

CRIMINAL ALTERNATIVE DISPUTE RESOLUTION: RESTORING JUSTICE, RESPECTING RESPONSIBILITY, AND RENEWING PUBLIC NORMS

Maggie T. Grace*

INTRODUCTION

This Article explores theoretical concerns underlying contemporary appeals to Alternative Dispute Resolution (ADR) in the criminal justice system. Drawing on philosophical literature on free will and responsibility and leading work on transitional justice, I argue that a restorative justice lens reveals how ADR can address realities of social foundations of crime while respecting deeply-held commitments to personal responsibility and public norms. I further argue that this approach provides a useful response to critics, such as Owen Fiss, who argue that ADR privatizes disputes, thereby failing to produce and reinforce essential public norms.

In 2001, the Surgeon General identified factors that are highly correlated with, if not predictors of, criminality. Citing this and other social science data, some have argued that traditional concepts of criminal liability based on abstract notions of free will cannot be sustained because they ignore the influence of environment. However, the determinist conception of agency offered as an alternative is also unattractive because it conflicts with subjective experience and treats citizens as objects of social control. ADR is frequently implicated in these debates, but also faces its own unique objections. One of the stickiest, advanced by Owen Fiss, is that ADR procedures privatize disputes and fail to reinforce essential public norms.

This Article argues that ADR, reconceived through a restorative lens, can resolve these apparent dilemmas. Part I explores the development of ADR procedures in the criminal context and subsequent criticisms of its alleged propensity to “privatize” public conflicts. Part II sets up the free will and moral responsibility debate and frames the conceptual concerns in terms of sociological data, which suggests that criminality may be environmental. Part III charts a course between the Scylla of determinism and the Charybdis of naïve moralism by describing a role for ADR procedures. These procedures restore faith in and function of public norms

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by addressing not only the relationships between victims and offenders, but the moral characters of offenders as well. ADR procedures effectively track the social history of a criminal and his crime as a procedural avenue for correcting the offender's deficits by supplanting the influence of environmental factors and developing procedural "presponses" that engender socially-acceptable norms and provide economic and educational opportunities. Part IV concludes that ADR is better equipped than traditional systems to achieve real justice.

I. ADR: A RESPONSE TO THE "LITIGATION EXPLOSION"¹

Throughout the 1970s and 1980s, a range of nontraditional dispute resolution processes evolved under the general umbrella of ADR² to streamline dockets and harmoniously resolve problems.³ In 1976, the Roscoe Pound Conference, *Perspectives on Justice in the Future*, brought together judges and lawyers to discuss potential procedural alternatives to adjudication.⁴ The conference aimed to highlight ADR's consensual focus as an advantage over crowded courts and litigious citizens.⁵ The move garnered support from Chief Justice Warren Burger, who warned that

1. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982). Compare Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 27-28 (1986) (arguing that higher caseloads do not indicate an increase in adversarial combat and noting that most courts "are arenas in which most cases are resolved by negotiation"), with Dan B. Dobbs, *Can You Care For People and Still Count the Costs?*, 46 MD. L. REV. 49, 53-54 (1986) (claiming that even if litigation is not increasing, the costs are increasing, and even if the costs are not increasing, the intangible costs are increasing). For a more extensive critique on the "litigation explosion" from many different perspectives, see Benjamin R. Civiletti, *Comments On Galanter Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986); Jerry J. Phillips, *To Be or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55 (1986); Michael J. Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63 (1986); Robert J. Samuelson, *The Litigation Explosion: The Wrong Question*, 46 MD. L. REV. 78 (1986).

2. MELISSA LEWIS & LES MCCRIMMON, THE ROLE OF ADR PROCESSES IN THE CRIMINAL JUSTICE SYSTEM: A VIEW FROM AUSTRALIA 2-3 (2005), available at http://www.doj.gov.za/alraesa/conferences/papers/ent_s3_mccrimmon.pdf.

3. See Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 431 (1986) (explaining that ADR aims to settle disputes with justice and efficiency).

4. Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1993). Roscoe Pound delivered a speech to the American Bar Association on *The Causes of Popular Dissatisfaction with the Administration of Justice* in 1906 on judicial administration. See generally Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in HANDBOOK FOR JUDGES (Kathleen M. Sampson ed., 2004). He claimed that the Anglo-American legal system was plagued with an "individualist spirit," a focus on litigation as a "game," a belief in judicial supremacy, a lack of legal philosophy to motivate the legislature to reform the law, and uncertain case law. *Id.* at 149-50.

5. Nader, *supra* note 4, at 6.

adversarial processes were tearing the country apart and should yield to mediation and arbitration by lawyers fulfilling their true calling as “healers.”⁶ In the following years, various ADR procedures gained attention because they allowed courts to clear their dockets while engaging in less adversarial proceedings.⁷

Evolving ADR practices included arbitration, in which parties relied on a third-party decision-maker to reach binding judgments; negotiation, in which parties or their attorneys worked together to settle disputes; mediation, which used a neutral third-party to bring about a voluntary resolution; and settlement.⁸ Other ad hoc ADR approaches developed from this progressive movement, which differed in levels of formality, the presence of lawyers, the role of third-party mediators, and the legal status of any subsequent agreement.⁹ These ADR procedures now often include “hybrid” devices that borrow procedural aspects of the courtroom and employ certain officials or quasi-officials (such as masters), private judges, and private “neutral” individuals.¹⁰

A. ADR in the Criminal Context

ADR procedures also further developed in the criminal context from earlier “informal justice” programs.¹¹ One of the dominant mediation forms,¹² Victim–Offender Mediation Programs, focused on restitution and

6. Burger, *supra* note 1, at 274.

7. Nader, *supra* note 4, at 6; *cf.* BENEDICT S. ALPER & LAWRENCE T. NICHOLS, BEYOND THE COURTROOM 13–14 (1981) (asserting that the costs of litigation virtually eliminated the poor from receiving any legal services and the delay due to an increase in litigation was jeopardizing the fundamental legal rights of all). A follow-up task force of the conference published a report in 1978 that dealt with “better means of dispute resolution, alternate forums, neighborhood justice centers, small-claims courts, arbitration, elimination of the adversary process, interests of victims, witnesses, and jurors, and in-prison complaint procedures.” *Id.* at 20. Various groups, including the American Law Institute, the American Bar Foundation, the National Conference of Commissioners on Uniform State Laws, the National Judicial College, the National Center for State Courts, the Office for Improvements in the Administration of Justice (U.S. Department of Justice), and the Federal Judicial Center contributed to the project. *Id.* These recommendations were included in a bill that would establish a “dispute resolution resource center” in the Department of Justice to conduct research and extend grants to neighborhood centers. *Id.*; *see also* Dispute Resolution Act, Pub. L. No. 96-190, 94 Stat. 17 (1980) (codified at 28 U.S.C. app.) (stating the purpose of the act is “[t]o provide financial assistance for the development and maintenance of effective, fair, inexpensive, and expeditious mechanisms for the resolution for minor disputes”).

8. MARK D. BENNETT & MICHELE S.G. HERMANN, THE ART OF MEDIATION 6 (1996).

9. LEWIS & MCCRIMMON, *supra* note 2, at 2.

10. Lieberman & Henry, *supra* note 3, at 424–25.

11. *See id.* (discussing how various “informal justice mechanisms” had long played a role in indigenous communities and other societies).

12. Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1483 (1994). Although these two approaches are

reconciliation through face-to-face meetings between victims and offenders before trained mediators.¹³ The goal was to provide a fair process in which discussion would facilitate an understanding of the crime and allow for negotiation of restitution.¹⁴ The model program began in Canada, but similar programs have since expanded to rural areas and large cities in the United States, serving both juvenile and adult offenders.¹⁵ These programs address property crimes, like vandalism and burglary, but have also been utilized to address negligent homicide, armed robbery, and rape.¹⁶ Community Dispute Resolution Procedures also evolved to dispose of minor conflicts that were clogging criminal dockets.¹⁷ Its advocates hoped to empower communities to resolve conflicts away from the state's influence and to shift the focus from the offender's individual rights towards community building.¹⁸ The U.S. Department of Justice created model Neighborhood Justice Centers in Atlanta, Kansas City, and Los Angeles in 1977, and other community dispute resolution programs have since developed in response to this model, working with referrals from the community and court system through arbitration and conciliation.¹⁹

Various other forms of criminal ADR have since developed, including victim-offender panels, victim assistance programs, community crime prevention programs, sentencing circles, ex-offender assistance, community service, school programs, and specialist courts.²⁰ Despite their differences, these ad hoc procedures all focus on giving the victim a voice and dominant role in the healing process.²¹ These ad hoc ADR procedures occur at various stages of the criminal process and can diverge from or parallel the

considered the leading ADR mediation paradigms in the criminal justice context, other informal processes were developed as alternatives to litigation. *Cf.* LEWIS & MCCRIMMON, *supra* note 2, at 1 (suggesting that circle sentencing and family group conferencing are other forms of ADR used in Australia).

13. Bakker, *supra* note 12, at 1483. A small city in Ontario, Canada created the Victim-Offender Reconciliation Program in the early 1970s to address damage done by two intoxicated teenagers. *Id.* Funded by church donations and government grants and supported by some community groups, a probation officer and church volunteer accompanied the teens when they confronted 21 victims of vandalism and handed them over to trained mediators to reach a mutual agreement of restitution. *Id.* The Canadian program made its way to Elkhart, Indiana and was later adopted and expanded in other United States communities. *Id.* at 1483-84.

14. *Id.* at 1484.

15. *Id.* at 1485.

16. *Id.*

17. *Id.* at 1485-86.

18. *Id.* at 1487.

19. *Id.* at 1485-86.

