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Reforming Restorative Justice for Legal Philosophy

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Reforming Restorative Justice for Legal Philosophy

Many jurisdictions around United States and rest of the world have implemented restorative justice practices as part of its justice system. Despite the growing number of restorative justice initiatives, “scholars of jurisprudence and legal philosophy ... have paid little attention to the developments...”¹ If the legal philosophy scholars accepted or engaged in restorative justice theory, there would be even broader acceptance of restorative justice practices. There are, however, several obstacles that prevent a broader acceptance of restorative justice.

First, restorative justice practitioners must use the same terminology and definition as legal philosophers, particularly the terms retribution and punishment. Restorative justice practitioners use “retributive justice” synonymously with punishment.² In general, restorative justice practitioners have defined retribution too broadly compared to legal theory.³ Conversely, restorative justice practitioners have often too-narrowly defined punishment. They present the restorative justice practices as an alternative to punishment rather than an alternative form of punishment. Due to these differences in definitions, legal philosophers would find much of restorative justice literature indefinite or inaccurate. In order for restorative justice theories to be comprehensible to legal philosophers, restorative justice theorists must be more definite in the terminology and use the same terminology and definitions as legal theorists.

Secondly, restorative justice practitioners must reframe restorative justice as a justification for punishment rather than an alternative to punishment. Much of restorative justice literature suggests benefits of restorative justice practices in ways that are similar to other

justifications for punishment. Such reframing would allow legal philosophers to more readily acknowledge and engage in restorative justice theory as a plausible alternative to or another category of existing justifications for punishment.

Finally, restorative justice is sometimes presented in a manner that seems spiritual or religious. Legal philosophers may unfortunately discount restorative justice principles based on the presentation by its practitioners. Unless restorative justice practitioners address all these obstacles, the traditional academia may continue to unfairly ignore much of the restorative justice theories.

A. Redefining Retributivism and Punishment

Both retributivism and punishment need to be redefined; restorative justice practitioners must not use the two terms synonymously. Many restorative justice theorists have defined retributivism too broadly. In legal philosophy, retributivism is understood as a *justification* for punishment of the offender. In contrast to legal philosophy's definition of retributivism, many restorative justice literatures seemingly presume that the term retribution does not mean a *justification* for punishment, but rather the focus on punishing the offender for an offence.⁴ With such presumptions, restorative justice practitioners lump every-and-all punishment under the umbrella of "retribution." They often describe the existing justice system in United States as retributive, when in fact many criminal law practitioners and scholars subscribe to the consequentialist justification of punishment. Restorative justice practitioners frequently use the term retributive justice as shorthand for all the numerous faults and failings of punishment practices" instead of as 'a theory of punishment.'⁵ Even worse, some restorative justice practitioners "use the terms 'vengeance', 'revenge' and 'retaliation' interchangeably with

‘retributive justice.’”⁶ But retributivism is distinguishable from these concepts in that it appeals to “the justice of punishment.”⁷ Legal philosophers would not be inclined to engage in restorative justice literature that does not accurately depict legal theories. Furthermore, restorative justice theorists often present restorative justice principles as a dichotomous alternative to retributivism.⁸ Legal philosophers would find such claims of dichotomy rather like comparing apples to oranges since restorative justice principles are never presented as justification for punishment and therefore are not a viable alternative to retributivism.

Similarly, there must be a broader account of what punishment entails. Restorative justice practitioners have typically equated retribution with punishment and have defined restorative justice as “an alternative to” punishment rather than its “proper aim.”⁹ However, such narrow view of punishment is unnecessary. Restorative justice practitioners may expand the notion of punishment beyond legal practitioners’ narrow forms of punishment that typically only include incapacitation, capital punishment, or rehabilitative programs. Possible expansion of the forms of punishment may include the offenders’ psychological or emotional experiences when going through various restorative justice processes. Offenders frequently express that the restorative justice process is harder than going to prison. Restorative justice practitioners often speak about offenders “taking responsibility” for their crimes, something that the offenders would not be prone to do outside of restorative justice processes. Therefore, given the offenders’ difficult experiences through the processes as well as them “taking responsibility” that they would not do otherwise, such restorative justice processes may properly be categorized as forms of punishment or “sanction.”¹⁰

With a narrower definition of retributivism and a broader notion of punishment, legal philosophers will then be able to more readily engage in restorative justice theories. In order for

restorative justice theory to gain a better foothold in legal philosophy scholarship, restorative justice theorists must “speak the language” of legal philosophers by accepting the traditional definition of retribution and punishment. Restorative justice practitioners must accept a narrowed definition of retributive justice and a broader view of punishment.

