

LAW AND JUSTICE
AT THE DAWN OF THE 21ST CENTURY
Essays in Honour of Lovell Derek Fernandez

EDITORS

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Restorative Justice as Postmodern Justice: Exegesis and Critique

Raymond Koen

Abstract

This essay explores the relationship between postmodernism and RJ. Postmodernism quickly outgrew its non-legal origins and has extended its reach to incorporate matters legal. Already, it has established a significant presence in the law, as increasing numbers of legal theorists have adopted or included a postmodern perspective in their analytical endeavours. The particular concern of the essay is with the impact of postmodernism upon the field of criminal justice. In this connection, it is submitted that RJ is the exemplification of the postmodern attitude in criminal justice. This submission is grounded in an investigation of the interrelations between postmodernism and RJ in six spheres, namely, the state, history, alterity, power, subjectivity and consumerism. This investigation shows that in each sphere there is a discernible and compelling postmodern flavour to the RJ tenet in question. In consequence, it is posited that the intersection between postmodernism and RJ is significant enough to justify the proposition that if there is a postmodern criminal justice it is RJ. In other words, RJ is postmodern justice. However, the relationship between postmodernism and RJ is steeped in contradiction. The latter part of the essay seeks to probe this contradiction, via an exposition and critique of the political economies of postmodernism and RJ, with a view to comprehending its implications for the future of RJ.

1 Introduction

Postmodernism is predatory. It long has superseded its origins in art, architecture and literary theory, and has wended its way voraciously through a large number of disciplines. It has conquered even the famously conservative defences of the law and already has made a noticeable imprint upon the analysis of legal relations. Indeed, it has implanted a colonising footprint in the legal form. There are today not a few legal academics who challenge the perceived certainties of legal modernism and who routinely subject law and justice to subversive interrogations through the postmodern lens.¹

The postmodern invasion of the law extends also to the field of criminal justice, where resort is had to the postulates of postmodernism in the comprehension and critique of crime and punishment. Restorative justice (RJ)

¹ See, generally, Edgeworth (2003), Davies (1996), McVeigh (2002), Hunt (1990), Stacy (2001) and Feldman (2000).

figures prominently here in that it encapsulates the postmodern offensive against the criminal justice system.² Indeed, it is a central proposition of this essay that the notion of RJ is the exemplar of legal postmodernism in the arena of criminal justice. In other words, if there is a postmodern criminal justice, it is RJ.³

There is a palpable correspondence between postmodernism and RJ, in that many of the major tenets of RJ have a discernibly postmodern flavour about them. The synchronicity between the two is neither episodic nor accidental. It is genetic. In this regard, RJ may be understood as one of the many progeny of postmodernism. There is enough constitutional intersection between them to justify RJ being theorised as a genus of postmodern justice, that is, as a form of criminal justice informed by the premises of a postmodern jurisprudence. The overall purpose of this essay, then, is to develop a critical comprehension of RJ as a postmodern presence in the criminal justice system. To this end, the first half of the essay is exegetical and seeks to establish the postmodern character of RJ, while the second is critical and attempts to elaborate a materialist critique of RJ as postmodern justice.

2 The Postmodern Impulse of Restorative Justice

The notion that RJ is constitutionally postmodern likely is a novel one for most of its advocates. As a rule, the proponents of RJ have little or nothing to say about postmodernism. Certainly, they do not confess readily to postmodern sensibilities, and still less do they identify expressly any postmodern provenance for their work. The literature of RJ is remarkable for displaying no wilful adherence to or conscious concurrence with the philosophical premises or operational axioms of postmodernism.

Arrigo has taken up the theoretical cudgels for a reciprocal engagement between postmodernism and RJ, bemoaning the apparent distance of RJ

2 See, for example, Edgeworth (2003) and Cunneen (2003).

3 There are two versions of restorative justice. Comprehensive restorative justice is the strong or maximalist version, conceived as a systemic alternative to criminal justice. The weak or minimalist version is partial restorative justice, which is content to be an adjunct to criminal justice. The former is abolitionist, the latter accommodationist. The partial version of restorative justice holds negligible philosophical attraction and is of minimal theoretical consequence. It is little more than a pragmatic adaptation to the contradiction between criminal justice and comprehensive restorative justice. Comprehensive restorative justice is engaging analytically precisely because it entails a radical rejection of what is. Partial restorative justice is not, precisely because it seeks a *modus vivendi* with what is. It therefore does not demand sustained analytical attention. In any event, it makes sense only in its relation of incompleteness to comprehensive restorative justice. In this essay, then, any unqualified reference to restorative justice means comprehensive restorative justice. See further Pavlich (2005) 16-20.

principles from postmodern social theory.⁴ He canvasses the challenges which postmodernism poses for RJ, and urges that the “tools of affirmative postmodernism” be harnessed as a “liberating blueprint for reform in RJ”.⁵ For him, RJ is the poorer for not embracing postmodernism and he considers that it is high time that its advocates begin to “apply postmodern principles to the logic and practice of restorative and community justice”.⁶ In a word, he entreats adherents and practitioners of RJ to become affirmative postmodernists, the better to advance their pursuit of a justice system which is responsive alike to the needs of victims, offenders and their communities.

Arrigo’s concerns may carry weight insofar as members of the RJ movement generally do not style themselves affirmative postmodernists or do not profess reliance upon the resources of postmodernism. However, the fact that they do not proclaim adherence to “postmodern principles” in itself is not an obstacle to the argument of this essay, that RJ is a thoroughly postmodern way of doing justice. As intimated above, and as will be demonstrated below, there is a constitutional coincidence between RJ and postmodernism which exists independently of the ideational preferences of their adherents. In this regard, Arrigo’s concerns are misplaced, for the practice of RJ already is decidedly postmodern, and the proponents of RJ need not be exhorted now to apply principles which already are inscribed, more or less, in their practice. In other words, RJ is postmodern in objective terms, notwithstanding the apparent unconcern of its followers with things postmodern.

It bears noting here that Armstrong makes a similar argument in his treatment of the drug courts in the USA as dispensers of postmodern justice. According to him, the drug court is almost instinctively postmodern in its ontological disposition and diversionary practice, breaking radically with the punitive propensities of the modern criminal court.

[I]t appears to me that the DC is postmodern because it combines ideas strongly influenced, perhaps even shaped, by postmodernism. The DC is not postmodern by design, its prime movers are not adhering to any preconceived intellectual or philosophical tradition. Instead the DC is a developing institution whose creators add components and adapt features based on first-hand consideration of the problem at hand. This, it turns out, is exactly what individuals engaged in the postmodern project do when they challenge adherence to universally applicable frameworks of interpretation.⁷

4 See Arrigo (2008) 477-480 and Arrigo (2004) 93-98.

5 Arrigo (2008) 481.

6 Arrigo (2004) 98.

7 Armstrong (2008) 272.

RJ is postmodern in much the same sense. It, too, departs radically from the mores of conventional criminal justice and comprehends the problems of crime and punishment from a postmodern perspective. But its postmodernism, too, is not espoused consciously or has not been developed deliberately by its adherents. Rather, it is a spontaneous postmodernism, which has emerged from their attempts to fashion an alternative to criminal justice. Like the drug court, RJ is extemporaneously postmodern. Not unlike Topsy, nobody never made its postmodernism, it just grow'd!

3 Methodological Excursus

It is necessary, at this juncture, to make some effort to forestall misinterpretation of the methodological conspectus of this essay. Patently, the analysis presented here entails a considerable degree of simplification, in respect of both postmodernism and RJ. And certainly, it is unable to do representational justice to the complexities and nuances which render postmodernism the proverbial moving target. However, all analytical endeavours, by definition, are exercises in simplification.⁸ It is not possible to analyse postmodernism or RJ or the relationship between them without simplifying their constitutional totalities. Wholeness must yield to partialness in the process of analysis. "Pigeon-holing" is unavoidable in the pursuit of comprehension.⁹

Simplification, in turn, always and necessarily involves the analyst in a process of abstraction.¹⁰ A social form or a concept cannot be theorised without abstraction, that is, "the intellectual activity of breaking [the] whole down into the mental units with which we think about it".¹¹ The process of abstraction isolates and purifies the relations chosen for analysis, and reduces them to "certain standard types, from which all characteristics irrelevant to the relation under examination are removed".¹² It is about avoiding periphera and highlighting essentialia in the pursuit of analytical clarity. The point, as Hegel put it, is for "the essential to be distinguished and brought in to relief in contrast with the so-called non-essential".¹³

The methodology which informs this essay is grounded in the process of abstraction. The objective was to get to the heart of the relationship between postmodernism and RJ. The six issues isolated for analysis were identified by abstracting them from the complex matrices of postmodernism and RJ. They

8 See Ollman (1993) 24.

9 See Mouton & Marais (1994) 58 & 126.

10 Marx (1954) 19.

11 Ollman (1993) 24.

12 Sweezy (1942) 17.

13 Hegel (1956) 65.

emerged from the process of abstraction as the locus for comprehending the relationship between RJ and postmodernism.¹⁴

It may be owned, readily, that the analysis undertaken here is susceptible to a charge of failing to apprehend the constitutional complexities of its objects. This is especially so in respect of the oftentimes knotty intricacies of the postmodern worldview, marked by an antipathy to essentialism, truth-talk and metanarratives, and a commitment to indeterminacy, dislocation and eclecticism. However, as Eagleton has observed, "postmodernism is such a portmanteau phenomenon that anything you assert of one piece of it is almost bound to be untrue of another".¹⁵ The focus of this essay is thus upon the "received wisdom" of postmodernism,¹⁶ that is, upon those fundamentals of the postmodern ontology by which we are able to recognise a phenomenon or a perspective as postmodern.¹⁷ It is submitted that the six precepts around which this essay revolves constitute a part, at least, of the "received wisdom" of postmodernism.

