

Justice-Rendering Schemas: A Typology for Forms of Justice And a Prolegomenon for Transformative Justice

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Abstract. This article provides a cross-cultural typology of justice-rendering approaches. It provides a framework for examining various systems or orientations of justice. By providing a typology we are in a better position to understand how various constitutive elements differ in each, and how justice is formulated. We are in a better position in understanding our own "criminal justice system" and possible directions for change. The typology is offered as a pedagogical, didactic, and heuristic schema that encourages more comprehensive understanding of justice-rendering practices in diverse cultures. In our discussion section we develop some suggestions on conceptualizing various justice-rendering systems as "assemblages" (Deleuze and Guattari, 1987), semiotic regimes, and some thoughts on furthering a transformative justice. Necessarily, a transformative justice needs a subject. We suggest a possible conceptualization in Schema QD.

Introduction

This essay is a first approximation in the development of a typology of justice rendering-approaches, or paradigms for thought. It furthers the thrust of Kraska (2004) in developing eight orientations to "criminal justice," expanding it to an international focus. It is meant as an organizing, didactic, pedagogical, and heuristic schema in understanding various systems of justice and their constitutive elements. It portrays (see Figure 1) twelve approaches in justice along with nine elements of clarification and comparison. It is not exhaustive, in fact it is meant to instigate dialogue and critique. Issues such as the separation of justice from law, the difference between distributive and retributive justice, multiple and often competing forms of justices, and the political economic determinants of each justice approach surely can be the basis of further analysis. This essay is less ambitious. In an age of overwhelming internet-induced information flow, global conflicts, new forms of surveillance and control, ever more micro and macro disciplinary mechanisms, transitional societies, and competing models of justice, we are in need of organizing schemas, "ideal types" (Weber, 1978), that provide us with a handle or working

orientation on the complexities involved. Simplification, off course, comes with a cost. It is but a step toward more comprehensive analysis and ultimately, the development of more humanistic forms of justice. Accordingly, this essay provides, in a short two-page diagram, some key justice approaches and how they differ according to select criteria.

This schematization is also important in the context of a movement in the last decade away from identifying university departments as "criminal justice" to something more comprehensive, such as social justice or justice studies.¹ There is a growing recognition that the study of social control is more comprehensive, more interdisciplinary in nature than the title "criminal justice department" suggests. In studying our own criminal justice system here in the US we can derive tremendous insights from other forms of justice in practice worldwide.

Previous orientations in theorizing criminal justice have been provided. Kraska's (2004) illuminating eight orientations in criminal justice highlights the need for theorizing the "criminal justice system" (see also Hagan, 1989; Quinney, 1974; Marenin and Worrall, 1998; Duffee, 1990; Bernard and Engel, 2001; King, 1981; Braithwaite and Pettit, 1990). Thus in Kraska's framework four orientations are concerned with what we generally perceive as the formal criminal justice system, the other four, state and non-state responses outside of the formal criminal justice system. He compares each along twelve dimensions. Other typologies have been developed that connect theories of crime with criminal justice policy, justice and court models, and level and type of interventional practices (see Einstadter and Henry, 1995, 18-19; Henry and Milovanovic, 1996, 189-196). Black, in *Behavior of Law* (1976), has also specified four "styles of social control" (penal, compensatory, therapeutic and conciliatory), although Einstadter and Henry (1995) and Henry and Milovanovic (1996) argue that Black's models do not sufficiently deal with structural components. In the present article, we choose not to stay within the orientation of

the U.S. form of social control, but extend to the global order. There is much to be learned from other cultural practices. We need to expand our imaginary horizon. Our approach seeks to build on these previous insightful works in theorizing criminal justice. Accordingly, we devise a preliminary schematization of twelve justice-rendering approaches, each compared along nine dimensions. Clearly, this is not exhaustive.

This article will first provide the constitutive elements of our schema. It will follow with a short explication of each approach. A discussion section will follow that will critically examine this initiative. We conclude with a discussion about the possibilities of a transformative justice.

Constitutive Elements.

The selected elements for comparison in our schema include:

1. *Origins/problem defined.* This briefly portrays the problem and/or origins;
2. *Legitimation.* This focuses on the underlying justifying principle, the feeling of righteousness or correctness of some order. Why is it that people feel compelled to obey?² ;
3. *Rationality.* We make use of Weber's typology³ of law-making and law-finding, but modify it to accommodate justice practices. Weber introduces four ideal types: formal rationality, substantive rationality, substantive irrationality, and formal irrationality. We can, much like in law-finding, apply this to the underlying logic of the justice principle involved, although we also are cognizant of Derrida's (1997) keen distinction between law and justice, the former being more economic and calculation, the latter, more akin to a gift and a duty to the Other. Thus each justice-rendering practice lays purchase to a more dominant form of rationality;

4. *Principle of justice*. Here we specify what form justice appears. What specific principle does the social formation under consideration makes use of in deciding on a fair resolution? Often, procedural and substantive justice can both be captured by the summaries provided. In other cases, the expanded commentary sections will elucidate the differences;

5. *Primary players*. The key question here concerns who are most active in the process of justice rendering;

6. *Frame/context for application*. Understanding, or reality construction, appears contextually. We can situate an issue in a very wide spatiotemporal framework, on the one hand, or in a very narrow one on the other (see Kelman, 1981). For example, the notion of "excusability" or understandability as to why a person committed a crime could be situated in a narrow framework where the only relevant issue is *mens rea* and *actus reas*, or a very wide one in which we look at both micro and macro levels for their contributions. The wider the context, the more likely we are to find understandability and excusability; conversely, the narrower, the more incriminatory. We find, for example, that the relationship between excusability and class in legalistic proceedings is inverse; that is, the higher the class standing, the more excusability, hence the manifestation of the pyramid structure that official crime reports indicate as to the relation between SES and official crime;

7. *Transparency of decision-making*. This is the question of knowing who is the decision-maker and what criteria are employed. Star-chamber proceedings during the dark ages provided a closed system, whereas in New Zealand, the Maori's notion of restorative justice opens the process up to not only the direct parties of the conflict but to families and the community;

8. *Role of negatively impacted*. Here we want to know how actively involved are the more directly impacted parties. This could be low, where they are passive, such as in the traditional due process model, or high as in the case of mediation programs in

restorative justice where the disputants take on active roles. In other cases it may be more mixed, such as in transitional justice: on occasion, revolt takes place forcefully in the streets in regime change; on other occasions, it is a small elite that leads, a “revolutionary vanguard”; yet in other cases, such as in restorative justice, it is the disputants that are most active;

9. *Discourse*. Each justice-rendering approach appears with a particular discourse. Signifiers and narratives have a logical construction and mold how reality is constructed.⁴ We will apply Lacan’s (1977, 1991)⁵ four discourses to indicate the discourse more likely to be used. They include: the discourses of the master, university, hysteric, and analyst. His is most useful because of the many levels within which it operates and because of the tremendous impact his work has had on our understanding of structured discourses. Narratives, as many have argued, are not just neutral means of communicating one’s desires; rather they are structured with effects, as insightfully explained by the linguistic relativity principle (Whorf, 1956), language-game tradition (Wittgenstein, 1958), and by those advocating the desirability of a multiplicity of “petit narratives” (Lyotard, 1984, 1999). Lacan (1977), however, shows how language often speaks the subject. The notion of justice, therefore, is a social construct. The use of language can frame the construction of justice and its application⁶;

10. *Critical commentary*. We include a selection of critical authors on the respective approaches (publication dates are included in the reference section).

Figure 1a. Typology of Justice-Rendering Approaches

	Crime Control Model/Justice	Due Process Model/Justice	Actuarial Justice	Inquisitorial Justice	Cadi Justice	Customary Justice

Origins/ Problems defined	Hobbes; "state of nature"; irreconcilable differences; bureaucratic priorities; presumption of guilt	Enlightenment period; unequal treatment; irreconcilable differences; common law; presumption of innocence	Scarce resources; predict dangerousness; efficient processing; risk assessment; risk society; uncertainties; border crossings	Roman law; Medieval era; Catholic Church; often, civil law based; overcome disorder; presumption of guilt	Religion; divinity; unexplainable; disorder; Shari'ah custom defined; uncertainties, and instabilities	Natural order; boundaries transgressed mechanical solidarity; br bonds; peace unity disrupt supernatural
Legitimation	Maintaining order: conviction and clearance rates	Inalienable rights; rule of law; quality control	Actuary; cost effectiveness; social defense	Administrative justice; rule of written laws	Divinity; Qur'an	Custom; mut aid; tradition spirituality; supernatural
Rationality	Substantive irrationality	Formal rationality	Substantive rationality	Formal rationality	Formal irrationality	Substantive irrationality
Principles of Justice	Organizational; thin blue line; protection from chaos; "war on crime"	Formal rationality	Substantive rationality	Formal Rationality	Formal Irrationality	Substantive irrationality
Primary Players	Police, prosecutor	Jury, opposing lawyers, judge	Actuary, profiler, actuarial tables, risk managers	Judge(s), lay judges, legislators	Cadi, Mullah	Elders(s), cla community, family; sham
Context for application	Medium	Narrow	Narrow	Medium	Wide	Wide
Transparenc y of decision- making	Low	High	High	Medium to Low	Low	Low
Role of agent impacted	Low	Low	Low	Low	Medium to High	Low to High
Discourse	Battle metaphor; master discourse	Battle metaphor; university discourse	Statistical/ risk discourse; master discourse	Administrative; university discourse	Religious duties; master discourse	Indigenous; master disco
Critical Commentary	Parker, Nasheri, Herman, Yant, Duff, Ashworth	Packer, Moore, van Koppen, Penrod	Feeley, Simon, Haggerty, Ericson, Zinger, O'Malley	van Koppen, Penrod, Merryman	Kamali, Nyazee, Makdisi, Hasan, Jackson, Haneef	Hoebel, Elech Weber, Sumr Malinowski

Figure 1b. Typology of Justice-Rendering Approaches

Environmental	Socialist justice	Family	Transitiona	Restorative Justice	Transform
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Justice		Model	I Justice		Justice
Global warming/degradation; water, natural resources, air; toxic dump sites; environment racism	Capitalist exploitation; repression of species being; revolution to socialism and communism	Maturation in nuclear family; conciliable differences; non-stigmatizing resolutions	Past injustices; regime change; marco: state change, post colonial, indigenous cultures; replacing despotic rulers	Conflict/transgressions; Quaker and indigenous resolutions in "mechanical" non-state and state societies	Negative investment; harm/hierarchy; harm reduction/repression rather than becoming rigidities, stasis; different mechanisms; react
Global Order; world community	Proletariat rationality; "transformative"	Patriarchal: nuclear family	Trans historical; global justice; universal rights of persons	Re-establish order, solidarity; peacemaking	Permanent revolution; actualization of differences/ solidarities singularities
Formal Rationality	Substantive irrationality	Substantive rationality	Substantive rationality	Substantive irrationality	Substantive rationality/irrationality
Sustainability; burdens equally distributed	Needs/ abilities principle; administrative "dictatorship of proletariat"	Ethic of cave; reintegrative shaming; reconciliation	Restorative; coming to terms with past harms; apology; compensation	Reintegration; healing; forgiveness; make amends; restore; reconciliation	Ethics of Other; soft care; needs, abilities; restorative justice; contingent universality
U.N.; NGOs; impacted groups; state agencies	State; peer/popular Tribunals	Parental authority	Truth and Reconciliation/ Reparations tribunals	Disputants; Mediator; Facilitator	Disputants/communitarian "multitude"; alterman Person; emergents "people yet to come"
Wide	Wide	Wide	Wide	Wide	Wide
Low-High	Low-High	Low-High	High	High	High
Low-High	Low-High	Low	Low-High	High	High
Sustainability; discourse of hysteric/university	Communal; master/university/hysteric/analyst	Kin relations; master discourse	New order; discourse of hysteric/analyst, master	Reconciliation; Discourse of Hysteric/ university	Becoming; petit narrative; Discourse of analyst; Hysteric; conscientization; Discourse of Other
Cole/Foster, Halsey, Taylor, Middleton, Seis, Agyeman et al	Marx/Engels, Pashukanis, Tse-Tung, Lenin, Solomon	Griffiths, Gilligan, Clement, Sevenhuijsen	Teitel, Fanon, Bhabha, Said, Tutu, Spivak, Elster, Olsen	Braithwaite, Zher, Sullivan/Tift, Acorn, Van Ness/Strong, Redekop	Levinas, Derrida, Unger, Hardt/Negri, Deleuze, Freire, Pavlich, Wo

Justice-Rendering Approaches

In this section we provide a brief overview of each justice-rendering approach. It is not to be construed as an exhaustive explication, but more in the form of providing orientation points necessary for locating differences.