B. Reframing Restorative Justice

After restorative justice theorists have redefined retributivism and punishment, they may further categorize restorative justice as a justification for punishment and thus comparable to other justifications for punishment.¹¹ In other words, restorative justice principles can be reframed as a restorative *justification* for punishment and not an *alternative* to punishment. Legal philosophy traditionally provides for two broad categories of justification for punishment: retributivism and consequentialism.¹² Consequentialism in turn includes general deterrence, specific deterrence, and rehabilitation. There are two options in reframing restorative justice. It may be reframed as a type of consequentialist justification for punishment. Alternatively, and perhaps more surprisingly, restorative justice may be reframed as a type of retributive justification for punishment.

Many restorative justice practitioners express the idea that restorative justice is dichotomously opposed to retributive justice. For this reason, perhaps restorative justice is best reframed as a type of consequentialist justification for punishment. As an alternate consequentialist justification for punishment, restorative justice may overlap with other categories of consequentialist theories. Some overlap may be a sign that the categorization is a valid one. However, in order to be a viable theory, restorative justice must also have some component that is unique and not covered by the other categories.

There are several points in which restorative justice overlaps with other categories of consequentialist justifications. For example, restorative justification may overlap with general deterrence, in that the sanctions of restorative justice processes may deter potential offenders from committing crimes. However, when given the choice, offenders seem to prefer the restorative justice process over incapacitation; perhaps the general deterrence effect of restorative justice processes is not as great as incapacitation. Restorative justification does not seem to overlap too much with specific deterrence, except to the extent that the offender in restorative justice processes may be kept from committing other crimes while participating in the processes as well as potentially serving prison terms as part of the restorative justice process agreements. Finally, restorative justification seems to have significant overlaps with rehabilitative theory.¹³ Both restorative justice and rehabilitative theory seek to meet the need of the offender, albeit for a different purpose. Many restorative justice proponents extol the efficacy of its practices by pointing to the reduced recidivism rates and the individual offenders' transformation. Such outcomes are consistent with the rehabilitative justifications of punishment.

Despite the overlaps with the existing consequentialist theories, restorative justification can be distinguished from other consequentialist justifications of punishment due to the positive benefits conferred upon the victims through the restorative justice processes.¹⁴ One of the main principles of restorative justice is to focus on the needs of the victims, which includes helping them "regain a sense of autonomy and power," compensation from the offender, answers to basic questions such as why the crime happened to them, an opportunity to communicate their emotions, and a recovery of sense of security.¹⁵ To the extent that restorative justice can meet these needs, and to the extent that meetings these needs can be a positive utility, restorative

justification can properly be categorized as a consequentialist theory of punishment.

Furthermore, victims sometimes express higher satisfaction with the restorative process than with “courtroom justice” and that the restorative process has helped them recover from their experiences.¹⁶ If victims’ satisfaction can be a utility and if restorative justice can produce more of it, then (again) restorative justification may be categorized as a consequentialist justification of punishment.

Perhaps more controversially, restorative justice can be reframed as a type of retributive justification for punishment. Positive retributivism asserts that “we should punish the guilty, *to the extent that they deserve*. [emphasis added]”¹⁷ While retributivism comes in “very different forms,”¹⁸ any account of retributivism must answer two basic questions. First, why and what does the guilty deserve to suffer? Second, why should the state inflict that suffering through a system of punishment?¹⁹ Restorative justification for punishment does answer in part these two basic questions. First, the offender should be punished primary as a means to restore the victim and secondarily to meet the needs of the community. Second, restorative theory may also assert that the state should mete out the punishment because the state has the resources to do so. Much of restorative justice literature points out the savings in resources to the government by switching to restorative justice practices from the pre-existing justice system. Majority of the restorative justice programs are linked to and dependent on the state criminal justice system.²⁰ Therefore, since restorative justice can answer these two questions, it can properly be categorized as a retributive justification for punishment.

