The Structure of Dialogue: Exploring Habermas' Discourse Theory to Explain the "Magic" and Potential of Restorative Justice Processes

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The theory of restorative justice has always lagged behind practice. As such, gaps in theory have developed, existed over time and continue to exist today, particularly in terms of explaining the so-called "magic" that occurs within the encounter process. By exploring the theories of Jürgen Habermas, it is suggested that new frameworks can be developed that can help theorists think about and explain the experiences central to restorative processes. This paper focuses on Habermas' theory of universal pragmatics and communicative action as a means to better understand the workings within the encounter process that give rise to common understanding, agreement, learning, and strengthened relationships.

La théorie de la justice réparatrice a toujours été à la remorque de la pratique. Par conséquent, des failles sont apparues, et les écarts qui se sont créés au fil du temps existent toujours, particulièrement pour ce qui est d'expliquer la réaction qualifiée de « magique » qui suit le processus transactionnel. Il est suggéré que, grâce à l'étude des théories de Jürgen Habermas, il serait possible de créer de nouveaux cadres d'action qui pourraient aider les théoriciens à se pencher sur les expériences au cœur du processus de réparation et à les expliquer. L'article examine la théorie de Habermas sur la pragmatique universelle et les énoncés performatifs comme moyens pour mieux comprendre les mécanismes du processus transactionnel qui mènent à une compréhension commune, à l'entente, à l'apprentissage et à des relations plus solides.

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Introduction

I. Habermas' theories of universal pragmatics and communicative action
   1. The role and function of language
   2. The three-world concept
   3. Validity claims and argumentation

II. Communicative action and the experiences of learning and bonding within the restorative justice process
   1. Learning potential
   2. Binding or bonding force

III. Explaining the restorative encounter process
   1. Framework to understand the restorative encounter process
   2. The significance of Habermas' theories for restorative justice

Introduction

An important aspect of the restorative justice process is a commitment to the bringing together of all parties involved in a wrong in a face-to-face encounter, to allow the parties to dialogue about the wrong committed and search for ways to make the wrong right. Despite encounter being at the heart of any restorative justice process, what happens within or during the face-to-face restorative process remains to some extent ambiguous and unclear. Authors have described the experiences witnessed in encounters such as strengthened social relationships, personal transformation, learning, and coming to a common understanding. To date, however, there is little explanation of the basic workings of the encounter and how it produces the above-noted experiences. Theorists have instead often simply skimmed over this element with vague terminology, or have taken a romanticized approach referring simply to the so-called “magic” that

Exploring Habermas’ Discourse Theory to Explain the “Magic” and Potential of Restorative Justice Processes

happens within or during an encounter.\textsuperscript{2} Still others suggest that there is “something significant” going on, but acknowledge that we are still struggling to explain it. As Paul McCold suggests:

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

... Today we struggle to understand what it is we see, although those observing the transformations that can occur in restorative processes would agree, we “know it when we see it.” A shared language will eventually develop from how we interpret what we see and how we express those visions to others.\textsuperscript{3}

Although never writing on the topic of restorative justice, the theories of German philosopher and sociologist Jürgen Habermas may provide a helpful framework or perspective from which to explore, further examine, and begin to understand the “something significant” that is occurring during the encounter process. In particular I believe that Habermas’ linguistic or discourse theories of universal pragmatics and communicative action may help us begin to articulate the structures at work within language that explain how the important experiences witnessed in the encounter process are achieved. I have turned to Habermas’ concepts of universal pragmatics and communicative action in particular. These theories aim at explaining how language can be employed to achieve understanding and how they give rise to individuals coming to agreement and coordinating their action correspondingly. Given that the crux of encounter is to employ dialogue so that individuals can understand the harm that has occurred and together come to agreement regarding what measures need to be taken to right


the wrong, the connections between the two theoretical constructs seem highly relevant.⁴

Although Habermas’ theories provide a useful framework that can help expand our understanding of restorative justice, the author nonetheless acknowledges that Habermas’ work has several weaknesses that should be kept in mind. The first weakness is that Habermas’ theories of universal pragmatics and communicative action are largely utopian in that they envision an ideal situation or context as opposed to what exists in actual fact. For example, Habermas articulates the concept of an ideal speech situation. Although Habermas moved away from this concept in later years, that move in and of itself makes the point that his original theories are overly idealistic. Another example is Habermas’ requirement that persons be oriented to understanding in order to facilitate communicative action. Although this is important to his theory, it is often absent in human discourse when fears, insecurities, vulnerabilities, and egos overtake the conversation.

This point leads into the second weakness in Habermas’ theories: they rely too heavily on rational thought. Habermas is known as a modernist who believed that modernity was not dead and could be salvaged instead of moving to a post-modern persuasion. When his theories are applied to specific situations such as restorative justice processes, however, it becomes clear that humans do not usually behave as rationally as Habermas might theorize. The rationality that Habermas envisions in his writings presents as sober thought, when in reality persons, especially those in conflict, rely significantly on their feelings and emotions and create and respond to a myriad of both verbal and non-verbal dynamics in dialogue (including, importantly, the issue of power dynamics present in nearly every discourse).