Crime Control Model/Justice. This orientation ⁷ responds to the overwhelming caseload of the courts. It can be traced to a Hobbesian underlying assumption of the "state of nature" and the irreconcilable nature of crime. Faced with the need to move the processing of cases, this model relies on bureaucratic imperatives in its

functioning with an underlying presumption and working definition of guilt. It's legitimation principle is identified with the ability to obtain high clearance and conviction rates. Plea bargaining and moving the assembly line become priorities. Even similar cases can have vastly different outcomes (substantive irrationality). The principle of justice is more focused on protecting society from immanent chaos, the "thin blue line." Key players in this model are the police and prosecutors. An arrest is seen as presumptive evidence that the defendant needs to overcome. Decision-making makes use of contexts and frameworks that go outside the dictates of formal rationality and due process, with the dictates of bureaucratic efficiency being determinative. Understanding precisely how a decision is made remains a mystery to recipients of the process. "Let's make a deal" justice arrives with wide disparities in outcomes, with little formal guidance in the process. More recently in the U.S., the Supreme Court has ruled in favor of the use of plea bargaining. The defendant's role in the process is minimal, relegated to passive acceptance of the deals being made. The discourse makes use of a battle metaphor (opposing lawyers doing battle; winner takes all; being "shot down"; bullpen; etc.). It is a master discourse in which bureaucratic lingo rooted in the battle model provides coordinates for linguistic constructions and use, within which an ideology of efficiency, expediency, and finality prevail.

Due Process Model/Justice. This orientation, in contrast to the crime control model, has its roots in the Enlightenment, Rousseau's answer to Hobbesian's "state of nature." It responds to the excesses, vastly unequal treatment, and barbaric forms of punishment of the dark ages. Most often, it is built on the common law tradition with fundamental fairness rooted in the rule of law and principles of inalienable rights (formal rationality, formal equality). The rules themselves provide the legitimacy of the system. Results are more uniform and predictable. Unlike the assembly line of

the crime control model, this model focuses on quality control, the ever present presumption of innocence and the possibility of error (Packer, 2004). Formal equality and uniform application of standards are the bases of justice. The primary players are jurors, opposing lawyers, and the judge. The formal proceedings assure that equally situated sides battle for the truth with an impartial judge or jury objectively deciding on the merits of the case. The context of application of the law is narrow; it is focused on the letter of the law. All are aware or made aware of the principles of justice and processes involved in making a decision. The process is highly transparent on its face. The defendant, however, plays a minor role in the process, relegated more to spectator. The discourse in use is rooted in a battle metaphor (opposing sides, battle for the truth, etc.). A dominant legal discourse, "legalese," is what provides the coordinates for narrative constructions, logic, and rationality. Accordingly, this university discourse provides a narrow framework within which reality is constructed.

Actuarial Justice. This orientation's origins stem from scarce resources and the demands of social defense. Danger and dangerous persons lurk in the real world, and this model is less interested in etiology than in protection of society from impulsive transgressors. Accordingly, the response to uncertainty is prediction instruments, risk assessments, and profiling. Legitimation revolves around accurately predicting dangerousness and minimizing risk. It is substantive rational to the extent some actual prediction instrument is being used which is often external to what is espoused by due process; with this instrument used uniformly, it is a rational system in the Weberian sense of prediction. Hence, the principles of justice are probabilistic which focuses on the reduction of possible harm. The primary players are the actuary, profilers, actuarial tables, and risk managers. The context or framework for application is narrow in the sense that a small group of identifiable determinants are

constitutive of the prediction instrument. The transparency is high in so much as we can eventually locate the instrument being employed and its constitutive elements. The role of those negatively impacted is low. Agents are reduced to passivity. The discourse is more statistically based. The discourse of the master prevails where the logic of the risk assessment instrument prevails over other discourses.

Inquisitorial Justice. This orientation can be traced back to the Roman law tradition, the medieval era, and the Catholic Church. It is rooted more in the civil law tradition. It was and is a way of dealing with disorder. It's medieval expression was the barbaric form in which confessions were elicited by the most hideous forms of pain imaginable in order for electing the confessions. More recent expression, however, maintains the inquisitorial nature – presumption of guilt – without the extreme excesses of the medieval era. Legitimation is more rooted in administrative justice where the judge(s) is a much more active party in evidence gathering and questioning of witnesses. Legitimation is based more on written laws themselves. It is therefore more formal rational. The principle of justice is more focused on formal equality and uniform application of fairness. Unlike common law, this civil law form does not build on precedence. Rather, legislators codify what is appropriate law. The primary players therefore are the judges, lay judges, lay assessors, and legislators. The context or framework of application are medium to the extent that judges or lay judges make use of wider parameters in their fact-gathering investigative processes. For example, often times a judge can question a defendant's background. Transparency is medium to high; high to the extent decision making is based on the rule of law; medium to the extent that defendants are not fully cognizant of the internal cognitive processes of the investigative authorities (judge(s), lay judge(s), lay assessors). Often the lay assessors first vote followed by a decisive judge's vote. The role of the agent negatively impacted is low in so much as s/he is reduced to

passivity in the process. The discourse employed revolves around administrative justice and the rule of written laws. Hence, this is a university discourse in which narratives, signifiers, semiotic codes are restricted to a particular form of construction, and accordingly, a particular way of constructing reality.

Cadi Justice. During the upheavals in the Middle East and surrounding areas between the 7th and 13th centuries (the so-called Abbasid era) the need emerged for the Caliphs (prophets) to better govern the land. The answer was the Cadi, a judge who would not only help resolve conflicts but also try crimes against God. The Cadi was a response to disorder that could not be kept in check by otherwise community norms. It dealt with disorder, unexplainables, otherworldly events. Guidance and legitimation is by way of the Koran (Qur'an). Decision-making is formal irrational to the extent that even seemingly similar situated peoples in conflict would invariably receive different treatment as the concrete situation determined the rulings. The involved parties cannot with certainty determine how precisely the Cadi came to his decision, making it irrational in the Weberian sense, and low on transparency. The principle of justice focuses on substantive fairness and is flexible in how it arrives at a decision. The primary players are the Cadi, or in other forms, the Mullah. The framework or context within which the Cadi works in coming up with his decision is wide. The role of agents impacted is high since the Cadi actively elicits their input to the conflict at hand. The discourse employed is a master discourse (the Cadi, in drawing from his understanding of the Koran, has overall power in employing narratives that are enshrined in God's words), and university discourse (reliance on a body of material, the Koran).

Customary Justice. In this orientation, origins of problems are traced to transgressions of natural boundaries, of broken bonds, and disruptions to peace and

unity. Legitimation is traced to custom, tradition, mutual aid, spirituality, and the supernatural in an otherwise stateless society. Sometimes sorcery, witchcraft and magic are constituents of legitimation. Often a Creator or existence of spirits are stipulated and substantive irrationality prevails, as some standard theoretically does exist within which decision-making takes place, but outcomes are diverse, even given like cases. The spirit has access to the truth and it can pass judgment on a case. Sometimes it is the shaman or sorcerer who has access to the truth, often by the use of magic. And at other times it is the clan's elders who do law-finding through negotiation, mediation and arbitration. The principle of justice is concerned with re-establishing broken bonds, re-establishing order, peace and unity. Often sought in justice rendering is reconciliation, reparations to put things back in peaceful, holistic order. Ostracism and banishment are used in worst cases, but with each, the culprit is given an opportunity to re-unite back in the clan, and, often, the record of transgression is erased from community memory. The primary players are the elders, clan, community, family, shamans, and sorcerers. The context or framework for application is wide, and the transgressor's act is placed in a holistic context. The transparency of the decision-making is low, as the final decision rendered may have invoked various supernatural entities in coming up with a decision in a particular case. The transgressor or disputant has very little access to the actual process by which the final decision is made. Even when the elders mediate or arbitrate and somehow invoke a divine being or the spirits, the disputants never know with certainty what they may be saying. The role of the person impacted is at times low where s/he is a recipient of an other worldly power's pronouncement; at other times, it is high, where disputants or, more often, their representatives (family, clan) more actively try to resolve the case by way of the mediation efforts of elders. The master discourse is prominent. A somewhat inaccessible matrix of master

signifiers are invoked, coming from a spirit or Creator, invoked by a shaman or sorcerer, which are the coordinates of narrative constructions, logic, and rationality.

Environmental Justice. In this orientation, the problem is global degradation, pollution of natural resources, toxic dump sites, and disparate impact. Legitimation is sought in the idea of a global order, a world community. Formal rational decision-making is of a premium. Principles of justice revolve around the notion of sustainability and burden being equally distributed. Primary players include non-government organizations (NGOs), United Nations forums, organizational efforts and struggles of directly impacted groups, and State agencies charged specifically with environmental issues. The context and framework for application is wide, it is global, as we become more aware of the effects of pollutants in one area having ramifications in other areas. The transparency of justice rendering is high to low; high, when organized groups struggle from beginning to end with their efforts, in the process gaining an acute understanding of the larger issues; low, when a struggle against environmental damage is relegated to lawyers and legislators where decision-making becomes more hidden in actions and words. The role of the agent impacted may be, at times, high, where a struggling group organizes and fights till the end; it can also be low where the person(s) affected are rendered passive recipients of political and bureaucratic pronouncements. The discourse in use is the language of sustainability and hence in the form of the discourse of the university; it can also be the discourse of the hysteric where laypersons seek expert's advice concerning the effects of pollution and environmental degradation. Hence, for the latter, those affected will incorporate the technical lingo of the experts in further construction of the problem.

