

Toward a Theory of Restorative Justice

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A theory is an explanation of some phenomenon (Campbell and Stanley 1966; Popper 1972; Popper 1992). Using this definition one can question whether restorative justice is a theory or simply a loosely connected set of alternative responses to the dominant justice approach. If restorative justice lacks a coherent theory, then it may also be posited that the dominant justice regime also lacks a single coherent theoretical structure. If the key dilemma facing essentially all justice approaches is the problem of recidivism (given that “crime is normal” and occurs within all societies (Durkheim 1972)), then each of the consequentialist theories of justice/punishment, including those of restorative justice, become valid theoretical representations of approaches oriented to the reduction of recidivism. If restorative responses to deviance are to be perceived as potentially valuable, it needs to be demonstrated that such approaches are *more* effective in reducing recidivism than competing approaches for roughly the same class and category of offender and offense. The validity of the present study contributes to the conversation on the merit of this idea. A new theory must show how and when competing theories fail and how this approach better addresses the core theoretical issues.

How justice processes respond to crime/deviance is mediated by the presenting category of crime/deviance. Thus, how the justice system responds to drug offenses (treatment) will be substantively different from how it might respond to violent street crime (retribution) or violence between intimates (incapacitation and counseling). How

¹ Note that for the purposes of this study, the term “crime” is a very broad one. The applicability of particular consequentialist responses to crime vary in appropriateness with respect to particular categories of crime. For example, incapacitation is most appropriate for career and violent criminals and a treatment response is most appropriate for offenders with a history of drug and alcohol crime. Thus, it is likely that no one theory ought to be applied to the whole class of crimes and offenders.

well the system responds to any category of crime is, in large part, a function of how well the response can be associated with crime reduction. For example, studies may show the apparent effectiveness of incapacitation in crime reduction, but there is the understanding that this response is only appropriate to particular categories of crime and offender. This discussion explores the issue of what categories of crime are best suited to processing using restorative justice approaches. There seems to be the understanding throughout the literature that restorative approaches, if used at all, are only appropriate for the least serious crimes where there is an identifiable offender and victim(s). It is my understanding that the choice to use restorative approaches to the problem of crime/deviance is not mutually exclusive to other approaches and modalities. Formal systemic responses to crime often merge sentencing philosophies. Most current approaches in sentencing possess both just deserts and rehabilitative components. It is therefore, very difficult if not possible to precisely define the limits to this approach. For example, a given judge may choose to sentence a drug offender to prison, community counseling (while on parole), and, ultimately, some restorative process based on the model outlined below. However, if it is believed that crime reduction is a function of self-accountability (self awareness) and the restoration of some informal social controls in the offender's life, then some restorative component is likely to be an important part of the sentence construct.

Despite an extensive reading of the literature, there appears to be an absence of theory in restorative justice. I have therefore sought to propose my own theory in this area, which is summarized below into seven core tenets. As manifested in Peacemaking, the order of the tenets is important to the theoretical construct. Restorative models of

justice imply that justice encompasses a broad social network, meaning that its zone of effect is broader than the dyadic state/offender that characterizes the conventional justice approach and that it is temporal, meaning that all instances of crime/deviance have a history as well as some unknown trajectory into the future. The hypotheses explored in this dissertation focus on the concept that the future life trajectory of an offender is substantively affected by the particular nature of the justice process.²

Tenet One: Healing as a Function of Deviance

Interpersonal violence presents unique opportunities for healing. The foundations of conventional justice as explored by Kant and Hegel posit a moral requirement to the justice process, wherein the establishment of guilt and blameworthiness carries with it an essential punishment that communicates to the offender the necessary obligation to suffer for the harm-causing event (Foucault 1967; Garland 1990; Duff and Garland 1994). The offender is grateful for his punishment because it is through the intentional infliction of pain and suffering that he is given the opportunity to learn and repent for the unfair advantage he sought over others. These philosophies define a crime as a ‘taking unreasonable advantage’ over others, which necessitates correction and moral condemnation for its general societal needs, and to provide the opportunity for the offender to experience its personal repercussions. This philosophy rationalizes the need to punish offenders. Violence and deviance are symptomatic of problems that need to be explored interactionally. Such violence can be likened to the visible part of an iceberg, where the underlying issue(s) are not visible and can only come to light through comprehensive problem solving. The first tenet of restorative justice theory is that

² It should be noted that the dominant theoretical paradigm does essentially the opposite as the one proposed here.

violence/deviance requires a problem-solving approach that emphasizes the social and temporal context of criminal and violent behavior.

Tenet Two: The Social Network Dimension of Effective Problem-Solving

Effective problem-solving is dependent on an environment that is inclusive, meaning that each entity effected by the presenting conflict ought to be present for its solution. An emphasis on inclusion possesses two fundamental strengths. First, it provides checks on power imbalances. Parents, neighbors, and others can provide essential testimony to neutralize unrealistic and self-promoting claims often made by individuals with a power advantage in mediation. Second, creative solutions are often a function of diversity and inclusion. Ideally the justice forum needs to include all offenders and victims. Opportunities for relevant solutions depend on involving everyone affected by the presenting *pattern* of violence and deviance. It, therefore, must include the victim(s), other family members (if appropriate), affected or involved members of the community, and possibly treatment providers. Tenet two states that effective problem-solving can never be offender based, but must be highly inclusive of all effected and relevant parties.

