects of the American administrative and adjudicatory state, increasingly relied on extra-state private controls.

Hence, Americans also witnessed the rise of community as a solution to many criminal justice problems (think: community policing, community corrections, community crime controls).[181] In this paradigm, "community" often became a receptacle for rational choice criminology now operating "beyond the state."[182] Theorists and policymakers described criminals as "opportunistic consumer[s]"[183] who break laws when benefits outweigh

177. Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, *in* RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 46–47 (Heather Strang & John Braithwaite eds., 2000).

178. WHITMAN, *supra* note 17.

179. GARLAND, *supra* note 16, at 137.

180. *Id.* at 120.

181. *See id.* at 123.

182. *Id.* at 129.

183. *Id.*

costs,[184] and therefore they designed community controls to decentralize and optimize risk management through, for example, private surveillance, local patrols, and incentives to reward law-abiding behavior.

Restorative justice shared a community-oriented ethos. For example, Bazemore and Umbreit reasoned that the ultimate success of restorative justice should be measured by "its ability to strengthen the capacity of communities to respond effectively to crime."[185] But restorativists did not argue for community controls based on risk-management and rewards. Rather, they wished to narrow the social distance between offenders and victims by re-embedding them in social relations. They hoped that in restorative mediations educators, clergy, extended family, and neighbors could collectively instill within offenders pro-social behavior through feelings of empathy and remorse for the harms they committed against their particular victims.[186]

To that end, restorativists also joined a larger social movement in the 1980s and 1990s to prioritize the voices of victims. Much of this movement was driven, Markus Dirk Dubber argues, "by grassroots campaigns of concerned citizens backed by politicians eager to outdo their opponents in the tough-on-crime competition."[187] These activists and politicians often encouraged citizens to identify intensely with victims through individualized

184. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

185. Bazemore & Umbreit, *supra* note 141, at 15.

186. *See, e.g.*, Anthony Bottoms, *Some Sociological Reflections on Restorative Justice*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 79, 100 (Andrew von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach & Mara Schiff eds., 2003) ("RJ has remained predominantly small-scale and communitarian . . . [with] certainly very little use of such late modern devices as risk assessment profiles. Neither RJ practitioners, nor most academics sympathetic to RJ, show any sustained interest in the issues of 'managerialism' and 'risk' in relation to criminal justice . . . ."); Richard Young, *Testing the Limits of Restorative Justice: The Case of Corporate Victims*, *in* NEW VISIONS OF CRIME VICTIMS 133, 162–65 (Carolyn Hoyle & Richard Young eds., 2002) (describing how restorative mediations require corporate representatives that are willing to express concerns with personal safety, security and loss, and to engage in "inclusionary" dialogue with offenders, rather than to use conferences to engage in actuarial risk-management strategies); Braithwaite & Mugford, *supra* note 31, at 144 (describing how offenders can learn to feel shame and remorse through connections with others).

187. Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 6 (1999).

and spectacular representations of their suffering.[188] The victims' rights movement also coincided with a decline in social solidarity expressed by faith in public institutions. As Garland observes, "in the new morality of market individualism, . . . moral sentiments are increasingly privatized along with everything else."[189] As such, he reasons, individual narratives of victim suffering became especially useful to motivate moral feeling.[190] Jonathan Simon offers a related claim. He traces how late twentieth century policy elites used the "victim" to replace the "worker" or "consumer" as the idealized American citizen in need of state protection.[191] Both Garland and Simon thus read the rise of the (often white, middle-class) figure of the victim onto broader political transformations. In the economic sphere, this victim helped to justify the state's retreat from welfarist interventions on behalf of workers and consumers; in the penal sphere, it helped to justify the state's intensification of moral law-and-order statism *and* market-managerial crime control—three trends that scholars read together as neoliberal criminal justice administration.[192]

How should we understand restorative justice here? Restorativists argue, after all, that crime primarily harms a victim (and, yes, her community as well) but *not* an abstract "society" or the state.[193] And as the field advanced, restorativists worked intently to make their practice more victim-centered against criticisms that their real allegiances lay with offenders.[194] Yet

188. *See id.* at 9; Aya Gruber, *Duncan Kennedy's Third Globalization, Criminal Law, and the Spectacle*, 3 COMP. L. REV. 1, 19–20 (2012).

189. GARLAND, *supra* note 16, at 200.

190. *Id.*

191. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75, 77 (2007).

192. *See also* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 618–25 (2009).

193. Christie, for example, called for "a victim-oriented" court. Christie, *supra* note 22, at 10. Or as Zehr put it, "[t]he theory and practice of restorative justice have emerged from and been profoundly shaped by an effort to take [the] needs of victims seriously." HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 15 (2002).

194. *See, e.g.*, Harry Mika, Mary Achilles, Ellen Halbert, Lorraine Stuzman Amstutz & Howard Zehr, *Listening to Victims: A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROB. 32 (2004). Indeed, scholars began to argue that sharpening an "essential focus on victim needs . . . is

restorativists persisted in refusing an idealized image of a vengeful victim mobilized by policy elites. In the restorativist imagination, if a victim is rendered insecure or even shattered, with support and the refuge of community, she is able to express anguish and anger and yet transcend vengeance, becoming open to personal recovery and forgiveness. For Zehr, this victim reflects what it means to be Christian: "seeking suffering for offenders is neither productive nor consistent with God's love"[195] (a point he would later rewrite using trauma theory[196]).

At this point, two observations should be clear. First, we can see how restorative justice, as it coalesced in the 1990s, was congruous with many of the broader neoliberal penal trends that coexisted with its creation: crime is personalized, justice is privatized, offenders are responsibilized, victims are centralized, the community is mobilized, and the state is deemphasized. These ideals are all rich for complex political alliances and new translations. Yet, we can also see why the restorative movement had little institutional pull in the decades preceding the millennium. Restorativists insisted on a moral-dialogic offender while the criminal justice system envisaged a rational or pathological offender; restorativists insisted on a relational victim whereas policy elites repeatedly conjured a vengeful one; and restorativists invoked an inclusionary (if also vague) understanding of community as an entity desirous and capable of "increas[ing] individual . . . commitment to the common good" whereas mainstream criminal justice reformers theorized community according to rational economic logics.[197] Hence, for scholar-practitioners who hoped that restorative justice could advance social and distributive justice—yet worried that restorative practice had become too individuated and "a-structural"—it would not have made sense to engage in too much hand-

essential to [restorative justice's] survival." Gordon Bazemore & Sandra O'Brien, *The Quest for a Restorative Model of Rehabilitation: Theory-for-Practice and Practice-for-Theory*, *in* RESTORATIVE JUSTICE AND THE LAW, *supra* note 34, at 31, 35.

195. HOWARD ZEHR, WHO IS MY NEIGHBOR? LEARNING TO CARE FOR VICTIMS OF CRIME 9 (1984).

196. Howard Zehr, *Restoring Justice*, *in* GOD AND THE VICTIM: THEOLOGICAL REFLECTIONS ON EVIL, VICTIMIZATION, JUSTICE, AND FORGIVENESS 131, 139–46 (Lisa Barnes Lampman & Michelle D. Shattuck eds., 1999) (drawing on JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR (1992)).