The last weakness that I wish to note, again stems from the previous, that is that Habermas’ theories tend to be highly ethnocentric in nature. Many cultures, especially those where restorative justice and other dialogue

⁴ It is acknowledged here at the outset that Habermas provides only one of many perspectives from which we should examine and better understand restorative justice. Offering this perspective, albeit with limitations, is nonetheless important in that it opens up and offers practitioners and theorists a different way of thinking of what occurs within restorative justice practice. It is the author’s hope that this article can help practitioners and theorists to further conceptualize and reflect on current practice from a new theoretical perspective so as to further refine, develop, and improve practice. By using Habermas’ theories as a broad starting point for the structure of dialogue, as employed within restorative processes, the framework can thereafter be critiqued, revised, contextualized, and redefined through the introduction of additional perspectives, theories, and ideas. The author wishes simply to use Habermas’ theories here in a limited way to provide a base or basic structure from which she and others can sculpt, mould, and add additional layers of meaning.
Exploring Habermas' Discourse Theory to Explain the “Magic” and Potential of Restorative Justice Processes

processes or oral traditions exist and even tend to dominate, are structured in ways different from European or Western rational thought. Concepts such as time, being, and the borders between the physical and spiritual are very different in these cultures than as envisioned by Habermas, and yet the “something significant” in restorative processes that take place within these cultures is no less strong.

Despite these weaknesses, Habermas’ theories have a great deal to offer, especially to help us to conceptualize the structure of speech, and thus the basic workings of restorative processes. Habermas’ work can be used to illuminate areas in restorative justice theory that have so far remained ambiguous.

In this paper I will first provide an explanation of Habermas’ theory of universal pragmatics and communicative action, throughout which I will make reference to the different ways these theories align with restorative practices and experiences. Once I explain the theories, I will then explore what Habermas describes as the learning and bonding potentials inherent in communicative action. Finally, I conclude by tying these explanations together in a framework that helps explain the linguistic structure at play within the restorative process.5

1. Habermas’ theories of universal pragmatics and communicative action

To put things into the restorative justice context at this early point, let me remind the reader that in restorative justice we start from a position of conflict where there is a lack of understanding, consensus,6 and coordinated action. It is in fact the lack of both consensus and coordinated action that leads to wrongdoings, crime, and conflict in the first place. We require, therefore, a process to bring about understanding, consensus (i.e., general commitment regarding how best to peacefully move forward) and coordinated action; a realignment of behaviour and right relationships (or the right way to relate to one another) to restore peace.

5. Although the discussion within this paper tends to reference restorative justice processes used within inter-personal conflict, it is suggested that the same broad principles, and the insights that arise from them, hold true for restorative justice processes in more macro settings as well, such as conflicts at the community, group, and nation level.

6. By “consensus,” I mean a general commitment to basic norms and social rules that instruct and inform behaviour in relation to inter-personal and social interaction.
1. **The role and function of language**

According to Habermas, humans are rational, autonomous beings who relate and interact with the world through language. To Habermas, language is much more than simply words and phrases. Not only does it convey meaning by way of symbols, but through language we are able, among other things, to relate to and influence others; establish interpersonal relationships; come to understanding about the world, others, and ourselves; and coordinate action. As such, Habermas' theories are much more interested in what language does than what it says.

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

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12. Habermas, *The Critique of Functionalist Reason*, supra note 8 at 120; Finlayson, supra note 9 at 34.
coordination of action is "mutual intersubjectivity" or "intersubjective recognition of the validity claim the speaker raises."\textsuperscript{13}

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

2. The three-world concept\textsuperscript{14}

To understand how language gives rise to a shared understanding and the coordination of action, we need to first explore Habermas' concept of "the three worlds." In his book, \textit{The Theory of Communicative Action},\textsuperscript{15} Habermas draws on the work of renowned psychologist Jean Piaget and explains that as we grow and develop as individuals, through the various developmental stages articulated by Piaget, we come to divide reality into three different realms or dimensions: the objective, subjective, and social worlds.\textsuperscript{16} According to Piaget, a child comes to understand the difference and the demarcation between the concrete physical world that she lives in and the internal world of her thoughts, feelings, and desires. As a child deals over time with objects and with herself, this line becomes more and more clear. Additionally, the child makes the distinction between these first two realms and the third realm of the shared social world. As the child interacts with others, and sees others interacting with the physical world, this understanding of the social world forms, and again the demarcation becomes strengthened.\textsuperscript{17}

Beyond understanding the separation between these three worlds, children come to understand that they can view the world from a variety of perspectives. Initially, they only engage the world from their own internal perspective; that is, they only acknowledge that the world can be seen through their eyes: how they see themselves, how they see others, and how they see the physical world. Over time, however, they come to realize that the "worlds" can be seen from other subjective perspectives; that is, you

\textsuperscript{13} Habermas, \textit{The Critique of Functionalist Reason}, supra note 8 at 120.

