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Some Meta-Theoretical Questions for Restorative Justice

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Abstract. Unquestionably, Restorative Justice (hereafter RJ) has finally gathered some real momentum. It has become a *sine qua non* topic in many national and international policy and statutory agendas. However, as the restorative practice expands to deal with crimes, ages and situations it has never addressed before (at least in its contemporary version), and as its application starts to make sense not only to national but also to regional and international bodies and *fora*, new theoretical problems are posed. In the fast-growing literature many theories and Schools have been evoked to support RJ's claims. This paper will take the discussion a step back by looking at questions of meta-theoretical character. In particular, the paper will ask: Does RJ have a place in the "world of theories," and if it does, then what kind of theory is it, and on what level should it be placed? Second, does RJ theory need a philosophy, and why? Finally, how can restorative practices be morally justified?

The failure to theoretically and practically operationalised the concept of Restorative Justice is an abrogation of responsibility on the part of those involved in promoting the concept of Restorative Justice and a serious weakness of the literature. (Kevin Haines 1998)

I. Introduction

No doubt, RJ has made its way onto the criminal justice agenda worldwide. It is discussed in many national and international criminal justice conferences, and is included in the curriculum of many American and British universities. It has caused a phenomenon of interest, stemming not only from academics, but also from theoreticians and practitioners in the criminal justice field, policy makers, law enforcement officials and politicians from various legal systems in the globe. On the other hand, there has been a vast writing on the restorative theory and practice, creating a phenomenon in the literature.¹ In addition, many restorative pro-

¹ This overwhelming response is reflected in the endless list of references in the National Criminal Justice Reference Service (National Criminal Justice Reference Service, Reference Department, Box 600, Rockville, MD 20849-6000, t: 800/851-3420). Also see McCold 1997.

grammes² have been implemented in many criminal justice systems, some diverting the criminal case out of the formal criminal process, others providing a parallel process alternative to the traditional one.

The *European Forum for Victim-Offender Mediation and Restorative Justice*³ reported that last year there were more than 800 restorative projects in operation across Europe. In addition, after the European Council Framework decision of 15 March 2001 (20001/220/JHA), RJ will have to be introduced in all EU countries by 2006. Article 10 states that all member States shall seek to promote mediation in criminal cases, while under Article 17 each State must put into place laws, regulations and administrative provisions to comply with the decision.

The rapid spread of restorative projects and the growing interest in the restorative theory might sound a good reason for celebration. However, a number of RJ proponents claim that it should be viewed with a certain degree of suspicion. For example, many who have been associated with RJ's development from its earliest days now view its growth with a certain degree of suspicion (Braithwaite and Strang 2000; Claasen 1995; Zehr 1989, 2000; Zehr and Mika 1998). What mainly triggered their concern was the growing diversity of opinions in what constitutes RJ theory and practice. In particular, according to these writings, RJ theory is sometimes stretched to fit elements that are not restorative in nature, whereas, on other occasions, it is narrowed down to a notion that cannot take in all the essential features that characterise it (Walgrave 2001; Zehr and Mika 1998). In short, despite the vast literature on the theory and practices of RJ, "there is (still) a need for reflection on socio-ethical, philosophical, and legal theory [. . .] to construct a coherent paradigm [. . .] which can serve as a frame of reference" (Walgrave 1995, 240).

Admittedly, it was not only until very recently RJ writers took a step back to attempt a self-critique and evaluate their fast-growing literature. In effect, some theories see RJ as a complete criminal justice paradigm that can stand alone; others are a bit more cautious, aiming to integrate restorative practices with traditional criminal proceedings. This paper does not wish to add to this traffic of ideas. Similarly, it does not wish to sell nor condemn RJ. In fact, the discussion will take a step back and ask questions of meta-theoretical nature.

The term meta-theory refers to theory about theory. In other words, meta-theoretical assumptions are those assumptions which underlie any given

² Some restorative programmes are: Victim-Offender Mediation, Victim-Offender Reconciliation, Family Group Conferences, Healing and Sentencing Circles and Healing and Justice Ceremonies, Community Restorative Boards, Community Service, Victim Impact Statements, as well as various Victim-Community and Offender-Community programmes.

³ This is a non-governmental not-for-profit organisation established according to Belgian law in 2000. Its general aim is to help establish and develop VOM and other RJ practices throughout Europe: <http://www.euforumrj.org/>.

theoretical perspective. Different theoretical perspectives rely on different meta-theoretical assumptions. For example, in order to study RJ's philosophical viability within existing criminal justice institutions, theoreticians must choose some theoretical perspective or School (e.g., communitarianism, utilitarianism, liberalism). However, prior to choosing a theoretical framework, a number of meta-theoretical issues must be addressed. This paper aims to address some of these meta-theoretical questions.

II. Does Restorative Justice Have a Place in the "World of Theories"?

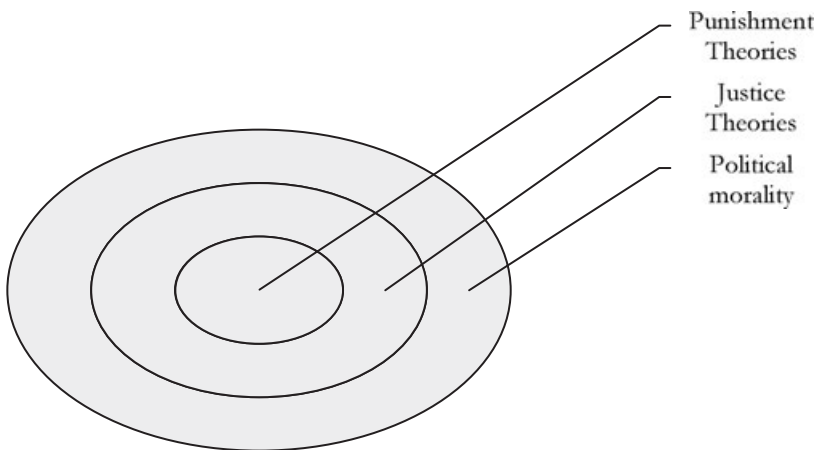
Before any question is considered, one needs to be clear first whether RJ can afford a theoretical discussion. Arguably, the term "Restorative Justice" was first introduced in the contemporary literature and practice of criminal justice in the 1970s. However, strong evidence suggests that the roots of its concept are ancient, reaching back into the customs and religions of most traditional societies. In fact, some have claimed that the values and practices of RJ are grounded in traditions of justice as old as the ancient Greek and Roman civilisations (Braithwaite 2002; van Ness 1986, 64–8). For instance, Daniel van Ness believes that the term was probably coined by Albert Eglash in a 1977 article (Eglash 1977), but the ideas underlying it, as well as many of its practices date back to the early types of human aggregations (van Ness and Strong Heetderks 1997, 24).