197. Bazemore & Umbreit, *supra* note 141, at 15.

wringing. To be sure, restorative justice failed, as its left proponents reflected, to generate structural change or any significant measure of decarceration (it would have taken a revolution to do otherwise). But in the law-and-order climate of the 1990s in the United States, restorative justice was far too marginal—perhaps far too ethereal—for anyone to seriously claim it was *strengthening* neoliberalism.

III. RETRIBUTIVE-RESTORATIVE JUSTICE AND MORAL NEOLIBERALISM: 2000s TO NOW

After the crisis of mass incarceration, I think the situation has changed. As Americans have come to question elements of penal harshness alongside the costs of mass imprisonment (and as crime rates have declined),[198] policymakers have begun to pursue small programs of decarceration.[199] Reformers on the political right, however, do not appeal simply to rational economic calculations to justify penal reform even as they advocate conservative fiscal policy and small government. Some also actively encourage restoration—albeit often as a supplement to, rather than a replacement for, retribution. In this Part, I trace ideas that contributed to this transformation. First, in the early 2000s among American criminal law professors who advocated for the integration of restorative justice and traditional penal theories and, in so doing, urged greater attention to the relational, not simply micro-economic, determinants of individual behavior and crime. Second, among evangelical Christian reformers whose vision of restorative justice includes the claim that theories of crime and reconciliation *should* be de-structuralized.

I suggest that a working composite of these ideas is today supported by the Charles Koch Foundation, a nonprofit within the broader Koch network committed to advancing individual liberty and economic freedom and opposed to redistributive pub-

198. *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2007).

199. Jonathan Simon, for example, suggests that a new "consensus now exists among criminologists that states should be addressing many nonviolent, nonserious crimes—even many now classed as felonies—with some combination of fines (which can be made income neutral), restorative justice, enhanced probation . . . and very short terms in local jails." SIMON, *supra* note 8, at 159. He also notes that "2010 was the first year in the last thirty-seven in which the nationwide prison population decreased." *Id.* at 173 n.1.

lic social policies. The Foundation applies "market-based management" (a registered trademark) to solve social problems, and now encourages penal reform as part of advancing its overarching mission.[200]

To illustrate the radicalism of this vision, consider that Charles Koch once criticized Chicago school economist Milton Friedman for "merely trying to make government work more efficiently when the true libertarian should be tearing it out at the root."[201] Here my overarching argument is as follows: radical libertarians and proponents of market freedom today support restorative ideas in part because they know that a compelling case for shrinking the penal *and* social state cannot rest solely on economic discipline. As such, restorative justice illustrates how moral-relational values are not invariably criticisms of—they can already be incorporated from within—neoliberalism.

A. MORAL MEDIATION

In 2003, Erik Luna (who would later establish a Koch-supported criminal justice center) hosted what he ventured was the first gathering devoted to restorative justice in "American legal academe."[202] Luna asked if restorative justice could be "more cost effective, more likely to reduce crime rates and recidivism, and more humane" than standard criminal justice practice.[203] But rather than promote the thick value-laden version associated with Zehr and his colleagues, Luna proposed a "procedural conception of restorative justice [that] would allow *all*

200. *See, e.g.*, Market Based Management, CHARLES KOCH FOUND., https://www.charleskochfoundation.org/about-us/market-based-management/ [https://perma.cc/3WQ2-4CAF]; Criminal Justice Reform Grants, CHARLES KOCH FOUND., https://www.charleskochfoundation.org/apply-for-grants/requests-for-proposals/criminal-justice-policing-reform/ [https://perma.cc/72BS-TMME].

201. BRIAN DOHERTY, RADICALS FOR CAPITALISM: A FREEWHEELING HISTORY OF THE MODERN AMERICAN LIBERTARIAN MOVEMENT 443 (2007). For Koch's remarks, see *Reminiscences & Prognostications: 10 Key Libertarian Activists Discuss the Significance of the Movement They Helped Build*, REASON (May 1978), https://reason.com/1978/05/01/reminiscences-prognostications [https://perma.cc/8J6U-D62S].

202. Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 14.

203. *Id.* at 3.

modern punishment theories to contribute to the decisionmaking process."[204] He envisioned respectful dialogues that would include moral censure of the criminal act and where participants could collaboratively reach any agreement on sanctioning for any reason, provided it doesn't contravene what Luna argued should be legislatively mandated floors and ceilings.[205] Luna thus aimed to interject purposeful indeterminacy into the restorative model; from his perspective, restorative practices like reparations and forgiveness could overlap with any modern penal value.[206]

In the same volume, Paul Robinson likewise proposed separating restorative justice processes from restorative justice theory. Contra Brown and Delgado, Robinson liked how restorative processes infuse the criminal justice system with moral-relational influence and bottom-up participation—values he reasoned that could produce "significant crime control benefits" through system-wide legitimation.[207] But Robinson argued that beyond minor cases, restorative meditations should complement, not replace, deserved punishment for the sake of what he called "justice."[208] Darren Bush proposed a different marriage: he commended restorative interventions for shaping moral-relational preferences yet thought "restorative justice ought to be combined with some [non-restorative] mechanisms that have deterrence value."[209]

These integrative theories—articulated by prominent criminal law scholars who may hold a range of political positions on

204. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 288 (emphasis added).

205. *Id.* at 289–95.

206. *Cf.* John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 391 & n.14 ("I cannot see how one can nurture restorative values like mercy and forgiveness while taking retributive proportionality seriously . . . . This is not to deny that there is a retributive conception of mercy and that there could be a retributive theory of forgiveness. It is just to say that mercy and forgiveness as restorative values mean something very different from what they could mean under any retributive formulation.").

207. Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375, 376; *cf.* Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307 (2006).

208. Robinson, *supra* note 207, at 384.

209. Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, 2003 UTAH L. REV. 439, 469.

the relationship between the market and the state, I don't presume to speculate—accomplished two things. First, they removed normative barriers to theorizing restorative justice as consistent with existing punishment ideologies rather than as an aspirational alternative to the dominant carceral paradigm, opening up new conceptual spaces for restorative justice to travel. Second, they retained for restorative justice a specific moral distinctiveness by promoting moral-relational values such as apology, remorse, and forgiveness—values that compel ethical action because they are theorized apart from rational economics and market discipline.

Consider, as one final example, a 2004 *Yale Law Journal* article by Stephanos Bibas (who is now a federal judge appointed by President Trump) and Richard Bierschbach. They criticized "[m]ainstream criminal law scholarship" for over-emphasizing "microeconomic concerns with individual behavior" while neglecting "the social and relational dimensions of criminal wrongdoing."[210] "Lawyers, schooled in law and economics," they argued, "are taught to evaluate settlements from a rational-actor perspective. We add up the monetary benefits, subtract the monetary costs, and arrive at a net present value . . . . But the ordinary person does not evaluate crime and punishment that way."[211]

Bibas and Bierschbach thus called for moral dialogic processes—specifically victim-offender mediation—to promote "moral education, catharsis, healing, and reconciliation."[212] Through VOM, they reasoned, offenders could "realize the wrongfulness of their acts, feel sorrow for their misdeeds, and accept responsibility. . . . [R]emorse and apology can help offenders cleanse their consciences and return to the moral fold."[213] Likewise, victims could potentially "achieve catharsis, let go of their anger, and forgive."[214] Yet they argued that "[r]emorse and apology are not substitutes for punishment in most cases, *as the restorative justice movement mistakenly contends*."[215] "For most

210. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 111, 112, 148 (2004).

