

Restorative Justice and the Problems of Defining Community

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The restorative justice (RJ) movement, which places greater emphasis upon reconciling victims and offenders as well as restoring community than does the traditional retributive justice approach, has gained considerable momentum in recent years. By the end of the 1990's, there were over 1,400 victim offender mediation programs (the most common RJ method) throughout North America and Europe. A 2003 study conducted by Lightfoot and Umbreit showed that victim-offender programs were legislated in nineteen states within the United States. A survey conducted in 2002 by the Balance and Restorative Justice project of Florida Atlantic University revealed that RJ programs in general were implemented in almost all states (Coates). The European Council Framework decision of 2001 mandated that restorative justice must be incorporated in all European Union countries by 2006 (Gavrielides 85). As is evidenced, officials within the justice system, as well as the community at large, have begun to realize the benefits of the RJ option.

A common theme emphasized throughout RJ literature is that philosophical underpinnings have lagged behind the implementation of actual RJ programs. While the justice system has incorporated RJ into its policies, reflection on what new theoretical perspectives RJ offers to the justice debate has been slow in coming. Albert Dzur and Alan Wertheimer lament the fact that, “the restorative justice movement is driven less by applied ethics discussions and far more by the close-knit internal dialogue of critic-practitioners involved in the study and practice of the criminal justice system” (Dzur 4). Francis Schweigert echoes this opinion: “The practice of restorative justice has led the theory” (Schweigert 168). On the other hand, Theo Gavrielides says that RJ “is discussed in

many national and international criminal justice conferences, and is included in the curriculum of many American and British universities,” and that, “there has been a vast writing on the restorative theory and practice, creating a phenomenon in the literature” (Gavrielides 84). With conflicting statements like these, this literature review is an attempt to analyze where RJ theory stands, and in what direction it might continue.

The failure of traditional justice practices to address root causes has spurred the rise of the RJ movement. Dzur and Olson outline some basic flaws with the current criminal justice system. First, the current system is state-focused and overly procedural, meaning that crime is moved from its communal context into an impersonal, institutional framework: “The moral force behind punishment is the authority of the state, so that crimes are conceived of as offenses against the state, rather than as offenses against individuals and communities” (Olson 91). Second, the current system focuses upon punishing the offender while failing to recognize the needs of the victim. The system must answer victim’s questions as to why they were victimized and allow the opportunity to recount their emotion-filled story. Third, the system fails to reintegrate offenders. Say Dzur and Olson, “like victims, offenders are largely bystanders in their own cases. Others – prosecutors, defense attorneys, and judges – make determinations of responsibility. Reintegration requires opportunities for offenders to recognize and accept responsibility for the harm they have caused” (Olson 92).

In its report to Synod of the Christian Reformed Church, the Committee to Study Restorative Justice mentions other downfalls of the current system. The present approach leads to recidivism, it cites, as studies reveal that two-thirds of those in prison are returnees. Re-entry of

offenders into society is another challenge because of stigmas and institutional structures that pose significant barriers (CRC 8).

But, the CRC report additionally indicates that the retributive/restorative dichotomy may not necessarily be helpful to discussion of RJ. It states that such a division is unfortunate for the following reasons: “First, it suggests that there is no place for retribution in a justice system ... Second, although the words retributive and retribution often have the connotation of vengeance in our culture, vengeance is not inherent in the concept of retribution. Third, such a distinction may be polarizing and misleading” (CRC 11). While the current system has taken retribution out of its context, RJ should not totally dismiss a proper use of retribution.

Schweigert also talks of the problems of the current justice system. However, he states that they are just symptoms of a greater problem. He places the troubles of the justice system within a broader context by emphasizing that there has been a loss of a sense of the common good. Structures that traditionally fostered understanding of a common good have continued to weaken, leading to increasingly destructive behavior. This has occurred so much so that, “the common good – the good of the whole community – can come across as abstract, contentless rhetoric.” (Schweigert 164).

So where does RJ fit into the justice debate? And, what can RJ, as a theory, offer? Dzur and Wertheimer classify RJ according to an act-based framework. They focus upon three specific models: deontological, teleological, and consequentialist. A deontological view asserts that an act must be performed even if not performing the act would result in a better moral state of affairs. But they doubt that this model can support RJ, let alone any stance on crime or punishment. A

teleological approach, they explain, states that actions may be morally necessary even if they go against the interests of the persons involved. The teleological justification, however, also provides little support for RJ since it is difficult to prioritize persons' interests. A consequentialist model claims that an approach to a state of affairs is justified and therefore better than the alternatives only if it leads to an end that is better for people with all factors considered. And, they say, "We believe that the consequentialist understanding of restorative justice is most consistent with the language of its advocates" (Dzur 13). From the consequentialist view, restorative justice is seen as having the best consequences for the individual, family, and community (Dzur 11-13)

The suggestions of Dzur and Wertheimer, however, have two problems. First, they do not address the systemic nature of RJ, they merely justify RJ according to an act-based approach. Second, they state that RJ leads to the best results for participants without providing any explanation of what that *telos* might be.