In other periods and cultures, the response to, what we call today, "delinquency" did not fall within the legal positivistic understanding of "crime" adopted by our modern Western societies. This resulted only after the 18th century, principally with the political philosophies of Thomas Hobbes (1588–1679), David Hume (1711–1776) and Jeremy Bentham (1748–1832). In fact, what we understand today as "crime" was seen by the early communities as a conflict between individuals. RJ practices were therefore used and considered within this framework. If there was a conflict in the community, then the various restorative mechanisms would be triggered.

The vision of a simple, practical RJ is adopted until today by many leading RJ proponents. We only need to look at the various projects and statements that have been produced in the past as an attempt to define RJ. Arguably, one of the most popular definitions is Tony Marshall's: "Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" (Marshall 1999, 5). Looking at Marshall's work on RJ, one notices that the choice he made of this particular understanding of RJ as a process was not accidental. In fact, this was carefully selected. Many times he had claimed that RJ of today has been the result of practical experimentation by enthusiastic practitioners who were not afraid to question the justice system's foundations (Marshall 1995, 1999). The theoretical development in the field, he said, appeared as these practices started

to attract the Government's interest and render good outcomes for all parties involved (Marshall 1999, 7).

Of course, Tony Marshall is not the only restorative adherent who supports this simplistic form of RJ. Serious questions are therefore raised whether RJ can indeed support a theoretical discussion. Therefore, does RJ belong to the world of theories or is it merely an alternative criminal justice process? The answer to this question will help us define the theoretical level on which RJ wishes to place its practices. However, before we are able to proceed, we need to comprehend the following schema that classifies the "world of theories" into three levels.



The schema can be illustrated with three circles, the smaller fitting inside the bigger. The first circle is broad enough to include theories with distinctive accounts of *Ethics* (how we should lead our lives) and *Political Morality* (relationship of the individual with the aggregation). Examples of theories fitting in the first circle are the philosophies of liberalism, utilitarianism, communitarianism, republicanism or feminism.

Moving on to the second circle, we find theories for justice systems. These are theories that deal with the justice system in its entirety, and are able to address issues deriving from all stages of the justice process. An example could be the *Republican Theory of Dominion* advanced by John Braithwaite and Philip Pettit⁴ (Braithwaite and Pettit 1990). Their theory, for instance, belongs to the second circle, because it can provide a general framework for evaluation of the criminal justice system as a whole. As they point out in the

⁴ Their theory is part of the larger tradition of republican political thought. Here, I refer to their criminal justice theory, and not to Republicanism, which falls under the first circle.

first sentence of their book, "the aim [of their theory and book] is to transcend the [criminal justice] debate with a theory, not only of punishment, but of criminal justice generally" (Braithwaite and Pettit 1990, 1). In other words, theories that belong to the second circle are broad enough to address any justice issues. However, they are not as broad as the theories of the first circle, which can take on board issues relating not only to justice, but also to ethics and political morality. That is why theories of the first circle are too broad to fit in the second circle.

Finally, there is the third circle, the smallest one, which includes theories that deal with specific problematic issues of various disciplines, in this case, of criminal justice. Theories that belong to the third circle cannot deal with all problematic issues of justice (like theories of the second circle), and are certainly not interested in questions of ethics or political morality (which are issues that are addressed by the theories of the first circle). Examples of theories that belong to the third circle are the various Punishment Theories (e.g., Just Deserts/Retributivism). Their primary concern is the justification of punishment.

To understand this separation better, a theory of punishment is likely to be narrower than a theory of criminal justice, while a theory of political morality must be broader than either. The delineation of the three levels of theories is important for two reasons. First, if we do conclude that RJ is not merely a practice, but also a theory, then the delineation will help us understand on what level this theory should be placed. As explained, each level is addressing issues of different nature. For instance, it would be a mistake to claim that punishment theories can address issues of ethics. Likewise, it could be wrong to say that the RJ theory can address issues that might be too broad for its scope. This schema is also highly significant because, for example, a utilitarian theory of punishment does not necessarily imply a utilitarian theory of criminal justice, much less a utilitarian theory of the whole of political morality. However, it is possible to construct multi-part or hybrid theories of punishment as H. L. A. Hart's.

Coming back to our first question of whether RJ has a place in this world of theories, we ask: What makes RJ qualify to be elevated from merely being a bunch of practices to a complete theory? In order to answer this question, we need to ponder whether RJ can indeed offer any normative promises apart from the empirical benefits it wishes to make? But more importantly, can these normative promises comprise their own family?

To answer these questions let us assume that we accept the many views in the restorative literature about the existence or the formation of a complete Restorative Paradigm. Leading proponents of RJ have claimed that the Restorative Paradigm is a *sui generis* matrix that sees and deals with anti-social behaviour in a fundamentally different way. Its most serious counterpart is, of course, the Punitive Paradigm, which is the basis for most of the justice theories that belong to the second circle, as well as for all pun-

ishment theories of the third circle. It is also the basis for our current criminal justice system.