The discussion which follows engages only those aspects of postmodernism which seem pertinent to the analysis of RJ as a postmodern way of doing justice. Thus, those aspects of postmodernism are singled out for analysis which appear to be most helpful in tracing the intersections between postmodernism and RJ. They have been chosen, not because they delineate or even approximate the structure of postmodernism or of RJ, but because they facilitate analytical access to the relationship between the two. That is, they offer crucial insights into the comprehension of RJ as a postmodern jurisprudence. The primary objective of this essay is to apprehend the contours of the relationship between RJ and postmodernism. It is submitted that the methodology adopted facilitates analytical access to that relationship in its pristine form, unencumbered by disposables and digressions.

Finally, it has to be recorded that for the purposes of this essay postmodernism is taken to be the worldview that corresponds to postmodernity, and that postmodernity is the political economy of the current epoch, which began in the early 1970s, of the capitalist mode of production. As

14 They are identified and analysed below.

15 Eagleton (1996) viii.

16 Eagleton (1996) viii.

17 See Callinicos (1995) 734 who, some time ago already, classified postmodernism as a "normal science", following the Kuhnian designation of "normal science" as "the state of affairs which comes into being when a group of researchers come to accept certain ways of proceeding intellectually as the basis of their future inquiries". He goes on to suggest that the "principal claims" of postmodernism have acquired "the solemn countenance of orthodoxy" for a goodly number of intellectuals. It would appear that, nuances and differences notwithstanding, there does exist an identifiable corpus of postmodern postulates which constitutes a "received wisdom".

a mode of production, capitalism is in historic decline. It is in the grip of a structural crisis of capital accumulation which goes to the vital issue of its reproduction as a mode of production. Postmodernism, then, is the intellectual disposition and cultural mood accompanying the contemporary stage of the capitalist crisis. It is the economic crisis expressed in non-economic terms. It is the generalised superstructural conjugate of the material contradictions embedded in the marrow of the capitalist mode of production.

4 Mapping the Constitutional Concordance

The next several sections of this essay comprise a presentation of a sestet of theses pertaining to the state, history, alterity, power, subjectivity and consumerism. It is submitted that these six theses are germane to the comprehension of RJ as a postmodern critique of the modern sensibilities founding the criminal justice system. In other words, they have been chosen because they appear to be most apposite for mapping the intersections between RJ and postmodernism and for facilitating analytical admission to the relationship between the two.

The analysis of each of the designated theses will traverse two stages: firstly, an exposition will be offered of the basic postmodern viewpoint on the issue in question, in contrast to the modern viewpoint; secondly, an enquiry will be undertaken into the extent to which RJ shares the postmodern position.¹⁸ However, it must be urged that the discussion which follows cannot and does not purport to be comprehensive. Certainly, it is not presented as any finished description of RJ, and even less as any catholic elaboration of the constitution of postmodernism. The aim is much more pedestrian, namely, to provide a prolegomenon to the analysis of RJ as postmodern justice.

4.1 The State Thesis

Postmodernism posits the decline of the nation-state in the era of globalisation. The argument is that postmodernity is the epoch of the global market, peopled by autonomous subjects, with little or no room for the strong state of modernity. The point is underscored by Edgeworth's characterisation of the postmodern state as a contracting state.¹⁹ This characterisation has a dual

18 It is appropriate to note here that postmodernism is discursively hyperbolic. Extravagant notions such as hyperreality, pastiche, hyperspace and simulacrum are all integral to postmodern discourse. And postmodernists present their arguments in similarly exaggerated terms. See, in this regard, Best & Kellner (2001) 1-2 and Rosenau (1992) 5 & 7. Generally, it is not possible to engage postmodernism, in any of its aspects or relations, without having recourse to and replicating some of its discursive conventions. If, therefore, parts of the presentation below strike the reader as hyperbolic, it is because hyperbole is intrinsic to the discourse of postmodernism.

19 Edgeworth (2003) 53-63.

import. On the one hand, it refers to the retreat of the state as a public institution and the diminution of its traditional hegemonic role in structuring the lives of its citizens. On the other hand, it signifies the increasing privatisation of public functions, as the law of contract is relied upon more and more in respect of both the provision of (whatever remains of) state services and the internal functioning of state departments. Essentially, the postmodern state has reversed the modern trend to centralisation and corporatism. It is a state for which, according to Edgeworth, "privatisation, deregulation and marketisation are the preferred mechanisms by which governance is secured".²⁰

The welfare state was the pinnacle of the evolution of the modern state. It was centralisation and regulation epitomised, and, from the postmodern perspective, was the left liberal political metanarrative materialised. The postmodern state is defined by the neoliberal disavowal of the perceived welfarist errantry of left liberalism. The watchwords of neoliberalism are the self-same trilogy identified by Edgeworth as the preferred mechanisms of postmodern governance.²¹ In other words, postmodernism champions the neoliberal drive towards the attenuation of all the welfare functions of the modern state. Postmodernism prefers the invisible hand of the free market to the visible hand of the centralised state. Ideally, the postmodern state is an absentee state or, at best, a minimalist one, divested of many of its traditional functions, which become privatised in the hands of capitalist corporations.²²

The vision of the state held by postmodernism coincides with its rejection of the notion of the grand narrative which it considers to be the defining flaw of modernism. In this connection, the modern nation-state is perhaps the grandest of all narratives. It is a cohesive, centralised and authoritative institution, which is uniquely competent to implement and realise its own truth claims. It is omnipotent and, for as long as it enjoys a monopoly of force, is impervious to

20 Edgeworth (2003) 56.

21 But see MacEwan (1999) 19: "Markets are always infused with state actions, and the neo-liberal position is not in reality an advocacy of a weak state; it is an advocacy of a particular kind of strong state." For an amplification of this argument, see MacEwan (1999) 125-139.

22 Postmodernists tend not to notice that the minimalist state which they extol is often party to the commodification of properly public functions, and that such commodification is achieved at the cost of increased immiseration of the oppressed and exploited classes. It would appear that for them the freedom of the individual which such a state supposedly brings is valuable enough to offset the deleterious impact upon the living standards of the masses. Postmodernism is a profoundly individualistic worldview. The autonomy of the subject is a centrepiece of the postmodern project (in much the same way as it was the centrepiece of the modern project). The freedom of the individual which accompanies privatisation is crucial. Its impact upon the living standards of the masses matters little.

the claims of competitors within its national borders. Postmodernism entails the break-up of the modern notion of state supremacy. State power becomes fragmented and localised, and state authority, like everything else in the postmodern world, becomes negotiable. The status of the state, as narrative, is reduced from the grand to the quotidian. In the postmodern perspective, most, if not all, traditional state functions can be performed as well, if not better, by non-state actors.

RJ shares this postmodern vision of a minimalist or absentee state. Indeed, easily the most conspicuous property of comprehensive RJ is its militant anti-statism. Its project to replace criminal justice with RJ is simultaneously a bid to eject the state from all matters criminal. In its search for a solution to the crime problem, RJ considers the state to be a hindrance which must be removed. The proponents of comprehensive RJ are, in this regard, all decidedly postmodern in their pursuit of a fully privatised system of criminal justice. The same is true, *mutatis mutandis*, of partial RJ. Although its proponents have reconciled themselves to the continued supremacy of state criminal justice, they too advocate the withdrawal of the state from those areas of the criminal justice system into which RJ may be admitted. Both versions of RJ thus embrace the postmodern argument for a minimalist or absentee state. Both believe that non-state actors are capable of solving, in whole or in part, the problem of criminality upon which the efforts of state agencies hitherto appear to have made little impact.

The intersection between postmodernism and RJ on the question of the state is extensive. Essentially, they are at one in their critique of the modern state in that both want an end of the state as the decisive authority and as the political metanarrative. The anti-statism of RJ mirrors the postmodern assault upon the intrusive character of the modern state. Both the postmodernist and the adherent of RJ advocate privatised relations to replace the current state forms. The RJ critique of the state thus is infused thoroughly with the ethos of postmodernism.

4.2 The History Thesis

Postmodernists readily trawl the past for both inspiration and ammunition in their battle against the configurations of modernism. In the result, historical references bulk large in the postmodern rejection of the perceived tyranny of the metanarrative. While such references are most evident in postmodern architecture and art, they form an integral facet of the postmodern project in most disciplines.²³ Indeed, it has been argued that postmodernism has

23 See Heartney (2001) 12 & 20 and Hutcheon (1988) 93.

embraced a “return to history” and appreciates the ontological value of historical consciousness.²⁴

Postmodern historicism is concerned primarily with excavating premodern social artefacts and organisational forms which may be enlisted in the crusade against the supposedly totalising machinations of modernism.²⁵ Postmodernists, following Lyotard, generally comprehend the premodern epoch in narrative terms, as opposed to the modern metanarrative.²⁶ The narrative model of knowledge accepts no fixed origin which structures the narrative, and refuses to grant the narrator autonomy from the narrative. It is a model which presumes narrator heteronomy and which values epistemological contingency.²⁷

The postmodern commitment to the narrative tradition translates into a fascination with tribalism and localism as historical constructs. It is, more or less, already a postmodern conventional wisdom to endorse the narrative devices of tribal societies which survive on the fringes of the contemporary capitalist world in Latin America, Africa and Asia. These societies are prehistoric in organisation and technics, and supposedly are free of the metanarrative immoderations of the modern epoch.²⁸ This is why, for example, arguments for a postmodern re-organisation of society invariably rely heavily upon notions of independent crafts, cottage industries, parochial economies and yeoman democracy.²⁹ The idea is to exorcise the demons of modernism and rejuvenate the perceived idyll of premodern community.³⁰

24 Hutcheon (1988) 91-94.

25 Of course, the postmodern recourse to premodern principles and concepts is a highly selective one. Invariably, the contradictions of the premodern world are avoided. The premodern epoch is wide. It spans both prehistoric and historical societies and includes at least two historical modes of production, namely, slavery and feudalism. The cultural and other achievements of the ancients were based on slave labour. The attractions of localism and community harmony omit the feudal structures of exploitation and oppression which dominated the day-to-day existences of serfs and peasants.