Socialist Justice. The capitalist mode of production is said to maintain hierarchy and exploitation, and denies a person's species being. It is also said that this mode of production, because of its internal crises, will eventually transform into socialism and then communism, "the higher form." Legitimation in socialism is based on proletariat rationality, but is also, at this stage, a "transformative" principle which culminates with communism and substantive equality. Thus substantive rationality is maintained in the former; substantive irrationality in the latter. The principle of justice is the "needs" principle, or more accurately, the needs and abilities principle.⁸ During the transitional period, the "dictatorship of the proletariat," proletariat rationality would be engendered. During the higher forms, the needs/abilities principle would be guiding. The primary players during socialism is the State and revolutionary tribunals; during the higher form, popular and peer tribunals. The context and framework from which justice is established is wide as both micro and macro level determinants are connected with individual excesses. The transparency of the decision-maker is low to high; low, in the earlier transitional stage where the dictatorship of the proletariat rule with a particular ideology; high in the higher forms where community mutual aid would also assure maximal participation in all decisions directed at the person. The role of the agent impacted would be low to high; low, in the initial stage of socialism where the person is subject to the State's transitional policies and the dictatorship of the proletariat at all levels; high in the higher forms where the agent is an active participant in her/his self development. The discourse of the master, often appearing in the discourse of the university (proletariat ideology) and hysteric (persons in struggle) would be most prominent in the socialist forms, giving way to the discourse of the hysteric/analyst in the higher forms. The former because during the transitional phase the proletariat would be in struggle in finding its new consciousness, aided by a ubiquitous proletariat discourse, enforced in direct administrative commands. The latter due to the communal, non-hierarchical and

substantive irrational principle of reasoning involved. The higher forms would focus on the discourse of struggle, but with a non-directive response by the other (discourse of the analyst) in developing ever new master signifiers that would be more reflective of being and becoming.

Family Model. This orientation was developed by Griffith (1970) in contradistinction to the "battle model" (due process and crime control models) postulated by Packer (2004) in our first two models of justice-rendering approaches. It is rooted in the family and the development of the child who inevitably would transgress during maturational development. Unlike the battle model, the family strives to both demonstrate the wrongfulness of the act through punishment of various intensities, and is also engaged in the reconciliation and the reintegration of the child back into the family with respect and love, without attributing a master status on the child. This non-stigmatizing form of shaming (Braithwaite, 1989) brings back order and stability in the family. It is then suggested that this model can be employed more macroscopically. Given, in Griffiths' model is a paternalistically governed nuclear family with clear identities of father, mother, child. The principle of legitimation is patriarchy, the father's word; or, where there is a matriarch, more often there is still engendering the principles of a patriarchal order. Substantive rationality prevails, since some standard is employed and there is an attempt to treat all children in the same family, given a similar transaction, in a similar way. It is substantive to the extent that principles of patriarchy are employed, being only one of other possibilities (i.e., alternatively based on equality between father and mother; non nuclear families; LGBTQ orientations, etc.). The principle of justice is an ethic of care, reintegrative shaming, and reconciliation. The primary player is parental authority, with the emphasis on the sanctity of the patriarchic order and the father figure. The context and framework of application of justice-rendering is wide, since

the parental authority seeks to contextualize the indiscretions. The transparency of the parent could be low to high; low when no explanation is provided to the transgressor; high when a full explanation of the punishment is provided. The role of the child is low, for s/he is seen as immature, undergoing the pangs of maturation. The master discourse is prominent, rooted in phallogentrism.

Transitional Justice. This orientation is focused on regime change from a previous repressive order to, ideally, a new, more just order. This has been very prominent during the 1980s and 1990s in Central and South America, Eastern Europe and Africa and is still ongoing. The principle of justice at play is transhistorical, often seeking global justice principles and universal rights. It is substantive rational to the extent some principle of justice is articulated. It is external to the previous dominant form of a repressive order. Once at play, it is applicable to all similarly situated. The principle of justice centers on coming to terms with the past repressive regimes and what to do with the previous exploiters. Often, formal equality, identified with some conception of "universal rights of man," becomes guiding in establishing principles of justice. Primary players include truth and reconciliation and reparation tribunals. At other times, the traditional criminal justice system is applied with traditional forms of punishment. The context and framework for application are wide, for, transformers are seeking an understanding of the macro-level context of the previous repressive order; trying, for example, to determine responsibility of "higher ups." It is high also because the new order is trying to establish wide-ranging understanding and ways of effectively dealing with the past in order to move on to the future. The transparency of decision-making is high, since much public attention centers on those responsible for past harms and what to do with the culprits. Existing here are highly publicized investigations, arrests, hearings, trials, forums, forms of punishment, and tribunals for reparations. The role of agent(s) impacted can be low to high; low, when the

emerging State takes on exclusive responsibility of the prosecution of cases; medium, to the extent that the State's organs elicit narratives/stories of those previously harmed; high, where mass and sometimes spontaneous demonstrations in the streets temporarily lodge all powers with those directly repressed by the previous regime. The discourse of the hysteric is most prominent, for the previously exploited seek a new identity, a new order, coming to terms with the past – a continuous struggle – with the consequence that an ever new identity is being formulated during the transitional phase. Beyond this, we can only speculate with the historic examples before us: in some cases, a new repressive regime is resurrected and thus the discourse of the master prevails; in some cases, an orientation on identity politics is dominant with a nostalgic return to origins; on the other end of the continuum are emergent States in which the search for identity are continuous, such as in post colonial transitions, and hence a discourse of the hysteric *and* analyst is at play.

Restorative Justice. This orientation has had a long history from ancient times and stateless societies. Conflict was often assumed to be ubiquitous and in need of resolution, in order to re-establish order, peace, and solidarity. It has been a continuous practice of indigenous peoples worldwide. In more recent times, the influence of the Quakers was quite apparent. Legitimation is based on the principle of peacemaking. Justice rendering in this model is substantive irrational to the extent that each person is seen as unique. Notions of justice vary with the uniqueness of the person. Even apparently similarly situated do not necessarily witness a similar outcome. Principles of justice include making amends, reparations, healing, forgiveness, apology, taking active responsibility for one's harm, and reintegration. The notion of shaming has sometimes been a component. The primary players are the disputants, family, community, mediators, and facilitators. Components of the

process include: a face-to-face meeting between the victim and offender; story telling by each; expression of emotion; reaching understanding and empathy; and a concluding agreement. The context and framework for justice-rendering is wide, taking into consideration many factors that are said to be related to the harm. It also incorporates various persons beyond the direct disputants. The transparency of the decision-making is high, since the disputants themselves try to arrive at an amicable solution to the problem. Hence, the role of the impacted is also high, since they actively contribute to an understanding reached. The operative discourse is reconciliation, and specifically the discourse of the hysteric. The latter is so because the victim is in struggle with why s/he was hurt and needs an explanation. Through the encounter a particular discourse emerges, moving away from anger and the desire for retribution to a discourse of forgiveness and reconciliation, aided often by a third party who mediates the process. It can also be conceptualized as a discourse of the university as clients are encouraged, often by subtle cues, to internalize the language of reconciliation (Woolford, 2009: 85-87).

Transformative Justice. The problem defined in this approach is the existence of excessive investments in hierarchy and harm. It produces harms of reduction and repression.⁹ Disciplinary mechanisms, originating from historical and political economic conditions, coordinate bodily forces in static configurations resulting in stasis, being, and repetition of the same. Desire is captured in configurations that inhibit the full development of the capacities and potentialities of people both individually as well as collectively. The Oedipus is but one of its engines, synchronized with the needs of capitalism. Alternatively, a legitimation principle, in an emerging transformative socius, is rooted in "permanent revolution," a continuous becoming of both the human being as well as the social formation. Humans are seen as singularities, unmeasurable as to what the body can do while at the same time

fully capable of forming solidaristic communities that remain molecular in their form. Privileged are far-from-equilibrium conditions and dissipative structures, emergents that are highly sensitive to perturbations, rather than the rigidities of identities and the bureaucratic form. These are "contingent universalities" Butler (1991). Accordingly, substantive irrationality and substantive rationality are ubiquitous. We cannot subsume a singularity within an abstract measure or standard applicable to all in a formally equal way. The principle of justice revolves around the ethics of the Other (Levinas, 1987), a duty to the other, a becoming-other (Deleuze and Guattari, 1987).¹⁰ In response to the extreme logic of becoming-other/becoming imperceptible and the potential for disappearing into the totality without any trace of agency, a softer ethics of care¹¹ is suggested whereby the ethics of the Other is tempered by recognition of personal desires. The latter are productive in form, not responses to lack. Accordingly, needs, abilities and unique desires are constitutive of principles of justice. Elements of restorative justice are employed, but expanded to critical structural-level examination and advocating the necessity of ongoing ("molecular") social change. Primary players are the "people yet to come," incapable of being defined in the present or future. There are only ongoing emergent identities. Disputants and dispute settlement become more and more orientated to an ethics of the Other. This is a logic that militates against premature imprisonment in static identities and precise futuristic forecasting. Advocated is a post postmodern or "altermodern" person that will emerge in a socius seen as a permanent revolution, that privileges becoming over merely being. The context and framework of justice-rendering is wide, taking into consideration the micro, meso and macro levels of configured forces. The transparency of the decision-maker is high, as continuous feedback is provided to all agents implicated. The role of the agent impacted is high, for s/he will actively participate in self discovery, exercise empathy for the Other, and engage in solidaristic struggle(s).¹² A combination of the discourse of the

hysteric and analyst will be ongoing. Agents insert themselves in this oscillating discourse for self understanding, expression, and understanding of the Other. This is the realm of becoming, a becoming-other, a becoming-imperceptible (Deleuze and Guattari, 1987). We witness an emergent, dissipation, and re-emergent as non-repetition of the same.

Discussion

We have developed twelve ideal-types of justice-rendering. These are not to be construed as exhaustive, but merely as orientations. We are in a national and global crisis, with questioning justice center stage. The U.S. with over 2.4 million incarcerated, a yearly budget of approximately \$70 billion, 750,000 employees, and with a recidivism rate after three years of two thirds is paradigmatic of the problem we face at the retributive level. The environmental damage being inflicted and its disproportional impact in distributive justice are also quite apparent. In this section we want to develop three thoughts: the application of assemblage theory which provides more dynamic tools for critical analysis; the effects of semiotic regimes; and the possible furtherance of a transformative justice.

Assemblages. Typologies are useful for sensitizing the researcher to some complexities, but they are ultimately static in nature. We briefly offer a possible way of resurrecting some of the dynamic elements at play. Deleuze and Guattari's notion of an assemblage is particularly noteworthy (1987: 88; see also Delanda, 2006). An assemblage can be defined as a historically-specific, contingent configuration of relatively stabilized social entities¹³ and flows.¹⁴ It is more process oriented. It provides some refinement of constitutive theory in so much as it provides the

dynamics for change while describing "reality" as an interrelationship amongst the macro, micro and meso levels of analysis; each is part of the other, the whole within the parts, the parts within the whole. Delanda (2006), for example, has insightfully applied it to social networks, persons, organizations and governments. Everything that has taken some form can be represented as an assemblage. They are both endowed with properties and capacities (ibid., 7). Each of our justice rendering forms can be envisioned as an assemblage.