But what is a *paradigm*, and why do we speak in terms of paradigms? "A paradigm is an achievement in a particular discipline which defines the legitimate problems and methods of research within that discipline" (Barnett 1981, 245). Put another way, paradigms shape our understanding of the notions that come under a specific discipline. As Howard Zehr puts it, "[t]hey provide the lens through which we understand phenomena" (Zehr 1990, 86). Moreover, they form our "common sense," and guide us in our understanding of what is "possible" and what is "impossible." Things falling outside the paradigm, to the common eye seem absurd and abnormal.

In general, paradigms are "particular ways of constructing reality" (Zehr 1990, 87). For instance, once the parliament or the law-enforcement authority of a State decides to criminalize a certain action, our reality is defined accordingly, sometimes in ways that may not correspond to the experience of the participants. Similarly, the Punitive Paradigm is such a construct. In accordance, notions and definitions that fall under the criminal justice umbrella are the result of the understanding that is available under the punitive matrix. Overall, as with all paradigms, this one too creates its own reality. Paradigms, however, are merely other ways of organising reality. They shape how we define problems and what we recognise as appropriate solutions. They define what we call "common sense" (Zehr 1990, 87). To conclude, paradigms are constructions of reality, and as such, they create our understanding of what is possible and impossible.

Nevertheless, constructs can and do change. One of the most influential books talking about *paradigms' changes* is "The Structure of Scientific revolutions" by Thomas Kuhn (1970). In this book, he claims that paradigms can replace another, causing a "revolution" in the way we view and understand the world. *Paradigm revolutions* constitute one of the primary sources that lead to changes in scientific outlook. What causes such a change is a *paradigm crisis*. At the beginning, the paradigm seems to fit most phenomena. Over time, however, dysfunctions begin to develop, as more and more phenomena stop fitting the paradigm. In Randy Barnett's terms: "As the paradigm develops and matures, it reveals occasional inabilities to solve new problems and explain new data" (Barnett 1981, 245).

An example of a *paradigm crisis* that led to a *paradigm change* is the Ptolemaic Paradigm, which used to shape the Western understanding of *cosmos* until the 17th century. Under this paradigm it was common sense that *cosmos* is a series of concentric "crystalline spheres" with the Earth at the centre. However, after time and new discoveries more and more phenomena stop fitting the paradigm, which started facing a crisis. As a result, Isaac Newton's new theory constituted the *coup de grace* of the old paradigm, which was from then and on replaced by a better, more accurate one.

Similarly, Randy Barnett, in an early article, suggested that we stop attempting to make the facts fit the old Punitive Paradigm, and adopt a new paradigm for criminal justice; what he names "Restitution" (Barnett 1977). The history of our justice paradigm, he said, shows some of the symptoms of "paradigm change." Also, despite the various patches and easy remedies for temporary solutions to problems that occasionally come up, the sense of dysfunction has become too great. This paradigm is what we call today "Restorative Justice."

In consequence, if we acknowledge that RJ can constitute or introduce a new justice paradigm, then we also have to accept that it can support a theoretical discussion and thus it must fall within one of the circles of theories. Of course, the question that follows naturally from this is: To which of the three circles of theories does it belong? The answer we give will define the nature of issues that RJ theory can address.

Using the method of elimination and by starting from what seems to be the most obvious circle that RJ can not probably join, we examine its viability as a theory of political morality and ethics. Can RJ teach us how individuals should relate with the sovereign authority? Surely, it can show us how to amend our relationships with individuals or groups of individuals in our communities. But can it teach us how to behave towards the centralised authority that co-ordinates the living of all entities in that community? On the other hand, can it lead us in our journey through life and experiences? Can it show us how to lead our lives? What is the ultimate goal it distinguishes and which we should pursue so that we make our lives meaningful and worthwhile? These simple questions can help us conclude that RJ, in its current form, does not aim to address this type of issues.

Slightly more complicated is the question of whether RJ can be a punishment theory of the third level. The debate on RJ's relationship with punishment has been particularly interesting and extensive. To give some examples, Kathleen Daly takes RJ to be punishment, because it leads to obligations for the offender (Daly 2000). She backs up her position with the results of a qualitative analysis on young offenders that have experienced Family Group Conferencing (Daly 1999). On the other hand, Paul McCold rejects the idea of including coercive judicial sanctions in the restorative process, as they might shift RJ back to being punitive (McCold 1999). Tony Marshall claims that coercive processes are not always achievable, and that they must be considered. However, this should be done through the criminal justice system. He argued that this is where RJ should end, and where the traditional system should take over (Marshall 1996). On the other hand, John Braithwaite believes that if a restorative process fails, it should be tried again and again; in his own words: "RJ rewards the patient" (Braithwaite 1999b). However, he envisages "not a future where punishment is abolished, but a future where punishment is marginalized" (Braithwaite 1999a). Finally,

Gordon Bazemore and Lode Walgrave believe that restorative practices include both coercive actions as well as voluntary processes, and that the coercive intervention should also be “reasonable, restorative and respectful” (Walgrave 2001).

For the sake of clarity, I will divide the many views on RJ’s relationship with punishment into two broad categories. The first denies that RJ measures can, in any way, be punitive (Wright 1996, 27). The second argues that RJ is not “alternatives to punishment,” but “alternative punishment” (Duff 1992). The argument of the first group is that restorative measures’ primary purpose is to be constructive. Therefore, they are not inflicted “for their own sake” rather than for a higher purpose (Walgrave 1999, 146). The second group, however, has argued that “this purported distinction is misleading because it relies for its effect on the confusion of two distinct elements in the concept of intention. One element relates to the motives for doing something; the other refers to the fact the act in question is being performed deliberately or wilfully” (Dignan 2002; 2003, 179). Irrespective of whether we decide to go with the first group that denies that restorative measures are punitive, or with the second that claims that they are not punishment but alternative punishments, we still accept that RJ is surely neither punishment nor is it interested in it, at least in the form that it has been given by the punitive paradigm of our criminal justice systems.