26 Lyotard (1991) xxiv famously pronounced that: “Simplifying to the extreme, I define *postmodern* as incredulity toward metanarratives.” See also Edgeworth (2003) 234.

27 Davies (1996) 68-70.

28 The postmodern faith in a prehistoric world free of the metanarrative is unsubstantiated. Custom was the grand narrative of the prehistoric world. See Seagle (1946) 33: “The great reality of primitive society is not ‘civil’ law or ‘criminal’ law, but custom.” The savage horde and the barbarian gens were totalising institutions to the core. Contemporary tribal societies survive not only because they are geographically excluded from the reach of the capitalist mode of production but also because they are structured by their own metanarratives, arguably even more totalising than those of modernism.

29 See Kumar (1995) 48. This premodern historical bias is an inevitability, more or less. History offers only the choice between premodernism and modernism. Since postmodernism stands contrary to all that is modern, the only viable historical alternative is premodernism. If, therefore, postmodernism seeks to validate itself

Proponents of RJ share the postmodern predilection for premodern historical justifications. Indeed, RJ is perhaps more strident than postmodernism in its reliance upon history to advance its cause. The opposition between RJ and retributive justice has become firmly established as a RJ article of faith. Retribution is portrayed as a modern response to crime which has no or little foundation in the history of punishment. Adherents of RJ believe that the premodern world was, as regards penal sanctions, a world of RJ. Thus, Christie relies heavily upon the justice regime of premodern African tribes as the basis for his proprietary theory of RJ.³¹ Similarly, the republican theory of RJ espoused by Braithwaite & Pettit is rooted historically in the premodern Roman notions of *libertas*, *civitas* and *dominium*.³² Other RJ advocates such as Zehr and Consedine concur with the view that the premodern era was, more or less, a golden era of restoration in the history of criminal justice.³³

Supporters of RJ identify retribution with large-scale industrial society. In other words, they conceive of it as the penal regime of the modern capitalist world. But they are adamant that retributive justice is neither the natural nor the necessary response to the problem of criminality. For them, RJ is not only the aboriginal but also the more natural way of doing justice. It was the justice of preindustrial, tribal, small-scale societies and, as such, was the archetypal premodern form of justice. And it was successful in keeping the premodern world free of the kind of rampant criminality in which every modern society has been languishing for decades. As the paradigmatic modern approach to punishment, retribution allegedly has brought about its own demise by its signal failure to make any significant impact upon the contemporary crisis of criminality. Hence the argument for its replacement by RJ which, it is

historically, it is entirely logical that it should draw upon premodernism as its primary source of such validation. What is more, the premodern epoch has the added attraction of being more unequivocally past than the modern era. It is no longer a component of living memory and thereby is available readily for a postmodern makeover, literally.

30 For a dissenting view, see Davis (1988) 83-84: "At least 100,000 apparel homeworkers toil within a few miles' radius of the Bonaventure [the Los Angeles hotel which has become a postmodern icon] and child labour is again a shocking problem. This restructuring of the relations of production and the productive process is, to be sure, thoroughly capitalist, but it represents not some higher stage in capitalist production, but a return to a sort of primitive accumulation with the valorisation of capital occurring, in part, through the production of absolute surplus value by means of the super-exploitation of the urban proletariat."

31 Christie (1977) 2 *et seq.*

32 Braithwaite & Pettit (1990) 9 *et seq.*

33 Zehr (1995) 95-157 and Consedine (1999) 10-11 & 80-96.

contended, has become necessary because it alone possesses the radical vision required to resolve the crisis.

If retribution is the apogee of the modern way of doing justice, then there can be little doubt that RJ is the prototypical postmodern approach to justice. It defines itself in terms of its opposition to retribution and considers itself to be imbued with the palliative and regenerative powers of its premodern pedigree.³⁴ From the postmodern perspective, retributive justice is a version of the modern metanarrative whereas RJ is imbued with the spirit of the premodern narrative. And the key to overcoming the tyranny of the former is to revert to the freedom of the latter. RJ and postmodernism evidently are coeval in their partiality to the supposedly emancipatory promise of the premodern narrative.

4.3 The Alterity Thesis

Postmodernism has a preoccupation with alterity. It is a preoccupation which has resulted in the idea of the Other becoming acknowledged generally as being “crucial to any discussion of postmodernism”.³⁵ Such a focus upon alterity is concerned to engage and thereby to foreground the traditional outgroups which have been marginalised by the modern metanarrative. Women, people of colour, homosexuals, indigenous populations, the disabled and the aged: these are the Others, ostracised and silenced by modernism, with whom postmodernism has chosen to identify. A large part of the postmodern project is devoted to embracing and championing the claims of the outsider. It is about giving a voice to the narrative of every outgroup which hitherto has been reduced to “a sideshow in the grand narrative of world history” by the domination intrinsic in totalisation.³⁶ The postmodern ideal is a world free of the modern bias against the Other, in which there is no longer any ontological difference between insider and outsider, and in which otherness has ceased to be a concept of marginality.

The postmodern credo is one of perfect equality, in terms of which every perspective is accorded absolute validity. There is no room for either hierarchy or domination in the postmodern worldview. If the postmodern ideal comes to pass, we shall find ourselves, to mangle Marx, in a very Eden of the innate equality of narratives.³⁷ Postmodernism is, in this connection, the self-appointed saviour of the Other. If postmodernism is an emancipatory movement, then outsider emancipation is at the top of its agenda. There is

34 See Pavlich (2005) 34-42 who provides a trenchant critique of the technicism of the medical model of crime and punishment embedded in the RJ perspective.

35 Heartney (2001) 51.

36 Heartney (2001) 65.

37 See Marx (1954) 172.

nothing more quintessentially postmodern than the endeavour to find and legitimate the outgroup narrative. Therein, for many postmodernists, lies the true meaning of their project.³⁸

Postmodern jurisprudence, unsurprisingly, is populated heavily by schools of outsider jurisprudence. The engagement between postmodernism and the law is dominated by the jurisprudence of the traditional outgroups identified above.³⁹ Such outsider jurists typically present an alternative truth to that installed as modern law. They seek to secure for their constituencies the same substantive legal subjectivity which modernism had reserved for able-bodied white heterosexual men.⁴⁰ The jurisprudence of alterity desires to integrate outgroups into the concept of legal subjectivity, and thereby to construct a properly universal and neutral subject. It is, ultimately, about validating otherness by subverting the axiom of sameness which lies at the heart of the modern legal form.

RJ may be understood as the outsider jurisprudence of the criminal justice system. Like postmodernism in general and postmodern jurisprudence in particular, it too is dedicated in a fundamental sense to the cause of the Other in the criminal justice system. The traditional outsider of criminal justice is, of course, the victim. Victimologists preceded the proponents of RJ in their advocacy of victims' rights and their overall concern with improving the status of the victim in the criminal justice system. However, RJ has taken a far more radical approach and installed the victim at the epicentre of the restorative process.⁴¹ The victim is no longer someone who must be taken into account by those who manage the disposition of criminal conflicts. She is no longer someone to or for whom justice must be done. In the RJ programme, the victim is an agent of justice. She is transformed from outsider to insider and becomes an indispensable participant in the restorative process. Her otherness, originally a source of powerlessness, is transfigured into a source of power. She becomes a "stakeholder". RJ vindicates the narrative of the victim in the face of the metanarrative of the criminal justice system.

The community is the other Other of the criminal justice system. It may be true that courts usually are enjoined to take into account the interests of the community when sanctioning a criminal offender. However, the determination of the interests of the community is seldom, if ever, made by the community

38 See Harvey (1989) 47 who refers to the seduction of "the most liberative and therefore the most appealing aspect of postmodern thought – its concern with 'otherness'".

39 Feldman (2000) 158-159.

40 Davies (1996) 70-74.

41 Pavlich (2005) 44-48.

itself.⁴² The community has, in this sense, much the same outsider status as the victim in the criminal justice system. RJ aims to do for the community essentially what it hopes to do for the victim, that is, to bestow upon it the capacities of an agent of justice.

The traditional insiders of the criminal justice system are the state, the legal professionals and the offender. RJ wants no truck with the first two.⁴³ Of course, the offender remains crucial. However, he is now, along with the victim and the community, a member of a triumvirate of equals, through whom justice must be done. RJ, in this regard, is about reconciling a trilogy of narratives, none of which is authoritative. It is about finding a restorative sanction in the engagement of each agent with the truth-claims of the others. And it is about ensuring that the traditionally muted are given voice. That is a typically postmodern way of doing justice.⁴⁴

4.4 The Power Thesis

Foucault's position on power has acquired the exalted status of a postmodern presupposition.⁴⁵ In accordance with its rejection of the grand narrative, postmodernism detaches power from its modern association with the state and the repressive and ideological state apparatuses. The state monopoly of power is denied, and the locus of power is dispersed throughout the social structure, from the apex of political power to the relations between individuals in a myriad of everyday power relations.⁴⁶ In contrast to the centralised notion of power comprehended by modernism, postmodernism posits a multiplicity of

42 It may be made by a magistrate or judge, who may or may not be assisted by lay assessors. Or it may be made by a jury. RJ does not consider either lay assessors or jurors to be adequately representative of the community.