20. LEWIS & MCCRIMMON, *supra* note 2, at 5.

21. Bakker, *supra* note 12, at 1488.

court process.²² As forms of ADR, they remove legal conflicts from the courts with the general goal of benefitting all parties, reducing litigation costs and delays,²³ and preventing subsequent legal disputes.²⁴ The hope of ADR was—and continues to be—to replace justice and rights “talk” with actual compromise and agreement away from the courts.²⁵

B. Privatizing Public Harm

As the ADR movement grew, Owen Fiss published his seminal article *Against Settlement*.²⁶ He argued that ADR advocates naively painted

22. LEWIS & MCCRIMMON, *supra* note 2, at 5. These other ADR procedures vary considerably in manner and substance. The prosecutor, for example, could bring to the court a guilty plea along with a recommendation for family group conferencing or involvement with a sentencing circle, Bruce P. Archibald, *Let My People Go: Human Capital Investment and Community Capacity Building via Meta/Regulation in a Deliberative Democracy—A Modest Contribution for Criminal Law and Restorative Justice*, 16 CARDOZO J. INT’L & COMP. L. 1, 53 (2008), both of which seek holistic integration of victim and offender, families, and the community to “focus on an outcome agreement,” *id.* at 39. Or, the jurisdiction might utilize “problem-solving” courts (which have increased since the 1980s) that developed as an alternative to the traditional court system to deal with drug and alcohol addictions, drunk driving, domestic violence, and child custody. Teresa W. Carns, Michael G. Hotchkin, & Elaine M. Andrews, *Therapeutic Justice in Alaska’s Courts*, 19 ALASKA L. REV. 1, 5–7 (2002). The U.S. Department of Justice Office of Drug Court Programs offers states, state courts, local courts, and units of local governments funding to “implement treatment drug courts” that “integrate substance abuse treatment, mandatory drug testing, sanctions and incentives, and transitional services in a judicially supervised court setting with jurisdiction over nonviolent, substance-abusing offenders.” Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, *Drug Court Discretionary Program*, <http://www.ojp.usdoj.gov/BJA/grant/drugcourts.html> (last visited February 8, 2010). To receive funding, the U.S. Department of Justice requires compliance with ten components, including:

- (1) the integration of substance abuse treatment with justice system case processing;
- (2) use of a non-adversarial approach where the prosecution and defense promote public safety while protecting the right of the accused to due process;
- (3) early identification and prompt placement of eligible participants;
- (4) access to a continuum of treatment, rehabilitation, and related services;
- (5) frequent testing for alcohol and illicit drugs;
- (6) a coordinated strategy among judge, prosecution, defense and treatment providers to govern offender compliance;
- (7) ongoing judicial interaction with each participant;
- (8) monitoring and evaluation to measure achievement of program goals and gauge effectiveness;
- (9) continuing interdisciplinary education to promote effective planning, implementation and operation; and
- (10) partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.

Carns, Hotchkin, & Andrews, *supra*, at 8.

23. ALPER & NICHOLS, *supra* note 7, at 13 (arguing that problems plaguing courts include inaccessibility because of delay and rising costs, inefficient procedures, fragmented administration, and disregard of criminal victims).

24. Lieberman & Henry, *supra* note 3, at 425–26.

25. See Nader, *supra* note 4, at 3 (suggesting that ADR proponents hoped to use these procedures as an alternative to litigation).

26. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

settlement as a “perfect substitute for judgment” by trivializing the remedial role of lawsuits and privatizing disputes at the cost of public justice.²⁷ Favoring the courts’ role in affirming public values through adjudication,²⁸ Fiss criticized ADR as highly individualistic and inadequate to public purposes because it removed the “passive umpire” judge from the resolution process and reduced or eliminated the role of important public norms and individual rights in favor of purely private dispute resolution.²⁹ The “Imbalance of Power,”³⁰ “Absence of Authoritative Consent,”³¹ lack of “Continuing Judicial Involvement,”³² and resulting “Justice Rather Than Peace”³³ were downfalls of the ADR process that Fiss thought were better handled by adjudication.³⁴

At the heart of his criticism, Fiss claimed that ADR eliminated the social function of lawsuits because, while peace between the parties might be achieved, society was left without a remedy.³⁵ Adjudication, he posited, positively exploited its very foundations—using public resources, public officials (chosen by the public), public power, and a public forum—to legitimize, expand, and reinforce core public values captured by the Constitution and democratically produced in statutes.³⁶ Settlement, by removing disputes from public forums, deprived courts, as reactive

27. *Id.* at 1085. Fiss’s larger area of study focuses on the role of the federal courts in pursuing equality for black Americans. See Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51 (2003), for a discussion of Fiss’s larger scholarly focus. His scholarship develops this inquiry through two avenues: developing an “equality theory” and its doctrinal implications and then opining on “the forms of justice,” particularly as to the role of judges in pursuing public norms. *Id.* at 52. I will limit my inquiry to his thoughts on the role of courts in pursuing public norms.

28. OWEN M. FISS, *THE LAW AS IT COULD BE* 10–13 (2003).

29. *Id.* at 15.

30. Fiss, *supra* note 26, at 1076.

31. *Id.* at 1078.

32. *Id.* at 1082.

33. *Id.* at 1085. This notion of “justice” as function of engagement of state authority and public norms can be traced back at least to Kant. See *generally* IMMANUEL KANT, *INTRODUCTION TO THE METAPHYSICS OF MORALS* (Mary Gregor trans., Cambridge Univ. Press 1993).

34. Fiss, *supra* note 26, at 1088–89.

35. *Id.* at 1085.

36. *Id.*; see also FISS, *supra* note 28, at 58. Fiss states:

[I]f we accept the privatization of all ends or deny the government the power to realize the values that may fairly be deemed public, we will impoverish our social existence and undermine important institutional arrangements. The judiciary would be without the means to protect against the threats posed by the bureaucracies of the modern state, and the Constitution would be debased. The Constitution would be seen not as the embodiment of a public morality but simply as an instrument of political organization—distributing power and prescribing the procedures by which that power is to be exercised. Such a development must be resisted and can be, but to do so we must first rediscover the meaning and value of our public life.

Id.

institutions, of the chance to create justice, educate society, and fulfill the government's social duty.³⁷ The legitimacy of courts, and therefore the law, depended upon the capacity to perform, but Fiss argued that settlement impinged on exactly that capacity.³⁸ Settlement eliminated the "publicity principle" at the center of "democratic political morality" by merely publicizing—if at all—the terms of the settlement without professing how it was reached, reasserting public norms, or recognizing underlying moral responsibility.³⁹

Fiss was not the only critic of ADR. Others argued that because ADR was largely the result of strong persuasive rhetoric—"spearheaded by the Chief Justice of the U.S. Supreme Court"—it was not backed by empirical data but by broad generalizations supporting a procedural framework insufficient to address legal rights.⁴⁰ Critics maintained that ADR was a product of "cultural imperialism" in which the Chief Justice, prominent legal writers, and other persuasive individuals worked together to advance rhetoric in response to a "litigation explosion," and because they were so influential, no one challenged their claims.⁴¹ ADR promised a more accessible, harmonious,⁴² and efficient form of justice through which

37. Fiss, *supra* note 26, at 1085.

38. FISS, *supra* note 28, at 32. Fiss noted that courts do not operate on a consent theory: while individuals can procedurally comment on the courts as part of upholding their civic duties, the courts have a more distant function to legitimize the system through discharging constitutional mandates. *Id.* As part of this process, it is necessary—even beneficial—to the system when individuals pursue lawsuits so that the court can vindicate the constitutional framework. *Id.* at 53. Dispute resolution, on the other hand, privatizes values through "any set of rules that would, in the future, minimize disputes or maximize the satisfaction of private ends." *Id.* at 52.

39. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995); see also Don Ellinghausen, Jr., *Justice Trumps Peace: The Enduring Relevance of Owen Fiss's Against Settlement*, RUTGERS CONFLICT RESOL. L.J. at 20, <http://pegasus.rutgers.edu/~rcrlj/articlespdf/ellinghausen.pdf> (last visited Mar. 29, 2010) (comparing the criticisms of both ADR and traditional settlement proponents). There is also debate about a number of factors—together called the "substantive process" claim—that affect the legitimacy and justice of the ADR process. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 489, 497–98 (1985) (discussing the "substantive process" claim). Professor Menkel-Meadow uses the "substantive process" claim in the sense that it was used by Professor Resnik. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396–97 (1982) (suggesting that settlement slows the process). Professor Menkel-Meadow alleges that removing cases from a judge's docket not only leads to insufficient justice and a "failed chance" to legitimize the law, but also may lead to larger social injustice in terms of removing potential appellate case law. Menkel-Meadow, *supra* at, 488.

40. See Nader, *supra* note 4, at 7.

41. *Id.* at 8–9.

42. Critics, including Laura Nader, alleged that ADR was "sold" easily to the public because it appeared to track a "harmony ideology" that was focused on pacification, but was actually a type of "coercive harmony" that "discourage[ed] newcomers to the courts" and "invoked danger." LAURA NADER, *THE LIFE OF THE LAW* 52–54 (2002).

parties could maintain control while dealing with conflict.⁴³ These critics argued, however, that ADR was incapable of communicating public norms precisely because its primary focus was “*facilitat[ing]*” settlement and creating a dialogue between parties instead of addressing legal rights.⁴⁴ Without confronting social realities and root causes of race, class, and gender,⁴⁵ it would be impossible for ADR’s private focus to adequately perform the court’s social function.⁴⁶ Therefore, according to these critics, ADR’s ascendancy threatened—and still threatens—the decline of public law and the protections of public institutions.⁴⁷

These are legitimate concerns. A turn to ADR, however, does not necessarily entail a trade-off with public norms. To the contrary, criminal ADR procedures have the potential, under proper theoretical guidance, to answer Fiss’s concerns in extending public norms while achieving significant restorative advantages for offenders and their communities. Part II finds ground for such a theory in unexpected territory: debates about free will and responsibility.

II. FREE WILL—RESPONSIBILITY AS A WINDOW OF OPPORTUNITY

A. Free Will and Responsibility

Free will is a traditional prerequisite for both moral and criminal responsibility.⁴⁸ From Aristotle’s perspective, praise or blame is appropriate

43. BENNETT & HERMANN, *supra* note 8, at xi.

44. CHRISTINE B. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 73–74 (1985) (“In the alternatives movement *legal resources are not rights, they are institutions to facilitate negotiation and mediation.*”).

45. Nader, *supra* note 4, at 5, 10–11.

46. Fiss, *supra* note 26, at 1085, 1089.

47. *See id.* at 1085–89 (suggesting that ADR infringes on the court’s ability to vindicate constitutional ideals).

48. KANT, *supra* note 33, at 41–42.

The capacity for desiring in accordance with concepts, insofar as the ground determining it to action lies within itself and not in its object, is called the capacity for *doing or refraining from doing as one pleases*. Insofar as it is joined with one’s consciousness of the capacity to bring about its object by one’s action it is called the *capacity for choice*; if it is not joined with this consciousness its act is called a *wish*. The capacity for desire whose inner determining ground, hence even what pleases it, lies within the subject’s reason is called the *will*. The will is therefore the capacity for desire considered not so much in relation to action (as the capacity for choice is) but rather in relation to the ground determining choice to action. The will itself, strictly speaking, has no determining ground; insofar as it can determine the capacity for choice, it is instead practical reason itself.