\textsuperscript{14} According to Habermas: "Speaker and hearer use the reference system of the three worlds as an interpretive framework within which they work out their common situation definitions," \textit{ibid} at 120.

\textsuperscript{15} Habermas, \textit{Reason and the Rationalization of Society}, supra note 7.

\textsuperscript{16} \textit{Ibid} at 52, 68; Habermas, \textit{Communication and Evolution}, supra note 10 at 120.

\textsuperscript{17} Habermas, \textit{Reason and the Rationalization of Society}, supra note 7 at 68; Habermas, \textit{Communication and Evolution}, supra note 10 at 66-67.
can see the world from someone else’s perspective or through someone else’s eyes. Other sociologists have expressed this perspective as “taking the attitude of the other,”\textsuperscript{18} that is, the self can see themselves through another’s eyes (alter); they can see the other through the other’s eyes; they can see the interaction between self and other through another’s eyes (third person); and they can see the physical world through another’s eyes.\textsuperscript{19} As children grow they also become more reflective. Taking the perspective of themselves (or other) and looking back on their own thoughts and behaviour.

This ability to take various perspectives or “take the attitude of the other” is an important mechanism within the restorative process. It is what allows parties to empathize with others, and metaphorically stand in the shoes of another when the different parties are “telling their stories.” This in turn has been linked to the ability to come to understanding with another. Being able to see things from the other’s perspective and comprehend what that may feel like (which is possible because they too have felt these things or can at least imagine such feelings given the situation) is part of the understanding of which restorative practitioners often speak.\textsuperscript{20} Once participants are able to stand in another’s shoes, the ability to reflect back on their own thoughts, feelings and behaviour is also key.

The recognition of the above-noted separate realities or three worlds is important to Habermas because he suggests that we use language slightly differently depending on the realm with which we are engaging.\textsuperscript{21} In other words, what language achieves, or the work language does, depends on what “world” we are talking about. For example, when we use language to relate to the objective world, the role language plays is to represent facts that exist (i.e., “the flower is green”). When we use language to relate to the subjective world, the role language plays is to express our inner intentions (i.e., “I like the flower” or “I want to eat now”). And when we use language to relate to the social world, we use language to establish legitimate interpersonal relationships or establish appropriate behavioural

\textsuperscript{18} Habermas, \textit{Functionalist Reason}, supra note 8 at 9-15 and 37 for Habermas’ exploration of Mead’s “taking the attitude of the other.”
\textsuperscript{19} Ibid at 35; Habermas, \textit{Reason and the Rationalization of Society}, supra note 7 at 69.
\textsuperscript{21} Habermas, \textit{Communication and Evolution}, supra note 10 at 28-29 and 33.
Exploring Habermas' Discourse Theory to Explain the "Magic" and Potential of Restorative Justice Processes

expectations (i.e., “I really appreciate you Laura” or “What you did was inappropriate, Brad”).

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

In relating this back to the restorative justice process, each of these functions of language corresponding to the three worlds is essential. First, it is important within an encounter for each of the parties directly involved to discuss what actually happened in terms of facts (objective world, asking the question “What happened?”). Secondly, it is also important for each of the participants to express their inner feelings and intentions to let others know how they feel, what effect the wrongdoing had on them, what they want done about it, and what they can do to make it better (subjective world, asking questions such as “How has it affected you?” or “What were you thinking at the time and how did it make you feel?”). Finally, at the heart of every encounter is the aim of acknowledging wrongs that have occurred, establishing appropriate behavioural expectations, and developing legitimate interpersonal relationships (shared, social world, asking questions such as “How did the behaviour affect others?” or “Who was harmed?”). When all of these things have been addressed, it is the larger goal of a restorative justice process to reach an agreement regarding what actions should be taken to repair the harm and establish right relationships for all those involved. Additionally, in order to come to this understanding and agreement, it is necessary not only for each individual

22. Ibid at 28 and 67; Habermas, Reason and the Rationalization of Society, supra note 7 at 68, 69, 278. It should be noted that in fact in every speech act there exists a threefold relationship between the utterance, the external world, the internal world, and the shared social world by way of the existence of all three validity claims in each utterance. However, given that each speech act thematizes only one validity claim, the function of speech differs depending on which validity claim or which “world” is emphasized; see, Habermas, Communication and Evolution, supra note 10 at 67.
25. Ibid.
participant to view these three worlds from their own perspective, but it is necessary for each participant to see things from each of the other participants’ perspective: only then can there be a shared understanding and consensus or agreement on how best to move forward or make things better.