43 The ejection of the state and legal professionals does not amount to the creation of new Others. It simply means that they are no longer pertinent to the justice process. Those who have no interest in the process are not outsiders in the sense used here. See Christie (1977) 2-5.

44 The postmodern language of alterity has become part and parcel of the advocacy literature of restorative justice. RJ advocates routinely call for those "other" voices which have been silenced by the criminal justice system to be heard. See, for example, Toews & Zehr (2003) 262: "Maintaining the crime experience in the hand of experts contributes to othering and the creation of social distance between offenders, victims and the rest of society. The public is never permitted to encounter offenders and victims as multi-dimensional individuals with personal stories and unique experiences. Instead, offenders as well as victims become stereotypes of the 'other'. These others are often associated with ethnic groups and social classes different than the majority of society."

45 See Feldman (2000) 169-174 who notes that, in their analysis of power, "postmodern legal scholars follow Foucault".

46 See Stacy (2001) 69: "For Foucault, power does not merely emanate clearly from identified political and legal domains, but can be found amorphaously circulating everywhere in society."

power relations which penetrates into every nook and cranny of our lives. Power, from this perspective, is primarily a local phenomenon. It becomes what Foucault refers to as a micro-physics of power.⁴⁷ Given the perceived decline of the nation-state, it is the power configurations of non-state relations which matter most in the postmodern worldview.

The Foucauldian perspective also implies that the postmodern self is, at bottom, a power construct. We do not precede the micro-physics of power. Instead, we emerge as “the meeting-point in the flows (or discourses) of power”.⁴⁸ We are a creation of the self-same power which operates upon us every day in a multitude of ways. In postmodern terms, the legal subject is “intrinsically heteronomous, constituted by power”.⁴⁹ The juridical is, in this regard, the core notion of a paradigm in which legal subjectivity is the discursive effect of intersecting power plays.

Its proponents do not comprehend RJ publicly as a site of power relations. To be sure, they are consistent critics of the criminal justice system as a matrix of centralised power. And, if they advocate comprehensive RJ, they also advocate the end of state power in all criminal matters. However, they tend to be silent on the question of power within the structure of the restorative process itself.⁵⁰ Of course, such silence cannot conceal completely the fact that RJ is implicated as deeply in the connivances of power as the criminal justice which it maligns so routinely.

The rejection of state-sponsored criminal justice suggests that, as a structure-in-power, RJ is sensible to the postmodern belief in the omnipresence of power in the constitution of social relations. To the extent that RJ is committed to a decentralised justice system, it is committed also to the parcellisation of adjudicatory and punitive power. Hence its advocacy of a restorative process which presumes a localised disposition regime. Criminal justice will no longer be state justice, visited upon offenders from on high. It will be neighbourhood justice, structured by the restorative process which embraces both victim and offender as empowered agents of justice. Each restorative community will become a separate locus of power. There will no longer be a metanarrative of power. It will be dispersed into a series of narratives in RJ locales.

Whereas RJ comprehends centralised juridical power in relentlessly negative terms, its appreciation of the localised variant of such power generally

47 Foucault (1977) 139.

48 Kumar (1995) 131.

49 Dews (1987) 161.

50 This, of course, is to be expected. The connotations of power are predominantly negative, and no self-image is eager to admit of such negativities.

is positive.⁵¹ At the parochial level, power is considered to be a productive phenomenon which constitutes the victim and the community, and which reconstitutes the offender, as agents of the restorative process. It is an unspoken presumption of the RJ catechism that power relations within the restorative process will be fundamentally symmetrical, which will discourage or stymie efforts by any party to lord it over any other. The restorative process is supposed to be one of equalisation, not of domination.⁵² It would appear that the supporters of RJ need to believe that, in their case at least, the fragmentation of power entails a qualitative transformation in the composition of power, such that, at the neighbourhood level, it becomes an instrument of emancipation.⁵³ At this level, then, power is a progressive heteronomy in the constitution of the legal subject.

4.5 The Subjectivity Thesis

Postmodernism comprehends the subject as a composite of a plurality of equal identities. It rejects the notion of the essential subject, rigorously defined and exactly delineated, which is at the centre of modernism. For the postmodernist, the subject is a social construct. Subjectivity is context bound and historically specific. There is no overarching pre-given subjectivity which delimits our person. We are created and re-created as subjects within the social milieu in which we find ourselves.⁵⁴ All of us “live in many different worlds simultaneously”.⁵⁵

51 Dews (1987) 161-162.

52 Postmodernists generally have not given attention to the structural factors which militate against such equalisation. It would appear that their primary goal is to transform the criminal justice system from a centralised to a decentralised one. And whereas they have problematised criminal justice as state justice, they have presumed, naïvely, that the restorative process will render power relations at the local level unproblematic.

53 It must be noted here that local power is potentially as dangerous as central power. Local power also tends to agglomeration in the same way as does central power. Local power is as susceptible of metanarrative pretensions as central power. Indeed, many local powers of disposition tend to come into existence as a version of central power. If such powers are a concession from the state, they are comprehended easily within the grand narrative of state power. In other words, there is nothing inherent in the dispersal of the power of disposition to regional or neighbourhood structures to suggest the dissipation of the tyranny of the grand narrative.

54 See Feldman (2000) 174-176, Davies (1996) 73-74 and Stacy (2001) 11-12.

55 Jamieson (1991) 583. As Wicke (1992) 11-21 points out, although the postmodern position on subjectivity entails a “deprecation of ‘identity’ in any form”, postmodern politics remains “entirely identity-based”. In other words, there is a basic contradiction between the postmodern assault upon the essentialism of the modern notion of identity and the postmodern embrace of identity-based outsider politics. See the discussion under the alterity thesis above.

Whereas modern subjectivity is centred, postmodernism proceeds from a decentred subjectivity. It is always in formation and is never a nucleus of sovereignty for the self.⁵⁶ Feldman identifies two implications of postmodern subject decentredness. Firstly, the subject is not an autonomous site of power which is capable of directing the course of social development.⁵⁷ Secondly, the subject does not possess an immutable centre upon which its elements may be elaborated or from which they may be extrapolated.⁵⁸ Postmodern subjectivity is fragmented to the core. There is, in other words, no postmodern subject who has not been constituted from the asymmetries and incommensurables which make up social existence.⁵⁹

Postmodern jurists transpose this idea of the social construction of subjectivity to their critique of the legal subject. The modern conception of the legal subject is singular and indivisible. Only those characteristics which qualify as juridical are factored into the constitution of the legal subject. Any other sources of subjectivity are discarded summarily. In other words, the law recognises only the legal subject. In the modern view, all non-legal derivations of subjectivity are considered trivial. Postmodern legal analysts are highly critical of this exclusionary proclivity of the modern conception of legal subjectivity.⁶⁰ Their major aspiration in this regard is to have non-legal subjectivities acknowledged and accepted, alongside legal subjectivity, as indispensable to the construction of a truly just dispensation.⁶¹

RJ is similarly impatient with the proscriptions and preclusions embedded in a strictly legal subjectivity. Indeed, the restorative process cannot accommodate the modern conception of the legal subject. It is a process which

56 Wicke (1992) 17-20.

57 Feldman (2000) 174.

58 Feldman (2000) 175.

59 See Stacy (2001) 12 and Jamieson (1991) 583.

60 See Beger (2002) 187-188 who describes the modern conception of legal subjectivity in the following terms: "The legal arena cannot operate without the logic of identity, yet subjects of the law do not exist prior to their negotiation in the legal processes. The power of law lies in representing something as real, as the only possible representation of the real. So, while subjects in court rooms are real people, they can only ever be represented partially in their diversities. The legal subject can only present itself *as subject* in the discursive logic of the juridical. Other possible truths and realities exist, but the reality that can be heard by legal interpretation is hegemonic and dominant. Thus, the power of the law is its acclamation of one reality as the most true reality, the most important reality."

61 Postmodernism is keen to widen the ambit of the juridical. However, there is no evidence that it is willing to abandon the juridical as the defining element of legal subjectivity. It is one thing to incorporate features of the traditionally non-juridical into the composition of the juridical. It is another thing altogether to replace the juridical with the non-juridical. The radicality of postmodernism does not contemplate the latter.

seeks to comprehend both victim and offender as more than mere legal subjects, as real people who lead complicated and unpredictable lives in disparate and contradictory conditions. Criminal justice reduces them to “mere” legal subjects. RJ proposes a subjectivity which extends to all those other aspects of their lives which, albeit non-judicial, are pertinent to the construction of a properly restorative sanction.⁶²

The RJ rejection of the limitations of legal subjectivity emulates its rejection of a state presence in the restorative process. Ultimately, legal subjectivity is a state-guaranteed status. The absence of the state invariably has a disintegrative effect upon legal subjectivity, thereby allowing for the activation of non-legal sources of subjectivity in the restorative process. The anti-statism of RJ is, in this connection, crucial to exploding the formal bounds of legal subjectivity. Indeed, RJ cannot stay within the prescribed parameters of legal subjectivity without subverting itself and its goals. The legal subject is germane to criminal justice. The restorative process needs to take account of “the diversity of the human condition” if it is to be distinguishable at all from the criminal justice process.⁶³ And the restorative sanction needs to be constructed according to realities which lie outside the ambit of legal subjectivity if it is not to be just another variant of state punishment. Again, RJ emerges as a decidedly postmodern way of doing justice.