Insofar as reason can determine the capacity of desire in general, not only

only if an action is voluntary.⁴⁹ According to Immanuel Kant, responsibility presupposes free will, liberated from “foreign [*determining*] causes.”⁵⁰ Basing culpability and punishment on “luck,” or conditions outside of an individual’s control seems unfair;⁵¹ if an individual is not reckless, negligent, or malicious in causing harm, it is not her fault and she should not be blamed.⁵²

Limiting the imposition of blame and punishment to acts of free will presupposes an individual’s capacity to deliberate, control, or choose behavior.⁵³ But determinists challenge this supposition, arguing that clusters of environmental factors *constrain* choice.⁵⁴ In *Skepticism About*

choice but also mere *wish* can be included under the will. That choice which can be determined by *pure reason* is called free choice. That which can be determined only by *inclination* (sensible impulse, *stimulus*) would be animal choice (*arbitrium brutum*). Human choice, however, is a capacity for choice that can indeed be *affected* but not *determined* by impulses, and is therefore of itself (apart from an acquired aptitude of reason) not pure but can still be determined to actions by pure will.

Id.

49. ARISTOTLE, NICOMACHEAN ETHICS III. I. 1109b3–1114a31 (Joe Sachs trans., 2002).

50. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 63 (Thomas K. Abbott trans., Bobbs-Merrill, 1977) (1785).

51. B.A.O. Williams & T. Nagel, *Moral Luck*, in 50 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 115, 140 (1976); *see also* A.J. AYER, PHILOSOPHICAL ESSAYS 271 (1965) (“For a man is not thought to be morally responsible for an action that it was not in his power to avoid.”).

52. *See* Gideon Rosen, *Skepticism About Moral Responsibility*, 18 PHIL. PERSP. 295, 296 (2004) (“And yet if it is clear that you had taken every reasonable precaution to prevent the injury—if it is clear that [you] were neither negligent nor reckless nor malicious in causing the harm—then there is another sense in which you are not morally responsible for the injury.”).

53. ARISTOTLE, *supra* note 49, at III. I. 1109b3–1114b31; *see* Williams & Nagel, *supra* note 51, at 140. Williams and Nagel assert:

They are all opposed by the idea that one cannot be more culpable or estimable for anything than one is for that fraction of it which is under one’s control. It seems irrational to take or dispense credit or blame for matters over which a person has no control, or for their influence on results over which he has partial control. Such things may create the conditions for action, but action can be judged only to the extent that it goes beyond these conditions and does not just result from them.

Id.

54. *See* Williams & Nagel, *supra* note 51, at 146. Williams and Nagel continue:

The area of genuine agency, and therefore of legitimate moral judgment, seems to shrink under this scrutiny to an extensionless point. Everything seems to result from the combined influence of factors, antecedent and posterior to action, that are not within the agent’s control. Since he cannot be responsible for them, he cannot be responsible for their results

Id.; ARISTOTLE, *supra* note 49, at III. I. 1110a1–5. Aristotle states:

Now it seems that unwilling acts are the ones that happen by force or through ignorance, a forced act being one of which the source is external, and an act is of this sort in which the person acting, or acted upon, contributes nothing, for

Moral Responsibility, for instance, Gideon Rosen questions the rational foundations of moral responsibility.⁵⁵ He begins with the common law rule that an individual cannot be responsible if he acts from ignorance, like mistaking arsenic for sugar when making tea.⁵⁶ Imposing liability for such mistakes requires proving culpability for the error itself, such as recklessly putting arsenic in a sugar container.⁵⁷ This finding requires proof of some failure to fulfill a “procedural epistemic obligation,” or a precaution that a “reasonably prudent person in [his] circumstances would have taken,” to avoid the mistake by acquiring accurate knowledge.⁵⁸ These procedural epistemic duties ensure “that when the time comes to act, one will know what one ought to know.”⁵⁹

According to Rosen, assigning responsibility based on failure to discharge these procedural epistemic duties initiates a regress with each mistake implicating a prior mistake and procedural failure.⁶⁰ Culpability can *only* lie if that regress ends with a conscious failure to perform an epistemic duty.⁶¹ That is, if X is to be responsible for the bad act, the responsibility must be, what Rosen calls, an akratic act.⁶² Rosen contends that because most crimes are derivative of blameless mistakes or external events that impact the agent’s assessments and weighing of normative considerations, no such point exists.⁶³ That is, the agent is ultimately blameless as most crimes are due to errors of fact, law, moral principles, or value judgments.⁶⁴ Rosen’s insight, like those of other determinists,

instance if a wind carries one off somewhere, or people do who are in control.

Id. For example, in the case of compulsion or insanity, punishment could be excused because the agent did not have full control, P. F. STRAWSON, *Freedom and Resentment*, in FREEDOM AND RESENTMENT AND OTHER ESSAYS 1, 2–3 (Methuen & Co. 1980) (1974), but beyond “abnormality,” if some outside factor caused an individual’s act (like a gun pointed at her head), the possibility of assigning moral responsibility is heavily contested because she might not have freely chosen to act in a certain way, compare AYER, *supra* note 51, at 279 (suggesting that she could be responsible).

55. Rosen, *supra* note 52, at 295.

56. *Id.* at 299–300.

57. *Id.* at 300–01.

58. *Id.* at 301 (emphasis omitted).

59. *Id.*

60. *Id.* at 303.

61. *Id.* at 309–10.

62. *Id.* at 309.

63. *Id.* at 308.

64. *Id.* at 304. In the case of ignorance of morals, for example, the ancient slave owner is only blameworthy if he is culpable for knowing that owning slaves is immoral, but proving that he should know this—that he has a procedural epistemic duty—is very difficult. *See id.* Perhaps his parents taught him slavery was moral; ignorance is then not necessarily his fault and moral culpability is unassignable. We can never truly know whether he had a procedural epistemic duty, according to Rosen, to seek behind the information his parents gave him. Thus, we cannot confidently assign moral responsibility to him. *Id.* at 304–05. The same holds true for value judgments. The individual cannot be culpable if he

deliberately shakes and complicates common notions of free will; the theoretically troublesome point is further amplified by recent studies on socioeconomic factors associated with crime.

B. Social Science Environmental Risk Factors

Mounting sociological data, which suggests a correlation between environmental risk factors and criminal formation,⁶⁵ supports the view of determinist skeptics of free will. That is, if environmental—causal—risk factors may “predict the onset, continuity, or escalation of [an individual’s] violence,” moral responsibility might crumble.⁶⁶ In Rosen’s language, these factors cause blameless ignorance of moral principles, misweighed judgments, or may interfere with the fulfillment of procedural epistemic duties.⁶⁷ For those shaped by these environmental factors, there may be good reason to question common notions of blame and responsibility.⁶⁸

In 2001, the Surgeon General issued a report on youth violence, which identified risk factors that place particular individuals at a higher risk of committing a criminal act.⁶⁹ The factors that perpetuate youth violence included: (1) individual risk factors, such as low IQ, aggressive behavior, psychological conditions, and substance abuse; (2) family risk factors, such as low parental involvement, broken homes, parental monitoring, low socioeconomic status, neglect, and antisocial parents; (3) peer group risk factors, such as association with delinquent peers, involvement in gangs, and social rejection; (4) community risk factors, such as neighborhood crime, drugs, and neighborhood disorganization; and (5) school risk factors, such as poor attitude and performance and academic failure.⁷⁰

thoughtfully considered whether or not to steal a loaf of bread to feed the homeless, but ultimately chose to do so because he decided while morally wrong, the non-moral benefit was greater. *Id.* at 305–06. He rationally deliberated—leaving him procedurally blameless—so is not at fault if he believed he should steal the loaf of bread. *Id.*

65. See OFFICE FOR THE SURGEON GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001) [hereinafter YOUTH VIOLENCE], available at <http://www.surgeongeneral.gov/library/youthviolence/toc.html> (follow “Risk Factors for Youth Violence” hyperlink under Chapter 4) (reporting that “scientists have identified a number of [risk factors] that put children and adolescents at risk of violent behavior”).

66. *Id.*

67. Rosen, *supra* note 52, at 304.

68. See *id.* at 311 (“If he is concerned with such matters he should presumably also take steps to revise or reconceive any social practice whose justification depends on the assumption that people are morally responsible for their bad actions—one salient candidate for which is the practice of criminal punishment.”).

69. YOUTH VIOLENCE, *supra* note 65.

70. *Id.*

As the study suggests, these risk factors crucially affect a child's social development, asserting their influence internally on moral judgments, value weighing, and behaviors.⁷¹ Children learn how to interact in society—physically, mentally, emotionally—creating their identities by internalizing norms, attitudes, and behaviors of their communities.⁷² Instead of being *uncaused* causes, sociological theory suggests that children become products of their society,⁷³ acting towards others based on assigned meanings that arise from prior interaction.⁷⁴ If we accept this premise, then, risk factors affect what Rosen might call a child's "normative ignorance"⁷⁵ because values taught in the home are tied intimately to the child's behaviors. This insight complicates traditional notions of free will.

The debate over free will and determinism may appear as intractable as the debate between ADR advocates and skeptics like Fiss. However, holding the two debates in one hand, a solution begins to emerge. We can see the seeds of such a solution in the suggested revisions to the Model Penal Code (MPC).

71. See George H. Mead, *Play, the Game, and the Generalized Other*, in *SOCIOLOGICAL THEORY* 222, 225 (Lewis A. Coser & Bernard Rosenberg eds., 1989). Mead states:

The self-conscious human individual, then, takes or assumes the organized social attitudes of the given social group or community . . . to which he belongs, toward the social problems of various kinds which confront that group or community at any given time, and which arise in connection with the correspondingly different social projects or organized co-operative enterprises in which that group or community as such is engaged; and as an individual participant in these social projects or co-operative enterprises, he governs his own conduct accordingly.

Id.

72. *Id.* at 223–24.

73. *Id.* at 224 (“It is in the form of the generalized other that the social process influences the behavior of the individuals involved in it and carrying it on . . . for it is in this form that the social process or community enters as a determining factor into the individual’s thinking.”).

74. George H. Mead, *The I and the Me*, in *THEORIES OF SOCIETY* 163, 165 (Talcott Parsons et al. eds., 1961).

75. Rosen, *supra* note 52, at 304. For example, while Rosen considers an ancient slaveholder who has no false factual opinions about his slaves, but believes it to be morally permissible to buy and sell them, *id.*, we might consider a child with an abusive father who has internalized the norm that physical violence is acceptable. That internalized norm might result in the child’s use of violence to solve problems in school if he is never taught by some other source that violence is an unacceptable reaction. Rosen, though, claims he can be culpable if he is responsible for the moral ignorance from which he acts. *Id.* It seems in our case that the child probably cannot be held morally responsible because at a young age he did not have a duty to fulfill the procedural epistemic duty of learning that violence is unacceptable from some outside source.