Assemblages have two perpendicular, intersecting axes¹⁵: the material (content)-expression axis, and a territorialization-deterritorialization axis. The material role is about diverse underlying forces that are at play¹⁶; it is about how bodies are constructed and oriented to each other (Deleuze and Guattari, 1987: 88, 90; Delanda, p. 12). It includes the question of obedience and its enforcement (Delanda, p. 68).¹⁷ An "abstract machine," a logic, coordinates these processes. It produces cuts in various flows. Consider the law machine (Deleuze and Guattari, 1986; Bogue, 2003: 78-86): rules, procedures, evidence, standards, proofs, verdicts, presumptions, even architecture and the effects on bodies. Expression is about how they take on specific expressive form, some of which is linguistic, some non-verbal¹⁸; although, expressive forms may also work to react upon content (Deleuze and Guattari, 1987: 89).¹⁹ The question of legitimacy of authority (i.e., Weber's forms of "domination") is one example, cultural rituals is another. Territorialization concerns how these underlying forces are brought within some configuration, some being more stable (e.g., "molar"), some more in the form of what chaos theorists would refer to as dissipative structures which continuously realign (e.g., "molecular"). In other words, it is about how boundaries are sharpened and how internal homogeneity is increased (Delanda, 13). It is these configured entities that are then given expressive form. Deterritorialization concerns the always present forces of disorganization,²⁰ destabilization, decoding, disruption,

antagonism.²¹ In this ontology, inherent within any assemblage are tendencies, “virtual vectors,” lines of flight that undo stases.²²

Each assemblage offers greater or lesser capacity, or degrees of freedom, or put in yet another way, “possibility spaces” as well as typical attractors (DeLanda, pp. 20, 29-30). The crime control and due process model, for example, are most often found together, two wings of the strange (butterfly) attractor; customary justice, a point attractor since the inherent tendency is for behavior to follow a centripetal pathway toward some cultural norm; transformative justice, torus and strange attractors, for substantive rational/irrational principle demand both indeterminacy and determinacy, ever in movement toward higher principles of substantive justice.

Accordingly, we may view each of the justice-rendering approaches as assemblages and then critically examine them according to the two constitutive axes. We ask, given an approach with its underlying abstract machine, what effects are produced in constituting bodies. In a due process assemblage, for example, interpellated agents (“spoken subjects”) see themselves as endowed with formal and universal rights, as formally equal to others, as centered subjects (e.g., individuals) with choice.

We could also look at each in terms of their capacities (e.g., some offering greater involvement of victims in conflict mediation, some less; some offer a more restrictive discourse, some less so; some greater concern for context, some less, etc.). Let’s take “customary justice.” Using the notion of assemblages, we could examine the material (content) dimension and ask why and how, in this particular *socius*, the particular expressive form appears. For example, why in response to the imperatives of adjusting to demanding, often unpredictable environments, did some reliance on the supernatural materialize as the response. Then, on the second axis, we may ask, what forces of territorialization persist that produce a more molar or a more molecular form. Then, finally, we examine what deterritorialization forces are

at play. Here, we could identify the forces of rationalization, colonialism, globalism, on the one hand, and more inadvertently and subtly, the effects of researchers who fundamentally alter the culture being examined.

We could do a similar exercise applying assemblage theory as a guide and apply it to the socialist form of justice-rendering. We could look at the transformations taking place in China, Russia, Vietnam, Cuba, Eastern Europe, the African Continent and elsewhere, for example, and bring to bear the two axes in aiding our understanding of existent forms of justice, and emerging principles. For example, we could look at deterritorializing forces such as rationalism and capitalistic logic and their effects as China experiences continuous industrialization and urbanization.²³

Semiotic Regimes (linguistic coordinate systems). Each orientation could also be studied dynamically in terms of semiotic regimes (subset of "expression" axis) that emerge. Instead of the more restrictive signifier-signified couplet composing the sign of Ferdinand de Saussure, a Deleuzian approach may very well be more productive. It follows Louis Hjelmslev (expression-content, as apposed to signifier-signified). It is developed more formally in Deleuze's (1988, 1989) late two books on cinema.

A typology of signs, Deleuze argues, must be constructed deductively from actual practice, the images that arise, and their relationships; linguistics, in short, is a subset of pragmatics. Although explaining cinema, he is also providing insights on consciousness and the thinking process. In *Cinema 1*, he offers the notion of an "organic regime" of signs more rooted in Hegel and Lacan and given exemplary cinematic form in film director Sergei Eisenstein. Here, given an ongoing stream of consciousness in every day life, the coordinates for thinking and action are inattentive recognition and habitual sensory-motor schemas. They are characterized as linear and deterministic constructions where truth is potentially discoverable in

the process of judgment. There is a premium on identity, unity and totality; it entails being and repetition. In this schema, perceptions are always-already linked to the initiation of some habitual action. In *Cinema 2* he develops the "crystalline regime," rooted more in Nietzsche, C. S. Peirce, and Henri Bergson and best expressed by the French avant-garde film directors Alain Resnais and Alain Robbe-Grillet. Here, given a problematic encounter, the sensory-motor schema collapses or is suspended. An interval emerges in which uncertainty prevails with various leaps into virtual memory for possible constructions of a gestalt or perception. This entails active attention, or "active recognition," where constructing truth is a creative process; it entails an ever becoming.

Deleuze and Guattari, much earlier in *A Thousand Plateaus*, also develop the notion of regimes of signs in some detail, although Deleuze does not return directly to this analysis in his late works on cinema. Regimes of signs, they argue, function to transmit power, privilege, distinctions, hierarchy, and order through "order words" which invoke incorporeal transformations in subjects, much in accord with speech-act theorists (see also Bogue, 136-149). For example, pronouncing "I do" in wedding ceremonies, or "Guilty!" by the judge.²⁴ The organic regime would tend to exemplify a more rigid (molar) incorporeal transformation, whereas the crystalline regime would tend toward continuous deterritorialization and release of "lines of flight" that produce transcendence ("creative evolution," in Bergson's sense), mutation, metamorphosis.

The first six forms of justice-rendering we have developed are more connected with the organic regime; the next five, an oscillating mixture of the organic and crystalline; the last, transformative justice, having the greatest connectivity with the crystalline regime.

Take, for example, our first three models. At the outset, socially constructed identities (victims, offenders) are better conceptualized as discursive subject-

positions: the "I" that emerges in everyday discourse within the traditional criminal justice system is but a narrowly construed form limiting a fuller understanding of demands in living. It is rooted in an organic regime of signs that privileges order, stasis, linearity, identity as repetition of the same, a truth to be found not discovered, a system of axioms and theorems that lead deductively to a truth, subordinating problems to pre-identified static solutions, and a system of judgment, following Nietzsche, originating from a presumed objective, transcendental perspective (Deleuze, 1989: 137-147; see also Rodowick, 1997: 121-138, 199; Delanda, 2002: 121-156). Even, as Woolford (2009: 97) argues, when alternatives such as restorative justice reconceptualize the victim and offender as "clients" or "agents" they, too, are heavily laden with ideological baggage; in this case, the new social constructions, he argues, are but well connected with consumerism and the neoliberal economic ideology of "choice."²⁵ The language of "risk" found in the actuarial justice model, for example, provides the discursive coordinates for furthering a managerial model rather than a basis for looking at wider social contexts for problems and possible resolutions (Ibid., p. 98). The family model, however, begins to provide an alternative discursive framework in stipulating that conflicts are inevitable and that both some form of "shaming" and reconciliation are necessary to re-establish order, although an order based on patriarchal and nuclear family relations. Woolford (2009) and Pavlich (2005) argue that we need to reconceptualize these static categories, and, we would argue, these discursive ("molar") frameworks.²⁶ They imprison us within the discourse of the master and the discourse of the university, contributing to the reification of dominant structures and conventional understandings.²⁷ Alternatively, more molecular forms are in need of development that privileges becoming over being, as in a transformative justice. To this we now turn.

Transformative Justice. What might justice look like in a socius identified as “permanent revolution?”²⁸ We want to focus on a justice of the Other that can be traced to the writings of Levinas (1987) and his primary interlocutors: Derrida, Lyotard, Deleuze and Guattari.

There are at least three critical questions that are unresolved in this line of inquiry: (1) naming the Other – the question of good and bad consequences; (2) disappearance into the Other – the question of becoming-imperceptible, or potential loss of identity; and (3) restraint v. enabling the Other – the question of privileging unique desires of human beings but with possible manifestations of both increasing expansion of what the body can do in a positive direction, and also the possibility of emerging excessive investors in harm. These three are related to two others: (4) the wherewithal of an alternative conceptualization of the subject and (5) vistas for a transformative socius.

1. *Naming the Other.* In interacting with the Other in a diverse, changing, heterogeneous, and risk socius one often, in a particular event, explicitly or implicitly names the Other, that is categorizes her/him. This, however, can be both good and bad. To the degree one names the Other in a more tentative way – always awaiting for evidence that her/his initial understanding must be modified, and thereby both giving some looser structure to the event, but at the same time not imprisoning the Other in one’s own expectations – we experience a possibility for fuller expression of becoming-other. At the other extreme, the category may take a life of its own. Here the excessive investor in energy to make hierarchical differences, the basis of negative energy flow, an act of repression or reduction (i.e., subjugation), denies the Other and what her/his body is capable of doing (Milovanovic and Henry, 2005; Spinoza, 1994). For example, ethnic cleansing, policies of *terra nullius*, stigmatizing form of shaming, violent purging of those previously associated with a dictatorial

regime, reversal of hierarchies, politics of revenge, racism, sexism, etc. (see also Prum *et al*, 2007). We also witness reification of categories in identity politics – the social construction of social categories with which to identify in struggles may often take on a life of their own.

Advocates of transformative justice must be cognizant of the ever present insidious possibilities to reconstitute a regime of denial of the Other in the process of naming.

2. *Disappearance into the Other* (“*becoming imperceptible*”). Deleuze and Guattari (1987), relying on Levinas’s notion of the concern for the Other, an infinite responsibility to the Other,²⁹ have argued for a becoming-other, and in the extreme, becoming-imperceptible where, the logic would go, one becomes Other entirely, a disappearance into the socius, a death of the subject,³⁰ a postmodern form of the death drive.³¹ In other words, the intensity of the ethic of care for the Other may tighten community bondage (“communal suffocation”) to a highly restrictive form, ironically turning the tide full circle, curtailing acceptance of difference (White, 1991: 104-105). We have seen this already in some misguided, dogmatic activists who engage in political correctness campaigns.

White (*ibid.*, 92), aware of the danger that “care always harbors the danger that the caregiver will overshelter the other, smother or envelop him or her in a blanket of paternalistic (or maternalistic) control,” an “overbearing mode of care,” advocates instead, a “lightness of care.”³² This begins a new direction of inquiry.