4.6 The Consumerism Thesis

Sardar identifies consumerism as “the quintessential characteristic of the postmodern era”.⁶⁴ In the same vein, Jameson refers to postmodernism as a “culture of consumption” which reproduces the “logic of consumer capitalism”.⁶⁵ There can be little serious discontent about this characterisation. If postmodernity can be reduced to any single condition, it has to be the complete triumph of consumerism. The postmodern subject is constituted, literally, by his “consumption of mass-produced objects and images”.⁶⁶ And the postmodern world is a hyperreality of representations of the universal consumer.⁶⁷ It is a world in which:

62 Compare the argument of Christie (1977) 9 for neighbourhood courts in which are considered “every detail regarding what happened – legally relevant or not”.

63 Stacy (2001) 12.

64 Sardar (1998) 59-60.

65 Jameson (1991) 206 and Jameson (1988) 29.

66 Heartney (2001) 42.

67 Khanom (2010) 62-63.

the department store [becomes] the cathedral of postmodern desire and the act of shopping [becomes] the postmodern version of democratic choice.⁶⁸

Postmodern society is, in a word, consumer society writ large.

Consumerism is, of course, more than the drive to accumulate and consume mass-produced goods and images. It is also, and crucially, the triumphant materialisation of commodity fetishism. It is the high-water mark of exchange relations in an economy structured by generalised commodity production. The relations between postmodern subjects are constituted as relations between commodities, the accumulation of which becomes, so to speak, a consuming passion. In other words, consumerism entails the fetishisation of human relations. Postmodern subjectivity is consumerist to the extent that it is a commodified subjectivity.⁶⁹

Consumerism, then, is commodification unbridled. It is a culture which is distinguished by the commodification of everything.⁷⁰ Everything is a commodity and the commodity is everything. The commodity is the elemental form of capitalist property and all commodity exchange relations are thus fundamentally proprietary in nature. In other words, the notion of consumerism is an essentially proprietary notion. The postmodern culture of consumption is the spirit of capitalist property made tangible, if somewhat rudely and gaudily. If rampant consumerism exemplifies postmodernism, then rampant commodification exemplifies postmodernity. And if the postmodern subject is first and foremost a consumer, then the postmodern consumer is first and foremost a proprietor.

Postmodernism, then, is deeply complicitous in the reproduction of the property relations of capitalism. However, and in keeping with its quest for diversity and multiplicity, postmodernism is not committed to the conventionally private and unencumbered form of capitalist property. The postmodern conception of property is an expansive and a flexible one. And while it may accept that bourgeois property is primarily private, postmodernism does not accept that it has to be exclusively private. Indeed, it

68 Heartney (2001) 47.

69 Khanom (2010) 63.

70 The following statement by Marx (1975) 34 is uncannily prescient of this aspect of postmodernism: "Finally, there came a time when everything that men had considered as inalienable became an object of exchange, of traffic and could be alienated. This is the time when the very things which till then had been communicated, but never exchanged; given, but never sold; acquired, but never bought – virtue, love, conviction, knowledge, conscience, etc. - when everything finally passed into commerce. It is the time of general corruption, of universal venality, or, to speak in terms of political economy, the time when everything, moral or physical, having become a marketable value, is brought to the market to be assessed at its truest value."

urges that the private fundament be augmented by a social or public dimension, in terms of which private ownership is charged with collective duties and responsibilities. In other words, postmodernism seeks to dethrone the individualist and absolutist notion of proprietorship which typifies modernism. Such proprietorship is disapproved as totalising and tyrannical. The regime of private bourgeois property must therefore be detotalised, by confronting it with the sensibilities of public service and community obligation. The postmodern conception is thus one which comprehends a decentred proprietary regime structured by an engagement between private rights and public claims.⁷¹

RJ may be considered a version of postmodern consumerism. This proposition, especially its conjoining of restorative doctrine with an unsavoury culture of consumption, likely will offend the bulk of RJ advocates. However, it is a proposition which is properly defensible. To be sure, RJ by no means displays or condones the excesses of wanton consumerism. But it is as deeply inculcated as such consumerism in the process of accelerated and generalised commodification which characterises the postmodern epoch. In other words, the difference between RJ and postmodern consumerism is a quantitative one, based on the extent to which the one is restrained and the other not. It is submitted that they are qualitatively akin in that they both embrace a foundational proprietary axiom. Both espouse property as their organising principle.

The proprietary nature of consumerism is obvious and incontrovertible. Albeit not patently so, RJ, too, is a fundamentally proprietary concept. The idea that RJ is proprietary in nature was originated by Christie, who is the acknowledged doyen of RJ theory. In his 1976 Foundation Lecture of the Centre of Criminological Studies at the University of Sheffield, Christie proposed a theory of criminal justice which since has become the premier theory of RJ. The lecture, published under the title *Conflicts as Property*, is easily the most quoted single piece in the capacious corpus of RJ literature, and its arguments have become "a modern orthodoxy amongst RJ supporters".⁷²

71 See Feldman (2000) 167. Whereas it may wish to infiltrate alterity into the composition of capitalist property, postmodernism accords property as a socio-economic category the status of an irrebuttable presumption. In other words, it leaves intact the modern metanarrative of property. The postmodern insurrection against all things modern stops short of capitalist property relations. The postmodern project to subvert and decentre the elements of modernism has had no impact whatsoever upon the modern commitment to the sanctity of property. In the midst of the maelstrom of postmodern destabilisation, property survives unscathed as the most stable of capitalist categories. What is more, it has suffused postmodernism with its own ethos.

72 Ashworth (2003) 171. See also Wright (1991) 54, Johnstone (2003) 24, Hudson (2003) 177 and Bottoms (2003) 82 & 80 footnote 2.

The Christie thesis expressly conceives of crimes as forms of property. Every crime is the property of the offender and the victim, and every criminal conflict is resolved in consumption by its owners. RJ is, in this connection, the Christie thesis given flesh. Indeed, the very idea of restoration is an inherently proprietary idea. That which is restored to a person must have belonged to that person originally. Property is the natural object of restoration. Its natural subject is the owner. Restoration presumes the unlawful loss or deprivation of that which one is legally entitled to have. It is about making good the loss or deprivation, and returning that which was taken, usually by means foul. The goal is unambiguous: to re-unite the owner with his property or an equivalent replacement, and thereby to recover the *status quo ante*.⁷³

Property is entailed in restoration. It is the relationship between the owner and his property which has to be restored. That relationship has been disturbed, and has to be reinstated. What is more, the proprietary relationship is a natural one which has to be recovered.⁷⁴ Thus, there is embedded in the notion of restoration an idea that a natural proprietary relationship has been rent, and that the aim of restoration is to repair that relationship. The premise is that a person has been deprived of something or access to something that is his or hers. The person may have a right of ownership in the thing or a right of possession. In either case, it is a proprietary right. And it is a taken-for-granted proprietary right. In other words, the relationship between the person and the thing is understood to be an organic one. Restoration is, in this regard, about re-establishing this relationship when it has been sundered unlawfully. It is about repairing what is considered to be normal and proper, namely, the fundamental proprietary relationship.

The appropriation by RJ proponents of the Christie thesis as the theoretical fulcrum of their project has made patent the proprietary constitution of RJ. The proprietary postulate once identified, it becomes obvious that RJ shares the consumerist ethos of postmodernism. To be sure, RJ may share none of the

73 The *Chambers 21st Century Dictionary* offers a definition of “restore” which includes the expressly proprietary “to return something lost or stolen to the rightful owner”. The definition contained in the *Oxford Universal Dictionary* is equally, if not as patently, proprietary: “To give back, to make return or restitution of (anything previously taken away or lost)”.

74 Thus the *Chambers 21st Century Dictionary* adds that “restore” also means “to bring someone or something back to a normal or proper state or condition”. The *Concise Oxford Dictionary* includes a similar definition of “restore”: “replace, put back, bring to former place or condition”. The established meaning of the nominal “restorative” as a health-restoring agent reinforces the idea of a natural or normal relationship which requires repair.

extravagances usually associated with consumerism.⁷⁵ But insofar as consumerism recasts human relations in proprietary terms, RJ is resolutely consumerist.

The conception of property adhered to by RJ cements its affinity with postmodernism. Although Christie theorised crimes as forms of property, he did not comprehend them necessarily as forms of private property. The conventional notion of property in the capitalist world is that it is private and that its private nature entails the exclusion of all non-owners from asserting proprietary rights over it, or deriving advantage from it without the consent of the owner. Christie's property postulate does not accord with convention. He proposes a proprietary form which deviates from the private norm of capitalism, namely, common property. When Christie declares both that a criminal conflict is not private property and that it is the property of victim and offender, he is referring, it is submitted, to a species of capitalist property which is located outside the classically private, insofar as non-owners enjoy access to it and possess certain rights in it.⁷⁶ Thereby, he is broadening the ambit of the capitalist property regime beyond its traditional parameters to include common property. But, importantly, it is a common property to the benefits of which individuals have enforceable claims. In other words, and in concurrence with the individualist catechism of the bourgeois world, it is a common property demarcated in terms of individual rights. For Christie, then, a criminal conflict is a form of common capitalist property in which all directly involved parties enjoy individual rights.

Following Christie, the RJ position on property thus replicates the postmodern position in its willingness to decentre bourgeois property and theorise it in terms other than the traditionally private. Both positions foreground a form of property which usually exists only in the penumbra of the dominant form. And while such an approach may leave the dominant form intact, it does undermine the dominance hitherto enjoyed by modern attempts to resolve the crisis of criminality.⁷⁷

5 Restorative Justice is Postmodern Justice

It is submitted that, *en bloc*, the six theses discussed above support the conclusion that RJ is the paradigmatic form of postmodern criminal justice. The analysis has shown that RJ replicates significantly the postulates of postmodernism in these six spheres. And the intersection is extensive enough

75 The extravagances of restorative justice lie elsewhere, in the promises embedded in what Daly (2002) 70 refers to as "the exceptional or 'nirvana' story of repair and goodwill".