C. The Model Penal Code's Suggested Revisions

The recent suggested revisions to the MPC shed light on this debate and suggest novel ways of looking at the purposes behind sentencing. The American Law Institute (ALI) has recognized a need to revise the sentencing provisions of the old MPC to incorporate determinate sentencing, which moves away from solely utilitarian justification for punishment and toward a just deserts philosophy supplemented with prisoner reform.⁷⁶ After nearly a decade, the full membership of the ALI approved *Tentative Draft No. 1* (Draft) in 2007, a compilation of suggested revisions that included changes that would better define the purposes of sentencing.⁷⁷ The Draft states:

The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii)⁷⁸

The Draft would limit sentencing to a range that accounts for the severity of the offense, the harm done to victims, and the offender's blameworthiness.⁷⁹ But it would allow, "when reasonably feasible" within this just range, for sentencing that includes aspects of rehabilitation, deterrence, incapacitation, restoration, and reintegration.⁸⁰ Most notably, the Draft incorporates room for restorative justifications, a recent trend emphasized among states that are seeking to move away from purely

76. Christopher Slobogin, *Introduction to the Symposium on the Model Penal Code's Sentencing Proposals*, 61 FLA. L. REV. 665, 666 (2009).

77. *Id.* at 670; see also MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1 2007).

78. MODEL PENAL CODE: SENTENCING § 1.02(2) (Tentative Draft No. 1 2007).

79. *Id.* § 1.02(2)(a)(i).

80. *Id.* § 1.02(2)(a)(ii).

retributive and utilitarian approaches to punishment and towards alternate paths of prisoner reform.⁸¹

Although it focuses on “just deserts,” the revision rejects the view that desert should be the *only* determinant or that “there is a single correct retributive punishment for each offender.”⁸² Instead, it assumes that society does not “have adequate ‘moral calipers’ to reach such definitive conclusions and that, at best, [society] can merely ascertain when a punishment is clearly excessive or insufficient on desert grounds.”⁸³ As Rosen might suggest, we cannot account for a constellation of causal factors to locate the offender as a

81. See, e.g., *id.* § 1.02(2) *rep. n. cmt. b(2)*. The Comment to the Reporter’s Notes states: Restorative-justice principles are mentioned in a growing number of contemporary sentencing codes. [citing] Alaska Stat. § 12.55.005(7) (2006) (“In imposing sentence, the court shall consider . . . the restoration of the victim and the community”); Arkansas Code § 16-90-801(a)(3), (4) (2006) (“primary purposes of sentencing” include “restitution or restoration to victims of crime to the extent possible and appropriate” and “[t]o assist the offender toward rehabilitation and restoration to the community as a lawful citizen”); Del. Code Title 11, § 6580 (2006) (goals for sentencing commission to consider when developing sentencing guidelines include “[r]estoration of the victim as nearly as possible to the victim’s preoffense status”); Kan. Stat. § 74-9101(b)(12) (2006) (sentencing commission shall “develop a program plan which includes involvement of business and industry in the public or other social or fraternal organizations for admitting back into the mainstream those offenders who demonstrate both the desire and ability to reconstruct their lives during their incarceration or during conditional release”); Mo. Rev. Stat. § 558.019(7) (2006) (“Courts shall retain discretion . . . to order restorative justice methods, when applicable”); *id.* § 558.019(8) (“If the imposition or execution of a sentence is suspended, the court may order any or all of the following restorative justice methods,” including victim restitution, offender treatment, mandatory community service, work release in local facilities and community-based residential and nonresidential programs); Mont. Code § 46-18-101(2)(c) (2006) (among other goals, the correctional and sentencing policy of the state is to “provide restitution, reparation, and restoration to the victim of the offense”); N.Y. Penal Law § 1.05(5) (2006) (one purpose of criminal code is “[t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim’s family, and the community”); Okla. Stat. tit. 22, § 1514 (2006) (purposes of criminal-justice system include “restitution and reparation”).

Id.

82. Slobogin, *supra* note 76, at 671.

83. *Id.*; see also MODEL PENAL CODE § 1.02(2) *cmt. b.* (Tentative Draft No. 1 2007). The Comment states:

[M]oral intuitions about proportionate penalties in specific cases are almost always rough and approximate Even when a decisionmaker is acquainted with the circumstances of a particular crime, and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is *precisely x*.

Id.

genuine akratic actor in order to confidently determine culpability and impose some definitive punishment. According to social scientists relying on the Surgeon General's data, the individual's environment might have influenced his moral development, leading him to commit the crime. The Draft, arguably then, aims to allow latitude in sentencing through secondary concerns that include restoration, but practically "place[s] a ceiling on government's legitimate power to attempt to change an offender"⁸⁴

This insight suggests that a solely utilitarian or solely retributive punishment system is inadequate; rather, the revisions suggest that we should utilize a host of justifications to best suit the individual offender within an appropriate range. The Draft's understanding of the role played by rehabilitative, reintegrative, and restorative approaches in sentencing and punishment offers one potential way that concerns about free will and moral responsibility can be addressed in sentencing. This understanding plants more promising seeds for an alternative theory of criminal sentencing that considers the influence of environment. However, it might not provide adequate emphasis on all of these various sentencing goals, at least in some instances, and does not address the concerns advanced by those like Owen Fiss about the consequences of some of these alternative considerations.

The suggested revisions begin to explore the role that restorative justice, in particular, and other justifications ought to play in utilizing the debate over free will and determinism to construct a theory of criminal justice. Part III expands upon these seeds and holds the debate over free will and determinism, along with the debate between ADR advocates and its skeptics in one hand, to create a more adequate solution. Literature on restorative justice is used to argue that criminal ADR, by addressing the private failures of offenders in light of environmental risk factors, entrenches public norms by simultaneously establishing a private role for public norms in the consciousness of offenders and extending those norms through an effort to restore the offender and his community.

III. CRIMINAL ADR, COGNITIVE TRAINING, AND PUBLIC NORMS

Determinists, supported by social science data that documents a close correlation between environment and crime, argue that the assumptions of free will grounding criminal blame and punishment are a fiction.⁸⁵ Critics of ADR argue that these procedures privatize public wrongs, and therefore fail to reinforce and extend both public norms of conduct and commitments

84. MODEL PENAL CODE § 1.02(2) *cmt. b.* (Tentative Draft No. 1 2007).

85. *See supra* Part II.

to justice embedded in court procedures.⁸⁶ However, criminal ADR avoids both objections by embracing both. Social science data on criminality suggests that environmental factors often interfere with the process by which agents internalize public norms. Where this occurs, blame—from Rosen’s standpoint—might be inappropriate.⁸⁷ Nonetheless, that does not mean blame is impossible.⁸⁸ Rather, the challenge is to construct a criminal punishment system that restores offenders to a condition of blameworthiness by employing a connection to public norms that allows for future assignment of culpability. The crucial insight of criminal ADR is that the best means to this end is through the offender’s victims and his immediate community.⁸⁹ Properly conceived, under a restorative lens, these procedures also have the capacity to restore the offender’s breach by reinforcing and extending the mutual respect and empathy embedded in both the criminal law and more familiar court procedures.⁹⁰ To see these connections and possibilities, it is first necessary to briefly revisit the problem of determinism.

*A. Public Commitments to Free Will:
Constructing a Theory of Criminal Punishment*

As A.J. Ayer has argued, there is a distinction between internal and external constraint missing in the determinists’ arguments.⁹¹ While the risk factors identified by the Surgeon General may *affect* moral development, they do not *compel* conduct from without.⁹² Rather, they, at most, determine character, constraining the offenders’ field of options and limiting the scope of possibilities that grip their imaginations.⁹³ But just

86. See, e.g., Fiss, *supra* note 26, at 1089 (viewing ADR as a “two track” strategy” that undermines American courts, which are a source of pride not shame).

87. See Rosen, *supra* note 52, at 296–97 (explaining that there are many reasons, “moral or otherwise” not to blame someone).

88. *Id.* at 308.

89. See *infra* Part III.B.1.

90. See *infra* Parts III.B.2, III.C.

91. AYER, *supra* note 51, at 282.

92. *Id.* (suggesting that external constraints do not compel conduct).

93. See *id.* Ayer states:

[I]t may be said that my childhood experience, together with certain other events, necessitates my behaving as I do. But all that this involves is that it is found to be true in general that when people have had certain experiences as children, they subsequently behave in certain specifiable ways; . . . It is in this way indeed that my behaviour is explained. But from the fact that my behaviour is capable of being explained, in the sense that it can be subsumed under some natural law, it does not follow that I am acting under constraint.

Id.; see also ARISTOTLE, *supra* note 49, at II. I. 1103a11–1103b25 (describing how character, both

because a psycho-analyst could account for violent behavior by examining the influence of an abusive father on his son, it does not follow that the son's conduct was not free.⁹⁴ Environmental effects on consciousness, therefore, do not preclude the possibility of free will.⁹⁵

In *Freedom and Resentment*, P.F. Strawson makes a similar point.⁹⁶ He argues that the concept of responsibility derives from reactive attitudes—those judgments of resentment and praise which are central to our most basic personal relationships and, thus, essential to existence in society.⁹⁷ Strawson contends that normatively colored reactive attitudes should not be suspended, except in a limited number of circumstances, because doing so would upset basic conditions of civilized society and impoverish public and private life.⁹⁸ He recognizes that situations exist in which reactive attitudes are inappropriate, as when dealing with what he calls “psychologically abnormal” individuals.⁹⁹ As a basic social premise and to preserve deeply held and socially useful patterns of conduct, however, these situations must be the exception, not the rule.¹⁰⁰

Ayer and Strawson's insights are crucial for setting criminal ADR in the proper theoretical context. Strawson's key intuition is that judgments about the appropriateness of reactive attitudes are *internal* to basic social processes,¹⁰¹ and thus, reactive attitudes of blame and praise are themselves justified, or at least essential, to all levels of social relationships.¹⁰² Therefore, even if rationally skeptical, determinism should be rejected as the foundation for public norms and practices, including the criminal law, because to do otherwise would reject social existence and

virtue and vice, is developed through habit).

94. See AYER, *supra* note 51, at 282 (“But from the very fact that my behaviour is capable of being explained, in the sense that it can be subsumed under some natural law, it does not follow that I am acting under constraint.”). For example, we could say that the child who responds to a problem with a classmate by resorting to violence was influenced by the abusive behavior he learned from his father. It does not follow, however, that he was constrained to hit the classmate. Because he could have acted otherwise, Ayer suggests that he was not acting under constraint. *Id.*; see *supra* note 75 and accompanying text.

95. See AYER, *supra* note 51, at 282 (noting that one could choose otherwise if constrained).

96. STRAWSON, *supra* note 54, at 1–25.

97. See *id.* at 24 (“But an awareness of variety of forms should not prevent us from acknowledging also that in the absence of *any* forms of these attitudes it is doubtful whether we should have anything that *we* could find intelligible as a system of human relationships, as human society.”).

98. *Id.* at 13.

99. See *id.* at 7 (suggesting that situations exist in which an actor did not mean to perform an act and reactive attitudes are inappropriate); *id.* at 8 (noting also situations exist in which an actor “wasn't himself” or was psychologically abnormal or underdeveloped and attitudes are suspended).