3. **Validity claims and argumentation**

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

First, Habermas explains that dialogue can be broken down into the smallest unit of speech, which he calls an “utterance” or “speech act.” Our conversations are made up of hundreds of these discreet speech acts. Second, Habermas asserts that within every one of these utterances or speech acts we raise “validity claims.” Validity claims are simply claims that what we are saying is legitimate or applicable. According to Habermas, whenever we speak, we raise three inherent validity claims: truth, sincerity, and rightness. By raising these validity claims, every time we utter a phrase, we are in essence asking those with whom we are engaged in speech to accept: 1) what we are saying is true; 2) that the intentions and feelings we are expressing are sincere and truthful—that they can be trusted; and 3) that what we are saying (and hence thinking) is normatively right or appropriate. Habermas calls these explicit or implicit assertions “validity claims” because we are asking those we are engaged in speech with to accept the claims we are raising. When we implicitly offer these validity claims within our conversations (within each discreet
Exploring Habermas' Discourse Theory to Explain the “Magic” and Potential of Restorative Justice Processes

speech act), we are asking the person we are speaking with to take a yes or no position to the claim we have offered. “Yes,” you accept my claims, or “no” you do not.32 This can also be done implicitly by “going along” with another, or explicitly by verbalizing the agreement.

Habermas’ validity claims fit with the practice of restorative justice in that there are underlying principles of openness, truth-telling, respect, and accountability within the process. These principles translate into practice by encouraging open and honest expression (truth, truthfulness or sincerity, and rightness). In fact the expression of all thoughts and emotions are welcomed as long as they are expressed with respect, sincerity, and truthfulness. When expression is not open and honest, persons within the process are encouraged to hold each other to account. The restorative justice process is a place where parties can confront one another, get questions answered, and gain insight. As described by Van Ness and Strong:

Parties put together a common understanding of what happened and talk about how they experienced and how it made them feel. ...Both are given the opportunity to ask questions of the other, the victim can speak about the personal dimensions of the victimization and loss and the offender has a chance to express remorse. ...[it] gives them greater insight into the harm they caused. ...Both victim and offender are confronted with the other as a person rather than a faceless, antagonistic force, permitting them to gain a greater understanding of the crime, of the other’s circumstances and of what it will take to make things right.33

Returning to Habermas’ theories, you might notice that these validity claims correspond with the three worlds explained above. For example, the claim that a speech act is true relates to facts in the physical or external world. Only facts can be true: feelings and intentions that arise from within us, on the other hand, can be sincere or truthful. Finally, utterances that can be claimed to be right or normatively appropriate come from our shared or social world. How we relate to one another or behave with one another can be appropriate, as opposed to true or truthful.34

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

32. Habermas, *Reason and the Rationalization of Society*, supra note 7 at 38: “every new utterance is a test: the definition of the situation implicitly proposed by the speaker is either confirmed, modified, partly suspended, or generally placed in question.” Habermas, *The Critique of Functionalist Reason*, supra note 8 at 121.
34. Habermas, *Communication and Evolution*, supra note 10 at 28–33.
In speaking we relate to the world about us, to other subjects, to our
own intentions, feelings, and desires. In each of these dimensions we are
constantly making claims, even if usually only implicitly, concerning the
validity of what we are saying, implying, or presupposing—claims, for
instance, regarding the truth of what we say in relation to the objective
world; or claims concerning the rightness, appropriateness, or legitimacy
of our speech acts in relation to the shared values and norms of our social
life; or claims to sincerity or authenticity in regard to the manifest
expressions of our intentions and feelings.\(^3\)

Although all three validity claims exist in each utterance spoken, that is,
in everything we say, Habermas suggests that within each speech act one
validity claim is actually emphasized or "thematized" above the others.\(^4\)
That is, we usually make facts, intentions and feelings, or norms and
interpersonal relations explicit or centrally thematic. For example, when
a victim within an encounter explains that the offender hit him in the
stomach, the victim is emphasizing or thematizing the propositional or truth
(objective) element of the statement. The victim is still raising the sincerity
and normative claims within such a statement; however, such claims
remain implicit or in the background, while the truth claim is explicitly
thematized. When the victim suggests, however, that he was frightened
when he was hit by the offender, the victim is instead emphasizing or
thematizing the expressive (subjective) element of his statement. Again,
the other validity claims are raised, but they remain implicit, whereas the
expressive validity claim is clearly explicit. Finally, when the offender's
mother, in response to hearing an account of the events, tells the offender
that he was wrong to have struck the victim, and that he should apologize
and never do such a thing again, the interactive or normative element of
the utterance is being thematized. In each of these utterances, the three
validity claims are being raised and offered to be taken as accepted; it is
simply that one of the three claims has been made explicit, whereas the
other claims are only indirectly expressed.\(^5\)

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

\(^3\) Habermas, *Reason and the Rationalization of Society*, supra note 7 at xii, "Translator's
Introduction."

\(^4\) Habermas, *Communication and Evolution*, supra note 10 at 53-59 and 66; Habermas,
*Functionalist Reason, supra note 8* at 120.