Just as with different categories of consequentialism, restorative justification may have some overlaps with different versions of retributivism. In order for restorative justification to be a viable theory, there must be some unique feature that is not covered by other versions of

retributivism. The Kantian basis for retributivism asserts that each individual may not be merely treated as a means to an end, but that each individual must be respected as an end. This means that each individual must be respected as an autonomous agent whose choices must be respected. Retributivism respects the offender as an autonomous agent by acknowledging the choices he has made by punishing him. To *not* punish the offender would be to treat him as less than an autonomous agent. The restorative theory accords with this Kantian basis for retributivism. In restorative justice, offenders are encouraged to “take responsibility” of what they have done, which is acknowledging of the fact that the offender has in fact made the past criminal decision as an autonomous agent. But restorative justice has even more to offer in terms of Kantian ethics than other forms of retributivism. The offender “takes responsibility” of past crimes, and he also exercises his autonomy through the process itself; the offender is never coerced into taking responsibility or coerced into an agreement. Therefore, restorative justice practices are inherently affirming of individual’s autonomy and thus compatible with the Kantian basis of retributivism.

Another version of retributivism asks whether the offender has taken “an unfair advantage” over the victims. This account of retributivism asserts that in a society, every member has agreed to live by certain limitation imposed by the state. If an offender has broken that limitation, he has unfairly taken advantage of others who have not broken that limitation. Therefore, the state should punish the offender in order to balance the unfairly gotten advantage.²¹ This version of retributivism also overlaps with the restorative theory, which asserts that restitution should be the foundation of the state’s response to crime. In other words, the offender should restore the victim to their previous position before the crime occurred. This restitution principle of restorative theory may be seen as one approach to the “unfair advantage”

version of retributivism; the state balances the unfairly gotten advantage by coercing the offender to pay back and otherwise meet the needs of the victim. Restorative justice, then, answers a critical piece of “unfair advantage” account of retributivism.

Yet another account of retributivism suggests that punishment is a proper response to crime because crimes often elicit feelings of anger towards the offender and guilt by the offender. Restorative justice overlaps with this “emotional” account of retributivism in as far as restorative justice affirms the emotions of each individual. However, restorative justice brings everyone together to share these emotions, and the very act of sharing and talking about these emotions becomes a path to healing for victims, offenders, and communities. Restorative justice then answers the crucial questions that are left unanswered by the “emotional” account of retributivism.²²

Finally, another account of retributivism asserts the justification of punishment as a communication of censure. According to this account, the punishment communicates to the offenders the “censure or condemnation they deserve for their crimes.”²³ The communicative account is compatible with the restorative theory in that many restorative justice practices include expressions of disapproval by members of the community, especially by those who are closest to the offender. Since the restorative justice process is in fact a form of punishment, it explicitly communicates to the offender the “censure or condemnation.” Therefore, restorative practices may be a better, more explicit expression of censure than other forms of punishment.

In summary, restorative justice must be reframed as a type of justification for punishment. As a type of consequentialist theory, restorative justice does overlap with some theories as well as offering an additional, unique account that is not captured by other existing

theories. As a type of retributive theory, restorative justice accords with the various theories of retributivism while providing an element that each of these theories do not fully answer.

Therefore, either categorization of restorative justice is plausible. By reframing restorative justice as a justification for punishment, restorative theory may be more accessible to legal philosophers and hopefully will result in broader acceptance in that field.

C. Re-presenting Restorative Justice

One final obstacle stems from the various backgrounds of restorative justice. Aboriginal cultures, Mennonites, and Methodists have all played a great role in developing and fostering the restorative justice movement, on an individual scale as well as in cases like South Africa with the Truth and Reconciliation Council. However, one obstacle of restorative justice from gaining even broader acceptance is that much of its literature is steeped in spiritual, religious, and cultural language that is outside the realm of legal philosophy.²⁴ An account of restorative justice that synthesizes only its theories using the terms of legal philosophy would have a better chance of broader acceptance by legal philosophers and eventually by the secular society.