Benhabib (1987; see also White’s discussion, 1991: 102-104) has already convincingly argued that Rawls’ and Habermas’s Kantian views positing the ideal position of formal equality from which to begin developing principles of justice, erroneously start with an abstract “generalized other,” whereas, we should start with a “concrete other.” Thus, not commonality, but differences is the starting point

(White, *ibid*: 103; Benhabib, *ibid*). Further qualifications by Fraser (1986) for a “collective concrete other,” bringing into play the group implicated, leads to an “ethic of solidarity,” a desirable orientation according to White (*ibid*: 107). More recently, Fraser (2003) has returned to and advocated a communicative ethic of justice contrary to those, like Honneth (2003) and Taylor (1992) who focus on recognition of the Other as a key component of justice.³³

Fraser, however, relies on a questionable understanding of discourse; that is, sees discourse as basically neutral in and of itself. We have already noted that a significant number of researchers in semiotics and linguistics have argued that discourse is not a neutral medium within which to express desires. Rather, it already constricts how social reality and justice can be constructed; how, for example, order-words produce incorporeal transformations, how the discourse of the master and university produce the *différand*. Accordingly, “participatory parity” advocated by Fraser, does not respond to the non-neutrality of the discourse employed itself. Lyotard (1999), for example, has shown how global narratives as apposed to micro, or “*petit narratives*,” restrict constructions and hence does violence to differences.

Recent discussions have attempted to go beyond the previous themes. Honneth (2007) attempts a reconciliation³⁴ between Habermas and postmodernists such as White (1991), arguing that both, whether more explicitly or more implicitly, recognize the desirability of equality in participation as a requisite for possible justice rendering. Then, drawing out his own implications of some late views expressed by Derrida (1988, 2005) on the subject and an earlier introduction of the “third” by Levinas (see Critchley, 1999), concludes that there is ultimately a “productive” but “irresolvable” and “permanent” tension between the concern for the Other and formalistic notions of equality, a view shared by Clement (1998), Derrida (2005), and by Max Weber (1978) much earlier with his notion of the “irresolvable” conflict between the principles of formal and substantive rationality.

We will show below in our development of a postmodern subject that the disappearance into the concrete Other – given the various interacting Others with often inconsistent voices that appear – becomes more complex and denies any clear line toward becoming- imperceptible. A lightness of care, rather, provides moments in which a space is created between self and other in which each's framework for understanding oscillates – I as Other, the Other as I – begins to resonate and to merge with a deeper understanding of differences and commonalities (see also White, 1991: 110).

3. *Restraint and enabling.* The ethics of care suggests we should foster otherness, we should provide an infinite justice to the (concrete) Other. There are no bounds. We should enable and foster difference, not sameness. But, recognized, too, is that deviations happen. Harms of repression and reduction are real with real consequences to both the direct and indirect parties. Spinoza's notion that we still don't know what a body can do appears with a qualification: potentialities exist for both active and reactive forces taking form (Deleuze, 1983). Accordingly, Deleuzians (see, for example, Patton, 2000) – who advocate becoming-other and reducing constraints on the other in order that the person may realize what her/his body can do – are quick to point out that this must always be tempered with evaluative schemas that in fact respond to negative "lines of flight" (i.e., negative energy flow, or what Nietzsche identifies as reactive forces). It would follow, then, that transformative justice is not only about macro level societal, political economic change,³⁵ but also about fostering principles of justice of care at the micro and community level, while responding to harm.

What follows is that the various ongoing other-orientations will find themselves in constant tension. In other words, Weber's, as well as Honneth's more recent analysis, argues convincingly that this tension between principles of formal

equality and notions of an infinite care to the concrete Other, is insolvable. But being insolvable does not mean it is a dead end. Rather, following Honneth, Clement and White among others, it can indeed be productive, echoing the words of early 20th Century legal realists and their call for pragmatism instead of strict formalism in law and justice-rendering.³⁶ It is here that a reformulated restorative justice approach can be the antidote to harms in society.

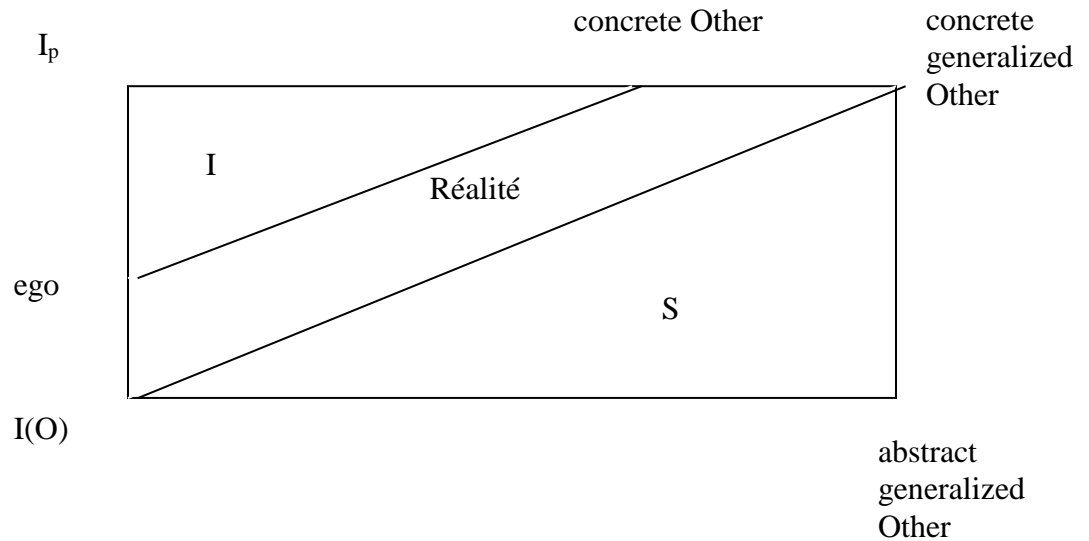
As it stands now, restorative justice is being absorbed by the logic of the traditional criminal justice system (see Acorn, 2004; Pavlich, 2005; Woolford, 2009; Arrigo *et al*, 2005). A transformative justice, infused with a bonafied notion of subjectivity, and we will offer, below, a modest direction in our Schema QD, would: foster differences, while at the same time solidarity; maximize participation by those directly and indirectly effected by the harm done; privilege the multiplicities of "petit narratives" (Lyotard, 1984, 1999); redefine harm away from the traditional narrow legalistic definition of crime (see Henry and Lanier, 2005; Milovanovic and Henry, 2005); foster, simultaneously, self-analysis and critique of structural forces; privilege differentials in needs, abilities and desires; and provide criteria by which we can gauge success (see, for example, Woolford, 2009: 153; Fraser, 1997).³⁷

If we take our (Henry and Milovanovic, 1996, 2005) reconceptualization of crime as harm, operationalized as harms of repression and harms of reduction, and the notion of the prevalence of "excessive investors" in hierarchy, then it follows that a criteria for transformation is whether these are reduced. Accordingly, a transformatively-oriented restorative justice must radically break with its marriage with the traditional criminal justice system and its master discourse and static order-words, veiled often as a libertarian discourse of the university. Strategies must be developed to foster this break, such as those recommended by Woolford (2009; see also Arrigo and Milovanovic, 2009; see further below). We must seek, for example, creative ways of operationalizing alternative evaluative measure such as those

advocated by Nietzsche, Deleuze and Guattari (see especially Patton, 2000: 58-67) in terms of activation of active (transformative, metamorphic) over reactive (repetitive, limitive, purely hierarchically adaptive) forces; the former, privileging active and productive desire and the realization of what the body can do; the latter, relying on a desire based on reactive forces and lack, and the capturing of desire in system-serving ends. And the nod goes to maximizing "petit narratives" and an inseparable on-going discourse of the hysteric/analyst, the "analyst"³⁸ being both initiator and reciprocal Other. If, in hierarchical society, formal equality remains the antidote, a "necessary evil," the ethics of care and justice of the concrete Other responds to the call for a more substantive egalitarian, participatory socius.

4. *Transformative Agency*. Where to go from here? It seems to me that much literature has disregarded subjectivity or agency itself.³⁹ It has been erased from the analysis, it remains a "différend." Let us provide a conceptualization with which we may move forward and which provides a nod to active forms of agency.⁴⁰ Agency, we argue, is inherently intersubjectively constituted. Fluctuating intensities of each of the attributes of our offered Schema QD produce an inherent indeterminacy. Our view also incorporates both discourse ethics and recognition of the Other. We need not choose between the two.⁴¹ In figure 2, Schema QD, we offer a de-oedipalized version of Lacan's (1977) Schema R, aided by insights from quantum mechanics.⁴² It offers how the gestalt, a holistic perception, arises. For our more immediate purposes, how also a conception of justice emerges. It offers the basis of an ethical and moral reflective gaze by the subject. In other words, Lacan's oedipally-based Schema R concerned how "réalité" was constructed, how momentary slices of reality, gestalts, or perception-images are internally constituted which then become the basis of social action. We want to modify his model.

Figure 2: Schema QD



Our Schema QD indicates that the subject of justice-conceptualizing, is composed of a number of interacting components: drawing from Mead (1962), the "me," self, or ego is the totality of relatively stabilized imaginary self-conceptualizations one retains tempered by culturally available forms (Foucault, 1997: 223-251; 1983; 1988; 1990: 25-32); from Lacan (1977), the $I(O)$ is the more permanent identifications with some internalized ideals of being liked and accepted (ideal ego), more explicit in various everyday interactions (Goffman, 1967); the concrete Other⁴³ (hereafter referred to as Other to distinguish this form from the following two) draws from Benhabib (1987), and here indicates that the

"me" is constituted intersubjectively via imaginary constructions with this immediate Other; the concrete generalized Other (the "collective concrete other"), drawing from Fraser (1986) in particular, suggests more immediate groups, networks, and communities within which the person maintains ongoing relations; the abstract generalized Other represents the more macro level of law and universality (i.e., notions such as the "reasonable man in law," the abstract legal subject) and is ubiquitously and unilaterally present with effects⁴⁴; S represents the domain of internalized signifiers, be they order-words or master signifiers, each of which are embodied with unique desires of the person; I represents the domain of images, memory-images, imaginary constructions one has internalized; I and S together are part of virtual memory (Bergson, 2002); and the I_p as "subject of speech," an intersubjective product of the three Others, ego, ideal-ego, which takes up residence within a particular discourse from which to speak.⁴⁵

Réalité or the gestalt, or, if you prefer, the perceptual image of justice is an emergent, the result of the three "Others" interacting with the ego and I(O), producing a momentary I, a place marker from which to speak in a particular discourse. In other words, it is the result of interactive effects of the four corners of the "cut" of Schema QD, and the emergent, momentary stable I, taking up residence within a linguistic regime, a place marker from which to speak. And this in a context of the Real – political, economic and historical forces, most often configured in more molar assemblage form. In his late work on the "care of the self," for example, Foucault (1983, 1988) suggests what form the self may take given a political economy, which should be read in conjunction with his earlier work on the disciplines. These various components cannot be disconnected in understanding the subject. A productive direction for a dynamic explanation of how *réalité* emerges would be to investigate how these three "Others" come into play⁴⁶ mediated by available cultural forms (e.g., "scripting of the self")⁴⁷ in the formation of a gestalt,

particularly one depicting a conception of justice. These instances, or “events” in Whitehead’s (1978) description, cannot be disconnected in understanding the subject of justice-rendering.

