

RESTORATIVE JUSTICE - HEALING THE EFFECTS OF CRIME

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Introduction

There are many options that provide more constructive ways to what we have now of dealing with most criminal offending. They do not require widespread use of imprisonment. They are effective and non-violent and generally cheaper. What they do require is patience, skill, resources and a whole new mind-set to enable their development.

Punishment has become an obsession in many countries. A retributive criminal justice system built primarily on a philosophy of vengeance and punishment does not produce fairness, either to victims or the offenders. We need to ask some fundamental questions about these matters. Given the incredible failure rate of the current retributive system, with between 60-80 percent recidivist rates in most countries within two years of release, should punishment remain the primary focus of the criminal justice structure?

In following a retributive model of criminal justice based primarily on punishment and vengeance, the world in the past two centuries has created a monster whose pernicious effects are impacting everywhere. As social decay has taken on a more marked appearance in recent years and the number of poor has grown, imprisonment and harsher penalties have taken on a fresh urgency in the minds of many politicians and with parts of the wider public. Yet of all social policies, surely this is the most failed. Never has any social system been so expensive and failed so consistently as has the system of criminal justice and imprisonment we adhere to so slavishly. In most countries it produces a recidivism rate of between 60-80% within two years. Where has it ever worked? Never has any tax dollar been less scrutinised for its fruitfulness than the criminal justice dollar. Are we wasting millions of dollars on a self-defeating system that hits minorities unfairly, dehumanises those caught, and simply guarantees more crime?

With the advent of the global economy and the development of private prisons, the prison-industrial complex has emerged worldwide as a major development in the past 20 years. This is a frightening development because it constitutes a set of bureaucratic, political and economic interests that encourages increased spending on imprisonment, regardless of actual need. Crime rates may often be falling and positive alternatives available, but prison construction continues unabated. The prison-industrial complex is built on a lure of big money and guaranteed jobs. Its raw material is the same everywhere: the poor, the homeless, the mentally ill, drug addicts, alcoholics and a wide range of socially dysfunctional and sometimes violent people.

The Failure of Prisons

Prisons fail on practically every front. They fail to rehabilitate. Nearly eighty percent of inmates re-offend again within a short time. They are extremely expensive at \$US25 000 per head. Basically it is money wasted. They undermine family life and leave children minus a parent. They are spiritually bankrupt in that they suppress the growth and freedom of people. They help create more crime by bonding similarly minded rejected members of society. They up skill their graduates in further anti-social techniques, which makes prisons the most successful tertiary institutions in the country. They breed violence and are the principal recruitment locations for gangs. They guarantee continued high rates of re-offending. They punish the innocent especially partners and children. They fail in practically every positive human indicator scale. As a 1993 *Time* magazine front cover boldly proclaimed, 'Each year jails take large numbers of hopeless people and turn them into bitter hopeless people'.

Prisons are the dinosaurs of the modern age. In no other area of human life and development do we allow 19th century philosophy and practice to dominate. As to the notion of imprisonment, locking grown adults into a 6m x 4m cell for up to 22 hours a day for months or even years on end, should be abhorrent to any thinking person. Only the twisted or those with a vested interest could regard such a procedure as acceptable. Sadly, there are many groups in the community with a vested interest in maintaining the status quo regardless of how destructive the system might be. The penal system stands condemned by its own violence and unfairness. Indeed by its own inhumanity.

There are unquestionably a 'dangerous few' who need to be kept out of circulation for the safety of both themselves and the community. These may well number a few hundred at any given time. But they should be kept in humane containment and encouraged to make constructive use of their time. Otherwise, imprisonment should be the very last line of resort in the sentencing process.

In recent years, many countries have come to see that there is an alternative process that is more humane and provides better justice to all parties. It is called restorative justice.

Restorative Justice - How does it work?

Restorative justice is a philosophy that embraces a wide range of human emotions including healing, compassion, forgiveness, mercy, reconciliation as well as sanction when appropriate. It also recognises a world-view that says we are all interconnected and that what we do be it for good or evil has an impact on others. Restorative justice offers the process whereby those affected by criminal behaviour be they victims, offenders, the families involved or the wider community, all need to have a part in resolving the issues which flow from the offending. This provides recognition to a degree at least that all things are interconnected.

Restorative justice cannot, of course, solve the systemic issues created by class, race and gender divisions. These belong to wider communal efforts that seek to bring about equity and justice for all through transformative justice. Restorative justice does

however play an important element in this transformative process. It can be used from situations in kindergartens and individual homes, through schools and communities, to the course of action followed in South Africa with the Truth and Reconciliation Commission, where a whole nation sought to be healed and reconciled to a criminal past.