\(^5\) Habermas, *Communication and Evolution, supra note 10* at 53-59; Habermas, *Functionalist
Reason, supra note 8* at 120-121.
be seen on a larger scale within the various phases of an encounter, where the subject-matter and overall discussion seems to be thematized around specific claims. For example, at the commencement of most encounter processes, participants begin by recounting the facts that surrounded the incident at the center of the restorative justice process. This phase of the encounter can be said to be centered on, or emphasize, truth claims. Of course, there may be speech acts within this phase that thematize other validity claims, but generally most of the speech during this phase emphasizes truth claims about what happened. The second phase of many encounter sessions focuses on how people felt and the harm they may have experienced as a result of the incident. This phase of the encounter could therefore be said to emphasize truthfulness or sincerity claims. The final phase of the encounter process focuses on what can be done to repair the harm and restore the relationships that have been damaged. This phase of the encounter process seems then to emphasize the normative or rightness claim.38

So far, we have seen that dialogue can be divided into discreet speech acts that have a structure implicit to them that corresponds to the objective, subjective, and social world, and that universally inherent in these speech acts are validity claims of truth, sincerity, and rightness. Although all three of these claims are raised in each speech act, only one claim gets emphasized or thematized at any given time.39 This theoretical basis is important, however, the key to Habermas' theory, and what allows individuals to come to understanding with each other through language, is that validity claims are raised as claims (as opposed to absolutes).40 Because these claims are not absolute, but are instead simply assertions or propositions, they are open to be challenged, criticized, defended and revised through a process Habermas refers to as "argumentation."41

For every utterance, validity claims are raised; therefore, whenever we engage in dialogue, a hearer has three possible courses of action upon hearing an utterance: 1) they may accept the statement and the validity

38. There is time to talk about the facts, about how people feel, and about what wrongs were committed and how such wrongs should be rectified. Although there is a natural rhythm within an encounter process that often flows from facts, to feelings, to restoring relationships, an encounter is never fully compartmentalized. At any time during the dialogue participants can express speech acts that thematize any of the three validity claims.
39. Habermas, Communication and Evolution, supra note 10 at 66; Habermas, The Critique of Functionalist Reason, supra note 8 at 120.
40. Habermas, Communication and Evolution, supra note 10 at 63; Habermas, Reason and the Rationalization of Society, supra note 7 at 9.
41. Habermas, Communication and Evolution, supra note 10 at 64; Habermas, Reason and the Rationalization of Society, supra note 7 at 22-42.
claims associated with it (take a "yes" or acceptance position in relation to the claims raised); 2) they may reject the statement and challenge the claims made (take a "no" or rejection position to the claims raised)—it is at this stage that the process of argumentation is then engaged; or 3) they may leave the issue undecided.

If a hearer accepts an utterance and validity claim as offered, there is no challenge, and thus no justification required. It is assumed that the parties both agree with the claim, and there is understanding and agreement with what was said. If, on the other hand, the hearer does not accept that claim as offered, the speaker must provide justification as to why the claim should be accepted. It is at this point that the claim can be said to be problematized and challenged, and the speaker is expected to offer reasons for why the hearer should accept the statement as true, sincere, or right. If the speaker can justify, defend, and ground their claim with reasons, the discourse ends with an agreement that the claim raised was valid. If, on the other hand, the hearer continues to reject and challenge the claim made, the discourse or "argument" continues with the offering and criticizing of reasons, or the parties may decide to leave the issue undecided for the time being. Such argumentation continues until the criticized validity claims are vindicated through reasons, unless left undecided.

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

When one "grounds a claim," as Habermas calls it, one is simply providing a justification, or pointing to the appropriate evidence that

42. Ibid at 18.
43. Ibid at 38.
44. It should be noted that this process of argumentation does not need to be a sophisticated process. Nor do the positions taken by the hearer need to be made explicit. For example, the hearer obviously is not likely to say, "John, I do not accept the validity claim of sincerity you have offered." And often times, individuals do not even explicitly state the rejection in a manner such as: "John you're being insincere." Often times instead, the acceptance or rejection of a validity claim, and the speech act it was raised within, is implicit and subtle in the hearer's response. Additionally, the terminology that Habermas uses, "argumentation," conjures up images of a yelling match. Other terms, such as debate or deliberate, could be employed here and may convey the meaning in a better way. Regardless of what term is used, however, the process is still the same and often occurs in subtle, rudimentary ways.
Exploring Habermas' Discourse Theory to Explain the
"Magic" and Potential of Restorative Justice Processes

supports the claim. This "grounding" takes slightly different forms depending on the validity claim being challenged and defended. For example, in order to ground or justify a truth claim, one must establish the existence of a state of affairs, that is, give evidence that a fact is indeed this, as opposed to that. In order to ground a claim of rightness, one must establish the acceptability of actions or norms, or establish the preference of a particular value, that is, give evidence that supports the action taken in a given situation in light of legitimate expectations. As for a claim of sincerity, Habermas suggests that such claims cannot be grounded per se, but instead only demonstrated. To demonstrate sincerity, one must establish the transparency of self-presentation or, in other words, show that they can be trusted by acting in a consistent manner. Although each claim requires a slightly different type of reason to be grounded, each claim is nonetheless justified with reasons.

It is this process of argumentation—criticism of validity claims raised, followed by a justification or grounding of the claim through reasons—that is the structure at the heart of individuals coming to understanding and coordinating their action, and is thus suggested to be the structure at the heart of encounter as well. This raising and debating of validity claims allows for what Habermas terms "intersubjectivity" or mutual agreement.