What is then RJ’s relationship with punishment? The retributive understanding of punishment identifies the existence of two basic elements. The first is the communicative and the second the retributive. Punishment should aim to communicate with the receiver, imposing “the suffering which she deserves for her crime” (Duff 1992, 53–4). Punishment is thus justified as an intrinsically appropriate response to “crime.” On the other hand, according to the utilitarian position its central characteristic is that it aims to prevent “crime” (either in a general or specific way), and what matters is that “crime” is actually or potentially harmful. Then what is punishment under the Restorative Paradigm?

The restorative understanding of punishment is a fundamentally different one. Consequently, there are two kinds of punishment. The first is what we experience today, as the outcome of a criminal process, and is based on the understanding of the Punitive Paradigm. The second is what we normatively experience in a restorative process, and has little to do with what Retribution and other punishment theories deal with. I name it “Restorative Punishment.” If we accept the retributive position that punishment consists of two elements: the expressive and the retributive (Duff 1992, 53–4) restorative measures would certainly deny the second one. Retribution is completely taken out of the restorative picture. However, the expressive element is desirable, as it promotes the restorative goal of the process. Put another way, punishment, no matter the type (restorative or punitive) should serve an “expressive function” (Feinberg 1965). Nonetheless, as Duff points out in

his works *Penal Communications* (Duff 1996) and *Punishment, Communication and Community* (Duff 2001) being merely “expressive” would not be enough “because it should be a two-way communication, not a one-way directive aimed at a passive wrongdoer” (Duff 1992, 53; also 1991). This also applies for the restorative process. All parties need to be heard in the process, and contribute to the restorative outcome.

In a discussion between Andrew Von Hirsch and Anthony Duff on the issue of the criminal sanction’s general justification (as this is defined under the *Punitive Paradigm*) they both agreed that punishment should be conceptualised as a form of censure (Duff 1999a, 1999b; Von Hirsch 1999). They also agreed that the vehicle through which blame is expressed is the visitation of deprivation (“hard treatment”). However, they disagreed on the question “why using this vehicle rather than simply expressing blame in symbolic fashion?” While Duff believes that deprivation can itself be explained in reprobative terms providing a kind of secular penance, Von Hirsch believes that it has to do with helping to keep predatory behaviour within tolerable limits. Yet, he acknowledges the fact that “one might still wish to devise another way of issuing authoritative judgements of blame, for such predatory behaviour as occurs. But those judgements, in the interest of keeping state-inflicted suffering to a minimum, would no longer be linked to purposive infliction of suffering” (Von Hirsch 1999, 70).

“Restorative Punishment” is the devise that Von Hirsch mentioned, as it is able to issue new authoritative judgement of blame, without using the “deprivation” (hard treatment) element. However, “Restorative Punishment” is not interested in “keeping state-inflicted suffering to a minimum.” This is because, it is not imposed by the State; it is an agreement reached by the parties (victim and offender)—with the help of the State (through its representatives, the facilitators). Von Hirsch was also right, in one more thing: that the new devise “would no longer be linked to purposive infliction of suffering.”

In addition, Gordon Bazemore and Lode Walgrave claimed that the difference between punishment and, what they call, “painful restorative obligation” can be identified in the intention of the punisher (Walgrave 2001). They said: “It is the punisher who considers a certain action to be wrong and who wants the wrongdoer to suffer for it. However, defining every unpleasant obligation as a punishment, in fact, places the distinction between punishment and non-punishment on the experience and the interpretation of the person who is subjected to the treatment” (Walgrave 2001, 22). Therefore, they refuse to call restorative sanctions “punishments,” since those who agree on them have no intention to make the offender suffer. In a similar vein, Martin Wright claimed that punishment practices are the intentional or “deliberate imposition of pain” on offenders, by which they would include incarceration and fines. He distinguished the intentions of legal authorities, arguing, “[w]hereas punishment is an intended

deprivation, non-punishment is intended to be constructive" (Wright 1991, 15). However, as Daly pointed out, this distinction "overlooks decades of critique of the rehabilitative ideal, with its associated treatment-oriented intervention" (Daly 2000, 39). She said that Martin Wright "equates punishment with being punitive and non-punishment with being non-punitive" and that this argument "exemplifies how elites may delude themselves into thinking that what they intend to do is in fact experienced that way by those at the receiving end" (Daly 2000, 39).

To conclude, "Restorative Punishment" aims to restore the harm done. Deterrence (general or specific) might be welcomed as a side effect, but is not among the primary goals of restorative measures, nor does retribution for what was done. Therefore, we notice a difference of aims in the Restorative vs. Punitive punishment comparison. As a restorative measure, punishment aims to restore, create, construct, repair and reintegrate. As a punitive one, depending on the punishment theory we use Retribution/Utilitarian, (deterrence/rehabilitation, etc.), its aims are rather different. In addition, restorative measures can entail education *per se*. Put another way, restorative punishment can teach communication, negotiation, compromise and related skills. In this way, it promotes a moral education, possibly creating a moral order in society.

RJ, therefore, has to fall within the second circle of justice theories nothing broader (such as a theory of life: first circle), nothing narrower (such as a theory of punishment: third circle). RJ theory can provide a framework for evaluation and de-(re)construction of the justice system in its entirety (e.g., police, courts, and judiciary), and can address issues that might arise throughout the justice process.

However, RJ needs to pass one more test before it is safely placed within this circle. If it is indeed a justice theory, which can introduce a new paradigm that can address issues of justice, then what reassurances do we have that it is indeed an original paradigm and not a reproduction or another hybrid of the Punitive Paradigm, which is currently, the dominant way of understanding and dealing with crime?