211. *Id.* at 147.

212. *Id.* at 148.

213. *Id.*

214. *Id.*

215. *Id.* at 91 (emphasis added).

crimes of more than minimal seriousness," they insisted, "punishment is needed to underscore the community's denunciation of the crime and vindication of the victim."[216] Hence Bibas and Bierschbach criticized "the academic literature" for failing to notice an "intriguing fusion of mediation and punishment"[217]—proposing to transform what was once many restorativists' fear or at least a very "fraught issue"[218] into a normative policy agenda.

B. MORAL NEOLIBERALISM AND AMERICAN RESTORATIVE JUSTICE

Writing from a different perspective, evangelical prison reformer Charles Colson advanced his own retributive-restorative fusion (that Bibas and Bierschbach could have invoked to challenge the dominant understanding of restorative justice penned by Zehr and Braithwaite that rejects or minimizes retribution). A former Nixon administration official, in 1975 Colson founded Prison Fellowship, a large international prison ministry, after experiencing a spiritual transformation while serving a prison sentence for Watergate-related offenses.[219] Like other restorativists (and, in the 1970s, writing before the restorative justice movement coalesced), Colson attempted to humanize offenders. He described the people he met in prison not as rational calculators but rather as men with "a sense of decency and goodness" yet "in the grip of some kind of evil power,"[220] and he simultaneously described all of us as fellow sinners ("we all share with [prisoners] a common heritage of sin").[221]

216. *Id.* at 123 n.183.

217. *Id.* at 124.

218. BRAITHWAITE, *supra* note 11, at 16.

219. *See generally* CHARLES W. COLSON, BORN AGAIN (1976). On Prison Fellowship, see PRISON FELLOWSHIP, ANNUAL REPORT (2017), http://prisonfellowship.org/wp-content/uploads/2017/11/AnnualReport_17_Nov21_web.pdf [https://perma.cc/E2BV-BPXA]. In 2017, its revenues were over 39 million. *Id.*

220. COLSON, *supra* note 219, at 319. For a broader genealogy of some of the strands of American Christianity reflected in Colson's penal ideas, see David A. Green, *Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform*, 15 PUNISHMENT & SOC'Y 123 (2013).

221. Charles Colson, *Towards an Understanding of Imprisonment and Rehabilitation*, *in* CRIME AND THE RESPONSIBLE COMMUNITY 151, 165–66 (John Stott & Nick Miller eds., 1980).

In the late 1980s, an arm of Prison Fellowship called Justice Fellowship began to develop its own explicit theory and practice of restorative justice.[222] "It should be noted," the organization explained, "that the term *restorative justice* is not unique to Justice Fellowship, although *this* formulation of the vision is."[223] Prison Fellowship reformers based their model on ideas that Daniel Van Ness elaborated in his 1986 book *Crime and Its Victims*[224] and that Van Ness rearticulated along with Colson in their 1989 book *Convicted*.[225]

Around the millennium this work intensified and began to institutionalize. In 1997, at the behest of then-Governor of Texas George W. Bush, another arm of Prison Fellowship implemented the first contemporary faith-based program in an American prison in Texas, which featured an intensive restorative curriculum (offenders engaged in dialogic encounters with groups of victims).[226] In the span of a few years, this Prison Fellowship affiliate opened similar programs in Kansas, Iowa, and Minnesota;[227] Van Ness and Karen Heetderks Strong published *Restoring Justice*, a book intended for secular audiences;[228] Colson and his coauthors published law review articles advocating for restorative principles and legislation;[229] Colson published *Justice that Restores*;[230] and another Prison Fellowship-affiliated organ-

222. DANIEL W. VAN NESS, DAVID R. CARLSON JR., THOMAS CRAWFORD & KAREN STRONG, RESTORATIVE JUSTICE: THEORY 5 (1989) (describing, for example, how in 1988 the board of Justice Fellowship began a three-year project to design a restorative justice model based on biblical principles).

223. *Id.* at 5 (second emphasis added). The authors then proceeded to write: "[f]or popularizing that name and for his many other generous contributions of time and insights, we are deeply indebted to Howard Zehr, Director of the Mennonite Central Committee's U.S. Office of Criminal Justice." *Id.*

224. DANIEL W. VAN NESS, CRIME AND ITS VICTIMS (1986).

225. CHARLES COLSON & DANIEL VAN NESS, CONVICTED: NEW HOPE FOR ENDING AMERICA'S CRIME CRISIS (1989).

226. Chuck Colson & Pat Nolan, *Prescription for Safer Communities*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 387, 394 (2004).

227. *Id.*

228. DANIEL VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE (1997).

229. Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L. REV. 1 (1998); Colson & Nolan, *supra* note 226; Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53 (1998).

230. CHARLES W. COLSON, JUSTICE THAT RESTORES (2001).

ization published a volume on Christian approaches to victimization.[231]

Colson and his coauthors engaged with early VORP writers such as Zehr (and vice versa) to describe and elaborate Christian restorative principles. But Colson and Zehr offered crucially different biblical visions.[232] Colson argued that restoration *should* coexist normatively with retribution, that crime *should* be theorized apart from preexisting social-structural-environmental conditions, and that restorativists *should* seek active partnerships with the state, but in order to encourage social welfare privatization. Let me flesh out these distinctions.

Retribution first. Like other early restorativists, Colson suspected treatment and deterrence-based theories of punishment: "To justify punishment by whether it 'deters or cures,'" Colson wrote, "is the triumph of sociology over justice."[233] But just deserts, he submitted, reflects God's rightful authority to punish morally evil acts—authority, he explained, that works through the hands of the secular magistrate.[234] As such, Winnifred Sullivan summarizes, "[t]he state's failure to exact retribution is, in Colson's view, the first step to 'collapse of the entire social order.'"[235]

A self-described law-and-order conservative who champions retribution, Colson nonetheless argued that restorative justice is necessary to rebalance American democracy in favor of *liberty*.[236]

231. GOD AND THE VICTIM: THEOLOGICAL REFLECTIONS ON EVIL, VICTIMIZATION, JUSTICE AND FORGIVENESS (Lisa Barnes Lampman & Michelle D. Shattuck eds., 1999).

232. Some early writers noted these distinctions. For example, in 1989 the Mennonite Central Committee Office of Criminal Justice published a volume with contributions from Howard Zehr, Daniel Van Ness, and M. Kay Harris. Harris criticized Van Ness (but not Zehr) for an "exclusive emphasis on the individual responsibility of the offender [that] appears likely to reinforce current social divisions and inequities." M. Kay Harris, *Alternative Visions in the Context of Contemporary Realities*, *in* JUSTICE: THE RESTORATIVE VISION 31–32 (1989).

233. WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 104 (2009).

234. *Id.* at 105.