76 Christie (1977) 8-12.

77 Indeed, the modern conception must take a not inconsiderable share of the responsibility for precipitating the crisis.

to sustain and defend the proposition which comprehends RJ as the exemplar of postmodern justice.

The postmodern character of RJ is perhaps most evident in its reliance upon narrative techniques to structure restorative conferences. In this area even the language of postmodernism has become integrated into the discourse of RJ. Participants in restorative conferences are encouraged to tell their own stories, to speak their truths, to highlight their individual experience of the crime and its consequences. The focus is upon the personal perspective, not the universal. Narrative is a "personalised approach" which does "not attempt to generalise or universalise".⁷⁸ The aim always is to render visible and thereby meaningful the particularities of the criminal episode as apprehended by the parties to it. Van Ness & Strong make the point thus:

At the [restorative] meeting, the parties talk to one another; they tell their stories. In their narrative they describe what happened to them and how that has affected them, and how they see the crime and its consequences. This is a subjective rather than objective account and, consequently, it has integrity both to the speaker and to the listener ... Narrative permits the participants to express and address emotions.⁷⁹

This is classic postmodern multi-perspectivism, engendered directly by RJ's rejection of the metanarrative of criminal justice.⁸⁰ Similarly, Toews & Zehr posit that justice is not "a generalisable experience" and argue for "multiple perspectives on a crime event" and hence for "multiple interpretations of the same event".⁸¹ Other prominent RJ supporters also routinely incorporate restorative narratives into their work.⁸² In other words, they adopt a typically postmodern strategy in their pursuit of a RJ resolution to a criminal conflict. RJ, in this connection, is structured by the calculus of idiosyncrasy which is so pivotal a dimension of the postmodern project.

It may be owned that, besides its penchant for narrator heteronomy, postmodern paraphernalia do not figure large in the self-image of RJ. However, that is no barrier to a legitimate designation of RJ as postmodern justice. This is exactly what Edgeworth does when he identifies the growth of RJ strategies as a manifestation, in the criminal sphere, of the advance of legal postmodernisation.⁸³ He refers to RJ as a new paradigm of justice which, in true postmodern fashion, advocates both the elimination (or, at least, severe

78 Van Ness & Strong (1997) 76.

79 Van Ness & Strong (1997) 77.

80 Van Ness & Strong (1997) 76-78.

81 Toews & Zehr (2003) 261-264.

82 See, for example, Zehr (1995) 15-18, Consedine (1999) 9-10 and Braithwaite (2003) 54-55.

83 Edgeworth (2003) 155.

reduction) of state involvement in criminal justice, as well as the ample expansion of the sources of legal subjectivity to include non-legal considerations.⁸⁴ The point is that between RJ and postmodernism there exists an objective intersection, the nature and ambit of which permit the properly reasonable inference that the former is indeed a species of the latter.

5.1 The Political Economy of Postmodernism

It remains to present a critical appreciation of RJ as the representative postmodern response to the contemporary crisis of criminality. In this regard, the first order of business is to engage the perceived newness of the postmodern epoch. Postmodernism is eponymously subversive. And postmodernists have a fondness for things unorthodox and imprudent. In the turbulent world of the early twenty-first century, postmodernists are self-consciously on the cusp of a dystopian revolution in sensibilities. The “new times” in which we find ourselves are, on this account, also “postmodern times”.

It is submitted, however, that the supposed newness of these “postmodern times” conceals a fundamental continuity with “modern times” and, hence, that the confrontation with postmodern novelty must focus upon the elements of this continuity. Such a focus is not an attempt to avoid grappling with the newness of postmodernism. Rather, it is a choice which is intended to throw light upon the political economy of this newness. The interrogation of postmodernism must proceed from the historical and material context of its evolution. In this regard, the paramount feature of postmodernism is that it is grounded in the social relations of production of contemporary, that is, late capitalism. Thus, whereas the identification and demarcation of postmodernism must of necessity proceed from its newness, the critique of postmodernism must commence with the capitalist constants which underlie its newness.

Notwithstanding its revolutionary posturings, postmodernism is a rather moderate phenomenon.⁸⁵ It is a superstructural manifestation of the contemporary epoch of capitalism, which is one marked by explosive material contradictions. Postmodernism is the intellectual expression of the structural economic crisis which is ravaging the heartland of the capitalist mode of production. It is simultaneously the ideological pivot of the bourgeois

84 Edgeworth (2003) 170.

85 Wenger (1991 & 1994) established years ago already that postmodernism, as an expression of intellectual despair in the face of the structural crisis of late capitalism, is philosophically idealist. Idealism, of course, long has been the philosophical handmaiden of bourgeois hegemony.

endeavour to stay the threat of total collapse.⁸⁶ Therefore, and despite its apparently historic newness, there is no cogent reason to analyse postmodernism as anything other than a superstructural effectivity of capitalism.

What is more, there is no fundamental difference between modernity and postmodernity insofar as they are comprehended as eras of the capitalist mode of production. Postmodernism may represent an intellectual sea-change from modernism. But postmodernity is not as fundamentally different from modernity as to qualify as some sort of post-capitalist epoch. Postmodernity is, quite simply, the contemporary conjuncture of capitalism. And the essentials of the capitalist constitution remain unreconstructed. That is, capitalist social relations of production are still defined by the struggle between bourgeoisie and proletariat; labour-power remains the only true source of surplus value; the anarchy which marks all departments of capitalist production continues unabated; the capitalist property regime continues to be defined in individualist terms; and the bourgeois worldview remains fundamentally juridical.⁸⁷ This catalogue of constants is by no means exhaustive. But it is comprehensive enough to convince that there is no basis upon which to comprehend postmodernity as anything other than an epoch - the current one - in the life and death of the capitalist mode of production. And while postmodernity is arguably the last epoch of the capitalist mode it is by no means the first of a post-capitalist mode.

As an economy of generalised commodity production, capitalism has an inherent tendency to commodify social relations. The history of the capitalist mode of production is, in this connection, the history of the process of commodification. The commodity is the primordial expression of capitalist

86 Following Harvey (1989) 173-197, the crisis is best comprehended as one of overaccumulation, requiring a flexible regime of accumulation to counteract the tendency of the rate of profit to fall.

87 Engels (1990) 598 describes the juridical worldview as "the classical one of the bourgeoisie". It is the worldview which holds that law is the fundament of human affairs. It is the ideological expression of the political economy of the commodity. The predominantly theological world outlook of the pre-capitalist era was an obstacle to the free development of the commodity economy. It had to be replaced. The bourgeoisie found the juridical world outlook to be the most appropriate ideational expression of its class interests. Engels explains: "The economic and social relations, which people previously believed to have been created by the Church and its dogma - because sanctioned by the Church - were now seen as being founded on the law and created by the State." The juridical worldview replaced church with state and religious dogma with law. It was, according to Engels, the theological worldview secularised. It enabled the bourgeoisie to present the commodification and sale of labour-power as transactions between legal equals. The economic exploitation and political oppression of the proletariat were secreted behind their juridical forms of equality and right.

property. The postmodern subject is a man or woman of property whose very existence is a personification of the organising principle of the commodity economy. Postmodernism has elevated commodification to heights unheard of in the evolution of capitalism. "Postmodernism is the consumption of sheer commodification as a process."⁸⁸ And postmodernity is the unmitigated triumph of the commodity. It is the stage of capitalism in which "social reality is pervasively commodified".⁸⁹ It is the era which is delineated by "the systematic commodification of everyday life".⁹⁰ The dictatorship of the bourgeoisie materialises as the dictatorship of the commodity.

The acceleration of the process of commodification entails the extension of capitalist property relations into new areas of social life which, traditionally, have had no relation to the market. As the cultural countenance of contemporary capitalism, postmodernism operates as the medium of such commodification. However, the march of the commodity is not merely about the colonial-type conquest of areas of social existence hitherto unsullied by grubbing acquisitiveness. It is also, and arguably more importantly, about equalisation. In its pure form, divorced from diversionary encumbrances, commodification in the postmodern world reduces to the vindication and amplification of the principle of equivalence which governs the market in commodities⁹¹ and which lies at the heart of the juridical worldview. Essentially, the postmodern promotion of commodification is an exercise in the universalisation of the principle of equivalence which defines the capitalist exchange relation. It is the augmentation of the principle from its origins in commodity exchange to the exchanges of everyday life.⁹² Postmodernity is, in a

88 Jameson (1988) x.

89 Eagleton (1986) 133.

90 Callinicos (1989) 151.

91 The commodity is at the epicentre of life in the capitalist system. The commodity form concentrates in itself all the constitutive elements of capitalism as a mode of production. It stipulates equivalence as the governing principle of capitalist social relations of production. The legal form which accompanies the commodity form is nothing other than the equality postulate given the imprimatur of the capitalist state. The legal subject is the postulate made flesh. He exists first and foremost as a commodity owner. And as such, he has no superiors or subordinates, only equals. In the epoch of competitive capitalism, it was in the market in commodities that the principle of equivalence mattered most. The development of the free market depended upon all-round respect for and acquiescence in the principle. The epoch of late capitalism has seen the steady extension of the principle of equivalence into more and more of the non-economic facets of the social relations of production. In other words, there has been an increasing intrusion of the spirit of the commodity into more and more areas of human relations.