No doubt, that the traditional punitive paradigm of our criminal justice systems has served as the core element of inspiration and creation of what we call "criminal law theories." In fact, the Punitive Paradigm has made it almost impossible to understand what "crime" is, without using the guidelines of criminal law, as this is principally the result of criminal law theories. That is why the exclusion or inclusion of an action in the category of "crime" is dependant on the way criminal law theories interpret it. Therefore, the question we should ask is: "is RJ a criminal law theory?" If we conclude with a positive answer, then RJ is indeed founded upon the Punitive Paradigm and thus cannot be original but merely another version of the traditional paradigm or in the best occasions another hybrid.

Before we are able to answer this question, we need to ask first: What is *criminal law theory*? According to Paul Roberts, *theorising* is “the practice of general and relatively abstract reflection producing knowledge, explanations or understandings.” As for *criminal law*, he said it is “that chapter of the law, which deals with the definition of ‘crimes,’ to be contrasted with other subjects of legal practice and study.” To conclude, “criminal law theory is general and relatively abstract reflection producing knowledge, explanations or understandings of legal definitions of crimes” (Roberts 1998, 289). Furthermore, Roberts suggested that “criminal law theory” is comprised of three principal parts. The first part is what he calls “theories of criminal legislation,” comprising theories of the nature and purpose of criminal law, punishment theories, theories of political authority to pass criminal laws and punish offenders and theories of criminalization. The second part is “theories of criminal responsibility,” comprising theories of legal personality (capacity) and theories of the grounds of responsibility. Finally, the third part includes “theories of criminal liability,” comprising theories of criminal culpability and theories of criminal law excuses (Roberts 1998, 302). Paul Roberts’ understanding is very much in line with Michael Moore’s definition of criminal law theory. His essay, *A theory of Criminal Law Theories*⁵ is an example of how naturalism need not imply any change in our retributive attitudes towards wrongdoers.

Now, let us assume that RJ is a criminal law theory. Under which subcategory does it fall? Put another way, is it a theory of Criminal Legislation, a theory of Criminal Responsibility or a theory of Criminal Liability? I will be hasty enough to say “none of the above.” In consequence, if it cannot fall into any of these subcategories, then naturally it cannot be a criminal law theory.

RJ cannot even be included in the broad canvass of topics and issues of criminal law theory as it is broadly defined by Nicola Lacey. Criminal law theory, she said: “can stretch from a relatively technical discussion of the fundamental tenets of and issues within criminal law doctrine, through (a) more abstract attempt to conceptualise the general framework within that doctrine operates, to historical analyses of the development of criminal justice ideologies and practices and normative arguments about the proper or ideal shape of that conceptual framework in a liberal, socialist, or other form of political society” (Lacey 1998, 13).

To sum up, RJ can support both practice and theory, and is qualified enough to be included in the world of theories. As a theory, it belongs to the second level of justice theories, but in contrast to the rest of the theories that belong to the same circle, it does not embrace the Punitive Paradigm, but is based on the *sui generis* Restorative Paradigm. One could ask: “What is the

⁵ The essay was originally published in 1990, but has since been revised and reprinted as in Moore 1997, chap. 1.

significance of all this?" Wouldn't it be just enough to put RJ into practice without having to puzzle ourselves with its theoretical implications? In other words, why does RJ need a philosophy?

III. Why Does Restorative Justice Theory Need a Philosophy?

Although this question might seem trivial, the very identity of RJ as a theory, as well as a practice is much depended upon the answer we give. It is also essential as RJ can only have a future as "re-(trans)-form material" if it is backed up by a philosophy that would justify morally its measures and methodology. Without it, I fear that it will stay a technique of preventing re-offending. Policy-makers and people involved in the administration of criminal justice will misapply and abuse the idea (Marshall 1998, 24) and RJ will get mixed with the Punitive Paradigm. RJ theory needs a philosophy for at least two reasons.

A leading proponent of RJ once asked me why one should need to know the philosophical foundations of a theory, whose central aim is repairing harm. Put another way, why one should worry for a philosophical justification of RJ, when its central target is to promote good? But isn't RJ theory morally problematic? Duff explains that what makes a theory morally problematic is that it "involves doing things to people that (when not described as punishment—or in our case as restorative measures) seem morally wrong" (Duff and Garland 1997, 2). For instance, if we accept that RJ involves coercion, then there can be no doubt that it can be morally problematic. In general, RJ aims to promote good and restore the harm done. None the less, it can have moral implications on the lives of victim, offender and the rest of the members of the community. In other words, "RJ is not a soft option" (Walgrave 2001, 17).

Three reasons come to mind as to why RJ is morally problematic. The first is what Walgrave calls "burden of the restorative action," and concerns the nature of the restorative process (Walgrave 2001, 18). Most of the restorative programmes might be informal, but this does not make them enjoyable or easy. On the contrary, for many offenders the fact that they have to participate in a personal and direct communication with the victim and/or her family is a deeply touching burden. They are confronted with the suffering and harm they had caused, apologising in front of others. In addition, the restorative process aims to awake the offender's feelings of shame, guilt, remorse and embarrassment, as well as a mixture of other unpleasant feelings, since this is the only way the offender can realise what she did and restore it in a genuine way. In addition, sometimes, these feeling do not stay in the mediator's office, but have an enduring impact on the offender's life. For instance, Schiff reports that some offenders that have experienced mediation have characterised it as a kind of "double punishment" (Schiff 1999).

The second reason concerns the nature of restorative measures. According to Allison Morris and Warren Young: “any outcome—including a prison sentence— can be restorative if it is an outcome agreed to and considered appropriate by the key parties (Morris and Young 2000, 16). In other words, though apologies and hugging might be key outcomes of a restorative process, they are not the only ones. All in all, RJ might involve more “painful” practices.