235. *Id.*

236. Colson, *supra* note 229, at 1 ("Citizens either must restrain themselves by an internal sense of duty or they must be restrained externally by a sense of fear. . . . 'The greater the strength of duty, the greater the liberty.'").

Order, he reasoned, often costs some individual freedom.[237] But "[a] fearful public has alternatives to strong-armed intervention by the government to suppress disorder"—namely, citizens who volitionally turn away from personal preferences to objective moral truth and the authority of law.[238] From this perspective, the problem with the American justice system is *not* just deserts (although Prison Fellowship writers submit that some deserts like mandatory minimums and carceral sentences for nonviolent offenders are unjustly excessive).[239] The problem is rather that retribution lacks moralizing—indeed revelatory—force because it is not placed "in the *context of community* and always with the *chance of transformation of the individual* and *the healing of fractured relationships and of the moral order*."[240] Like the legal scholars described above, Colson argued that punishment and restoration should be fused together.

Second, Colson pitted restorative justice against modernist social theories of crime—that is, against a view that holds "fault lies not in ourselves, but in unemployment, racism, poverty, or mental illness" and "the solution to crime must lie in addressing those outside factors."[241] "No matter what its aggravating causes," Colson and Van Ness insisted, "there is only one taproot of crime. It is not some sociological phenomenon; it is sin."[242] "The Bible tells us that crime is *sin*," Prison Fellowship's restorative justice training manual likewise explains.[243] From this perspective, *faith* conquers crime—that is, self and social order are restored through spiritual transformations, ministered by Christians in direct, personal, and loving relations.

237. *Id.* at 1–9.

238. *Id.* at 9.

239. *See, e.g.*, COLSON & VAN NESS, *supra* note 225, at 89 ("If we really want to get tough on crime, let's hold offenders accountable to their victims. Let's reserve prisons for hardened criminals (where they can be incarcerated for longer periods of time), and let's put nonviolent offenders to work."); VAN NESS, *supra* note 224, at 88 ("I am not justifying the kind of punishments we inflict today in prison. . . . But we should not abandon the notion of punishment simply because there are problems with its implementation.").

240. COLSON, *supra* note 230, at 115.

241. COLSON & VAN NESS, *supra* note 225, at 56.

242. *Id.* at 57.

243. SULLIVAN, *supra* note 233, at 95.

Arguments for social service privatization follow. Public institutions fail, Colson and Van Ness ventured, because "no governmental system can . . . change the human heart."[244] Government, they reasoned, sacralizing (a version of) libertarianism, has necessary functions including "the God-ordained responsibility to restrain evil and to preserve public order . . . through its police forces, courts, and prisons."[245] But the Church "brings unique resources to offenders that government programs cannot hope to effect," namely, love and communion.[246]

The surge of faith-based restorative prison programs that Prison Fellowship spearheaded in the late 1990s and early 2000s reflected, as Melinda Cooper observes, "a much wider transformation of the social services that has seen religious providers actively included in government contracts to provide homeless shelters, soup kitchens, group homes, substance-abuse treatment, welfare-to-work training, healthy marriage, and responsible fatherhood instruction, along with a whole host of other services for the poor."[247] These transformations were, in turn, made possible by changes in American welfare legislation. In 1996, when the federal government scaled back means-tested welfare, it simultaneously authorized states to contract with religious organizations to provide social services "without impairing the religious character of such organizations."[248] In 2001, President Bush expanded opportunities for religious organizations to "meet[] the needs of poor Americans," including by creating the White House Office of Faith-Based and Community Initiatives.[249] Lew Daly has described these initiatives as "an effort to hollow out the welfare state by relinquishing its public authority to religious groups."[250] Colson himself made a similar claim. "What's at stake," he stressed, discussing a legal challenge to government funding of Prison Fellowship's prison interventions, "is not just a prison program, but how we deal with social prob-

244. COLSON & VAN NESS, *supra* note 225, at 67.

245. *Id.* at 71.

246. *Id.*

247. COOPER, *supra* note 37, at 265.

248. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161–63 (codified at 42 U.S.C. §§ 601–617, 619 (2012)) ("charitable choice" provision).

249. Exec. Order No. 13,199, 66 Fed. Reg. 8499 §§ 1–2 (Jan. 29, 2001).

250. LEW DALY, GOD AND THE WELFARE STATE 32 (2006).

lems in our country. Do we do it through grassroots organizations or big government? We know what works."[251]

Indeed, consider how Van Ness and Pat Nolan[252] described a model secular restorative justice program. A juvenile court recruits public and private actors and clergy to help offenders surmount bad behavior: "If they were chronically absent, their truant officer was included. If they couldn't read, local optometrists performed free eye exams. If they needed glasses, the local Lions Club donated them. If they were gang members, plastic surgeons volunteered to remove their tattoos."[253] In this example, basic forms of care—eye exams and glasses—happen voluntarily through the community. Voluntarism matters greatly, as Prison Fellowship Vice President Heather Rice-Minus explains, because it grounds the Christian case for small government: "As Christians, rather than spend more money through taxes so that the state can act as an institutional service provider, we wish to give in ways that *build relationships*."[254]

Daly argues that partnerships between the federal government and religious organizations have helped "the religious groups that provide social services, not the people who depend

251. Samantha M. Shapiro, *Charles Colson's Jails for Jesus*, MOTHER JONES, Nov./Dec. 2003, https://www.motherjones.com/politics/2003/11/jails-jesus-charles-colson/ [https://perma.cc/Z3XL-FVHS]; *see also* Tanya Erzen, *Testimonial Politics: The Christian Right's Faith-Based Approach to Marriage and Imprisonment*, 59 AM. Q. 991 (2007). On the lawsuit Colson is invoking, see generally SULLIVAN, *supra* note 233.

252. Pat Nolan was a prominent California Republican who, after serving a prison sentence for racketeering, joined the leadership of Prison Fellowship and strongly advocated for restorative justice. *See generally* PAT NOLAN, WHEN PRISONERS RETURN: WHY WE SHOULD CARE AND HOW YOU AND YOUR CHURCH CAN HELP (2004). In 2010, he cofounded the libertarian think tank, Right on Crime. *See, e.g.*, *Pat Nolan*, ACU FOUND.: CTR. FOR CRIM. JUST. REFORM, http://acufoundation.conservative.org/center-for-criminal-justice-reform/pat-nolan/ [https://perma.cc/9JW7-VSEG]. Right on Crime also advances restorative justice. *See, e.g.*, Derek M. Cohen, *Reviving Restorative Justice: A Blueprint for Texas*, RIGHT ON CRIME (Dec. 16, 2013), http://rightoncrime.com/2013/12/reviving-restorative-justice-a-blueprint-for-texas/ [https://perma.cc/UX2S-XNG7].

253. Van Ness & Nolan, *supra* note 229, at 94.

254. Telephone Interview by Amy J. Cohen with Heather Rice-Minus, Vice President of Gov't Affairs, Advocacy & Pub. Policy, Prison Fellowship (May 14, 2018).

on them."[255] But I want to read all this in good faith.[256] Motivating arguments against the American welfare state and public provisioning are lived spiritual commitments to personal redemption, mutual aid, love, and relationship-building.