Tenet Three: The Requirement for Process Openness

Procedural openness is essential in providing satisfaction with the justice process and in facilitating effective problem solving. Tenet three states that, if justice processes are to be organized around the objective of reducing future violence/deviance between disputants, then its sessions and hearings must be completely open to personal narrative. All participants must feel free to tell their story and their stories must be accorded

importance and relevance by key third party decision-makers.

Tenet Four: The Re-distribution of Power to Process Participants

As long as representatives of the state hold all of the power, process openness will be more appearance than substance. Participants need to know that their stories matter. It is therefore essential that the structure of restorative justice needs to be, to some extent, fluid. Tenet Four requires that the interaction between process participants shape the process and substantially influence its outcome.

Tenet Five: The Requirement of Individual Accountability

Reducing violence/deviance between people experiencing conflict (from the perspective of restorative justice theory) is based on two principles; acceptance of accountability on the part of harm-causers; and the revitalization of active informal social controls in a harm-causer's life. Where the dominant justice paradigm relies on external sources of coercion to enforce behavior modification (which is true of some current restorative justice approaches as well), Non-western restorative constructs stress the requirement for self-transformation. Voluntary acceptance of accountability cannot be extrinsic to the wrongdoer, although the initial stages of the self-understanding process may be dependent on external sources of inducement. Ultimately, authentic accountability is a state of emotional being that is self-motivated and self-realized. Therefore, personal accountability is an essential prerequisite for authentic behavior modification.

Tenet Six: The Need for Material/Emotional Repair of Victims

Victims have legitimate justice needs that must be formally recognized. As part of the operation of voice in restorative justice, victims are entitled to have these needs

recognized on an emotional and material basis. The emotional and psychological component(s) are essentially recognized in Tenet Five. Tenet Six states that where these needs are material, victims possess the right to demand restitution and reparative services to be paid and performed by the wrongdoer. However, the specifics of the settlement agreement need to be formulated in an open session by the case participants. Agreement on the details of reparations and restitution would be incorporated into the formal sentence. Since they both the victim and offender agree to their merit, compliance with this element of the sentence is much more likely to occur.

Tenet Seven: The Revitalization of Informal Social Controls

How self-motivated changes can be sustained over time is one of the great challenges of any justice intervention. Unlike the dominant Anglo/American model of justice, restorative processes emphasize the primacy of relationship. Offenders (harm-doers) need to possess the tools to live their lives conventionally and nonviolently. As part of the problem-solving phase, offenders learn how their actions and behaviors affect others. They need to experience the pain and suffering they have caused others. Without understanding their deleterious effect on others, they can never be expected to genuinely accept personal accountability for their actions. Tenet Seven stresses the need to involve the offender in programs that repair their social relations. This involves the revitalization of informal social norms as manifested and expressed in the family, school, and work. Unless these values are part of the wrong-doer's everyday life, transformative processes invoked earlier in the process are likely to deteriorate over time. Such programs are essential in reforming conventional and conformist bonds. Thus Tenet Seven states that informal social structures and norms need to be established in the wrong-doer's life to

sustain the modification in behavior first aroused in his/her acceptance of accountability.

Table 1 is a summary of many of the key points differentiating Anglo/American justice with NPC. Each of the rows corresponds with one of the theoretical tenets. Having posited a potential construct for restorative justice, the next task is to explore its operationalization in a real world setting. Since conventional and restorative justice approaches address identical issues in very different ways, it is now necessary to determine if restorative approaches perform as well or better than conventional. Were that to be demonstrated and were it possible to replicate experimental results in a variety of real world settings, it would then be possible to understand restorative approaches to crime and deviance as representing a viable, if not superior alternative to the conventional justice paradigm. Some key elements of the experimental structure are presented in the Hypotheses section of this prospectus.

Table 1 A Summary of Differences Between Anglo/American Justice and NPC

Issue	Anglo/American	NPC
Participant Focus – T2	The offender	All affected case/family members
Problem Focus – T3	Presenting problem (crime)	Presenting problem and its whole context
Issue Focus – T3	Underlying issues are tangential to the process	Underlying issues are central to the objective of healing. Voices of all the participants are critical to the success of the process
Role of Victim – T2 and T3	Either irrelevant, rhetorical, or as witness. Voice limited to potential testimony and reporting of material losses	The voice of the victim is essential for healing, reconciliation and emotional/psychological restoration or termination of relations
Role of Justice Agency – T3, T5, and T6	Establish guilt/innocence, level of blameworthiness, and assign punishment	Support, understand, acknowledge voices of process participants, and provide guidance

Position of Third Party Decision-Maker – T2, T5, and T6	Superior, autocratic, generally great social and cultural distance, paternalistic, mechanical. Does not know case participants	Friend, equal, supportor, and perhaps most importantly, a sensitive listener. Very similar social and cultural distance. Typically knows case participants
Effect on Social Bonds – T2, T5, and T6	Divisive, rending, failure to acknowledge voice leads to further rending of conventional bonds	All affected case/family members are encouraged to find solutions to presenting problems. Actively planning to establish a plan to restore rent social bonds
Source of Healing and Reconciliation – T1, T3, T4	None	Self-transformation through self-awareness, understanding, and encouragement of empathy- all through procedural channels
Role of Force Efficacy of Agreement Enforcement (where appropriate) – T6	Systemic coercion Limited, often failing to coerce offender into satisfying conditions of reparative settlement	None Highly effective, based on mutuality of interests, and role of self-awareness in providing opportunities for family/community reintegration
System as a Source for Social Change T5 and T6	Divisive, marginalizing, explicitly exclusionary	Mending, non-marginalizing, inclusionary