Gavrielides provides a meta-theoretical analysis that better explains where RJ fits within the 'world of theories'. He breaks the theory world into three categories. The first and broadest category includes theories of ethics (how we conduct our lives) and political morality (how the individual relates to the whole). Examples of theories that fit into this category, says Gavrielides, are liberalism, utilitarianism, comunitarianism, republicanism, and feminism. The second category includes theories for justice systems as a whole. These second level theories provide a framework from which to evaluate justice systems in their entirety, but do not deal with ethics or morality. The third category includes the specific practices of criminal justice. Examples of third-category theories are punishment theories like retributivism or just deserts (Gavrielides 86-88). RJ, says Gavrielides, does not fit in the first category since it does not provide a *telos* that governs life.

Similarly, RJ does not advocate for a specific form of punishment, thus it does not fit into the third category. RJ fits into the second category as a framework of thought that offers suggestions for the justice system in its entirety.

As a second level theory, suggest Gavrielides, RJ “can teach communication, negotiation, compromise and related skills. In this way, it promotes a moral education, possibly creating a moral order in society” (Gavrielides 93). Likewise, Schweigert, says that “the theory and practice of community-based restorative justice provide important social and philosophical foundations for community-based moral education” (Schweigert 173). RJ is able to bring together communal moral traditions (those frames of reference that certain traditions agree upon) with universal moral principles (notions that persons participate in meetings as free and equal individuals, and that as the confrontation is consensual the conclusions reached will be adopted by all). It also focuses on the ‘space between places’, as Schweigert phrases it, which refers to the space between various levels of interaction – individual, family, and community. Here is where new modes of interaction are developed; offender, victim, and surrounding persons practice problem solving and mediation techniques. “The social space of the mediation conference introduces participants to new roles ... it opens participants to new levels of competency in their established roles” (Schweigert 177). Furthermore, RJ frames moral development according to the community and not just the individual.

Charles Barton also echoes these claims by stating that RJ helps with the reversal of moral disengagement. Its techniques force the participants, offender and victim alike, to recognize the interests of all, and to accept their responsibility within the system. RJ also provides emotional and psychological healing through both material and symbolic – gestures of remorse and forgiveness –

compensation. In addition, RJ encourages social and moral development, to which Gavrielides and Schweigert also attest. The outcome of a restorative justice encounter is that “the offender is welcomed back into the moral fold with a clearly articulated expectation that they will have learned from the incident and that they will do better in the future” (Barton 6). A renewed sense of morality is fostered within those involved in the process; restorative justice provides to the offender with a morally formative event of the greatest level.

Barton talks of the moral crisis that evokes change within the offender. He states “that it is the sense of existential and moral crisis created by the relevant life events that is more significant in explaining the disturbance in the internal equilibrium of the subjects” (Barton 9). Introducing such crises in an appropriate manner greatly enhances the process of reforming offenders; a moral crisis emphasizes to the offender that they too must act within community.

But Gavrielides, Schweigert, and Barton’s discussion of RJ as a form of moral education provides no understanding of a *telos*. If moral education is to succeed, there is need for a knowledge of exactly what values are to be taught. RJ, as a second level theory, must be more closely connected with a first level theory. In other words, what is needed is a definition of community according to a set of fundamental ideals for which all strive.

RJ, admits Gavrielides, challenges the manner by which we commonly define community. He says “RJ might require that we rethink our notions of what constitutes community, and that we begin to accept the fact that community is far more than a place” (Gavrielides 101). Community, he suggests, ensures that the liaison between individuals can occur, and that a relationship between the individual and the community can also flourish. Referencing Nicola Lacey, he emphasizes that the

individual never exists prior to community. Everything that individuals perceive about themselves and others is determined within a societal framework.

Gavrielides refers to the work of Alexander Pope, who talked of how the realization of others evokes a sense of the individual’s relationship and dependency to the whole. Gavrielides claims that RJ draws notions of intersubjectivity from the philosophy of people like Pope. According to this philosophy, RJ indicates that relationships formed in the system can also be broken due to crime. Thus, as he states, “The broken social liaison . . . between individuals and individuals and their community is the focus of restoration” (Gavrielides 99).