As the following case illustrates, here we have a version of restorative justice aptly expressed as moral neoliberalism. Its decarceral potential is ethically appealing, drawing on values such as redemption and forgiveness alongside values such as efficiency and cost savings; it is likely practically desirable for anyone concerned with the inhumanity of today's prisons; *and* it is used explicitly by libertarians and conservatives to break popular associations with government as a necessary and desirable social institution.

C. VICTIM-OFFENDER MEDIATION IN TEXAS

Texas, a state known for fiscally oriented libertarian penal reform,[257] is experimenting with VOM. In 2009, Democratic house representative Ruth McClendon introduced a bill authorizing courts to divert people charged with misdemeanor and state-jailable felony property crimes to mediation before a guilty plea or conviction.[258] McClendon linked popular arguments about cost savings and docket clearing to values such as apology, dialogue, and reparations.[259] Her Democratic colleague Jim McReynolds echoed her restorative aspirations: "If I transgress, and it's not a major crime, and the victim and I can get together . . . and . . . I make that restitution and this person is willing to give forgiveness . . . couldn't lives be redeemed and problems be solved shy of using stiffer penalties and ultimately state-run facilities?"[260]

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255. DALY, *supra* note 250, at 43.

256. I use the term good faith as an invitation for readers to grapple with alternative world-making visions, not as a form of interpretation that disallows for complex human motivations, including the reality that people can hold views that are both sincere and strategic.

257. *See* McLeod, *supra* note 4, at 667–68.

258. H.B. 2139, 81st Leg., Reg. Sess. (Tex. 2009). In 2007, McClendon proposed a predecessor bill that died in committee. H.B. 2750, 80th Leg., Reg. Sess. (Tex. 2007).

259. *Hearing on H.B. 2139 Before the H. Comm. on Corrections*, 81st Leg. Reg. Sess. (Tex. 2009) (testimony of Rep. Ruth McClendon).

260. *Id.* (testimony of Rep. Jim McReynolds, Chair, H. Comm. on Corrections).

McClendon envisioned that a mediation agreement—which would include an apology, restitution, community service, and potentially counseling—would result in dismissal.[261] As she conceived it, however, offenders—not taxpayers—would absorb most or all of the costs of mediation: up to $500 for program costs, plus any counseling costs, based on the offender's ability to pay.[262] This was a crucial provision. Prosecutors could already divert arrested people to mediation at their discretion.[263] But to charge offenders for the value of reconciliation, they needed statutory authorization.[264]

Numerous actors with different political affiliations advocated for the bill over the years it was considered. For example, the Texas Public Policy Foundation (TPPF)—a leading Koch-funded think tank devoted to small government and economic freedom—repeatedly testified in support.[265] A legislative staff person representing an association of prosecutors described TPPF's position as follows:

> For drug and property crimes, they don't think the state should be locking those people up because it costs too much. They are interested in shrinking government. That's why they support victim-offender mediation. Why should we pay taxes and the court system to do something when people can do it themselves?[266]

TPPF employee Vikrant Reddy (now a senior fellow at the Charles Koch Institute, a Charles Koch Foundation-affiliated organization) added nuance to this position. In legislative testimony, Reddy emphasized the value of *empathy*. In VOM, he explained,

> an offender realizes what they've done wrong. They begin to develop a certain sense of empathy, and it stops feeling so indirect. . . . It's much easier to steal from Wal-Mart than it is to steal from a nursing home

261. H.B. 2139, art. 56.22–.23, .25.

262. *Id.* art. 56.25.

263. *See, e.g.*, *Hearing on H.B. 2019 Before the H. Comm. on Criminal Jurisprudence*, 82d Leg. Reg. Sess. (Tex. 2011) (testimony of Shannon Edmunds, Staff Attorney, Texas District and County Attorney's Association).

264. *Id.*

265. In its words, the TPPF's "mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation." *Mission*, TEX. PUB. POL'Y FOUND., https://www.texaspolicy.com/about/ [https://perma.cc/UG86-ZDH4].

266. Shannon M. Sliva, *A Tale of Two States: How U.S. State Legislatures Consider Restorative Justice Policies*, 20 CONTEMP. JUST. REV. 255, 265 (2017).

> room because Wal-Mart seems so remote . . . and you sort of figure, 'what's the harm?' Whenever you sit down with the person that you stole from, the person that you victimized, you tend to feel that empathy and I think the statistics show that there is that a lot more satisfaction [from the victim].[267]

Reddy thus envisioned mediations based not on rational calculations and arm's-length relations that would likely capture how a consumer (or rather shoplifter) feels about one of the world's largest corporations, but rather on fellow-feeling: the kind of affective, personal remorse that one is expected to feel after harming an intimate caregiver. To be sure, Reddy linked empathy to "significant savings."[268] Because VOM influences offenders and satisfies victims, he predicted the state could save judicial and prosecutorial resources.[269] "And *fundamentally*," he concluded, "[VOM] is a real tangible way of *limiting the scope of government*."[270] In Reddy's comments, the moral neoliberal and the market neoliberal thus converge; he yoked empathy and relationality to limited government and market freedom.

Despite support from conservative and progressive organizations, McClendon's bill stalled because of state resistance: prosecutors demanded to decide who is eligible for mediation and the right to request a dismissal—demands that McClendon expressed willingness to accommodate.[271] In 2015, Mark Keough, a newly elected Republican legislator, jointly authored McClendon's revised bill.[272] Support for restorative justice is an increasingly comfortable Republican position. For example, in 2012 the Republican Party endorsed faith-based institutions specifically for "[t]heir *emphasis on restorative justice*, to make the victim

267. *Hearing on H.B. 2019 Before the H. Comm. on Criminal Jurisprudence*, 82d Leg. Reg. Sess. (Tex. 2011) (testimony of Vikrant Reddy, Senior Policy Analyst, Texas Public Policy Foundation).

268. *Id.*

269. *Id.*

270. *Id.* (emphasis added).

271. *See, e.g.*, *Hearing on H.B. 167 Before the H. Comm. on Criminal Jurisprudence*, 83d Leg., Reg. Sess. (Tex. 2013) (testimony of Rep. Ruth McClendon); *see also id.* (testimony of Shannon Edmonds, Staff Attorney, Texas District and County Attorneys Association) ("I'll tell you frankly, this is a bill that prosecutors have killed [in] several sessions because it didn't allow the prosecutor to have a say in who went into the program and . . . McClendon has agreed to that language . . . that's great . . . .").

