

The Limits of Restorative Justice

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by Kathleen Daly¹

Restorative justice (RJ) is a set of ideals about justice that assumes a generous, empathetic, supportive, and rational human spirit. It assumes that victims can be generous to those who have harmed them, that offenders can be apologetic and contrite for their behavior, that their respective “communities of care” can take an active role of support and assistance, and that a facilitator can guide rational discussion and encourage consensual decision-making between parties with antagonistic interests. Any one of these elements may be missing, and thus potentially weaken an RJ process. The ideals of RJ can also be in tension. For example, it may not be possible to have equity or proportionality across RJ outcomes, when outcomes are supposed to be fashioned from the particular sensibilities of those in an RJ encounter.

Achieving justice – whether RJ or any other form – is a fraught and incomplete enterprise. This is because justice cannot be achieved, although it is important to reach for it. Rather, drawing from Derrida, justice is an “experience of the impossible” (Pavlich, 1996 p.37), “an ideal, an aspiration, which is supremely important and worth striving for constantly and tirelessly” (Hudson, 2003 p.192).

This chapter addresses a selected set of limits of RJ, those concerning its scope and its practices. My discussion is selective and limited. I do not consider the discursive limits of liberal legality, as these are viewed through a postmodern lens (Arrigo, 2004), nor do I consider related problems when nation states or communities cannot imagine particular offences or understand “ultra-Others” (see Hudson, 2003 pp.212-3). My focus instead is on the limits of current RJ practices, when applied to

youth justice cases in common law jurisdictions. There are other contexts where RJ can be applied, including adult criminal cases; non-criminal contexts (school disputes and conflicts, workplace disputes and conflicts, and child welfare); and responding to broader political conflict or as a form of transitional justice practice, among other potential sites (see Braithwaite, 2002). I focus on RJ in youth justice cases because it currently has a large body of empirical evidence. However, as RJ is increasingly being applied in adult cases and in different contexts (pre- or post-sentence advice, for example, as is now the case in England and New Zealand), we might expect to see different kinds of limits emerging.

THE SCOPE OF RJ

Limit (1). There is no agreed-upon definition of RJ.

There is robust discussion on what RJ is or should be, and there is no consensus on what practices should be included within its reach. One axis of disagreement is whether RJ should be viewed as a process or an outcome (Crawford & Newburn, 2003). A second is what kinds of practices are authentic forms of RJ, what kinds are not, and what is in-between (McCold & Wachtel, 2003; *Contemporary Justice Review*, 2004). A third is whether RJ should be viewed principally as a set of justice values, rather than a process or set of practices (compare, e.g., Braithwaite, 2003 and Johnstone, 2002, with von Hirsch, Ashworth & Shearing, 2003), or whether it should include both (Roche, 2003). Finally, there is debate on how RJ can or should articulate with established criminal justice (CJ).

A lack of agreement on definition means that RJ has not one, but many identities and referents; and this can create theoretical, empirical, and policy confusion.