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

In a discourse like a restorative justice encounter, when all parties are engaging in speaking and listening, this process repeats itself over and over again (either acceptance of a validity claim, a rejection of a claim which results in argumentation, or a neutral reaction to leave the claim unchallenged and undecided for the time being) as the parties work through different issues and topics, and understanding is achieved through

46. Ibid at 15, 25, 39, 41.

47. Ibid at 14, 25, 27, 35, 50; Habermas, Communication and Evolution, supra note 10 at 63.

48. Habermas, Reason and the Rationalization of Society, supra note 7 at 25-26; Habermas, Communication and Evolution, supra note 10 at 121.
intersubjectively recognizing validity claims the parties reciprocally raise.\textsuperscript{49}

As seen throughout this discussion, the process of coming to understanding through intersubjectively recognizing validity claims fits squarely with the process involved in restorative justice encounters and is a good perspective from which to understand how individuals come to understanding and are able to emphasize and stand in each other's shoes. Although Habermas terms the process of questioning and defending validity claims "argumentation," it is important to remember that there is nothing forceful or aggressive about the process. It is based entirely on the giving and accepting (or challenging) of reasons. No force or coercion is permitted, other than the force of the stronger argument or better reasons.\textsuperscript{50}

Because the restorative justice process is meant to be an open process where participants are free to speak their minds in a respectful manner, if someone disagrees with the statement of another, whether in regards to the truth of the statement, the sincerity of the statement, or the appropriateness of the statement, the encounter not only allows for, but also encourages that person to freely disagree with and challenge what the other says (hold to account). This is exactly what Habermas describes as criticisable validity claims and argumentation. The encounter is an open forum to express oneself, challenge others respectfully and defend one's thoughts and beliefs with reason through discourse.\textsuperscript{51}

II. \textit{Communicative action and the experiences of learning and bonding within the restorative justice process}

In addition to helping us think about how understanding, empathy (standing in another's shoes), and agreement (in relation to future actions and inter-relations) are achieved through the restorative process, Habermas' theory

\textsuperscript{49} Ibid at 121-122.

\textsuperscript{50} Habermas, \textit{Reason and the Rationalization of Society}, supra note 7 at 25-28. Indeed, "power imbalances" among participants in restorative processes, which may result in a weaker party purportedly agreeing with a "restorative" outcome while having silent reservations, is an important issue and concern within restorative justice processes that must actively be addressed and managed within each process.

\textsuperscript{51} It may be good to remind the reader at this point of the weaknesses of Habermas' theories as outlined in the introduction, and reiterate that the arguments contained within this paper are offered as one perspective from which to reflect on current practice. The author acknowledges fully the idealistic nature of these arguments and acknowledges too the complex nature and dynamics of discourse, that includes issues of power, status, gender oppression, cultural etiquette, emotions, fears, insecurities, politics, etc., that are not dealt with in Habermas' concepts of universal pragmatics and communicative action. Habermas does attempt to address many of these issues in \textit{The Inclusion of the Other: Studies in Political Theory}, Ciaran Cronin & Pablo de Greif, eds, (Cambridge, MA: MIT Press, 1998). All of these dynamics, however, could not be addressed in this initial discussion; hence the offer that this discussion is written simply as a starting point to lay out an initial perspective and structure of dialogue that will have to be further developed and refined.
may also help us begin to think about other gaps that exist in restorative justice theory, including understanding how the learning and bonding that is observed in the restorative process may come about. According to Habermas, when communicative action is employed (i.e., the raising of a criticisable validity claim, followed by a justification or grounding of the claim through reasons with no force other than the force of the better argument), both a learning and a bonding potential exist.

1. Learning potential
Because validity claims are subject to challenge and need to be defended, or at least be defendable, the process of argumentation provides a space for claims to be altered and improved if in their original form they fail (that is, we can correct failed attempts). Argumentation thus allows participants the opportunity to learn, that is, identify mistakes or failed claims and improve upon them based on valid reasons given. For example, if a hearer challenges a validity claim, and the speaker cannot defend it with reasons, according to Habermas the claim should be modified or abandoned. If the hearer offers reasons in her challenge, it is more likely that the claim can be modified to one that can be grounded by the hearer’s reasons. If no reasons exist to sustain even a modified claim, the claim should simply be abandoned. Habermas suggests that in cases where there are no reasons to ground a claim and it is not modified or abandoned, the speaker who put forth the claim deceives him- or herself and can be said to be acting irrationally.

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

The repeated stories of changes in attitude “in which the victim and offender recognize within the other a common humanity” as well as the idea that the restorative process is “able to touch—and perhaps change—

53. *Ibid* at 18-19, 22.
the hearts and minds of offenders (and, coincidentally, of victims) may be explained in part by this modifying or abandoning of unsustained validity claims.

If this is, in fact, one of the mechanisms at play within the restorative process, then it can give us a potential starting place to begin to address Bazemore’s concern that “we cannot easily explain why such short term encounters might change...attitude, behaviour and/or...impacts lawbreaking” as well as some idea of the “something significant” that McCold suggests occurs.