The quadrangle marking *réalité* actually is a flattened Moebius band. If one was to develop a 3-dimensional topological model and then activate a twist that is constitutive of the Moebius band, connecting the ends, one witnesses that all four corners are now connected⁴⁸ (ego - concrete generalized Other; I(O) - concrete Other). This suggests that the four corners are inseparable; analytical dissection of the parts produces a dysfunctional human being. The abstract generalized Other is ubiquitous, with various degrees of effectivity, given the interactions at hand. We must also recognize the singularities which we are, and differentials in needs, abilities and desires.

Ultimately, there may occur multiple “cuts”; that is, following quantum mechanics, at the preconscious level,⁴⁹ they may be in superposed or intertwined quantum states, each resonating with uniquely constituted memory-images, and it is the intensity of attention⁵⁰ that “collapses” the wave function producing a particular more stable slice, a momentary conceptualization of justice, which becomes the basis of action. The subject, in short, is an assemblage and we then look to whether the socius and its expressive forms (i.e., semiotic regime) are more enabling of a perpetual becoming, a molecular development, or whether they are more restricting in form, producing molar organizations and privileging being. We also look at the interactive effects of the configured Others.⁵¹ To restrict law-finding practices, for example, to some narrowly circumscribed space-time frame in producing a responsible subject – an entity which can then be studied in isolation from its constituting dynamics such as in exclusive legal practices focusing on narrowly constituted “intent” – is to effectively lobotomize the wherewithal of personhood. It is to deny the human being’s construction of justice and consequent justice-rendering

practices, divorcing it from the contributing effects of the larger spatiotemporal frame of political economy.

Schema QD, as an assemblage, must be seen as nested within a transformative assemblage, which in turn could be situated in a "permanent revolution," with dynamic interactions amongst them. Schema QD is not equivalent to a transcendental subject, nor is it a pure illusion; rather, it is midway, flickering between the two. It provides a possible direction in understanding agency.

5. Transformative Socius/Assemblage. Schema QD, as an assemblage, must also be seen as nested in a transformative justice assemblage, and both, nested within a transformative socius, with dynamic interactions amongst the three. For another day is a more fully developed argument, but we offer some direction for further critical inquiry. We also need to respond to the call for strategies and for normative theory.

i. Transformative Socius. Not blueprints, but seen more in terms of vistas for possibilities, several theorists have been exemplary: Hardt and Negri's (2009) and Dyer-Witherford's (1999) notion of the "commonwealth," Unger's (1987) notion of an "empowered democracy," and Deleuze and Guattari's (1987; see also Holland, 1999: 92-123) call for "permanent revolution." Here, a running theme is molecular assemblages and active lines of flight, whether manifest, respectively, as the "multitude," role-jumbling, or nomadic forms of subjectivity. This molecular form of an assemblage, we would hypothesize, engenders a crystalline regime of signs. Risk, occasions for conflict, the unexpected would invariably increase, but each would be an occasion for crystalline logic. Active recognition rather than the habitual forms would be more prevalent, an ongoing "creative evolution" in the Bergsonian sense (1998). Rather than Truth being found or discovered in the act of judgment, as in the organic regime, Truth emerges, is a process, created in problematic encounters.

The habitual sensory-motor schema collapses giving way to gaps, intervals and suspended action. Not a totalizing discourse, there is an ongoing movement to the new, the unforeseen, the creative possibilities.⁵² The subject, in turn, is ever changing, transforming, metamorphosing, a perpetual becoming.

The molecular transformative assemblage privileges not the build up of theorems, axioms⁵³ and the linear forms of deductive logic and syllogistic reasoning that are its motors for truth finding that is inherent in a organic regime of signs, a tendency of subsuming problems to given solutions (Delanda, 2002: 144), a plague of formal rationality; but rather, as in the crystalline form, engages problems which confront thought in an active way, evoking consciousness and attentive recognition (Rodowick, 1997: 1999; Bogue, 2003: 180; Delanda, 2002: 128-135; Lefebvre, 2008). Thus the necessity for developing well-posed problems, not hastily defining a situation and then finding prior solutions to the issue so defined, as takes place predominantly, for example, in the courts in adjudicating cases, what Lefebvre calls a subsumptive approach (Lefebvre, 2008).

ii. Strategies. Various strategies have been offered in the progressive literature, both at the personal as well as collective level for transformative practices. Woolford's (2009) transpraxis includes: "play to restorative strengths" (make visible the accomplishments and potentialities); "ideas are not enough" (we must confront habits, repetition that reproduces the same); "there are opponents" (recognize entrenched agents in the criminal justice system and political arena); "seek popular rather than professional legitimacy" (professional certification often comes with buying into a master discourse); "link up and network" (make linkages with other social movements); "keep going" (transformative justice is ongoing, it has no final end point); "commit to reflexivity" (engage in constant re-examination of one's own presuppositions). Arrigo and Milovanovic (2009: 164-169), building on Massumi's

first five (1992: 103-106), offer six additional strategies for a transpraxis at the more personal level: "stop the word"; "cherish derelict spaces," "study camouflage," "side and straddle," "come out," "seek and form alliances," "be a jazz player," "invest in social judo," "become-other," "be active/be joyful," "cultivate an ethic of care." Other suggestions for expanding the capacities for being human have appeared in the literature: Deleuze and Guattari (1987: 161) advocate continuous experimentation and becoming-minor⁵⁴; Foucault, curiosity and the benefits of liminal zones, and limit-experiences (1990: 8-9: see also Miller, 1993: 30, 31; Lyng, 2005: 39-47)⁵⁵; Lyng (2005: see also Lippens, 2011), confront and overcome the challenges of edgework involving high; Lyotard (1984: 79), assume the position of a poet who "hold[s] language...under suspicion," somewhat in the same direction as Rorty's (1989)"ironist" who, understanding the contingent nature of history, always keeps some distance from conventionality, always ready to question what is and what could be; Drucilla Cornell (1998), advocates the sanctity of the imaginary domain where things can always be otherwise, a place of experimentation.

iii. Normative Theory. Much criticism directed toward postmodernists and those advocating a transformative justice has been in terms of a presumed vacuity of normative theory. Moreover, it is said that it provides a predominantly external rather than an internal critique (Litowitz, 1999).⁵⁶ In briefly responding, we will divide our remarks to distributive justice and retributive justice.

Distributive justice, or how resources and burdens are fairly allocated, finds several approaches that have gone beyond Marx's "from each according to his [her] abilities, to each according to his [her] needs." It may very well be that to go from molar to molecular transformative assemblages a transitional form of justice may be pragmatically useful.⁵⁷ Jeffrey Reiman's (1990) "difference principle," for example, building on Rawls, has offered a transitional form of justice, a materialistically based

moral theory where competition will be preserved, incentives will be maintained, while the worse-offs are incrementally and systematically empowered and rewarded. Deleuze and Guattari (1983, 1987; Deleuze, 1983; see also Patton, 2000: 58-67), rooted more in Nietzsche, have offered an evaluative schema for deciding whether a social policy producing a "line of flight" is good or bad. It centers on the mobilization of "active" or reactive forces." Active forces are those that increase the productive capacities of persons (the capacities to be affected and be effective); reactive, those that diminish these capacities. Active forces are inherently transformative; reactive, restrictive. Patton (ibid, 63; see also Braidotti, 2006: 4) cautions us in saying that these two forces are in dynamic relation, always having the potential of changing into each other, and only by way of a meticulous ongoing genealogical analysis⁵⁸ can we conclude as to its efficacy.⁵⁹ Further, it is argued that ultimately, in this evaluative schema, we ask: to what degree are molecular rather than molar forms emerging?, where the former are more "dissipative structures" ever responsive to even the slightest input and producing lines of flight that increase capacities, opportunities, potentialities; the latter more ossified, formally rational, hierarchical bureaucratic regimes, that are restrictive.⁶⁰

Nancy Fraser (1997, 2000; see also Woolford's comments, 2009: 150-153) has offered three aspects to a transformative justice. "Recognition" focuses on the degree of recognition of the concrete Other. Non-recognition is compatible with our notions of harms of repression and reduction (Henry and Milovanovic, 1996) where exclusionary practices diminish a persons' full capacities. "Redistribution" focuses more on economic harms. A transformative form of redistribution advocates a fundamental reordering of the labor market that systematically reduces life chances. "Representation" advocates transparency and inclusionary practices. As Woolford (2009: 153) summarizes: the litmus test of whether a transformative justice is in progress, the "analytical guideposts," is the degree to which each of the three

aspects are more transformative rather than merely affirmative (the latter are more superficial, non disruptive changes and do not respond to structural, material forces).

Perhaps the exemplary statement on a postmodern ethics comes from May (1994: 121-137). After reviewing Deleuze, Foucault, and Lyotard, and noting their reticence for developing a full fledged statement on ethics, he suggests that implicitly all three advocate two elements of an ethical principle: "antirepresentationalism" (not representing others in their behalf); promoting differences (which could also incorporate an ethic of care), with the caveat, "as much as possible" and "all things being equal."⁶¹ Fraser's idea of recognition and representation is in a similar direction.

Therefore, we now have four elements for an evaluative schema: evaluation based on active and reactive forces, antirepresentationalism, promoting differences, and genealogical evaluation. We also draw from Marx's classic "needs" principle. In short, let us offer a postmodern ethical principle underlying as transformative *distributive* justice that draws from the various perspectives we have reviewed:

'From each according to [her/]his abilities, to each, according to his[/her] needs' and desires; tempered, as much as possible, by the promotion of differences and antirepresentationalism, and subject to genealogical evaluation of forces.

Retributive justice, or how we respond to harm, is squarely within the thrust of those advocating a transformative justice as apposed to merely currently practised restorative justice. Foucault (1981) has asked us to consider doing away with punishment all together, for, following Nietzsche, it answers to other deeper needs and insecurities that remain uninvestigated in the act of punishment. Braithwaite's

(1989, 2002) "reintegrative shaming," on the other hand, suggests that some form of disapproval is necessary where we find excessive investors in harms of reduction/repression, but followed by reintegration. Clearly, a definitional issue of punishment is at stake. We follow a milder form: social disapproval, without necessarily implicating schemas of penal punishment. If confinement can be justified, then, it follows we are in need of ethical principles pertaining to those so confined (see Arrigo *et al*, forthcoming; Williams and Arrigo, 2008; Bersot and Arrigo, 2010; Ward, 2010). We see Ward's (2010; see also Beyleveld and Brownsword, 2001) suggestion of the principle of "dignity,"⁶² not contrary to, but as a compliment to Bersot and Arrigo's "virtue-based ethics."⁶³

A postmodern *retributive* evaluative principle for a transformative justice would include the following concepts:

Degree to which measures deliver a transparent message of disapproval in a least-restrictive, collaborative, transparent, and transformative form; active and meaningful participation of those directly affected by harm, with involvement, as much as possible, by those indirectly affected; opportunities for ongoing reconceptualization of victims, offenders, community, networks and other social assemblages, and their implementation into practice; where employment of incarceration, prioritizing respect, concern, and redemption practices and scripts; diminution of subjugation and domination in institutions and social practices (assemblages), and privileging active, molecular lines of flight; the holistic reintegration of excessive investors in harm with presumption of equal moral worth; degree to which our distributive evaluative schema is co-determinative in the responsive process; all subject to genealogical evaluation of forces.