100. *Id.* at 12–13.

101. *Id.* at 16–17.

102. *Id.* at 11–12.

intimate human relationships in favor of isolation¹⁰³ and an impoverished life of moral solipsism.¹⁰⁴

This is not to say that environmental conditions that may affect agency have no role in shaping reactive attitudes or the public and private responses to wrongdoing. They surely do.¹⁰⁵ For instance, the appropriate reactive attitude to one accused of stealing a jug of milk might initially be resentment. That resentment is—and should be—mollified by learning that the accused did so to provide for his two children.¹⁰⁶ Even more so were we to discover that the reason he had to steal was because he did not have a steady income due to dropping out of high school to support his ailing single mother and three siblings. Applying Strawson's vital insight, then, suggests that the focus of justice must address both failures—the offender's violation of public norms and community's failure to inculcate the offender with proper values—while allocating room for blame and responsibility for public values.

Among the range of considerations that do and ought to affect reactive

103. *Id.* at 11–13.

104. *Id.* at 15. Underlying this insight is the idea that individuals learn to assign others a “*virtual social identity*” based on shared communal norms that allows him to impose expected behaviors on others. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2* (Simon & Schuster 1963). When the individual's “*actual social identity*” fails to live up to these expectations, the outsider experiences Strawson's reactive attitudes. It is impossible to extract the reactive attitude from the situation, except in the case of a child or “*deranged individual*,” STRAWSON, *supra* note 54, at 8–10, because of the social network in which we develop shared values and norms. As Strawson vehemently asserts, the external claim that a behavior was causally determined has no effect on the reaction. *Id.* at 18.

105. See STRAWSON, *supra* note 54, at 21–22. Strawson states:

Indignation . . . tend[s] to inhibit or at least to limit our goodwill towards the object of these attitudes, tend[s] to promote an at least partial and temporary withdrawal of goodwill; they do so in proportion as they are strong; and their strength is in general proportioned to what is felt to be the magnitude of the injury and to the degree to which the agent's will is identified with, or indifferent to, it. . . . The partial withdrawal of goodwill which *these* attitudes entail, the modification *they* entail of the general demand that another should, if possible, be spared suffering, is, rather, the consequence of *continuing* to view him as a member of the moral community; only as one who has offended against its demands.

Id.; cf. Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 493 (2001) (arguing that expressive theories of law focus on “examining the logic of moral emotions and passions whose proper functioning may be essential to our identity and integrity as a moral community”).

106. See STRAWSON, *supra* note 54, at 7. Strawson states:

[L]et us consider what sorts of special considerations might be expected to modify or mollify this feeling or remove it altogether. . . . To the first group belong all those which might give occasion for the employment of such expressions as ‘He didn't mean to’, ‘He hadn't realized’, ‘He didn't know’ . . . ‘He couldn't help it’ . . . ‘He had to do it’, ‘It was the only way’, ‘They left him no alternative’ . . .

Id.

attitudes are conditions that limit an agent's ability to make the choices required by public norms.¹⁰⁷ Normal criminal procedures fail to address these concerns because they either deny agency and use the offender as a means to an end of stable social order,¹⁰⁸ or they assume full responsibility without seriously engaging the far more complicated constituents of common reactive attitudes that provide the social foundations of the criminal law.¹⁰⁹ From Fiss's perspective, ADR would likewise fall victim to the same critique because privatizing the dispute wholly leaves public "justice undone."¹¹⁰ Structuring ADR procedures as projects of restoration solves both problems by seeking to rehabilitate the offender and his relationship with the community, integrating respect for public norms where environmental factors or personal history failed to provide conditions sufficient to internalize public morality, and confirming the preconditions of blame and responsibility going forward.¹¹¹

107. *Id.* (suggesting that reactive attitudes can be mollified).

108. *See* COREY LANG BRETTSCHEIDER, PUNISHMENT, PROPERTY AND JUSTICE 52 (2001) (arguing that utilitarian approaches to punishment do not seek moral justification, but pleasure and pain). Jeremy Bentham suggested that the best decisions were those that produced benefit and prevented pain. *Id.* Punishment, he theorized under an utilitarian justification, imposed pain, but was justified by maximizing pleasure, in the form of deterrence. *See id.* Brettschneider states:

The pain of a life lived in prison is enormous. However, when this degree of pain is measured against the entire life of pleasure that would be maintained among future victims of this individual, combined with the pleasure of the families of these future victims, utilitarians would argue that the murderer's pain is worth fewer utils. The principle of utility would seem to lend even more support to punishment in cases in which others would be deterred from committing crimes as a result of punishment.

Id.

109. *See* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW 11 (2008) (describing how people share common ideas regarding blameworthiness); *see also* DAVID SHICHOR, THE MEANING AND NATURE OF PUNISHMENT 29 (2006). Shichor states:

[T]he retributive perspective has moral implications. Central to this perspective is the existence of a direct connection between the punishment and moral guilt. This is based on the supposition that the law embodies the moral principles of society that are concerned with establishing and maintaining proper social relations among persons with respect to issues or interests typically vital to such persons. Thus, by violating the law that embodies the moral principles of society, the lawbreaker could be considered, by definition, to be morally guilty. Again, this assumption is rooted in the social contract view of law reflecting a general consensus in society concerning morality.

Id. (citations and internal quotation marks omitted).

110. Fiss, *supra* note 26, at 1085.

111. *See* HOWARD ZEHR, CHANGING LENSES 181 (1990) (arguing that a restorative paradigm would better address crime and justice than traditional retributive justice because of restoration's more holistic approach, which addresses the needs of society, the victim, and the offender).

B. Criminal ADR as Restorative Justice

A restorative lens reframes the problem and the solution in a way that highlights how ADR emerges as a more satisfactory theory of criminal punishment that serves public justice and embraces failures of the offender and community. Because the problem is conceived of as a violation of relationships,¹¹² the solution must seek to restore the offender with the victim and his community.¹¹³ ADR actualizes this solution; it connects public norms and community relations by exploiting the community as ultimate “consumer”¹¹⁴ to produce justice and reframe the relationship between offender and community in both personal and public terms.¹¹⁵

But ADR also respects traditional notions of blame and responsibility by addressing the damage done by forcing the offender to take moral responsibility for his actions and make amends,¹¹⁶ while also attending to environmental factors through rehabilitation and reintegration.¹¹⁷ Reactively, the focus is no longer on traditional blame or deterrence, but on using the social history of the crime as a procedural avenue to correct the offender’s deficits. Proactively, ADR programs could also be utilized to supplant the influence of “risk factors” by developing procedural “presponses”¹¹⁸ that engender socially-acceptable norms and provide economic and educational opportunities, thereby correcting social failures to support character development.¹¹⁹ In this way, “justice” can be achieved by moving beyond utilitarianism and retribution to restore norms and address internal systemic problems.

1. Connection Between Public Norms and Community Relationships

Under the restorative justice paradigm, the community becomes a

112. *Id. Contra id.* at 82 (arguing that the retributive paradigm defines crime as an offense against the state).

113. *Id.* at 186. *Contra id.* at 82 (arguing that the retributive paradigm structures “justice” to establish blame and inflict punishment).

114. PAUL H. HAHN, EMERGING CRIMINAL JUSTICE 134 (1998) (“The concept that the community must be viewed as the ultimate ‘customer’ and as a true partner in the production of justice is probably the first and major aspect of restorative justice that sets it apart from the traditional justice system.”).

115. *See infra* Part III.B.1.

116. *See infra* Part III.B.2.a.

117. *See infra* Part III.B.2.b.

118. Thanks are owed to Professor Gray for suggesting this term to represent types of criminal ADR “proactive responses.”

119. *See infra* Part III.B.2.c.

“partner”¹²⁰ in producing justice and publicizing norms better than adjudication. The offender is not pitted against the state—as he would be in the courtroom—but set in a cooperative dialogue with his community.¹²¹ Reframed as such, ADR feeds off of the Strawsonian insight that attitudes are natural responses to a harm,¹²² but argues further that the community must restore public norms, instead of the state or judge. The shifted focus recognizes that the criminal acted contrary to an expectation, which resulted in the harm, but reaches beyond pure blame and punishment¹²³ to restore core public norms. Only the reactive attitudes internal to the process of moral judgment, as Strawson would suggest, can correct the harm and the offender.¹²⁴

Procedurally, the “passive” judge interpreting public norms from his bench, is replaced with community members who interact with the offender to inculcate “correct” norms, behaviors, and attitudes.¹²⁵ Similar to a child learning appropriate behavioral responses from birth, the community “restores” the offender with appropriate public norms.¹²⁶ The natural processes of social norm development, instead of the external procedural court system, better reinforce public norms.¹²⁷

Not only is the offender forced to reexamine public values personal to him and confront the consequences of his action, but society is forced to

120. HAHN, *supra* note 114, at 134.

121. ZEHR, *supra* note 111, at 181–82 (suggesting that the focus is on the relationship).

122. See STRAWSON, *supra* note 54, at 23.

123. See ZEHR, *supra* note 111, at 70–72 (arguing that the traditional retributive paradigm seeks to determine guilt and impose punishment).

124. See Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664–65 (1985) (criticizing Fiss’s characterization of ADR and suggesting that ADR has the potential to promote community values in redressing conflicts). Strawson claims that optimists and pessimists both “over-intellectualize” the moral responsibility debate by looking outside the general structure of human attitudes and feelings. STRAWSON, *supra* note 54, at 23. Thus, the proper way of addressing reactive attitudes and moral judgment must be to make them *appropriate* through criminal justice systems that use the internal processes.

125. See generally Mead, *supra* note 71, at 224–25 (claiming that socialization internalizes norms).

126. A restorative “re-socialization” into correct norms and behaviors takes place under ADR processes.

127. Critical issues about the age and criminal background of the offender, seriousness of the offense, and the like must be addressed further to discover which particular offenders would best be served through this type of character development. For example, the procedures suggested here might not be acceptable for crimes as severe as murder or those involving sociopathic defendants, or some repeat offenders, but could effectively be used in minor cases not involving murder and juvenile school disturbances. The limits of this Article, however, prohibit me from adequately investigating these questions and the scope of crimes and offenders amenable to these processes, and it is left open for the future development of a taxonomy that accounts for these differences. See Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985) for the creation of a related taxonomy of negotiation.

calibrate reactive attitudes and reaffirm public norms.¹²⁸ By participating in the process, society is forced to view the offender as a “human,” not as simply one with an evil “stigma.”¹²⁹ Thus, reactive attitudes are addressed directly through confrontation with the offender;¹³⁰ the separation between label and person—the lessening of negative reactive attitudes, or conversion of properly negative reactive attitudes to proactive attitudes focusing on potential for reform—allows for a fuller acceptance after rehabilitation. By playing a part in the offender’s internalization of proper norms, society reconstructs the relationship in public terms and “publicizes” norms for themselves better than a judge.¹³¹

2. Addressing the Environmental Damage

Not only does the restorative lens allow us to view ADR as a restorer of public norms,¹³² but it also respects blame and responsibility by addressing the damage done by offender and community.¹³³ Utilitarian approaches to criminal punishment may fail to fully respect autonomy by using the offender as a means¹³⁴ and retributive approaches may assign excessive weight to thick notions of moral responsibility.¹³⁵ Restorative approaches, however, confront the reality of social conditions with the aim of achieving a fully functional social relationship between offender, victim, and society by forcing offenders to confront their wrongful conduct¹³⁶ and then by mending environmental risk factors.¹³⁷

a. Offenders take moral responsibility

The scheme hinges on the offender’s moral responsibility, in the form

128. See STRAWSON, *supra* note 54, at 21–22 (noting that reactive attitudes can be calibrated).

129. See GOFFMAN, *supra* note 104, at 2–3 (writing about the imposition of stigma).

130. See HAHN, *supra* note 114, at 137 (“Offenders must feel that they are being held accountable, and the community must be in agreement that this is in fact taking place. Offenders must experience ‘shaming’ for what they have done, but as soon as the shaming phase is finished, their reintegration into the community must be emphasized.”).