2. Binding or bonding force

In addition to the learning potential that is present in communicative action, Habermas suggests there is also a bonding potential (that creates an obligatory relationship between speaker and hearer) that exists in this type of speech. On one level, the raising of validity claims brings about an interpersonal relationship that is bound together by the reciprocal obligation of each speaker to justify or ground the claims he or she has raised, and for hearers to accept these claims unless they have good reasons to challenge them. Habermas refers to this as the illocutionary or rationally motivated binding force of communicative action. Each participant implicitly offers a “warranty” that if challenged, they can provide reasons to support the claim raised. An individual in this case is bound then by the requirement that she act rationally. If she raised a validity claim, she must (i.e., she has the obligation to, based in rationality) provide reasons that support that claim, and a hearer too must accept such claims, (i.e., she has an obligation to accept such claims, unless she has good reasons to reject them). Furthermore, based on the reasons provided within the testing of validity claims, the illocutionary binding effect results in a speaker regarding a question as settled when a satisfactory answer is given, dropping an assertion when it proves to be false, and following his own advice when he finds himself in the same situation as the hearer.

Above and beyond the illocutionary force of speech, Habermas’ communicative action allows for a second kind of bonding to occur. On

55. Maxwell, supra note 1 at 11.
57. McCold, supra note 3 at 359.
58. Habermas, Communication and Evolution, supra note 10 at 41-62 and 63; Habermas, Reason and the Rationalisation of Society, supra note 7 at 34 and 278.
60. Habermas, Communication and Evolution, supra note 10 at 62-64.
this second level, individuals are bound due to the need to act consistently in regards to normative or regulative speech acts agreed to or accepted within dialogue. If a speaker has, for example, commanded or directed a hearer to do something, and the hearer has accepted (i.e., accepted the normative validity claim raised in the speech act), the hearer is morally obliged to comply with the command or directive. If, on the other hand, the speaker has, for example, made a promise or an announcement and the hearer has accepted (i.e., again accepted the normative validity claim raised), the speaker this time is bound morally to act in a manner consistent with the promise or announcement made. Similar moral obligations also appear when dealing with agreements, contracts, advice and warnings.61

At both levels, relationships are established or re-established through this bonding potential because as parties engage in communicative action and come to agreement over and over again on truth, sincerity and rightness claims, they begin to form a common understanding and “knowing” of each other. They know what each other is thinking, feeling, and experiencing because they are agreeing on the thoughts, feelings, and values through the claims raised. Furthermore, parties begin to trust one another as a result of their coordinated action and their compliance with agreed upon normative or regulative speech acts. If we agree as a group to behave in a certain manner and comply with this agreement, then trust will be built. If we do not comply, we feel the guilt that comes from others holding us to account. It is this “knowing,” trusting, and being able to hold to account in the process, that give rise to strengthened social relationships.

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

Proponents of restorative justice claim that people are far more likely to do things they have agreed to do, than to do things which they have been ordered to do.62

Furthermore, according to McCold and Wachtel:

61. Ibid at 63. It may be good to remind the reader here that, although I am speaking of individual speakers and hearers throughout the discussion, within the restorative process there are numerous participants, and thus numerous speakers and hearers who each individually take their turns in these roles as the process takes place.
For community justice initiative to be effective they must capitalize on the fact that people act in a certain way because they want to avoid experiencing the external shame of disapproval by people they care about and because of the internal shame experienced through conscience.\footnote{Paul McCold & Benjamin Wachtel, "Community Is Not a Place: A New Look at Community Justice Initiatives" in John Perry, ed, \textit{Repairing Communities Through Restorative Justice} (Lanham: American Counseling Association, 2002) at 42.}

In terms of the increase in knowing and trusting leading in turn to strengthened social relationships, as Kay Pranis notes:

Because restorative values emphasize those characteristics that support good relationships, the application of those values continuously strengthens relationships and deepens the connections among people. When people experience respect, equality and mutual care they become more likely to drop defences or protections, which are often the course of destructive or non-cooperative behaviour. They become open to recognizing common ground and acting in the common interest—a critical aspect of community.\footnote{Kay Pranis, "Restorative Values" in Johnson & Van Ness, \textit{supra} note 1.}

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

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

III. \textit{Explaining the restorative encounter process}
Knowing that Habermas' theories are offered here solely as a beginning perspective to help us start to understand the encounter process, I nonetheless believe that his articulation of universal pragmatics and communicative action in relation to restorative justice theory and practice can provide a framework and an explanation of structures within speech that help us begin to understand how we relate to one another with language and how we are able to come to a more shared understanding of the world.

1. \textit{Framework to understand the restorative encounter process}
The ultimate goal of a restorative justice encounter process is for the parties to come to understanding with each other, come to consensus and agreement on what actions can be taken to right the wrong, address the
harm that has been caused, and then finally to coordinate their actions so that this agreement can be fulfilled and the parties can move forward. Along the way, within this process, individuals get the chance to confront and challenge each other, learn from each other, and try to establish right relationships of equal dignity, respect, and care. This is done through a dialogue process that brings together all the parties with a stake in the issue. According to Habermas, the ultimate function of language, when used in the form of communicative action, is to bring individuals to understanding and coordinate their action. As you can see, Habermas’ framework of communicative action aligns almost perfectly with what occurs within a restorative justice encounter process.