272. H.B. 3184, 84th Leg., Reg. Sess. (Tex. 2015).

whole and put the offender on the right path."[273] For his part, Keough lauded VOM for its roots in the Bible. "It's really pretty amazing," he exclaimed, describing how VOM has been reported to enhance offenders' willingness to pay restitution.[274] "And what's more amazing is that the people who came up with this came up with it from an Old Testament scripture in the book of Leviticus."[275] Here is Keough's exegetical interpretation: "punishment should be commensurate with the crime. And cutting off somebody's hand [for theft] is too harsh. However, *making them pay back four times or five times* based upon the value is also fairly *painful*. Painful enough that people won't continue with that form of activity."[276] From this perspective, restitution is retributive (and deterrent), a position that reflects some of Colson's teachings.[277]

McClendon and Keough's joint bill passed both houses in the Republican-controlled Texas State Legislature.[278] The governor, however, vetoed it as an assault on state power.[279] In his words, "'victim-offender mediation' leaves out a key party in criminal litigation—the State of Texas" (an apt reminder that on the political right, libertarian, Christian, and law-and-order positions continue to tangle into complex configurations).[280] In 2017,

273. COMM. ON ARRANGEMENTS FOR THE 2012 REPUBLICAN NAT'L CONVENTION, WE BELIEVE IN AMERICA: REPUBLICAN PLATFORM 2012, at 38 (2012) (emphasis added), https://assets.documentcloud.org/documents/414158/2012-republican-national-convention-platform.pdf [https://perma.cc/KHB8-SU6F].

274. *Hearing on H.B. 3184 Before the H. Comm. on Criminal Jurisprudence*, 84th Leg., Reg. Sess. (Tex. 2015) (testimony of Rep. Mark Keough).

275. *Id.*

276. *Id.* (emphasis added).

277. Colson and Van Ness reassure their readers: "Did this mean there was to be no punishment [in the Bible]? Not at all. Restitution was understood to be retributive." COLSON & VAN NESS, *supra* note 225, at 50. Van Ness's own account appears more ambivalent. He reasons: "It is certainly possible to create a criminal justice system built on restitution and requiring multiple amounts for purposes of punishment. But the more satisfying explanation to me for the use of different amounts in Scripture is that the fundamental requirement was simple restitution, an eye for an eye." VAN NESS, *supra* note 224, at 211.

278. *84(R) History for H.B. 3184*, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/billlookup/History.aspx?LegSess=84R&Bill=HB3184 [https://perma.cc/H9JL-KACB].

279. GOVERNOR OF THE STATE OF TEX., PROCLAMATION, H.B. 84-3184, Reg. Sess. (2015), https://lrl.texas.gov/scanned/vetoes/84/hb3184.pdf#navpanes=0 [https://perma.cc/H4XU-Q7QX].

280. *Id.*

Keough tried again, limiting the bill to misdemeanor property crimes to make it more palatable.[281] Keough's bill is currently pending.[282] This example nonetheless illustrates a range of themes emergent in restorative justice's translations: the fusion of restoration and punishment theories to make restorative justice less radical, its active support by libertarian reformers engaged in a broader assault on social welfare spending and (particular kinds of) state power, and the idea supported—here, by everyone—that individual offenders rather than "society" should bear the costs of restoration.[283]

Read more generally, this case also exemplifies how neoliberal penal reform rests on more than economic logics. Market-oriented discipline is alone too anemic to carry the case for shrinking the penal state; American cultural sensibilities around personal security and irredeemable offenders mean taxpayers are willing to pay. As the director of criminal justice programs at the Charles Koch Institute told me, "arguments about cost savings and fiscal prudence can start a conversation, but they don't bring people over the finish line. *Moral arguments matter*."[284] Thus when organizations like TPPF and the Charles Koch Foundation deploy empathy and care in the service of shrinking government, they intend for these moral-relational values to be experienced noninstrumentally.

In 2016, the Charles Koch Foundation began funding Prison Fellowship, continuing a strategic (and, as some have observed,

281. H.B. 72, 85th Leg., Reg. Sess. (Tex. 2017). In 2016, McClendon resigned from the House due to illness. Patrick Svitek, *Former State Rep. Ruth Jones McClendon Dies at 74*, THE TEX. TRIB. (Dec. 19, 2017), https://www.texastribune.org/2017/12/19/ruth-jones-mcclendon-former-state-rep-dies/ [https://perma.cc/H6SW-Z3XQ].

282. *85(R) History for HB 72*, TEX. LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB72 [https://perma.cc/FW88-9F75] (last visited Nov. 16, 2019).

283. Indeed in 2013, Republican Senator Charles Schwertner, who boasts that he is working "to pass one of the most conservative legislative agendas in Texas history," successfully amended the state's civil mediation statute to facilitate criminal mediation for nonviolent, non-sex-related offenses including by authorizing a user fee of up to $350. S.B. 1237, 83d Leg., Reg. Sess., 2013 Tex. Gen. Laws 1993; *Senator Charles Schwertner*, TEX. SENATE, https://senate.texas.gov/member.php?d=5 [https://perma.cc/4W6P-NEB9].

284. Interview by Amy J. Cohen with Charles Koch Foundation and Institute staff, in Arlington, Va. (Apr. 13, 2018) [hereinafter Koch Interview].

uneasy) alliance with the religious right.[285] Foundation staff explained that they view evangelical Christians (people who express deep faith in personal transformation) as crucial allies in their broader criminal justice mission—here explicitly knitting together the economic and the moral into the same overarching vision.[286] To be sure, the Charles Koch Foundation, a savvy and powerful organization, may deploy whatever strategies and alliances it calculates will advance its larger political mission.[287] But I think to leave the point here stands to miss a deeper understanding of some of the lived experiences of American neoliberalism. Today no one is seeking to revive restorative justice as a form of market freedom as it was once sketched by Randy Barnett.[288] To persuade citizens that they are better off with "less state," libertarian and conservative reformers attempt to cultivate within Americans particular moral-relational sentiments, such as belief in grace and mutual aid. One Koch staff member, who had formerly worked for Prison Fellowship, described how in a restorative mediation a victim offered to help his own young offender find employment.[289] His colleagues agreed that this victim-initiated overture was an exemplary restorative aspiration.[290] Here, then, reformers committed to radical forms of market freedom commend restorative justice for how it nurtures altruistic, loving citizens.

CONCLUSION: RESTORATIVE JUSTICE AND THE LEFT

At the outset of this Article, I suggested that left legal scholars have argued that there is a fundamental distinction between decarceral programs motivated by humanitarian ideals, on the one hand, and decarceral programs motivated primarily to cut

285. U.S. DEP'T OF THE TREASURY, RETURN OF PRIVATE FOUNDATION: CHARLES KOCH FOUNDATION (Nov. 2017), http://990s.foundationcenter.org/990pf_pdf_archive/480/480918408/480918408_201612_990PF.pdf [https://perma.cc/LA8W-XZHC]. On the alliance, see, for example, Paul Blumenthal, *Koch Brothers Fund Group that Contradicts Their Ideology in 2014 Election Push*, HUFFPOST (Oct. 23, 2014), https://www.huffpost.com/entry/koch-brothers-gay-marriage_n_6035958 [https://perma.cc/4B2B-67VU].

286. Koch Interview, *supra* note 284.

287. *See, e.g.*, Jane Mayer, *New Koch*, NEW YORKER (Jan. 17, 2016), https://www.newyorker.com/magazine/2016/01/25/new-koch [https://perma.cc/SK3F-Q5CU].

288. *See supra* notes 97–103 and accompanying text.

289. Koch Interview, *supra* note 284.

290. *Id.*

costs, enhance efficiency, and shrink government, on the other. From this analytical perspective, which I shorthanded as market neoliberalism, the decarceral left criticizes the decarceral right for reproducing market rationalities and argues that economic discipline is both a morally impoverished and practically limited justification to ground reform of the American penal system. I think these arguments are significant. But I also suspect that they reflect a common intuition: namely, that actors on the left and right presume that value divergence is a defining distinction.