131. Obvious economic issues and questions about funding arise in this discussion. These issues rightfully deserve fuller treatment, but if an effective model could be developed, based on the seeds planted here, as an alternative to adjudication and imprisonment for a particular set of offenders who would benefit and better contribute to society after punishment, perhaps a program like this could be sustained and the benefits would outweigh the costs.

132. See *supra* Part III.B.1.

133. See *infra* Part III.B.2.a–b.

134. See *supra* note 108 and accompanying text.

135. See *supra* note 109 and accompanying text.

136. See *infra* Part III.B.2.a.

137. See *infra* Part III.B.2.b.

of understanding the consequences of his action, as measured by reactive attitudes informed by both private interests and public norms.¹³⁸ He must first take responsibility by acknowledging his wrong and accepting the label of offender, and then symbolically repair the injury through the criminal justice process to begin making social amends.¹³⁹

To recognize the consequences and be fully accountable to the victim and community, he must understand the impact of the harm on others and recognize his violation of public norms.¹⁴⁰ After accepting responsibility,¹⁴¹ he must make full amends¹⁴² by addressing his indiscretions and restoring relationships to bring the victim to closure.¹⁴³ ADR procedures allow offenders to do so in the form of restitution, usually an economic sanction,¹⁴⁴ or reparations, consisting of some sort of symbolic action that includes denouncing the offense, vindication, reassurance, and repair.¹⁴⁵ Retribution, in the form of punishment, might also be proper in some circumstances.¹⁴⁶

138. See ZEHR, *supra* note 111, at 200–01 (noting that the offender needs to understand and acknowledge his harm).

139. *Id.* In an Indiana “juvenile reparations” program, for example, Zehr notes that part of *recognition* is in first encouraging the offender to comprehend the harm done to the victim and community and then play a role in his own sentencing to address that harm. *Id.* at 201.

140. *Id.* at 200–01.

141. While the aim of ADR procedures is to meet these goals of understanding and accountability, *see id.* at 197, not all offenders may be willing to accept this responsibility. However, just because it may not be the most effective means of punishment for all, it still remains a viable and promising candidate for the individual offenders it could assist. Traditional punishment and imprisonment, therefore, may necessarily still play a role in a system that simultaneously uses criminal ADR. *But cf.* Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 14 n.23 (1992) (arguing that alternative dispute resolution, in general, “has little to say about genuine disputes, and its proposals for reform suppress conflict as often as they resolve it”). Future research will address the types of offenders that would be best assisted with character development in order to address genuine disputes and offer practical proposals for reform.

142. See ZEHR, *supra* note 111, at 197 (arguing that offenders need to accept the obligations of their crime).

143. *See id.* at 195 (suggesting that the offender needs to vindicate and repair the crime).

144. HAHN, *supra* note 114, at 145. Restitution is appealing to the general public because it could be used at any point in the process, would be directly related to the crime (for those offenses involving money or services), and has been a long-used sanction. *Id.* Victim-offender mediation programs, just one type of criminal ADR procedure, often require restitution and reconciliation in addressing the harm. Bakker, *supra* note 12, at 1484. The only problem with restitution, however, is that low-income offenders might not be able to make full payment of damages. HAHN, *supra* note 114, at 145–46.

145. ZEHR, *supra* note 111, at 195. Reparations normally refer to schemes that provide payment “in cash or in kind” to a large group to amend for harm done rather than to deter future wrongdoing. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003) (parentheses omitted).

146. ZEHR, *supra* note 111, at 209–10. Restorative justice approaches are normally seen as more just than typical punishment paradigms. *Id.* at 209. The real question, Zehr then poses, is “whether

b. Responsibility for core public values

ADR procedures, as revealed through the restorative lens, also address the damage done by environmental risk factors by incorporating public norms into the offender's private decision-making process. Once the offender has taken responsibility, the community can inculcate normative considerations that determine appropriate conduct.¹⁴⁷ Pairing reintegration and rehabilitation, ADR takes notice of the act's social history in the "correction" of the harm by altering the offender's opinions toward the law, the community's attitudes toward the offender, and underlying social conditions.

ADR procedures rehabilitate the offender to give him the tools necessary to be an asset to society post-conviction.¹⁴⁸ Rehabilitation seeks to alter the offender's behavior and attitudes toward public norms to prevent future crime by tailoring punishment to individual offenders.¹⁴⁹ It recognizes that outside factors might have impacted the criminal act, then calls on psychiatrists, psychologists, sociologists, or social workers to displace those influences through corrective measures like education and vocational training.¹⁵⁰ The future-oriented approach of rehabilitation is hesitant to assume the offender's full responsibility,¹⁵¹ so instead focuses primarily on affecting change in the offender's character to prevent future harm.¹⁵²

For the incorporation of public norms into the offender's private decision-making process to be fully successful, ADR procedures ease the offender's acceptance into society.¹⁵³ Reintegration focuses on changing reactive attitudes toward the offender as well as social patterns that produce criminal behaviors to reach full incorporation into society after

punishment *intended as punishment* has a place." *Id.* He suggests that punishment for purposes of pain should not be used to achieve an ends, but that "fair and legitimate" punishment might have a place if it relates to the "original wrong." *Id.* at 110.

147. *Cf.* HAHN, *supra* note 114, at 134 (arguing that the tradition of Anglo-Saxon criminal justice has been to use punishment to maintain a "just and viable society," but that restorative approaches do not prohibit efforts to "empower communities" to effectuate the rule of law.).

148. *See* ZEHR, *supra* note 111, at 200 (arguing that offenders, just like victims, have needs that must be met in order for full justice to be achieved).

149. SHICHOR, *supra* note 109, at 44.

150. *Id.*; *see* HAHN, *supra* note 114, at 103. Retroactively, probation and parole officers might work with neighborhood groups, businesses, churches, and schools to advance program development for the offender. *Id.* at 105. Under this model, the gap between "institutional" custodial, correctional staff, and treatment would likely be lessened to take a team-based approach. *Id.*

151. SHICHOR, *supra* note 109, at 44.

152. *Id.* (citation omitted).

153. *See* HAHN, *supra* note 114, at 135 (internal citation omitted) (noting that a key component of restorative justice is providing opportunities for offenders to reintegrate into the community).

punishment.¹⁵⁴ The process “present[s] positive alternatives to law-violating behavior” by encouraging healthy family ties and nourishing community relationships that promote individual support.¹⁵⁵ Doing so develops the offender’s social values in a practical way that can be utilized after punishment.¹⁵⁶

c. “Presponses”

Proactively, ADR systems can further supplant the influence of “risk factors” by developing procedural, restorative “presponses” that engender acceptable norms and provide the means of “correct” character development, thereby correcting social failures evidenced by, *inter alia*, the Surgeon General’s identified risk factors.¹⁵⁷ ADR procedures operate, in essence, as a “resocialization” into behavioral expectations, offering positive alternatives, before risk factors produce criminality.¹⁵⁸

One such example is the Cristo Rey Network of high schools located around the United States, which targets urban youth in low-income areas who have limited educational opportunities.¹⁵⁹ The schools seek to give individuals from gangs, broken homes, and poor backgrounds—all of which are social risk factors—the opportunity to broaden their education, secure job opportunities, and establish better economic means.¹⁶⁰ Students finance their education by participating in once-a-week work-study programs gaining experience and learning values like hard work and responsibility.¹⁶¹ Programs like Cristo Rey attack clusters of risk factors to holistically embrace youth prone to criminality.¹⁶²

154. SHICHOR, *supra* note 109, at 52.

155. HAHN, *supra* note 114, at 100. See *id.* at 100–06, for a more thorough explanation of how reintegration seeks to recognize the pathology of the crime to correct the offender’s behavior going forward.

156. *Id.* at 105. At times, pairing reintegration with aspects of reform could even allow for an emphasis on communal standards that the offender must meet to become a productive member of society through systems of rewards and punishments, surveillance, and behavior-monitoring in correctional compliance. *Id.* at 103.

157. See *supra* Part III.B.

158. This type of ADR procedure would require funding on a proactive basis to prevent crime. In this sense, it might require a reallocation of funds: money spent on dealing with the consequences of crime, would instead be used to *prevent* crime. The change of focus, however, if these programs are ultimately effective in preventing crime, would justify the reallocation and promote a “safer” society.

159. Cristo Rey Jesuit High School, http://www.cristorey.net/about/our_story.html (last visited Oct. 30, 2009) [hereinafter Cristo Rey].

160. *Id.*

161. *Id.* This approach seems to be working well so far, with 99% of graduates accepted to two or four year colleges. *Id.*

162. See YOUTH VIOLENCE, *supra* note 65 (“Risk factors usually exist in clusters, not in isolation.”). The report, for example, suggests that abused and neglected children tended to come from

“Presponses” connect public norms with community relationships, but address the damage in a proactive way. “Presponses” exploit natural reactive attitudes in response to past crime; they represent the understanding that an act’s social history can be employed to prevent the development of future *negative* reactive attitudes by correcting the risk factors revealed in the act’s social history. If we know what might correlate with crime and cause negative reactive attitudes, we can utilize that knowledge to make reactive attitudes appropriate in the future—or wholly prevent negative reactive attitudes—and work to eliminate crime altogether.¹⁶³

C. Rebutting Determinism

Skeptics might claim that ADR cannot truly “resolve” the determinist critique. That is true in a certain respect because these procedures accept that environmental factors play an important role in agent formation.¹⁶⁴ However, the connection forged between public norms and private relationships in ADR procedures usefully shifts the focus from the past to the future by working to restore the preconditions of reactive attitudes¹⁶⁵ and to establish justified assignments of responsibility.¹⁶⁶

The process does not eliminate blame entirely because the act could be correlated with, rather than caused by, risk factors and the offender was not *constrained* to act.¹⁶⁷ Rather, this process packages punishment in a more satisfactory way.¹⁶⁸ While we demand a certain degree of good will from

poor, single-parent families living in disadvantaged neighborhoods with rampant violence, crime, and drug use. *Id.* Programs like Cristo Rey address the Surgeon General’s warning that “[m]ore important than any individual factor . . . is the accumulation of risk factors.” *Id.* The work-study program, for example, provides strong community ties and job training, *see* Cristo Rey, that counteracts weak social ties and neighborhood disorganization, *see* YOUTH VIOLENCE. Invested teachers and faculty who run after-school programs, *see* Cristo Rey, offset gang involvement, low parental involvement, and poor attitude or school performance, *see* YOUTH VIOLENCE.