First, it is important to acknowledge that Habermas’ theories deal with speech and discourse, which are at the heart of every restorative justice process. By applying the speech act theory and Habermas’ discourse framework to the encounter process, it can be said that each participant raises the three validity claims every time they speak within the restorative process. As mentioned above, the first phase of the encounter process is the recounting of each participant’s story of the event in question. As such, when each participant speaks about what happened (recounts their story about what happened) they are raising the three validity claims in each of their speech acts, that is they are claiming that what they are saying about the event is true, that they are being sincere, and what they are saying about the event is normatively appropriate in the context. Despite raising all three claims, they are predominately thematizing the truth claim, while the others remain in the background, being raised implicitly. Each participant takes their turn explaining the situation and raising their claims with each utterance, but at the same time have the opportunity to question or challenge the others’ claims regarding what happened in a space of open and honest dialogue, holding each other accountable. Discussion ensues and through the discourse, claims are raised, questioned and argued (giving of reasons), or agreed upon and accepted. There is meant to be no coercion or force within this process other than the force of the better argument. Through the process of argumentation, participants may come to gradually agree on a common definition of the situation if validity claims

65. Llewellyn & Howse, supra note 20 at 1, 39, 71.
66. See also Habermas’ comments on narrative: Habermas, The Critique of Functionalist Reason, supra note 8 at 136.
are accepted and not left unresolved\textsuperscript{67}; in this case, a general common definition of the facts of the incident.

Participants are also asked about how the incident made them feel, the consequences of the harm, and the impact on their lives. Each time they speak, they are again raising all three validity claims, but are now predominately thematizing the expressive claim—speaking about their subjective world. It is during this aspect of the process that all the parties can express their needs, desires, and feelings. Victims are able to make fully known the nature and extent of his or her injuries. Upon hearing the consequences of their actions on the victim and the community, the offender may express regret and remorse because he or she is able to take the attitude of the other and see their subjective world experience through the victim’s eyes. Through accepting, criticizing, and engaging in argument regarding the claims raised, the parties begin to come to understanding regarding the others’ subjective world.\textsuperscript{68}

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

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

Furthermore, this challenging and criticizing of claims gives rise to the learning potential Habermas refers to. That is, individuals modify or abandon claims (thoughts, feelings, and values) that are unsustainable. When thoughts, feelings, and values are challenged and there exist no reasons to

\textsuperscript{67}. It should be noted that it is not necessary for there to be full agreement on the facts of the incident within a restorative process, although this can occur if validity claims are accepted. Often there are differences, where each party has their own story or version of events. What is needed is a general agreement or a common starting place regarding what occurred. This is often achieved when the prerequisite, of offenders taking responsibility for their actions, is met (i.e., an acceptance that the offender was present and did commit certain acts).

\textsuperscript{68}. Again, full understanding of each other’s subjective worlds is not necessarily expected, but a general understanding of how the parties may have felt as a result of the incident often occurs.
justify or ground them, logically they must be changed or discarded. As mentioned this results in a change in thinking and “knowing” and can help individuals acquire insight, overcome self-deception and difficulties in comprehension. So when an offender is faced with a victim who gives reasons that demonstrate that they are not insured, are not wealthy, or have great financial responsibility and grew up in the same neighbourhood with the same socio-economic conditions and challenges as the offender, the offender’s original thoughts and feelings of “she could afford it,” “he is insured,” “these people aren’t like us,” would be modified or abandoned. A change in thought, attitude and, potentially, behaviour can therefore take place as learning occurs and claims are modified or abandoned throughout the restorative process.

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

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

In the last phase of the process once a general common understanding is established regarding the objective world (facts), the subjective world (feelings and intentions), and the social world (normative rights and wrongs, and what is needed to right the wrong) in relation to the particular event in question, the parties can then determine what agreement they can come to so as to coordinate their action in terms establishing right relationships regarding those involved.

69. Maxwell, supra note 1 at 11.
2. The significance of Habermas' theories for restorative justice

Habermas' theories provide us with a language and framework to be able to articulate and explain phenomena that practitioners "knew when they saw them." I propose that it is a promising framework, albeit one that requires further research, testing, and articulation.

Having this framework is important in that it allows us to contribute to the theory by beginning to provide deeper meaning to the different elements of the encounter process. Habermas' theories, albeit with their limitations, give us the framework to understand the pragmatic side of language, that is, what work language does within the restorative justice process. Most importantly it allows us to begin to articulate how language permits and fosters coming to understanding, learning, the establishment of interpersonal relationships, coming to mutual agreement, and coordinating our actions and behaviours, all essential elements in restorative justice thinking.

Habermas' framework therefore provides us with at least one possible explanation of the structure of dialogue and basic workings within the restorative process. It helps us start to understand the "something significant" that practitioners suggest they know when they see it, but to date have difficulty explaining.