Restorative justice focuses left analysts on a different problem—namely, that of value convergence, specifically as terms like “community,” “empathy,” and “care” travel across partisan lines. For this reason, I suggested that when left scholars set moral values against putatively amoral rational economics, they stand to misapprehend how real-world actors define their own interventions in the contemporary moment. For some libertarian and conservative advocates of decarceration, shrinking public social services *is* a deeply held commitment to promoting the well-being of humans. Likewise, libertarian and conservative advocates may describe embracing VOM to limit the social and political functions of government and to enhance market freedom—but through the conservation of ethical relations.

From this analytical perspective, which I called moral neoliberalism, the challenges of bipartisan collaborations are different. All sides may advocate genuinely for empathy as a principle to order the relationships among people affected by crime, at the same time as all sides may disagree about what empathy requires from just political, penal, and economic systems. Of course, this argument does not mean that left criminal justice reformers must therefore reject projects like VOM because they are politically indeterminate, as I have illustrated, today in practice—not simply in theory. (To return to Texas, local branches of the NAACP and the ACLU registered support for VOM legislation, motivated, I presume, to reduce the human costs of incarceration.[291]) But it does mean that left criminal justice reformers

291. *Hearing on H.B. 167 Before the H. Comm. on Criminal Jurisprudence*, 83d Leg., Reg. Sess. (Tex. 2013); *cf.* JAMES FORMAN JR., LOCKING UP OUR OWN 229–31 (2017) (describing the benefits, as well as the costs, of finding small points of convergence across ideological difference as a strategy to undo mass incarceration).

will find themselves in spaces where they are not the only ones advancing moral-relational commitments—all sides may invoke care, empathy, and mutual aid to deepen their own competing political and moral world-making visions. Value convergence, I am thus proposing, can be a risky approach to forging alliances across political difference.

To be sure, this caution applies primarily to restorative justice collaborations unfolding within state systems. I do not intend to suggest either that moral restorative logics exhaust left analytics in a struggle against mass incarceration, or that the left is a coherent or singular thing. For example, the work of Democratic legislators in Texas is not the same as social movement organizers who today *also* turn to restorative justice, but from very different social locations in their struggles against mass incarceration.

Let me therefore conclude with a sketch of new (and old) radical left approaches to restorative justice. Today, social movement organizers aim to create spaces for healing and restoration outside of the state by experimenting in their own neighborhoods and communities, as they simultaneously organize to hold the state accountable for the harms it has perpetrated against people of color and others through decades of violent punitive mechanisms. More specifically, prison-abolitionist-anti-violence feminists and collectives of women of color describe efforts to document, concretize, and share strategies that marginalized communities have long deployed to manage conflict not least because they simply deem it unsafe to call upon law enforcement.[292] These organizers encourage dialogic responses to intimate and family violence (including child sexual assault) through informal interventions where communities "unite[] in holding perpetrators accountable."[293] In so doing, they aim to reclaim precisely the kinds of intimate, gendered, and sexual

292. *See generally* Ejeris Dixon, *Building Community Safety: Practical Steps Toward Liberatory Transformation*, *in* WHO DO YOU SERVE, WHO DO YOU PROTECT? 161 (Maya Schenwar, Joe Macaré & Alan Yu-lan Price eds., 2016); Rachel Herzing & Isaac Ontiveros, *Making Our Stories Matter: The Storytelling & Organizing Project (STOP)*, *in* THE REVOLUTION STARTS AT HOME: CONFRONTING INTIMATE VIOLENCE WITHIN ACTIVIST COMMUNITIES 207 (Ching-In Chen, J. Dulani & L. L. Piepzna-Samarasinha eds., 1st ed. 2011).

293. Andrea Smith, *Preface* to THE REVOLUTION STARTS AT HOME, *supra* note 292, at xvi. Organizers, to be sure, frequently describe the challenges of

harms that have legitimated punitive state interventions within many contemporary strands of liberal legalism and feminism—and hence precisely the kinds of harms that many first generation restorativists conceded to formal adjudicatory power.[294] Via highly detailed training manuals and practical curriculums, these radical organizers explore how community members can instill accountability within offenders through facilitated conversations that emphasize empathic listening, relationship building, and extensive forms of moral, material, and spiritual reparations. And they likewise consider how the justice provided by the state may diverge from victims' own contextual and contingent visions of what counts as meaningful remediation.[295]

These organizers, however, tend *not* to describe their activism as "restorative justice," conscious of its complex politics and contemporary alliances. For example, in a report describing community-based possibilities to address childhood sexual assault, a group called Generation Five explains:

community building: "developing community-based responses to violence cannot rely on a romanticized notion of 'community' that is not sexist, homophobic, or otherwise problematic. We cannot assume that there is even an intact community to begin with. Our political task then becomes to *create* communities of accountability." *Id.*

294. And the kinds of harms that many feminists argue continue to demand state-based, carceral, law-and-order responses. On resistance to restorative justice among anti-violence feminists today, see LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 92–94 (2018). For analysis of different feminist positions, see Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 225–28 (2018).

295. *See generally* CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE (2012), http://www.creative-interventions.org/wp-content/uploads/2019/05/CI-Toolkit-Complete-FINAL.pdf [https://perma.cc/SG9X-GVPA]; GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE (2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf [https://perma.cc/W9DA-WVCM]; THE CRITICAL RESISTANCE - INCITE! STATEMENT ON GENDER VIOLENCE AND THE PRISON-INDUSTRIAL COMPLEX (2008), https://incite-national.org/wp-content/uploads/2018/08/CR-INCITE-statement-2008discussion.pdf [https://perma.cc/4Z9E-MD65]. For work describing some of these interventions, see Alisa Bierria, Mimi E. Kim & Clarissa Rojas, *Community Accountability: Emerging Movements to Transform Violence*, 37 SOC. JUST. 1, no. 4, 2011–12; Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 98–101 (2017); and Kim, *supra* note 294, at 226–27.

> Our investigation began with a conversation about Restorative Justice because this was the framework with which we were most familiar. While this approach offered us a valuable starting point, we quickly rejected Restorative Justice models because of their co-optation by the State . . . . We also questioned the implication that a sense of justice had been present in the past that it was possible to restore. We then spent two years studying existing alternative models of justice—such as Hollow Waters (a model by First Nations people in Canada),[296] INCITE,[297] the Mennonite Circles of Support and Accountability,[298] Navajo Peacemaking processes,[299] as well as Cuba's neighborhood Committees for the Defense of the Revolution.[300]

These organizers thus invoke different genealogies to describe their restorative practices and to distinguish them from competing institutionalized approaches. To that end, they also frequently use different terms such as "transformative justice"[301]

296. In 1984, the Hollow Water First Nation created an extensive community-based response to the extremely high rates of sexual and family violence plaguing community members. For an overview of the Hollow Water model, see THÉRÈSE LAJEUNESSE, COMMUNITY HOLISTIC CIRCLE HEALING: HOLLOW WATER FIRST NATION (1993) and RUPERT ROSS, RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE 29–48 (1996).