163. Cristo Rey presents just one example of a proactive ADR procedure that could be used to prevent crime altogether, or justify reactive attitudes if crime occurs in the future. Cristo Rey, *supra* note 159. The aim of “presponses” is to counteract environmental risk factors that lead to potential criminal conduct at an early stage of an individual’s life. Measuring the “effectiveness” of such a system might be impossible, but it is theoretically imaginable that we could prevent crime if we targeted—and eliminated—these troubling factors. More research is necessary to identify other—and possibly more effective—“presponses” that could be constructed in the most cost-effective way.

164. *See* ZEHR, *supra* note 111, at 44 (suggesting that the offender’s actions “grew out of a history of abuse”).

165. *See* STRAWSON, *supra* note 54, at 22–23 (suggesting that conditions can change reactive attitudes).

166. *See* Rosen, *supra* note 52, at 308–09 (suggesting that moral responsibility is possible).

167. *See* AYER, *supra* note 51, at 278, 282–83 (suggesting that the possibility of explaining behavior does not mean that the individual acted under constraint).

168. *See* ZEHR, *supra* note 111, at 181–82 (suggesting that crime injures relationships and harms

individuals, as part of society, reactive attitudes can—and should—be lessened when we consider the effect of the risk factors on the individual and the act.¹⁶⁹ ADR does not forgo reactive attitudes of condemnation entirely.¹⁷⁰ Neither does it fully embrace hard moralism by refusing to consider sympathetic reactions that underlie its focus on compassionate punishment.¹⁷¹ The decision to use ADR instead represents a compromise between reactive attitudes and sympathy that reflects our own epistemic humility.¹⁷² Because we cannot fully know the role that environmental factors played in shaping a criminal response, the focus should be on correcting the influence of those environmental risk factors through rehabilitation and reintegration to inculcate public norms as central features of public agency going forward, instead of harsh, punitive punishment.¹⁷³

Besides lessening punishment, ADR shifts the focus to the act's social history to address the damage done by the environmental risk factors. By rehabilitating and reintegrating the offender with proper public norms for private decision-making and developing "presponses" to thwart the influence of risk factors, the scheme sets the stage for future appropriate reactive attitudes.¹⁷⁴ ADR displaces the "incorrect" normative and misweighed judgments presented by the risk factors that might interfere with the fulfillment of procedural epistemic duties.¹⁷⁵ For example, programs like Cristo Rey counteract the influence of risk factors by

both offender and victim).

169. STRAWSON, *supra* note 54, at 7, 16; *see id.* at 7 ("[Various situations] invite us to see the *injury* as one for which he was not fully, or at all, responsible.").

170. *See* ZEHR, *supra* note 111, at 194–95 ("Victims feel violated by crime, and these violations generate needs. Communities feel violated as well . . . and they have needs too. Since one cannot ignore the public dimensions of crime, the justice process in many cases cannot be fully private.").

171. *See id.* at 186 ("If crime is injury, justice will repair injuries and promote healing.").

172. *See* DESMOND MPILO TUTU, NO FUTURE WITHOUT FORGIVENESS 252–53 (1999). Tutu states:

We shouldn't underestimate the power of conditioning. That is why I hold the view that we should be a little more generous, a little more understanding, in judging perpetrators of human rights violations. This does not mean we will condone what they and the white community in South Africa did or allowed to happen. But we will be a little more compassionate in our judgment as we become a little more conscious of how we too could succumb as easily as they. It will make our judgment just that little less strident and abrasive and possibly open the door to some being able to forgive themselves for what they now perceive as weakness and lack of courage.

Id.

173. *See* STRAWSON, *supra* note 54, at 23 (arguing that "questions of justification," which might lessen moral judgments and reactive attitudes, are internal to the process).

174. *See generally* Rosen, *supra* note 52, at 307 (suggesting that conditions might exist for imposing moral responsibility).

175. *See generally id.* at 306–07 (suggesting that original responsibility can only be determined when we can determine an individual has made an akratic act after fulfilling certain procedural epistemic duties).

providing a set of tools for individuals to correct their own character

development. In the case of a child with an abusive father, for instance, “presponses” intervene to present the child with appropriate alternatives.¹⁷⁶

By addressing the social history of crime and criminal, ADR allows individuals to better locate the agent as potential akratic actor, have *appropriate* reactive attitudes in the future, and impose moral judgments.¹⁷⁷ Next time a child turns to violence to solve a problem with a classmate, we can have an appropriate reactive attitude;¹⁷⁸ we better know that the reason he responded violently was not because he did not know any better, but that he knew the pertinent facts, knew that it was wrong, and “[knew] that in the circumstances, all things considered, he should not do it,” but did it anyway.¹⁷⁹ The resulting moral condemnation, then, is an appropriate reactive attitude.¹⁸⁰

By making a connection between appropriate reactive attitudes and public norms, ADR avoids the Fiss critique¹⁸¹ by putting substantive and procedural norms of public justice at the center of the effort to restore the offender to a condition of public agency subject to the full spectrum of reactive attitudes. The offender is inculcated with public norms for his future private decision-making, but because the community plays such a large role in this paradigm, public norms are also reinforced for society.¹⁸² Complementarily, by focusing on the act’s social history to allow for appropriate future moral judgment, the community—particularly by developing “presponses”—rights actual wrongs.¹⁸³ By confronting environmental factors proactively, ADR avoids the critique that its primary concern with “*facilitat[ing]*” settlement left it procedurally inept at addressing root causes.¹⁸⁴

176. See *supra* note 75 and accompanying text. In the case of the violent student, “presponses” help the child choose the option more accommodating of public norms, even though non-moral payoffs may seem more advantageous.

177. See *supra* note 90 and accompanying text.

178. See *supra* note 75 and accompanying text.

179. Rosen, *supra* note 52, at 307.

180. See STRAWSON, *supra* note 54, at 6–7 (suggesting that reactive attitudes can be mollified); Rosen, *supra* note 52, at 307–08 (suggesting that we can determine an akratic actor).

181. See FISS, *supra* note 26, at 1085–89 (arguing that ADR problematically privatizes the dispute, prohibiting it from promulgating core public norms).

182. See HAHN, *supra* note 114, at 134 (arguing that restorative justice procedures can “contribute more fully to the rule of law as it affects them”).

183. Compare HARRINGTON, *supra* note 44, at 73–74 (suggesting that ADR is not framed to right actual legal wrongs).

184. *Id.*

D. A Transitional Justice Defense of ADR's Approach

Transitional justice literature¹⁸⁵ highlights how ADR procedures avoid the Fiss critique and fulfill the law's public role by cultivating a social regard for the interconnectedness reflected in public norms.¹⁸⁶ ADR may "privatize" the dispute by removing it from the confines of the courts,¹⁸⁷ but does so to fulfill restorative justice's central concern for, in Archbishop Desmond Tutu's terms, "the healing of breaches, the redressing of imbalances, the restoration of broken relationships, [and the rehabilitation of] both the victim and the perpetrator"¹⁸⁸ Shifting the focus of the harm from the state to relationships allows for the exploitation of community to cultivate, what Tutu and other transitional justice literature refers to as, *ubuntu*¹⁸⁹ and re-legitimize the existing political scheme.¹⁹⁰

Tutu's concerns in utilizing a restorative remedy, similar in many respects to ADR, was to draw on natural human relations to reinforce social order and public norms.¹⁹¹ Tutu argued that the South African Truth and

185. See Bronwyn Leebaw, Assistant Professor of Political Science at the University of California, Riverside, *Beyond Therapy: Truth Commissions and Restorative Justice as Responses to Systematic Political Violence at the Annual Meeting of the Law and Society Association* (May 29, 2009) (on file with author), for an exploration of how truth commissions advance restorative justice by addressing underlying systemic conflict and injustice, as opposed to therapeutic justice, which reduces "injury" to psychological harm and recovery. Thanks are owed to Professor Bronwyn Leebaw whose draft for the Annual Meeting of the Law and Society Association provided insight crucial to the development of this Article.

186. Restorative justice, when applied to transitional situations, furthers the reasoning behind my argument. Transitional justice literature suggests that restorative approaches recognize that "pre-transitional abuses are symptoms of social and political pathologies[]" and "provide a path to the future by laying the groundwork for social, political, and legal change." David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 *FORDHAM L. REV.* 2621, 2690 (2006). Likewise, the restorative-based approaches under the umbrella of "ADR" recognize that criminality may be a product of "social and political pathologies," *id.*, that *need* to be corrected in order to fulfill government's duty as "conduit for knowledge of right and wrong . . . leading up to prosecution and punishment," *id.* at 2656. On a much less serious level, these retroactive and proactive approaches legitimize government's role and counteract risk factors in an attempt to prevent their development in the future. *See id.* at 2690 (suggesting that transitional justice demands that conditions are "create[d]" or "restore[d]" "to ensure the success of a new regime").

187. Lieberman & Henry, *supra* note 3, at 425–26.

188. TUTU, *supra* note 172, 54–55.

189. *Id.* at 31 (describing "[a] person with *ubuntu* [as] open and available to others, affirming of others . . . he or she belongs in the greater whole and is diminished when others are humiliated or diminished").

190. *See* Leebaw, *supra* note 185, at 5 (suggesting that the Truth and Reconciliation Commission included "a role for political judgment and political responsibility").

191. *See* TUTU, *supra* note 172, at 45–46.

The adoption of this Constitution lays the secure foundation for the people of

Reconciliation Commission (TRC) could only fully remedy the harm and properly publicly promulgate the law by restoring *ubuntu*, or social harmony.¹⁹² Tutu's underlying concern sheds light on Strawson's key insight: *full* justice is achieved, even in the most horrific instances, by restoring both offender and community to conditions described and accounted for by reactive attitudes that reflect deep social commitments that give rise to public norms.¹⁹³ ADR, on a lesser scale, cultivates *ubuntu* by moving beyond pure legalism and restoring relationships that law and public norms are designed to protect.¹⁹⁴ The community guides the offender's re-entry into society, and communal root conflicts are addressed by restoring the offender with his community through rehabilitative means, instead of a distant legal process.¹⁹⁵ The victim in the ADR process, like the TRC, is forced to take "symbolic" and actual responsibility¹⁹⁶ and make

South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.