Third, restorative interventions might include implicit or explicit coercion. Put another way, restorative outcomes constitute legal agreements that need to be respected. Despite the fact that RJ is premised on consensual decision-making, requiring all key parties to agree on the appropriate outcome, the State is still present. It is there to supervise the process making sure that all standards (e.g., Human Rights) are respected, and that the agreed outcome is taken up. If the offender or the victim fail to live up to the promises and commitments they make to each other during the restorative process, then the formal criminal justice system takes over. To conclude, if RJ is indeed morally problematic in terms of theory and practice, then we have to accept that it needs a philosophy to justify its measures and methodology.

Moreover, there is a second reason why RJ needs a philosophy apart from being morally problematic. We agreed that RJ can support a theory, which belongs to the second circle, as it is a justice theory. In general, theories of the third circle need theories from the second or the first circle to justify themselves morally, and similarly, theories of the second circle need theories of the first circle to support their claims and methodology. To give an example, the criminal justice *Theory of Dominion* (Braithwaite and Pettit 1990), which belongs to the second circle, would not have been morally right if Braithwaite and Pettit had not deducted it from the general theory of Republicanism, which belongs to the first circle. Another example is Retributivism (just deserts), a punishment theory that belongs to the third circle. Its moral justification is dependant on the general theory of Liberalism, which belongs to the first circle. Therefore, since RJ belongs to the second circle, then it needs a theory from the first circle to support its claims and methodology. In a nutshell, RJ theory and practice are not broad enough to exist independently and without the support of first level theories. They both need to be backed up by a philosophy—or a combination of philosophies—of the first circle.

IV. Deconstructing the Restorative Justice Theory

To recap, we have concluded that RJ has a place in the world of theories, and that it belongs to the second circle of Justice Theories. These can address issues deriving throughout the justice process. However, it is not a criminal law theory, because it is not based on the Punitive Paradigm on which most

criminal justice and punishment theories are based. RJ is based on a separate paradigm. In addition, we have accepted that since RJ belongs to the second level of theories, and is morally problematic, it needs a philosophy of the first circle to justify its aims and methodology. However, a question that remains unanswered is: Which first level theory RJ follows? Does it adopt a single first level theory, a combination of two or more than two theories or is it a hybrid of everything?

Admittedly, numerous are the writings on the substance of RJ theory. Some prefer utilitarian directions of justice, others liberal, communitarian, republican or a mixture of some or all the above or other philosophies. This is a meta-theoretical paper, however, and does not wish to deviate from its primary target. That is why it will not engage in a discussion about the theory's content. It will merely ask: What is the core theoretical assumption on which RJ base its practices? The answer to this question should help us identify the direction we should take in finding the proper first level philosophy that can support RJ's justifications. Put another way, if we assume that the first circle is consisted of many different fragments each one representing a different School, then the answer should direct us towards its right section.

The primary target of RJ is to restore. The question that follows naturally from this is: What? Surely, this cannot be "crime," at least in the sense we understand today under the punitive model of justice. In fact, I argue that if we want to be precise in our terminology, then we need to forget the word "crime," as it has a fundamentally different meaning under the Restorative Paradigm. As Howard Zehr put it, "crime" takes a completely different meaning. Under the restorative paradigm it is seen as a "wound in human relationships" and an action that "creates an obligation to restore and repair" (Zehr 1990). On the other hand, he said, Retributive Justice understands "crime" as "a violation of the state, defined by lawbreaking and guilt. Retributive Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules" (Zehr 1990, 181). However, "[c]rime is fundamentally a violation of people and interpersonal relationships" (Zehr and Mika 1998, 17), a conflict not between the individual and the State, but between individuals. This claim is very similar to Nils Christie's, who believes that the details of what society does or does not permit are often difficult to decode, and that "the degree of blameworthiness is often not expressed in the law at all" (Christie 1978, 2). In *Conflicts as Property* (Christie 1978) he argued that the State has stolen the "conflict" between the citizens, and this has deprived society of the "opportunities for norm-classification." In other words, by restricting criminal procedure and law to the narrow legal definition of what is relevant and what is not, the victim and the offender cannot explore the real effects of the case and the degree of their culpability. This is very much in line with what Martin Wright has claimed. "The boundary between crime and other harmful actions is an

artificial and constantly changing one. Crimes, he says, are not necessarily different in kind from other actions by which people harm each other. [. . .] Crimes are actions by which people cause certain types of harm, prohibited by law, and for which, if a person is convicted of them in court, a sanction may be imposed" (Wright 1996).

This new understanding of "crime" transcends the burden of the "criminal process," introducing a new target: the restoration of the relationship between victims and offenders, and offenders and their communities. As Zehr put it, RJ understanding of "crime" "creates an obligation to make things right," and while "Retributive justice focuses on the violation of law [. . .] RJ focuses on the violation of people and relationships" (Van Ness, Morris and Maxwell 2001).

A question that follows from this is: What created this relationship that RJ aims to restore? The answer to this question is what constitutes RJ first core theoretical assumption. RJ assumes the existence of, what I call, a "social liaison" that bonds individuals in a relationship of respect for others' rights and freedoms. The theory assumes that this liaison has always been with us, because it is innate in our nature as human beings. We cannot see it, but we can feel it in moments of danger, or of extreme happiness. Individuals are not really strangers, and that is why victim and offender are not enemies. Sullivan, Tifft and Cordella described this relationship in a slightly different way. They said: "the RJ ethic is based in a spiritual sense that sees us all connected to each other at a fundamental level and, as such, requires of us a more heightened and pervasive sense of justice" (Sullivan, Tifft and Cordella 1998, 16). In a similar vein, Allison Morris and Warren Young argued: "In essence, the social values underlying RJ rely on connections-connections between offenders, victims and communities" (Morris and Young 2000, 15). "RJ endorses a collective ethos and collective responsibility. Thus, it emphasises the existence of shared values, which can be used to address the offending and its consequences and to reintegrate victims and offenders at the local level" (Morris and Young 2000, 14).