92 See McVeigh (2002) 279: "Much of the work of postmodern theory in United States of America has disputed modern jurisprudence in the field of epistemology. It has been

word, the commodification of everything. It is the high-water mark of the fetishisation of the social relations of production. The absolute dominance of the commodity has transformed existence itself into a hyperreality of infinite simulacra.⁹³

It is tempting to take the accelerated commodification of the postmodern era as an index of the vitality of capitalism. That would be a mistake. By the time it entered its monopoly stage at the beginning of the twentieth century, capitalism was no longer a developing mode of production, and it has been degenerating ever since. Modernism was a response to this historic decline of capitalism. Postmodernism, too, is an expression of crisis, not of vitality.⁹⁴ The postmodern intensification of commodification is, in this regard, part and parcel of the attempt to resolve the current capitalist crisis of overaccumulation⁹⁵ by restructuring the regime of accumulation along more flexible lines.⁹⁶ Flexibility requires a more expansive domain of accumulation opportunities. Hence the intrusion of the commodity form into areas of life traditionally not associated with the ethos of the market. Accelerated

concerned to work towards a jurisprudence that recognises, and respects, equality in difference.”

- 93 This transformation assumed a phantasmagorical aspect in Baudrillard’s bizarre pre-war pronouncement that the Gulf War would not take place and his even more bizarre post-war declaration that the Gulf War had not taken place. See Norris (1992) 15 who avers that postmodernism has rendered truth obsolete, “in so far as we have lost all sense of difference – the ontological or epistemological difference – between truth and the various true-seeming images, analogues and fantasy-substitutes which currently claim the title. So the Gulf War figures as one more example in Baudrillard’s extensive and varied catalogue of postmodern ‘hyperreality’. It is a conflict waged – for all that we can know – entirely at this level of strategic simulation, a mode of vicarious spectator-involvement that extends all the way from fictive war-games to saturation coverage of the ‘real-world’ event, and which thus leaves us perfectly incapable of distinguishing the one from the other.”
- 94 See Davis (1988) 83 who observes that “the crucial point about contemporary capitalist structures of accumulation [is] that they are symptoms of global crisis, not signs of the triumph of capitalism’s irresistible drive to expand”.
- 95 See Harvey (1989) 180-181 who defines overaccumulation as “a condition in which idle capital and idle labour supply could exist side by side with no apparent way to bring these idle resources together to accomplish socially useful tasks”. He continues: “A generalised condition of overaccumulation would be indicated by idle productive capacity, a glut of commodities and an excess of inventories, surplus money capital (perhaps held as hoards), and high unemployment.”
- 96 According to Harvey (1989) 147, flexible accumulation “is marked by a direct confrontation with the rigidities of Fordism. It rests on flexibility with respect to labour processes, labour markets, products and patterns of consumption. It is characterised by the emergence of entirely new sectors of production, new ways of providing financial services, new markets, and, above all, greatly intensified rates of commercial, technological and organisational innovation.”

commodification is thus a symptom of weakness, not of strength. It is a sign that capitalism is able no longer to countenance significant spheres of social relations outside the market in commodities. The contemporary imperatives of its reproduction as a mode of production demand that human existence be commodified as far and as fully as possible. Everything must become a potential source of capital accumulation. Flexible accumulation means absolute obedience to that basic law of the commodity, the principle of equivalence.

This is the context in which postmodernism becomes a celebration of equality. It is, in fact, equalisation untrammelled. Here the Lyotardian postmodern incredulity towards metanarratives may be apprehended as an incredulity towards the inequality inscribed in such metanarratives. The premodern narratives towards which postmodernism is especially partial are comprehended as perfect equals of one another and are understood to display none of the despotic propensities of the metanarrative. There is no grand narrative; there is only an infinite series of equally valid narratives. In other words, the repudiation of the metanarrative is simultaneously an assertion of the principle of equivalence.

Postmodernism, then, professes an unqualified commitment to equality in all things. It is a commitment which is embedded in constitutive notions such as polycentrism, multi-perspectivism, destabilisation, anti-totalisation, decentredness and the like, all of which are variants of the hegemonic principle of equivalence, all of which repudiate hierarchy. In the postmodern world nothing is absolute except absolute relativism. Nothing is certain except that every point of view enjoys the same claim to validity as any other point of view. No discursive formation is prior to any other and no person is more valuable than any other. The postmodern subject is constituted in terms of the principle of equivalence. He lives and dies by the law of the commodity.

The immersion of postmodernism in the culture of commodification necessarily implies that it subscribes to a worldview that is fundamentally juridical.⁹⁷ The equality postulate which defines the postmodern moment also structures the juridical moment. The common factor is the commodity. In the evolution of exchange, to commodify is to juridify. This is why, despite its nihilistic excesses and random subversions, postmodernism is unequivocally wedded to the bourgeois, that is, the juridical worldview. Indeed, it is militant in its purveyance of this patently sectional worldview as the generalised worldview of all social classes; and it is radical in its advocacy of the principle

97 See McVeigh (2002) 274: "The account presented here has emphasised that law has changed the means and objects of its regulation. Regulation through law no longer proceeds according to a principle of limited unity marked by distinctions between public and private spheres, State and civil society and so forth. Instead regulation proceeds according to a juridical saturation of social reality."

of equivalence as the determining principle of all human interactions. This is why the postmodern era has witnessed the exponential intensification of the process of commodification. It is also why the equality postulate now reaches into areas which would have been off limits during the modern era.

5.2 The Political Economy of Restorative Justice

It is time to revert to the theory of RJ expounded by Christie. If, according to its self-image, RJ is to be comprehended as the negation of criminal justice and a crime is to be understood as a private legal transaction, then it is Christie's notion of conflicts as property that continues to provide a theoretical springboard for the RJ project. In this sense, Christie's proprietary theory of RJ is archetypal. Therefore, the remainder of this essay will be concerned to assess this theory, as an epistemological fundament of RJ, in relation to the central argument, that RJ is the exemplar of postmodern criminal justice.

Although his theory does not rely expressly upon the discourse of equivalence, Christie does show a strong intuitive grasp of the place of the process of commodification in the constitution of the legal form. Christie is concerned with criminal justice in "industrialised large-scale society".⁹⁸ It is, of course, an analytical truism that "industrialised large-scale society" is more or less coincident with capitalism, a mode of production delineated by generalised commodity production and structured by class conflict. In other words, Christie is concerned with capitalist criminal justice. And he agitates for crimes in capitalist society to be redefined as forms of property. Since capitalism is a society of generalised commodity production governed by the legal regime of private property, it follows that Christie's argument that criminal conflicts be comprehended as property forms is, upon examination, an argument for their commodification.⁹⁹ In "industrialised large-scale society" property is perforce a commodity, and the broadening of the ambit of property is perforce an extension of the domain of the commodity. In this context, to privatise the criminal episode is to commodify it.

Christie's proprietary thesis, then, turns upon the process of commodification as its central theoretical premise. He is proposing, in effect, that RJ be theorised in terms of the extension of the process of commodification to criminal behaviour itself. In other words, every criminal episode is, or must become, a commodity. Christie's work is primarily about grounding RJ theoretically, and in his elaboration of a theory of RJ he grasps the basic truth that legal relations are the superstructural manifestation of commodity

98 Christie (1977) 1.

99 See Pashukanis (1978) 126: "Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production."

relations, and that the legal form is, at bottom, a proprietary form which is suffused with the ethos of the market. Christie's thesis is more or less universally accepted as an unsurpassed theory of RJ, and rightly so. Certainly, it may be asserted with confidence that not a single proponent of RJ has taken issue with Christie. But it may be asserted with equal confidence that the true import of the Christie theory rarely, if ever, has been engaged and excavated by its adherents.

Christie's real achievement is that he grasped the fundamentals of the political economy of RJ. He discerned that the crisis of criminality had its material basis in the crisis of capitalism and fashioned a theory which comprehended the pivotal position occupied by proprietary relations in the social relations of production of capitalism.¹⁰⁰ When Christie conceptualises a crime as a form of property, he is commodifying it. He appreciates the proprietary bias of contemporary capitalist society and celebrates it as the cornerstone of the theory of RJ. However, this celebration is also his major weakness, for it fails to engage the singular fact that capitalist society is historically decadent and that RJ is a product of this decadence.

The material roots of the RJ movement are to be found in the economic crisis which has ravaged the capitalist world, more or less unabated, for the past four decades at least. The severity and depth of the crisis have spawned the neo-liberal drive to unburden the state of the social and welfare responsibilities which it had to assume after the Second World War. Privatisation is the watchword of this project, and is touted as the answer to public waste and bureaucratic inefficiency which apparently underlie the crisis of capitalist profitability. The neo-liberal project is supposedly about rejuvenating the free market, unencumbered by the "dead hand" of public claims and responsibilities. Its proponents argue that private enterprise will achieve the levels of profitability and general prosperity which hitherto have evaded those who make public policy. The state and its agencies are perceived as impediments to the blossoming of the free enterprise system. Hence the neo-liberal credo that the state ought to step aside and leave the business of the economy to those who have their lives invested in making it functional.¹⁰¹ These are not salaried state officials, for whom economic concerns are little

100 It may be noted here that Christie's idea of criminal conflict as property is a quite stunning vindication of the analysis of the legal form proposed by the Marxist jurist Evgeny Pashukanis during the Bolshevik years of the Russian Revolution. In Christie we see a respected member of the non-Marxist criminological community proffering an analysis of crime and punishment which is spontaneously but uncannily Pashukanian in its essentials. See Koen (2103) for an extended exploration of the relationship between Pashukanis and Christie regarding RJ.