This does not mean that all religious or spiritual terminology need to be excised. Instead, these religious or spiritual terminologies can be expressed in a manner that is compatible with legal philosophy. For example, “forgiveness” and “transformation” are terms that are often found within restorative justice literature. Victims are encouraged to forgive the offender, and the offender is described as going through a process of transformation. While these terms may be spiritual in nature, they can be expressed in a purely philosophic manner as well.²⁵

D. Conclusion

In conclusion, there are several obstacles that prevent a wider acceptance of restorative justice among legal philosophers. The first obstacle is that restorative justice defines retributivism too broadly and punishment too narrowly. Accepting a stricter definition of retributivism, as well as understanding punishment in a legal positivist sense may be the solution to this obstacle. The second obstacle is that restorative justice is not framed in a way that is comparable to legal philosophy. Reframing restorative justice as a justification for punishment, under either retributivism or consequentialism, allows legal philosophy to engage in restorative justice theories. Finally, the spiritual, religious, and cultural language of restorative justice prevents legal philosophy from engaging in this material. Accepting more philosophic definitions to these concepts may allow restorative justice to be more comprehensible by legal scholars.

A wider acceptance of restorative justice by legal philosophers will likely result in wider credibility of restorative justice among those within the criminal justice system. Restorative justice practitioners will have more than empirical studies to validate their practices. IN effect, addressing these theoretical concerns, restorative justice will gain a broader acceptance among both theorists and practitioners.

¹ Conrad G. Brunk, *Restorative Justice and the Philosophical Theories of Criminal Punishment*, in 33 THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE (Michael L. Hadley ed., 2001).

² Declan Roche, *Retribution and Restorative Justice*, in 78 HANDBOOK OF RESTORATIVE JUSTICE (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

³ *Id.*

⁴ Declan Roche, *Retribution and Restorative Justice*, in 77-78 HANDBOOK OF RESTORATIVE JUSTICE (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

⁵ Declan Roche, *Retribution and Restorative Justice*, in 78 HANDBOOK OF RESTORATIVE JUSTICE (Gerry Johnstone & Daniel W. Van Ness ed., 2007).

⁶ *Id.*

⁷ Hugo Adam Bedau & Erin Kelly, *Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2010/entries/punishment/>.

⁸ Howard Zehr, 184-85 CHANGING LENSES (1990).

⁹ Antony Duff, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2008 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2008/entries/legal-punishment/>.

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- ¹⁰ “[L]aw is a phenomenon of large societies with a *sovereign*.... The laws in that society are a subset of the sovereign's *commands*: general orders that apply to classes of actions and people and that are backed up by threat of force or ‘sanction.’” Leslie Green, *Legal Positivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2009 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>.
- ¹¹ Gerry Johnstone, *Restorative Justice: Issues, Values, Debates* 106-07 (2011).
- ¹² Bonnie, Coughlin, Jeffries & Low, *CRIMINAL LAW 2* (2nd ed. 2004).
- ¹³ Gerry Johnstone, *Restorative Justice: Issues, Values, Debates* 111 (2011).
- ¹⁴ Brad Hooker, *Rule Consequentialism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2011 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2011/entries/consequentialism-rule/>.
- ¹⁵ Gerry Johnstone, *RESTORATIVE JUSTICE: ISSUES, VALUES, DEBATES* 66 (2011).
- ¹⁶ Simon Green, *‘The Victims’ Movement and Restorative Justice*, in 177-78 *HANDBOOK OF RESTORATIVE JUSTICE* (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
- ¹⁷ Antony Duff, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2008 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2008/entries/legal-punishment/>.
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ Anne Skelton and Makubetse Sekhonyane, *Human Rights and Restorative Justice*, in 590 *HANDBOOK OF RESTORATIVE JUSTICE* (Gerry Johnstone & Daniel W. Van Ness ed., 2007).
- ²¹ Antony Duff, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2008 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2008/entries/legal-punishment/>.
- ²² *Id.*
- ²³ *Id.*
- ²⁴ Mark Umbreit and Marilyn Peterson Amour, 68 *RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE*.
- ²⁵ Paul M. Hughes, *Forgiveness*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2011 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/win2011/entries/forgiveness/>.