Where crime is involved, under restorative justice victims and offenders assume central roles and the state takes a back seat. The process does not focus on vengeance and punishment but seeks to heal both the community and the individuals involved. It seeks the common good of all concerned. This is done by putting the notion of reparation and not punishment at the centre.

With restorative justice, a different fundamental question is asked to that posed by retributive justice. The latter asks, how do we punish this offender? Restorative justice asks a different question – how do we repair the damage of this offending? Note the shift from focusing on the offender to focusing on repairing the damage done. This is why it offers so much to victims and conversely, why retributive justice offers so little. This is a radical shift in emphasis and the processes which flow from it are quite different to the adversarial trials, courts and prisons that flow from the retributive question.

The goal of restorative justice is to heal the wounds of every person affected by an offence. It obviously requires the co-operation of all parties to progress fully. The offender, to be involved in any useful way, must acknowledge responsibility for the crime committed and express honest regret. More than that, the full implications of the offence need to be spelled out and confronted, as the offender deals with the causes of offending and, where possible, makes restitution and gives concrete evidence of more responsible behaviour. If the offender does not wish to co-operate, the traditional system should remain as a parallel option.

The victims are invited to examine their feelings and take advantage of any support network that will facilitate healing. Victims are helped to see that their own victimisation is only intensified by feelings of retributive action against the offender. When possible, they are invited to become involved in a facilitated group process, along with the offender and community representatives.

The New Zealand experience indicates that the Restorative Justice Conference (also called the Community Group Conference) is the best method of achieving restorative justice. While community panels and other forms of restorative justice are effective, the most lasting results come from the group conferencing approach.

The restorative process offers tremendous advantages over the retributive system. Three stand out.

1. Restorative justice places victims at the centre of the justice equation

Under the current retributive system victims are shoved either right outside or stuck on the periphery. How much of the punitive wave of anger that sweeps the country after a particularly nasty crime flows from the unresolved anger, grief, hurt and pain of the victims of crime? We all initially feel like lashing out at a thief who has taken

our car or burgled our home. But our emotions settle with time and we all know that such violence would probably do as much damage as the original crime and would not solve anything.

There is a need often for victims to speak to their feelings, to be acknowledged, to be offered apology, to receive restitution, to experience justice. They need answers to questions that plague them such as who was at fault; so often victims blame themselves. But above all else, victims need the experience of forgiveness.

2. Restorative justice offers healing to all involved

In his book *Changing Lenses*, Howard Zehr points out that ‘for victims of crime, forgiveness is letting go of the power that the offence and the offender have over them, while not condoning or excusing that person. It means no longer letting the offence and the offender dominate. Without this experience of forgiveness, without this closure, the wound festers and takes over our lives. It, and the offender, are in control. Real forgiveness allows one to move from victim to survivor.

Just as victims need an experience of forgiveness, so do offenders. How else can they put the past behind them and positively confront the future? The retributive criminal philosophy provides little encouragement and virtually no room for an offender to confess, repent, change direction, turn life around, admit responsibility and make things right. The justice system simply encourages anger, rationalisation, denial of guilt and responsibility, feelings of powerlessness and dehumanisation. As with victims, the wounds just fester and grow.’

Forgiveness is not something that the victim does for the benefit of the offender. It is the process of the victim letting go of the rage and pain of the injustice so that he or she can resume living freed from the power of the criminal violation. We encounter injustice daily in our homes, our places of work and in the affairs of nations. We can ill afford to respond to the grievances, large or small, in ways that are likely to escalate conflict and perpetuate cycles of violence. In many situations it is precisely the quest for justice as retribution that prevents many grievances from ever being channeled into forums that can bring resolution and redress. Limiting justice to retribution turns interpersonal disputes into tit-for-tat feuds, and border skirmishes into fully-fledged wars.

3. Restorative justice places responsibility for crime in the hands of those who commit it

Restorative justice brings a dimension of community responsibility into being. It recognises that we all form part of the one human family and that we have responsibilities towards one another. To focus always on the individual as if we always exist outside a grouping at work, at home, in the community, in a sports club - wherever - is to focus too narrowly. It is one of the great weaknesses of the Western judicial system.

Sheeting home responsibility for criminal behaviour to the individual in the context of family and friends usually brings massive shame and regret to offenders. How often have I sat in jail and talked to burglars who had done 20, or 30, or 80 burglaries, and still have no comprehension of the damage done in peoples' lives? To them it is

simply property stolen to feed their families, their drug habits, or their greed. It is the same with most other offenders. Only a tiny percentage ever face the reality of what they have done. Their general approach towards a system that treats them like schoolchildren is that once their punishment is done, there is no more need to worry. 'I've done my time' becomes their catch cry. They have had their 'just desserts', says the state. They have paid their debt to society. There is clearly no room for either victims or positive change in such a scenario.