101 Pavlich (2005) 6-7.

more than an item in a job description, but the entrepreneurs for whom the health of the economy and the stability of the social order are absolutely vital. In other words, from the neo-liberal perspective it is the private sector, not the public, which holds the key to the solution of the structural crisis of capitalism and its expanded reproduction as a mode of production.

The neo-liberals found ideological justification for their project in the notion of popular capitalism. They sought to obfuscate the class character of privatisation by re-presenting capitalism as a people's mode of production.¹⁰² The precepts of popular capitalism were formulated with a view to giving all citizens a material stake in the mode of production, that is, to create a "stakeholder society", or at least the illusion thereof.¹⁰³ Ordinary working people were assured by capitalist ideologues that they too could enjoy a slice of the profit pie and were lured by opportunities to invest in the economies of their countries via the equity market. The idea was to free the economy from state interference and control, and thereby to prove that capitalism was a dynamic system which could bring good fortune to all who embraced its methods and mores.¹⁰⁴ Capitalism was no longer only for the capitalists. It was for everybody. It was a people's mode of production, and all people could profit by investing in it. Welfare capitalism had enabled the state, which had now become a hindrance to capitalist progress. Popular capitalism wished to liberate the market from the strictures of state control. The free market was the key to prosperity. The wider the process of commodification, the more opportunity there would be for avoiding crises and promoting growth. Hence

102 The idea of popular capitalism does suggest a certain "publicness". However, it is a dimension which is entirely subsumed under the popular capitalist drive towards privatisation.

103 Here it is worth noting that RJ advocates habitually refer to the persons for whom they aspire to obtain justice as "stakeholders", a term heavy with proprietary overtones. The collection edited by Zehr & Toews (2004), for example, devotes more than a hundred of its 400-odd pages to what are called "stakeholder issues". This trend appears to be derived from the popular capitalist idea of a "stakeholder society", in the success of which everyone is supposed to have a proprietary interest.

104 For a detailed exposition of the tenets of popular capitalism see Redwood (1989) 24-45. The primary target of the popular capitalist ideologue was the state. It was argued that capitalism was in trouble because of too much state interference in its operations. The problem with capitalism was, according to the popular capitalists, not structural but conjunctural, deriving from the overbearing presence of the state in affairs which ought to be private. The state was an undesirable interloper and had to be expelled from the relations between private commodity owners. The key to prosperity was not in class solidarity but in individual achievement. The possibility of a better life lay in a private, not a social, future. Such were the pledges of popular capitalism: it was not an elitist system; it could uplift the masses.

privatisation. Hence the celebration of the market as the great leveller. Hence the enthusiasm for entrepreneurship and free enterprise.¹⁰⁵

RJ may be comprehended as the penological correlate of the neo-liberal economic vision and the ideology of popular capitalism. There is an almost palpable correspondence between the crisis of profitability and accumulation besetting the economy and the crisis of criminality and penalty besetting the administration of justice. RJ represents the incursion of the spirit of the market into the arena of criminal conflict. Whereas this arena has been an eminently statist one hitherto, the advocates of RJ have taken an expressly anti-statist position. For them, RJ is a sphere of privatised justice in which the state has no place. They view the criminal justice system as a state asset which needs to be privatised, like so many other state assets which have been privatised already. Privatisation is necessary because the state has been unable to administer the criminal justice system “profitably”, and has earned but minimal returns upon its investments on the anti-crime *bourse*.

The RJ argument is that the state has failed in its bid to solve or even manage the crisis of criminality which continues to run amok in most capitalist social formations, and now needs to hand it over to those who can. In this regard, RJ seeks to bring to criminal justice a remedy of the order which neo-liberalism purportedly has brought to the economy. A crucial feature of this remedy is the transfer of hitherto public assets to the private sector, and the import of the principles of the market into existing state institutions. Adherents of RJ seek to sever the link between the state and criminal justice. They wish to remove criminal conflicts from the public sphere and reconstruct them according to the precepts of the private sector. They are convinced, more or less, that it is the entrepreneurial spirit which holds the answer to the worldwide crisis of criminality. They are the free-marketeers of the criminal justice system.

The RJ antagonism to statist criminal justice is a radical one. Comprehensive RJ is the first and only criminological movement to advocate that the state be ejected entirely from the criminal justice process. However, it is a localised radicality. It is concerned to re-organise the manner in which capitalist society deals with crime. It proposes that such re-organisation be founded upon the

105 Of course, popular capitalism meant serious cutbacks in the hard-won social rights of the workers. But, they were told, every worker now had the right to break free of a life of dependence upon and charity from the state, and to discover his true worth in the heady atmosphere of the free market. Popular capitalism was proffered by its ideologues as the solution to the structural crisis of and proletarian disaffection with the mode of production. It promised to sideline the class struggle and to transform every citizen into a property owner, motivated by the ideals of individual incentive and self-promotion, and dedicated to making capitalism work. Popular capitalism was, in this regard, an attempt to replace classes with consumers. See Mawby & Walklate (1994) 80-86.

privatisation of criminal justice, which, in terms of the proprietary approach pioneered by Christie, entails the extension of the process of commodification to the criminal conflict itself. In other words, RJ appropriates the defining form and process of the capitalist economy as its theoretical touchstone. Thereby it classifies itself as a bourgeois theory of criminal justice.

6 Conclusion

It should be evident from the preceding presentation that the political economies of postmodernism and RJ are coterminous in many respects. In particular, its commodification of the criminal episode, which is entrained in Christie's comprehension of criminal conflicts as property, locates RJ squarely within the compass of postmodernism. The latter, it will be recalled, represents the high-water mark in capitalist culture of the process of commodification and thereby of the principle of equivalence upon which commodification rests. If the idea of popular capitalism was part of an ideological response of the ruling class to the economic crisis of the mode of production, then the idea of postmodernism represents the ethos of popular capitalism extended to the superstructure as a whole.

RJ is the criminal justice of postmodernity. It is the postmodern moment in the evolution of the criminal justice system. The objective affinity between postmodernism and RJ is unmistakable. They have the same material and historical origins in the long-term decline of the capitalist mode of production. Like postmodernism, RJ understands the world in juridical terms. Both are structured by the core juridical principle of equivalence, which is embraced as the organising axis of social relations. Both comprehend the legal form in relation to the commodity form. And they both take commodification to new heights in their respective fields of influence. The restorative "stakeholder" in a criminal conflict is the analogue of the postmodern consumer. Postmodernism commodifies everyday life relentlessly. RJ commodifies the criminal conflicts which have become a relentless fixture of everyday life. If postmodernism demarcates the general configuration of the superstructure of late capitalism, then RJ is postmodernism expressed in legal superstructural terms. It is the commodified character of postmodernism which structures the proprietary character of RJ. RJ is postmodernism writ small.

However, it is precisely the postmodern nature of RJ which stands as an impassable barrier to its success. The proponents of RJ may be true radicals in their rejection of a state-sponsored criminal justice and their agitation for a privatised RJ. However, they turn out to be true conservatives about the notion of the juridical which underlies both criminal justice and RJ. The devotees of RJ relate to criminal justice in the same way that anarchists relate to bourgeois law: they reject its external characteristics while preserving "its inner essence,

the free contract between autonomous producers".¹⁰⁶ Insofar, therefore, as its opposition to the state is a parochial one which never ventures outside the conceptual confines of the bourgeois worldview, the radicality of RJ is overwritten in reaction. The RJ demand for the demise of criminal justice is simultaneously a vote of confidence in the perpetuity of the commodity form and its homologous legal form.

Even within the parameters of the juridical, the radicality of RJ soon runs aground upon the tenacity with which the state holds its position in the criminal justice system. There is here a debilitating contradiction between the theoretical premise of RJ and the nature of capitalist criminal justice, a contradiction which has the effect of undoing the former. For it is a vain hope that, within the confines of the social relations of the capitalist mode of production, it is possible to construct a response to the problem of crime which does not rely upon state participation. Christie and his adherents do not understand that capitalist criminal justice is necessarily state justice. The neo-liberal project may encourage the privatisation of policing and corrections. But crime and its punishment are off limits. Even in the world of popular capitalism, they must remain public functions. They must retain their statist fundamentals.

The regime of criminal justice as we know it is a thoroughly juridical regime, in the sense that it is dedicated to the principle of equivalence which defines the legal form. However, since every crime is a negation of this principle, the entry of the state as party to every criminal matter is simply necessary to ensure that the principle is upheld. The neo-liberal assault upon its hegemony notwithstanding, the capitalist state cannot and will not allow itself to be ejected from a system which is predicated upon its involvement. Capitalism, however popular, contains no space for the transformation of criminal justice into RJ. When all is said and done, RJ will not supplant criminal justice. The social relations of production themselves constitute an insurmountable impediment. The radicality of RJ dissipates in the face of bourgeois class power. And the desideratum of comprehensive RJ ceases to be a viable alternative to criminal justice. Instead, it is broken up into so many discrete pieces, each operational only at the behest and under the auspices of the capitalist state and its criminal justice system, but never combining into a RJ system. The only future for RJ within the parameters of capitalism is a partial one.

That, then, is the essential difficulty facing RJ: the very material conditions which engendered it also conspire to prevent it attaining its goal. RJ is postmodern justice. But the material constitution of postmodernity militates

106 Pashukanis (1978) 124.

against the ultimate success of RJ over criminal justice. The triumph of RJ requires nothing less than a post-legal and, hence, a post-capitalist world, which has transcended the parameters of postmodernism. Absent such a transformation, RJ stands in jeopardy of being despatched, along with postmodernism, to the rubbish heap of historical curiosities.

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