Our principle draws from a number of contributing authors, not all of which would necessarily self-identify with a transformative justice nor with poststructuralist/postmodern thought.⁶⁴ Key contributing works have been by Pavlich (2005), Acorn (2004), Woolford (2009), Woolford and Ratner (2008), Arrigo and Milovanovic (2009), Milovanovic and Henry (1991 [2009]), Maruna (2001), Braithwaite (2002), Parker (1999), Sullivan and Tift (2001), amongst the most prominent, but driven by the works of Deleuze and Guattari. A "virtue-based ethics" (Bersot and Arrigo, 2010) and an ethics of "dignity" (Ward, 2010; Beyleveld and Brownsword, 2001), in our view, would be included as a partial operationalization of our postmodern retributive ethics. We would also suggest that given the mobilization of these elements that a crystalline regime of signs (Deleuze, 1988,1999) would be engendered along with a "creative evolution" (Bergson, 1998). Ultimately, a transformative justice, as well argued by Woolford (2009: 148), and well in line with the work of Deleuze and Guattari, is a work in progress, resisting static (molar) conceptualizations.

Conclusion

Our conclusion is hopefully only a beginning for further critical inquiry on the wherewithal of justice. There is much to be done. Our typology of justice-rendering approaches provides a quick access, or orientation to some of the more manifest historical forms. Our typology can be the basis of further critical reflection of our own justice system and possible change. In the discussion section we furthered a transformative justice. We indicated the importance of integrating some concept of the subject in our theorizing. Accordingly, we offered Schema QD as a possible conceptualization and how a momentary conception of justice, a "slice" or *réalité*,

emerges that becomes the basis of action. The ethics of the Other has much merit but needs further theorizing. It is time to rise to the challenge.

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Endnotes

¹ To mention only a few alternative names: see School of Justice and Social Inquiry at Arizona State University; Justice Studies Department at Northeastern Illinois University; Centre for Studies in Social Justice at the University of Windsor.

² Weber, of course, is the inspirational theorist for this thrust.

³ Weber has offered a schema by which he ranges rationality (predictability) by formality (extent to which one decides by using internal criteria). Thus, four ideal types emerged: (1) formal rationality is identified as high in rationality and high in formality; (2) formal irrationality is where there is adherence to a body of formal material but its application nevertheless is unpredictable; (3) substantive rationality is where some outside principle, norm, logic, idea is at play, but once identified is applied to all similarly situated in a similar predictable way, and (4) substantive irrationality which is both highly informal in terms of which logic, principle or body of rules is employed, and highly irrational, since little predictability exists as to how the chosen logic, principle, or body of law is applied.

⁴ There has been a long and luminous critical exposé of the non-neutral nature of discourse: see, for example, Lacan (1977), Whorf (1956), Wittgenstein (1958), Lyotard (1999), C.S. Peirce (1931), Deleuze and Guattari (1987), Rossi-Landi (1983).

⁵ Lacan's (1991) four structured discourses, below, include the discourse of the master, university, hysteric, and analyst. There are four factors and four positions in this schema for each discourse. The four factors are S2, which stands for a body of knowledge imbedded within a discourse in use; S1 master signifiers or those signifiers that have been internalized early in one's life and receive further reinforcement by the particular socius within which one primarily lives; \$ represents the split subject, the subject of discourse, a notion that suggests the person is inseparable from the discourse which speaks him/her; and *a* represents many things for Lacan, and only in particular application can it be provided a working definition. Here it represents *pas-toute*, the left out, the more than enjoyment, the excess both beyond and below some threshold. The four positions include: upper left, the initiator of the message; upper right, the receiver of the message; bottom right, what is done with the message, what production takes place in the unconscious; the lower left, the unique Truth of the subject, his/her particular nuanced givens. Now the four discourses: the discourse of the master finds the sender of the message as S1, the sender of master signifiers; the receiver produces S2, a body of knowledge from these master signifiers; this in turn produces an effect in the unconscious, here a feeling of *pas-toute*, left out, excess; finally, we find the split subject in the place of Truth. In other words, the agent who is imprisoned in a particular discourse populated with very specific forms of master signifiers. The discourse of the university witnesses, by way of a quarter of a turn, S2, a body of knowledge such as a given paradigm in the sender's location; little *a* in the receiving location, meaning that the subject is in a position of enacting the message without feeling a sense of satisfaction, completion; the split subject is the production in the unconscious, meaning that s/he remains in a disconnected state; and finally, master signifiers remain unchanged and the basis of S2 production. The discourse of the hysteric witnesses the struggling subject in the position of the initiator of the message, a person who appears in the form of challenging some regime, on the one hand, to the clinical hysteric on the other; the agent's communication to the other produces a response, S1, master signifiers being offered as an explanation to the agent; this produces S2 in the unconscious, a body of knowledge generated by the master signifiers imposed; finally terminating in little *a*, the struggling agent still feeling left out, incomplete. The discourse of the analyst is where the agent feeds back to the person in struggle (the receiver of the message) what is incomplete, the excess; the response is production, but in a two-stage process. First, alienation, a distancing from previous master signifiers; they are seen as less significant in narrative construction. Second, separation, whereby new master signifiers, less resistant to closure, more processual are substituted. This produces S2 as Truth, a new body of knowledge, which then offers the initiating agent (therapist, cultural revolutionary) information of what is left out, the excess, *a*, which, again, is communicated to the receiver. This process continues producing new, non static, master signifiers better embodied with desire and more in tune with context (i.e., Freire's "true words," 1973).

Discourse of the master discourse of the university

$\underline{S1} \rightarrow \underline{S2}$
 $\$ \leftarrow a$

$\underline{S2} \rightarrow \underline{a}$
 $S1 \leftarrow \$$

Discourse of the hysteric

discourse of the analyst

$\underline{\$} \rightarrow \underline{S1}$
 $a \leftarrow S2$

$\underline{a} \rightarrow \underline{\$}$
 $S2 \leftarrow S1$

⁶ For how legal discourse structures reality, see particularly Heffer (2005). For an offering of how alternative signifiers and discourse may emerge by way of an integration of Lacan's four discourses and chaos theory, see Milovanovic, 2005.

⁷ See Packer (2004). See also commentary by Nasheri (1998), Herman (1997), and Yant (2003).

⁸ Recall, the Marxist principle is "from each according to his [her] abilities, to each according to his [her] needs" which indicates variability in needs *and* abilities.

⁹ See Milovanovic and Henry (2005). Harms of reduction is where one is reduced from a position one has enjoyed; harms of repression is where one is denied the ability to develop one's potentialities.

¹⁰ White (1991: 125) has operationalized this orientation to otherness as a "grieving for all those who bear the added burden of a life of needless suffering and injustice." It is at once focused on grieving the other, and delight in what emerges as difference and possibility (ibid., 110).

¹¹ As White (1991: 91-92) informs us, "care always harbors the danger that the caregiver will over shelter the other, smother or envelop him or her in a blanket of paternalistic (or maternalistic) control." He calls for a "certain lightness of care" as a substitute for the potential suffocating of the other.

¹² Fraser (1986), in responding to an ethic of care, has reconceptualized the ethic as an "ethic of solidarity" which stems from struggles, movements and the core master signifiers and narratives employed.

¹³ Each "social entity" is, in turn, an assemblage, assemblages nested within assemblages.

¹⁴ Flows vary in speeds, intensities, thresholds, critical points, and their manifest attractor states. Elsewhere, we have called it a COREL set (see Henry and Milovanovic, 1996). Deleuze (1987: 69) has defined it as: "a multiplicity which is made up of many heterogeneous terms and which establishes liaisons, relations between them across ages, sexes and reigns - different natures."

¹⁵ He does, in passing, going beyond Deleuze and Guattari's (1987) analysis, identify a third intersecting axis (ibid, 19): "specialized expressive media" may intervene, which, on the one end of the axis, "consolidate and rigidify the assemblage," on the other end, "allow the assemblage a certain latitude for more flexible operation while benefiting from genetic or linguistic resources (processes) of coding and decoding."

¹⁶ Deleuze and Guattari, following the tradition of Nietzsche, Spinoza, and Bergson, to name a few, conceptualize the universe as various subterranean forces that exist with diverse intensities, often clashing. Immanent to all social reality is the "plane of consistency," a quantum field within which various abstract machines induce change. Deleuze and Guattari develop the concept of an "abstract machine," a logic that once developed molds bodies into a distinctive form. These "machines" produce "slices" in the ongoing material flow and, accordingly, are said to shape bodies (Deleuze and Guattari, 1983: 36). We conceptualize these "slices" functioning to collapse the wave function. Foucault's panopticism is but one form; Marx's commodity-exchange is another.

¹⁷ Foucault's two contributions here would be the disciplinary mechanisms that produce bodies of docility/utility, and in his late works on self-disciplining, the "scripting [care] of the self."

¹⁸ As Deleuze and Guattari (1987:88) say, it concerns "a collective assemblage of enunciation, of acts and statements, of incorporeal transformations attributed to bodies." Delanda (2006: 3) tells us that "language plays an important but not a constitutive role." We disagree.

Discussion in *A Thousand Plateaus* concerning "signifying regimes" indicates the converse.

¹⁹ The material and the expressive dimensions are always in "reciprocal presupposition" (Deleuze and Guattari, 1987: 90); the causal arrow may work in both directions as constitutive theory implies.

²⁰ Deleuze and Guattari (1987) argue that a product of deterritorialization are "lines of flight," some active leading to increased capacities, some, reactive, leading to stasis, repetition. On the "plane of consistency," the plane where matter is unformed, which underlies all "reality," are "lines of continuous variation" that assure continuous change (see Bogue, 1989: 149).

²¹ Consider, for example, Durkheim's (1964) analysis of the division of labor in society. For content, we could include the particular type of solidarity in existence (mechanical, organic). For expression, he argues a particular system of law develops as a consequence of a particular content. In a society with a predominance of the organic form he argues, with evidence being somewhat inconclusive on this point, restitutive law would primarily exist. Forces of deterritorialization would be the Darwinian principle of "social density." Or consider formalism in law, countered by forces for informality; however, with moments of informality in ascendance, voices for more formalism and less discretion surface. Or, consider Weber's (1978) classic "insoluble conflict" thesis, the dialectics between formal rationality and the always present principles of substantive rationality.

²² Deleuze and Guattari argue that libidinal economy ("desiring production") is about paranoid forces of stasis in antagonism with schizo forces of metamorphosis.

²³ Or, following Marxists, we could cite dialectical materialism as the deterritorializing force.

²⁴ Bogue (1989: 138) following Deleuze and Guattari summarizes two examples: In Foucault's *Discipline and Punish* "expression...[stands for] the collection of judgments, verdicts, evaluations and classifications which transform bodies through the discourse of delinquency"; in their readings of Kafka, "its acts, its death sentences and its verdicts, its trials, its 'law.'"

²⁵ Woolford (2009) and Pavlich (2005), building on Foucault's idea of pacification and disciplining bodies as well as his late works on governmentality and the "care of the self," suggest that current restorative justice practices essentialize categories and are but "soft" versions of coercion.

²⁶ Consider Maruna's (2001) insightful study on "making good," where he argues for the desirability of "redemption scripts," or narratives that offer greater capacities for understanding, change, transcendence, mutation, metamorphosis.