Id. Cf. David Gray, *Constitutional Faith and Dynamic Stability: Thoughts on Religion, Constitutions, and Transitions to Democracy*, 69 MD. L. REV. 26, 37 (2009) (noting that religious figures, like Desmond Tutu, are "prominent in the Pantheon of peacemakers").

192. TUTU, *supra* note 172, at 16–17.

193. *See* STRAWSON, *supra* note 54, at 22–23 (suggesting that internal reactive attitudes are the foundation of moral judgments, not external considerations); *see also* Pumla Gobodo-Madikizela, *Alternatives to Revenge: Building a Vocabulary of Reconciliation Through Political Pardon*, in *THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE AND IMPUNITY* 51, 53 (Charles Villa-Vicencio and Erik Doxtader eds., 2003) (arguing that the "duty to prosecute" limits the framework of justice to "criminal jurisprudence" because it "focuses strictly on the question of individual responsibility" when apartheid's human rights violations must find resolution through other avenues, in particular restorative justice, which gives victims a voice, a "sense of affirmation[,] and validation that is so crucial for the healing").

194. *See* ZEHR, *supra* note 111, at 186 (arguing that the goal of justice should be restitution and healing for victims).

195. *See id.* at 184 (noting that the solution must address the relationship and place the emphasis on the interpersonal connections).

196. *See id.* at 192 (arguing that the offender takes responsibility). Some commentators on the TRC argue that beyond documenting the past and providing victims with the opportunity to put "their stories on record," "some of the perpetrators were able to move beyond mere description and to reflect on the ethical component of their actions, to begin to feel sorry for what they had done." *See* Godobo-Madikizela, *supra* note 193, at 51. Pumla Gobodo-Madikizela, for example, suggests that even though all of the perpetrator's apologies were not sincere, the "rendering of apologetic remarks, offered directly to families who had lost loved ones, laid the groundwork for the TRC hearings to engender something even more important than reams of testimony: it opened the door to the possibility of rendering political pardon morally defensible." *Id.* at 51.

amends to the victim and community.¹⁹⁷ Thus, ADR does a better job at promulgating the law through community sharing in the restorative process¹⁹⁸ because only by cultivating *ubuntu* through a reconciliatory dialogue can justice—and the full role of the law—be fulfilled.¹⁹⁹

Through the process, ADR, like the TRC, addresses political accountability and legitimizes legal systems by addressing larger social problems.²⁰⁰ Charles Villa-Vicencio has argued that a larger political restorative justice approach allowed the TRC to promote a democratic dialogue to restore the political community.²⁰¹ Confidence in the rule of law had to be restored, but closure had to simultaneously be brought to a “dark chapter in South African history.”²⁰² Prosecution of offenders would not help “heal” a troubled nation;²⁰³ rather, full healing would require addressing the needs of victims and survivors.²⁰⁴ Only by exploring “legal accountability, citizen responsibility, and material acquisition to the forging of new notions of belonging[,]”²⁰⁵ could confidence in the rule of law be restored as a “basis for peaceful coexistence.”²⁰⁶

197. ZEHR, *supra* note 111, at 200–01 (suggesting that the offender must make amends for his crime).

198. See Leebaw, *supra* note 185, at 18 (exploring Tutu’s claim “that an emphasis on resolving past conflicts and addressing abuses through the courts is in tension with the goal of establishing a sense of shared community in South Africa because it will undermine the quality of *ubuntu*”).

199. See TUTU, *supra* note 172, at 30–31 (asserting that community forgiveness and rehabilitation can be fostered through open dialogue that focuses on our interconnectedness and shared humanity).

200. See Charles Villa-Vicencio, *Restorative Justice: Ambiguities and Limitations of a Theory*, in THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE, AND IMPUNITY, *supra* note 193, at 30, 31 (arguing that “political restorative justice” must be sought).

201. *Id.* at 31–32.

202. *Id.* at 35.

203. *Id.*

204. See *id.* at 35–36 (“[Healing] also requires that the restlessness and uncertainty of perpetrators be addressed. Individual demands for retribution need to be integrated with national needs for amnesty and reconciliation.”).

205. *Id.* at 36.

206. *Id.* at 35. The “conditional amnesty” granted to perpetrators allowed South Africa to “build social cohesion and to forego revenge in favour of restoring peace.” See Godobo-Madikizela, *supra* note 193, at 52. Selective prosecution, some argued, was the proper way to proceed because it would simultaneously promote “state integrity” and justice. See, e.g., Dumisa Ntsebeza, *Responding to the Symposium*, in THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE, AND IMPUNITY, *supra* note 193, at 23, 25. As Part III argued on the backs of Strawson and Ayer’s critical insights, a theory of criminal punishment in which we seek full justice must account for the failure of society and the failure of the offender. See *supra* Part III. In the context of mass atrocities, then, the TRC sought transitional justice by addressing both society and the offender through conditional amnesty and reparation. See Ntsebeza, *supra*, at 25 (“Selective prosecution is the only way forward. For reasons of justice, this must happen. For reasons of state integrity, this must happen – the TRC has recommended appropriate prosecutions, and the Promotion of National Unity and Reconciliation Act provides for them to happen.”); Erik Doxtader & Charles Villa-Vicencio, *Introduction: Provocations at the End of Amnesty*, in THE

Like Fiss, Villa-Vicencio recognized the public role of law, but unlike Fiss, he realized that it could be fulfilled through restorative justice, outside of the courtroom.²⁰⁷ In the transitional society struggling to bridge the law's administration and the state's integrity following "illegitimate rule and lawlessness," Villa-Vicencio realized the importance of legitimizing the laws while also reconciling the relationships between victim, offender, and community.²⁰⁸ South Africa had to demonstrate the capacity to enforce rules "enshrined in [its] founding constitution" while "promot[ing] the fullest participation by citizens in a process that claim[ed] to be driven by . . .

ubuntu."²⁰⁹ He believed that restorative justice best implemented measures that counteracted the retributive demands of victims and survivors.²¹⁰

ADR similarly resolves the conflict, albeit on a much smaller level, by providing a way for the government to enforce its constitutional ideals while addressing the role of environmental factors in private engagement with public norms.²¹¹ ADR is a vehicle through which individuals can be instructed to form the necessary cognitive and moral skills that underlie public norms and make law-abiding behavior natural instead of a response to a forceful threat.²¹² ADR, therefore, embraces the Aristotlean notion that

PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE, AND IMPUNITY, *supra* note 193, at x, xiv ("[T]he amnesty process was to provide a means for perpetrators 'to become active, full and creative members of the new order' . . . [F]or both victims and perpetrators to cross the historic bridge from the past to the future . . .") (internal citation omitted); George Bizos, *Why Prosecutions are Necessary*, in THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE, AND IMPUNITY, *supra* note 193, at 5, 5 (arguing that amnesty, "but not blanket amnesty" was a "middle way" that gave "both perpetrators and victims[] the opportunity to speak about the past and present conflict").

207. See Villa-Vicencio, *supra* note 200, at 31-32 (arguing that the TRC "negotiat[ed] a way through the ambiguities inherent to political transition from oppressive, autocratic rule to the beginning of democracy"); see also Gobodo-Madikizela, *supra* note 193, at 53 ("Unlike a court of law, where victims are brought into the picture only in relation to the perpetrator's deed, the TRC put victims in the centre of the process, allowing them to tell their stories . . .").

208. Villa-Vicencio, *supra* note 200, at 36.

209. *Id.* at 37.

210. *Id.*

211. See *supra* Part III.B.

212. See ARISTOTLE, *supra* note 49, at III. I. 1110b12-17. Aristotle states:

Also, those who act by force and are unwilling act with pain, while those who act on account of what is pleasant and beautiful do so with pleasure. And it is ridiculous to blame external things but not oneself, for being easily caught by such things, and to take credit oneself for beautiful deeds but blame the pleasant things for one's shameful deeds. So it appears that what is forced is that of which the source is from outside, while the one who is forced contributes nothing.

Id.; see also Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 28 U. PA. J. INT'L L. (forthcoming 2010), available at <http://ssrn.com/abstract=1477075> (suggesting that trials, as justice mechanisms, internalize norms "through dramatization of the

private character is a function of public enculturation by allowing the government to reach beyond the courtroom to better fulfill the mandates of a just society.²¹³ By endorsing ADR, the government can use the community to “teach” public values and re-legitimize itself in the process.²¹⁴

IV. CONCLUSION

This Article has argued that debates between free will advocates and determinists and contests between ADR advocates and skeptics, such as Fiss, are useful in that both miss the point. Instead of focusing on *either* the offender or society, legitimate criminal punishment systems must address both failures to fully promulgate public norms.²¹⁵ Under a restorative lens, ADR emerges as a theory of criminal punishment that accounts for both failures and is better equipped than traditional systems to reach full justice.²¹⁶ ADR procedures exploit the Strawsonian emphasis on the interpersonal connections captured in public norms and correct environmental risk factors that have influenced the offender to sympathetically, meaningfully, and holistically bring “recalcitrant reality closer to our chosen ideals.”²¹⁷

As a practical matter, the theory of criminal punishment advanced here offers a potential framework through which we can begin to construct ADR procedures. These procedures rehabilitate offenders, who will benefit from the intervention and become assets to society, while respecting responsibility and renewing public norms. Future work will critique and refine the arguments addressed here, particularly the intricacies of character development and the most cost-effective ways of implementing these procedures, including how to identify the most impressionable offenders, to discover the best means of applying this theoretical framework in the community.

effects of the wrongdoing[] and stigmatization of the offender); *id.* at 9 n.26 (suggesting that truth commissions might be an alternative venue of norm internalization efforts because it “has as its goal recording the history behind severe violations of international law,” but noting that it cannot impose punishment that deters to such extent as trials).

213. ARISTOTLE, *supra* note 49, at I. IX. 1099b30–31 (“[T]he highest good is the end of politics, while it takes the greatest part of its pains to produce citizens of a certain sort . . .”).

214. Villa-Vicencio argued that, “[w]here . . . government fails to demonstrate an ability to deal with poverty and alienation, the affirmation of basic human rights, corruption, crime, greed and related concerns, the competency and legitimacy of that government will be questioned.” Villa-Vicencio, *supra* note 193, at 37. Developing “presponses” targeted towards “clusters” of risk factors provides one way that government can justify its existing structure and rule of law to avoid these claims.

215. *See supra* Part III.A.

216. *See supra* Part III.B.

217. Fiss, *supra* note 26, at 1089.