Arguably, the rationale of the theory's claim may not make any sense at all, but if we read the Philosophy of Collectivists, it might help us to uncover, at least, its philosophical influences. In Jonathan Barnes' words, Collectivists' "oddities and accidents may be individual and independent, their movements and machinations largely self-determined, but in their essence they are necessarily bound to others- for all are adjuncts and elements of a larger whole" (Barnes 1991, 1).

Alexander Pope, at the end of the first Epistle of the "Essay on Man" said: "[E]ach of us, like any other natural object, is a part of the universe; it is folly to deny the fact—and folly to wish it changed [. . .] for our good is determined and our moral comportment should be governed by our partial statues in the universal All" (Mack 1950). On the other hand, each of us is not only a part, but also a "system" or a whole. We are, what Jonathan Barnes

once called “partial wholes” (Barnes 1988), in the sense that we are parts of a greater whole, and again wholes with parts of our own. Finally, the fact that we are parts of universe does not entail that we are not also parts of a social system. This is because the natural world is a strictly hierarchical system.

Pope’s philosophy was much influenced by the works of the Greeks, though one can easily claim that he caught the mood of his age: “His moral philosophy was the enlightened moral philosophy of the century of enlightenment” (Mack 1985). Marcus Aurelius’ work *Meditations* (see Rutherford 1989) is said to be the closest ancient parallel to Pope’s views (see Barnes 1991, 7). Marcus insisted that we are a part (μέρος) of Nature (φύσις), or of the universe (κόσμος), or of Fate (εἰμαρμένη). He said that we stand to the universe as our hands and feet stand to our bodies and that as with organic parts we have mutually interdependent functions and activities, working together (συνεργούσιν) to a common end a common good. In other words, “we are interdependent parts of an organised whole, and our mutual dependencies determine our nature and our function” (Barnes 1991, 7).

What RJ theory takes from these philosophies is their common central feature of “interdependency,” determination and self-assurance through the realisation of the existence of others. This reality creates the social liaison, which connects individuals, and which might be broken if a “crime” occurs. Jonathan Barnes said: “Systems, or integral wholes, are wholes which have (at least) one special sort of partition. The special sort is characterised by the fact that its members are united by a special relation (or set of relations)—they form a family. Families are defined in terms of binary relations” (Barnes 1991, 13). The broken social liaison, or what Barnes called the “special relation,” between individuals and individuals and their community is the focus of restoration; with the RJ process we aim to mend it, and restore the relationship that was corrupted with the occurrence of “crime.”

However, one could ask: “Shouldn’t we be more realistic with our beliefs”? It seems that RJ is unfolding a dimension that involves more than just criminal justice systems. In fact, many restoratavists believe that the theory has a transformative dimension that raises “a considerable number of questions about how we live our daily lives, and offers us alternatives that are structurally different from power-based social arrangements” (Sullivan, Tifft, and Cortella 1998, 17). However, as we have concluded in section two of this paper, RJ is a theory that belongs to the second circle of theories and not the first. RJ is a theory of Justice Systems and not a theory of life. The existence of the “social liaison” between individuals, and between individuals and their community might be a central feature in the restorative thought and a prerequisite element for a RJ system, but it does not imply that we need to take steps towards a transformation of our relationships or lives. The theory assumes that the liaison is already with us, as

it is innate in our nature. All in all, RJ suggests transformation not of our lives, but of our justice systems, and the way we deal with "crime."

The restoration of individual relationships and the bond that connects community members gain particular interest under the restorative paradigm because of the theory's understanding of the primary parties. Victim and offender are treated as free individuals, responsible for their actions and decisions. They are not strangers, but related because of the "social liaison" that connects them. It does not matter whether they have met before or not. What is important is that they live in the same environment; let it be social or legal. As free individuals, both have rights that need to be respected and protected. They also have obligations among which to restore the balance that the offence distorted in the community. Therefore, what RJ calls them to do is to restore the broken liaison that used to bond them. They are considered the most appropriate for this task, but need to be guided and supervised by an impartial third party chosen by the community, such as a mediator. In general, they are both considered mentally competent and hence morally culpable actors, who are expected to take responsibility for their actions, not only to the parties directly injured, but perhaps also to a wider community (Daly 2000, 35).

Under the Restorative Paradigm, victim and offender are seen as two sides of the same coin. The offender is not dealt with as a parasite of society, but as "one of us." Offenders distort the social liaison, but this does not make them our enemies.⁶ On the contrary, their actions are seen as an opportunity to prevent greater evils, "to confront crime with a grace that transforms human lives to paths of love and giving" (Braithwaite 1999b). As Moberly pointed out: "[T]he strategy of punitive segregation is morally inappropriate as a response to fellow members of the community: [W]e owe them compassion as well as moral indignation" (Moberly 1968). A central belief in the restorative thought is that "it is wiser to strengthen our relationship with offenders rather than weaken it" by segregating and ostracising them (Johnstone 2001, 13). That is why "it makes sense to show them that we care about them" (ibid.), and want to "reintegrate" them into the community. Accordingly, "offenders are provided opportunities and encouragement to understand the harm they have caused to victims and the community, and develop plans for taking appropriate responsibility. Voluntary participation is maximised coercion and exclusion are minimised" (Zehr and Mika 1998, 51).