This model portrays intersubjectivity as a dyadic, or horizontal, relationship between offender, victim, and community. Gavrielides quotes Jonathan Barnes to state that, “members are united by a special relation (or set of relations) – they form a family. Families are defined in terms of binary relations” (Gavrielides 99). Unfortunately, the problem with such a model is that it still lacks the ability to appeal to a greater good, an absolute authority. There is no sense of a *telos*. That moral certainty can truly be deduced in a RJ situation seems questionable, for the principles are situationally dependent. Outcomes are determined by a specific group of people at a specific moment in time, without the ability to appeal to universal moral principles beyond the general ones that Schweigert outlines, as mentioned earlier. Moral principles remain beyond the framework.

Other discussions further indicate the lack of moral imperatives, as well as a lack of a specified *telos*, in the RJ philosophical framework. Dzur and Wertheimer re-frame the understanding of forgiveness within RJ. Normally, they point out, advocates describe forgiveness as a psychological phenomenon. In other words, the offender does not ask for forgiveness unless

s/he really desires it, and the victim does not grant forgiveness unless such an attitude is truly felt. In this sense forgiveness represents an indwelling feeling, descriptive of inner character. But, say Dzur and Wertheimer, this is not the only way to look at forgiveness; it can also be viewed as an action. While an apology or statement of forgiveness without internal sentiments may seem pointless, the action still has moral consequences. One must follow-up a statement of remorse of forgiveness with appropriate behavior. Thus, forgiveness as an action, while lacking a transformation of moral understanding, results in the same end.

In a separate article that discusses the relationship between deliberative democracy and RJ, Dzur and Olson further expand upon this theme. They assert that RJ need not appeal to altruism to accomplish its ends. Neither must it appeal, they say, to a common good that all rational persons would accept. They state, “Deliberative democracy, like restorative justice theorists, do not expect altruism or other radical changes in human motivation. Nor do they believe in any sort of obvious ‘public good’ toward which all rational beings must incline” (Dzur 100). Instead, what RJ appeals to is the value and strength of the better argument, or, as mentioned earlier, the consequentialist understanding of RJ. The purpose of RJ, then, is merely to establish a structure wherein persons can deduce the better argument. It does not assert specific moral principles, a specific *telos*.

Gavrielides also claims that the purpose of RJ is not to transform lives or relationships. He states that RJ assumes that the knowledge of how to participate within a society is already ingrained within us. As mentioned earlier, Gavrielides claims RJ is a theory of justice systems that suggests how to deal with crime; it is not an ethical theory (Gavrielides 99).

But the report of the CRC, on the other hand, emphasizes that a RJ framework and moral principles, can, and should be inextricably linked. It recognizes that true restoration cannot occur

without a realization of the ethical and moral imperatives that God seeks for his creation; transformation is imperative. It says, “The root of our sense of justice comes from our creator. Our sense of justice reflects the character of our God ... The outcome of justice in this sense is shalom, not simply peace but right relationships, where each person, indeed, each part of creation, receives its due and lives in right relationship with every other part of creation” (CRC 19). Thus, RJ cannot be obtained with a simple dyadic framework, a product of social circumstances. It must appeal to higher principles of ethics and morality as well. The CRC report shows that RJ, a theory of the second level according to Gavrielides, is closely related with an ethical theory of the first level; one does not operate without the other. To this end Gavrielides agrees, yet he himself only surmises as to how the two levels might interact.

More discussion is needed to specify the *telos* towards which RJ strives. RJ provides an excellent framework within which moral principles can be discussed; it can serve as a great medium for moral education. The problem, however, is that without an understanding of what actually characterizes the moral principles that are to be taught, RJ cannot achieve what it is intended to accomplish. Community must first be defined, according to a common set of goals and interests, before any restoration can truly occur. RJ can only succeed as a justice system if further analysis focuses upon connecting RJ with a communal understanding of ethical and moral principles.

WORKS CITED

- Barton, Charles. "Theories of Restorative Justice." *Australian Journal of Professional and Applied Ethics* 2, no.1 (July 2000): 41-55.
- Christian Reformed Church Committee to Study Restorative Justice. *Synodical Report on Restorative Justice*. Grand Rapids, MI: CRC Publications, 2005.
- Coates, Robert. "Restorative Justice Systematic Change: The Washington County Experience." *Federal Probation* 68, no. 3 (2004): 16-23.
- Dzur, Albert and Alan Wertheimer. "Forgiveness and Public Deliberation: The Practice of Restorative Justice." *Criminal Justice Ethics* 21, no. 1 (2002): 3-20.
- Dzur, Albert and Susan M. Olson. "The Value of Community Participation in Restorative Justice." *Journal of Social Philosophy* 35, no. 1 (Spring 2004): 91-107.
- Gavrielides, Theo. "Some Meta-Theoretical Questions for Restorative Justice." *Ratio Juris* 18, no. 1 (2005): 84-106.
- Schweigert, Francis J. "Learning the Common Good: principles of community-based moral education in restorative justice." *Journal of Moral Education* 28, no. 2 (1999): 165-183.