²⁷ We are also reminded of Althusser's classic notion of "interpellation," of film theory's notion of the "spoken subject," and of Deleuze and Guattari's (1987) notion of "points of subjectification whereby the subject of speech is the end result.

²⁸ Conceptually, the outlines of a desirable "permanent revolution" are clear: a more dynamic society in far-from-equilibrium conditions; privileging emergent structures that are more in the form of dissipative structures or molecular forms; privileging becoming over being; human beings seen more as singularities, but still capable of forming solidaristic communities (i.e., the "multitude," Hardt and Negri, 2009); democratic, decentralized decision-making; protections against excesses of majorities; redistribution of wealth; guaranteed support for health, minimal wage, and shelter; fulfilling and participatory work organizations; the overcoming of harms of repression and reduction (subjugation); privileging active over reactive forces, the molecular (dynamic change, becoming) over the molar (repetition, homeostasis); transparency at all levels; principles of justice (both distributive and retributive) that relay on some notion of reconciliation; active involvement of all involved; care, peace, and a duty to the Other, to name a few often mentioned in the progressive literature.

²⁹ See also Gilligan's ethic of care (1982), Sevenhuijsen (1998).

³⁰ For a useful analysis of the positive aspects of this "death," see Braidotti (2006: 261-262).

³¹ A re-immersion into a universal quantum wave, interconnected non-locally with all.

³² This lightness of care would "share the mood and measure of more intense care; but its distinctiveness and palpability would not be directly anchored in the needs and motivations of intimate relations, but rather in the needs and motivations that are forming in the context of our frustrations and dissatisfactions with modernity" (see also White, 1991: 91-94).

³³ Honneth's (2003, 2007) point is that a denial of recognition leads to impairment in self-understanding in intersubjective interactions. It consequently leads to reduction or suppression of self-realization.

³⁴ See also the classic argument by Critchley (1999) who argues for the potential marriage between Habermas and Derrida.

³⁵ Recent works by Hardt and Negri, particularly their *Commonwealth* (2009), Unger, *False Necessity* (1987), Dyer-Wetherford, *Cyber Marx* (1999), and earlier foundational work by

Deleuze and Guattari *Thousand Plateau* (1987) and their advocating a "permanent revolution" provide a plausible direction. See also Arrigo and Milovanovic, *Revolution in Penology* (2009).

³⁶ See for example, Lefebvre's (2008) Deleuzian approach to jurisprudence as an example of a Bergsonian "creative evolution."

³⁷ Conceptually speaking, Deleuze and Guattari's ultimate criteria would be the degree to which a permanent revolution is being sustained, while simultaneously fostering becoming-minoritarian, becoming-other, privileging molecular over molar structures at all levels of the socius and personhood. Woolford's move to an operationalization makes use of Fraser's (1997) three components, recognition (misrecognition is harm done to the other), redistribution (material and socially exclusive practices), and representation (exclusion from decision-making) and whether they are more passively (affirmatively), or more actively (transformatively) being confronted.

³⁸ We read "analyst" more in terms of Paulo Freire's (1973) cultural revolutionary engaged in a dialogical pedagogy, being neither representative of a party vanguard, nor the provider of a blueprint for social change; rather, more a facilitator, a catalyst, helping to pose a better formulation of a problem, and an agent encouraging the development of new master signifiers that are more open ended, dynamic and the basis of more genuine constructions of self, others, and the present and possible future socius (see for example, Milovanovic, 2003 where we integrate Lacan, dialogical pedagogy and chaos theory in suggesting how alternative master signifiers may develop in legal practices).

³⁹ But see Lippens' (forthcoming) instructive integration of Bergson's *élan vital*, Sartre's notion of choice and responsibility, and Deleuze's notion of the "fold"; ironically, it is from nothingness, a void, an emptiness from which consciousness actively begins its narrative creations.

⁴⁰ Even Critchely's (1999: 277) insightful and illuminating exposition of the differences between Derrida and Levinas suggests the importance of some component of psychoanalysis to further the dialogue.

⁴¹ As was the case in the debate between Fraser and Honneth in *Redistribution or Recognition* (2003).

⁴² Several prominent researchers have argued for the existence of quantum consciousness, noting that current more Newtonian constructs have not caught up with recent literature (see for example, Penrose and Hameroff, 1996; Stapp, 1999, 2004; Schwartz, Stapp and Beauregard, 2004; Eastman and Keeton, 2003). The brain, for example, is often explained by Newtonians in analogous terms to computer functioning. With the development of quantum computers within the foreseeable future it would seem another more productive analogy will emerge.

⁴³ Levinas introduces an Other outside of the immediate dyadic relationships as the "third" connected with social rules, social order, morality, justice, judgment. We build on this in conceptualizing three forms of the "third" varying in proximity to the dyadic relationship, from the concrete Other, to the generalized Other (of some group/community/locality), to the more distant abstract Other.

⁴⁴ See for example Deleuze and Guattari (1987) notion of a "point of subjectification" whereby a subject of speech emerges from a speaking subject, which in turn finds its origins at some "point" marking the sender of the message in the Lacanian construction in the four discourses. Althusser's notion of interpellation also comes to mind.

⁴⁵ The literature has provided a variety of notions of the I: for Lacan, a shifter in discourse, a minor player, better conceptualized as the speaking being (*parletre*); for Mead, the more spontaneous, unpredictable, biological component of a person; for Deleuze and Guattari, only arriving at the last phase of the passive syntheses in a recognition, "that's me!"; for Bergson, having a passive existence in everyday action, but a more active form in problematic encounters (e.g., active recognition).

⁴⁶ Derrida (1988:641) poses the rhetorical question: "Does not my relation to the singularity of the Other as Other pass through the law? Law here being equivalent to the 'third,' representing an abstract generalized other and universality. To build on Derrida, the I_p that emerges, that is an "occasion" or "event" (see Whitehead, 1978), is a moment where these various components, following quantum mechanics, are in a "superpositioned," intertwined or entangled state, a notion compatible with Deleuze and Guattari's (1987) notion of a "plane of

immanence." In the instance, various possible outcomes are simultaneously present. In other words, for quantum mechanics these too can be envisioned as being described by the wave function, and here too, the superpositioned components can collapse producing a particular gestalt which becomes the basis of intersubjective conduct. A collapse of the wave function is where any observation, measurement, or interaction with the environment produces an event, one possibility amongst many others. Space limitations do not allow a full exposition here but the question as to what triggers this gestalt remains a challenging task. It would seem much evidence centers on "attention" and how it produces this superpositioned state and a collapse. Active attention produces a collapse. Passive attention, such as in the unconscious, produces repetition of the same. Absent active attention, the passive subject is a prisoner of objectification and consequent repetition, and, as some have argued, more likely to act very much like a script dictates (Matza, 1969).

⁴⁷ Deleuze's (1995) of a "control society" going beyond Foucault's surveillance society indicates the emerging postmodern society. See also Lippens' (2011) intriguing analysis of new "forms of life" that are emergents.

⁴⁸ Further, the Moebius band is also constitutive of a topological structure referred to as the cross-cap, a four dimensional figure imbedded in 3-D space for exposition. It shows the immersion of the "cut" and the singularity found at the end of the spiraling inward Moebius band representing the deeper connection to the unconscious and the subterranean, primordial quantum field.

⁴⁹ The "cut" is a surface with an additional depth dimension that encompasses the pre-conscious, a more dynamic substratum that included superposed/intertwined quantum states, with continuity with an even deeper level, the quantum field itself.

⁵⁰ We recall, Freud, in his earlier writings, posited "attention" as being the agency which was responsible for hypercathexis, producing the release of bundled energy, resulting in the emergence of an idea or thought. After 1919, having attempted several drafts on attention, he dropped this idea and destroyed his drafts. Perhaps, upon reflection, he was moving too much toward privileging conscious agency in the psychic apparatus? For the importance of "attention" in the collapse of the wave function, see Schwartz et al, 2004.

⁵¹ As Bauman (1993) says, however, balancing the calls of the Others is inherently an unstable undertaking, increasingly so in current "risk society."

⁵² See for example Lefebvre's (2008) Deleuzian application to legal judgments where he compares the linear constructions in law, a "subsumption theory" where a judge subsumes a "case" under a given law for its resolution, a form of inactive recognition/judgment, to an active form where there is a search for new ways of understanding the concrete encounter and developments of new principle that may resolve it.

⁵³ Deleuze and Guattari (1983) have referred to this as overcoding, an axiomatic system, a system of "capture," rigid restrictions placed on otherwise creative flows (see also Patton, 2000: 94-99).

⁵⁴ "Lodge yourself on a stratum, experiment with the opportunities it offers, find an advantageous place on it, find potential movements of deterritorialization, possible lines of flight, experience them, produce flow conjunctions here and there, try out continuums of intensities segment by segment, have a small plot of new land at all times" (Deleuze and Guattari, 1987: 161).

⁵⁵ "There is not a book I have written," Foucault has said (cited in Miller, 1993: 31), "that does not grow, at least in part, out of a direct, personal experience." His late work on the history of sexuality was to also see his experimentations with sexuality and S/M, which, ultimately led to his contracting AIDs and succumbing in 1984 (ibid.). Miller sees these personal experiences reflected in Foucault's late work (1983), "The Scripting of the Self." Elsewhere, Foucault has stated (1990: 9): "The object was to learn to what extent the effort to think one's own history can free thought from what it silently thinks, and so enable it to think differently."

⁵⁶ However, see the recent debate on ethics in penology in the *Journal of Theoretical and Philosophical Criminology* (2010: volume 2). See also Arrigo et al (forthcoming), Bersot and Arrigo (2010).

⁵⁷ Recall, for Nietzsche and Deleuze, that advocating in advance an external measure or standard by which to compare, is exemplary of the domination of reactive forces. It may, however, be a necessary evil in transitions.

⁵⁸ For a good introduction to genealogical analysis see May, 1994: 89-119. Its key components have been developed from Nietzsche and Foucault. These include: contingency, uncertainty, non-linearity, emergents, surprise, unpredictability, are key elements.

⁵⁹ Take for example some form of Left activism that advocates "reversal of hierarchies."

⁶⁰ See also Todd May's (1995) "multivalued consequentialism." "It allows for guidance and evaluation of acts, evaluation of situations, and a relative weighing of moral goods (p. 93)," although we would have some reservations with his inclusion of "rights," along the lines laid out by Lefebvre's (2008: 85-87) reading of Deleuze, that is, they tend to ossification. Braidotti (2006: 158-59, 209) also explains potential limits to experimentation. Corporeal warnings, for example, can be indicators of "too much." "An unsustainable relation," she argues (p.209), "...stops the flow of relations to others and as a result the subject encounters the state of termination of its intensity. Given that intensity is the body's fundamental capacity to express its joy, positivity and desire...to put a stop to it marks the death of desire."

⁶¹ There is compatibility here with Braidotti's (2006) call for a "sustainability ethics."

⁶² Two elements are "empowerment" (increasing potentials in exercising agency) and "constraint" (reductions in harms of reduction; see also Milovanovic and Henry, 2005).

⁶³ This has origins in Aristotle and his notion of the necessity to be able to communicate and associate with others. They argue the same necessity goes against excesses in penal practices that focus on isolation.

⁶⁴ Space limitations here preclude a fuller explication.