Even if we accept all the above assertions, there is one issue that does not seem to add up. RJ takes individuals to be dependent on their communities; their lives gain meaning from the aggregation, and their happiness is linked

⁶ In *Meditations* Marcus Aurelius noted: "For in a way all things are interwoven with one another, and all things are for this reason friendly to one another. One thing is continuous with other because of the tonic motion and the conspiracy and the unity of substance" (Aurelius, Marcus 1909–1914, ●●).

to the existence of the aggregation that witness it. That is why the restoration of their relationship becomes of primary importance. But how realistic is that in today's sense? Truly, RJ assumes a kind of relationship between people, which is difficult to accept, or even comprehend. What makes it difficult is our modern, solitary way of living. In the Westernised societies of the 21st century, the individual has become lonelier than ever. Arguably, the theory promotes a social ethic "that differs radically from that prevalent in our current political economy" (Sullivan, Tifft, and Cordella 1998, 16). Accordingly, many restorativists suggest that we try to understand this relationship, not by comparing it with what we live today in our societies (where the "social liaison" is less visible), but with what communities such as the Navajo Nation experience. Robert Yazzie, Chief Justice of Navajo Nation court system, explains how their spiritual approach to life and human relationships leads them to define the Navajo sense of justice as peacemaking (Yazzie 1994).

But isn't this a bit far-reaching. How can we expect our modern societies to transform themselves into aboriginal models of community living? Paul McCold alerts us that the only way we can comprehend what "community" really mean under the Restorative Paradigm is that we interpret it in the broadest way possible. Indeed, 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. However, this does not mean that we have to change the structure of our communities; only the normative idea we have planted in our minds.

In his article *Community is not a Place*, McCold proposed a reconceptualization of community that is more consistent with RJ (McCold and Wachtel 1998). Now, bearing in mind the assumption of the pre-existence of a "social liaison," the central characteristic of a restorative community is that it provides the environment for growing human relations. It does not really matter its size. "Although we may live in the same neighbourhood, municipality, county, state or nation, be governed and served by the same institutions, we may have no sense of connection with each other, no sense that we are part of a unified group. As such, we are not of one community" (McCold and Wachtel 1998, 72). What is important is that without a community the liaison that relates individuals would not exist. The community takes care that individuals respect and protect the liaison. It succeeds that by keeping also a liaison between itself and the individual; not a liaison of control and power, but of care. This promotes a feeling of responsibility, especially to individuals that have violated their connection with other individuals and with their communities. Finally, the Community "wants reassurance that what happened was wrong, that something is being done about it, and that steps are being taken to discourage its recurrence" (Zehr 1990, 195).

As explained above, RJ embraces the idea of individual freedom and liberty, and, based on that assumption, community aims to protect humans'

relations by giving them the voice to amend and restore. It supervises them, but does not control them. However, as Gerry Johnstone notes, "the community must be prepared to become involved in the resolution of conflicts [...] as controlling and dealing with 'crime' cannot be delegated entirely to the state and to professionals" (Johnstone 2001, 14). In fact, in the mind of a restorativist, government cannot effectively address "crime" without the moral authority and informal social control provided by community. In Zehr's terms, under the Restorative Paradigm "the justice process belongs to the community [...] it draws from (its) recourses and, in turn, contributes to the building and strengthening of community" (Zehr and Mika 1998, 53). It is important to understand that under the Restorative Paradigm, it does not really matter whether individual communities are homogenous, pluralistic, multicultural, national, regional or global. This is primarily because the social liaison can survive and be extended to all levels and dimensions.

Howard Zehr gave some examples on how today's community can become involved in the resolution of conflicts. He said that ordinary members of the community can serve as mediators, or get involved in witnessing and helping to enforce agreements and action plans. Furthermore, they can try to make offenders fully aware of the harmful consequences of their actions, and above all they must be prepared to befriend and support those who ask for their compassion and understanding, such as victims or offenders who are serious about reparation and repentance (Braithwaite 1989; Zehr 1990). On the other hand, McCold developed the idea of "Restorative Policing," claiming that "the collaborative processes developed from RJ practitioners are a natural tool for police interested in engaging communities for crime control and prevention" (McCold and Wachtel 1998, 79). In their examples one can find evidence of research on police-based family group conferencing projects,⁷ which demonstrates that police officers are quite capable of assuming the non-directive, empowering role of facilitator. Overall, these show how contemporary societies can indeed introduce restorative elements and ideas of justice without changing their structure or foundations.

This is also consistent with the way Nicola Lacey saw the relationship between individuals and their community. She said: "The conception of an a- or pre-social human being makes no sense. What individual human beings perceive as the proper boundaries of autonomy around themselves. What they regard as just distribution, how they regard their relations with each other and a thousand other questions central to political philosophy, are ones which we simply cannot imagine being answered outside some specific social and institutional context" (Lacey 1988, 171).

⁷ An example of Restorative Justice policing can be found in the Wagga/Real Justice model of family group conferencing.

V. Conclusion

“So we make mistakes—can you say—you (the current system) don’t make mistakes [. . .] if you don’t think you do, walk through our community, every family will have something to teach you. By getting involved, by all of us taking responsibility, it is not that we wont make mistakes [. . .]” (B. Stuart: Rose Couch, Community Justice Coordinator, Kwanlin Dun First Nations, Yukon, Canada; Stuart 1995).

The paper addressed a number of elementary questions without which it seems impossible to proceed to an in-depth analysis of the substance of the RJ theory and practice. It appears from this analysis that RJ comprises two elements: the theoretical and the practical. The restorative theory aims to highlight the importance of the role of all parties in the process of restoring the harm done. It succeeds that by reminding us that we are all connected with a liaison that makes no strangers. Victim, offender and communities are called to restore what violated their relationship. Crime is not merely a violation of the law. The restorative practice provides the means to implement these normative assertions.

However, before we are able to proceed with implementation, clear philosophical frameworks need to be established. A number of reasons have been illustrated that make this moral justification imperative. Equally essential is that we realise and accept the conceptual limits of RJ so that we move our practices within them. Whether a social transformation and community reconstruction can be achieved through RJ or not, are definitely not issues that should concern us at this stage. In fact, RJ needs to establish itself first as a coherent second level justice theory and this can only be achieved through the support of philosophies of the first level. The analysis of the theory’s core assumptions pointed out the direction that this justification could take.

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