297. INCITE! is "a national activist organization of radical feminists of color advancing a movement to end all forms of violence against women, gender nonconforming, and trans people of color through direct action, critical dialogue, and grassroots organizing." *Back cover* to THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (INCITE! ed., Duke Univ. Press 2017) (2007); *see also* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (INCITE! Women of Color Against Violence ed., 2006).

298. These circles originated in the 1990s in Canada as (initially Mennonite-affiliated) support groups to help reintegrate high-risk sex offenders into communities. *See, e.g.*, Robin J. Wilson, Franca Cortoni & Andrew J. McWhinnie, *Circles of Support & Accountability: A Canadian National Replication of Outcome Findings*, 21 SEXUAL ABUSE 412 (2009).

299. *See supra* note 144.

300. GENERATION FIVE, *supra* note 295, at 4.

301. In the North American context, Ruth Morris, a Canadian prison abolitionist, is often credited with popularizing transformative justice. *See* MORRIS, *supra* note 145, at 3–5. Like other left restorativists, in the 1990s, Morris began to argue that restorative justice "leaves out . . . the social causes of all events" and doesn't sufficiently grapple with "distributive injustice." *Id.* at 4–5. She advocated for transformative justice instead. *Id.*; RUTH MORRIS, A PRACTICAL PATH TO TRANSFORMATIVE JUSTICE (1994); Ruth Morris, *Not Enough!*, 12 MEDIATION Q. 285 (1995). For Zehr's own early call for restorative justice that is transformative, see *supra* note 136. *See also* M. Kay Harris, *Transformative Justice: The Transformation of Restorative Justice*, *in* HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 54, at 555–65.

or "community accountability."[302] But they draw nonetheless on many of the same restorative ideals that animated early left community mediation proponents and VORP advocates: that much crime is interpersonal violence not an offence against the state; that interpersonal and structural violence are fundamentally intertwined; that healing interpersonal relationships must therefore include efforts to transform preexisting unjust social conditions; that political battles for racial and economic justice and political battles for restorative justice therefore advance overlapping visions; that community and social responsibility must therefore accompany personal responsibility but that personal responsibility is nonetheless crucial; and that personal responsibility should evolve through processes of restoration, not retribution—and here with minimal or aspirationally no state involvement or coercion.

This is informalism, delegalization, and decentralization (and to an extent it is mediation) cast once again as left-structural visionary politics. Organizers conjure alterative community-based social orders as responses to racial, economic, and social hierarchies. In so doing, they are revitalizing perhaps the most radical *and* practical aims plausible to ascribe to left restorative justice today. Namely, that while organizers wage political battles against the state for racial and economic justice and procedural reform, they can simultaneously create spaces for people to opt out—that is, to manage conflict and violence by cultivating love and forgiveness as well as armistice, separation, and safety through relationships and forms of reparations meaningful to them.

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302. Community accountability is:

> [A]ny strategy to address violence, abuse or harm that creates safety, justice, reparations, and healing, without relying on police, prisons, childhood protective services, or any other state systems. Instead of police and prisons, community accountability strategies depend on something both potentially more accessible and more complicated: the communities surrounding the person who was harmed and the person who caused harm.

Ching-In Chen, Jai Dulani & Leah Lakshmi Piepzna-Samarasinha, *Introduction* to THE REVOLUTION STARTS AT HOME, *supra* note 292, at xxiii; *see also* Bierria, Kim & Rojas, *supra* note 295 (collection of articles on community accountability projects); *Community Accountability: Creating a Knowledge Base*, CMTY. ACCOUNTABILITY BLOG (May 26, 2012), https://communityaccountability.wordpress.com/ [https://perma.cc/N4JJ-WQY9].

This final example illustrates how even as virtually all restorativists emphasize community, relationality, and empathy as definitional values, these values are simply not flexible enough to stake a political consensus. This is because many organizers and others directly affected by the criminal justice system experience "community" and "relationality"—as strategies and values of conflict resolution—as deeply constituted by structural inequalities and generations of racial violence. Hence what these left restorativists want is a fundamental transformation of unequal systems.

For many, this desire means a commitment to the state as a crucial vehicle of social change. As Angela Davis argues, "a justice system based on reparation and reconciliation" requires "radical transformations . . . of structures of domination," including, she suggests, through dramatically reimagining public education and free healthcare systems[303]—which, to note the obvious, is hardly the public social vision endorsed by the Charles Koch Foundation. Braithwaite likewise describes a welfare state as a minimum political condition to sustain successful restorative justice interventions.[304]

At the same time, scholars on the left have also traced how actually existing restorative systems follow from egalitarian social and economic conditions that may emerge through voluntary forms of social organization as much as through centralized state systems. This is what David Graeber, in work on indigenous American penal systems, calls "'baseline' communism" such as the sharing of food and shelter so that individual autonomy and nonsubordination are mutually guaranteed, and property arrangements where there are few opportunities to convert inequalities of wealth into power over others and hence limited incentives to pursue material self-interest and behave badly.[305] Or what Christie, based on sketches of European small-scale collectivities, describes as including social interdependence where no social group holds a monopoly on power, and where group members share specific values such as "each human body contains a

303. ANGELA DAVIS, ARE PRISONS OBSOLETE? 107–08 (2003).

304. John Braithwaite, *The New Regulatory State and the Transformation of Criminology*, 40 BRIT. J. CRIMINOLOGY 222, 233 (2000).

305. David Graeber, The Rat's Wisdom 15–16 (chapter in unpublished manuscript) (on file with author).

sacred soul."[306] Or what Garland, invoking the work of Mary Douglas, identifies as "extensive network[s] of insurance and gift-giving" where mutual trust and economic security means "restitution can reasonably be expected and relied upon."[307] From these perspectives, restorative justice can unfold through multiple forms of social ordering that may mix voluntary exchange and community control with state interventions.[308]

This genealogy of American restorative justice has thus argued *not* that questions of criminal justice reform are intrinsically moral-relational issues invariably expressed as sentiments such as remorse, empathy, accountability, and forgiveness. Rather, it has attempted to show how significant questions of policy, politics, and institutional design are now articulated in a moral language—with highly contingent and divergent political ambitions and effects. Today, the financial and human costs of mass incarceration have produced renewed interest in restorative justice among a wide range of activists, reformers, and scholars.[309] This interest, I have argued, includes a common left/right grammar of relationality. But rather than suggest that value convergence should therefore create new opportunities and generative alliances, I have explored instead how shared moral values can reflect deeply unshared political visions—a perspective that critical legal scholars elide when we presuppose thoroughly rational, atomized, individualized, and "market-based" understandings of neoliberalism.

306. NILS CHRISTIE, LIMITS TO PAIN 81–91 (1981); S. COHEN, *supra note* 77, at 229.

307. GARLAND, *supra* note 16, at 47.

308. *See generally* BRAITHWAITE, *supra* note 11; *cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

309. Including, I should add, among American ADR scholars. For example, in 2018, Jennifer Reynolds started a listserv for law professors interested in criminal-side ADR. In 2019, Andrea Kupfer Schneider and Cynthia Alkon published a textbook for law students devoted to "negotiating crime." CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT (2019).