The Case of New Zealand

In New Zealand we have practiced restorative justice conferencing for youth offenders between 14-17 years of age for the past 14 years. This process involves a meeting convened by a skilled facilitator to which the victims and the offenders are invited. Both are encouraged to bring family and friends as support. The experience of our youth justice system offers us some positive insights. The number of young offenders appearing before the courts has dropped from 13,000 cases a year to 5000. Clearly the rate of young people undergoing custodial sentences has also shown a dramatic reduction. Restorative conferencing among the young is obviously having some success. Given the opportunity, it is amazing how contrite and shamed so many young people become after meeting their victims at what is called a family group conference. It is also noticeable how forgiving, gracious and helpful so many of the victims are towards the offenders once they have been able to put a human face and history on the crime.

Under the Children, Young Persons' and Their Families Act 1989, every juvenile offender who was arrested had to attend a Family Group Conference. Eighty four percent of young people and 85% of parents said they were satisfied with the outcomes. About 85% of the young people agreed to carry out the agreement reached by way of community work, reparation and the like, and if apologies are added to these, the figure reaches 95%. Widespread diversion was carried out prior to arrest with 22% given a warning, 59% diverted. Only 11% of young offenders were arrested. (1996)¹ Conclusions reached by researchers Morris and Maxwell were

- Victims were willing and able to participate
- A significant portion felt positively towards the process and were satisfied with the outcomes
- Offenders were held accountable
- Reconviction rates were no worse and may be better for court-based samples
- Factors in restorative justice processes may be linked to a lower probability of reconviction²

In 1989 all the juvenile prison-type institutions were closed down and it is only recently that two juvenile institutions have re-opened, including a small secure unit. After 14 years, the results have been encouraging enough for many jurisdictions around the world to adopt the same or a similar process for their juvenile offenders, and the process is now widely used in Canada, Britain, Australia, South Africa and many of the countries of Europe. It is used also in varying degrees in many of the

¹ Morris and Maxwell, Research on Family Group Conferences with Young Offenders in New Zealand, in Hudson J. et al (eds) *Family Group Conferences: Perspective in Policy and Practice* (Annandale, NSW: Federation Press)

² Morris and Maxwell, *Restorative Justice in New Zealand: Family Group Conferences as a Case Study*, *Western Criminology Review* 1 (1), 1998

States of the US. It is a difficult process to evaluate because of the number of expectations differing groups have who participate. However, widespread research has been carried out into restorative practices in many countries, some of which is readily available in research outlets.³

New Zealand Adult Conferencing

In 2001, the New Zealand Government began to fund a four-year national pilot at a cost of \$4.8m to examine restorative justice at four district courts. This pilot marked the official acceptance by the government of restorative justice in the adult jurisdiction. The pilot is evaluating conferences which take place between the time a guilty plea is entered and sentence passed. The pilot seeks to test the effectiveness of the conferencing model chosen, to provide victims with an opportunity for input and resolution, and to enable offenders to take responsibility for their actions and reduce their chances of re-offending. A report of the conference is given to the judge and outcomes agreed to by parties are taken into account at sentencing. The courts are tending to hand down less punitive sentences because they recognise that in the process offenders are truly held to account and victims' concerns are given weight.

The pilot targets serious crime. This is because the pilot administrators believe that where the damage caused by the offence has been the greatest, restorative justice may have the greatest impact. Offences which are being referred include property offences, burglary, theft, serious fraud, assault, aggravated assault, firearms offences and dangerous or careless driving causing death or injury. All these offences potentially carry substantial periods of imprisonment.

A referral from the courts triggers a process whereby first the offender is interviewed as to suitability for a restorative conference. Then the victim's fully informed consent to the process is sought. Only after the agreement of both does the conference proceed. Research shows the main reasons why victims wish to attend is to 'tell the offender what the offence was like', and 'to find out about the offender'. Offenders most commonly wished to attend 'to apologise to the victim', and 'to make amends to the victim'. About two thirds of court referred conferences do not proceed to conclusion principally because victims do not wish to meet the offender or the offender is too difficult to contact. Among adults, it remains a purely voluntary process.

More than 120 facilitators were trained in conferencing processes. Proper training is required because facilitators have a vital skilled role to perform in the process. In addition, the law was changed to encourage restorative processes to be referred. The Sentencing Act 2002 (section 7 and section 10) contains clear restorative provisions which oblige sentencing Judges to take into account restorative processes. The court 'must' (not 'may') take restorative justice into account. In addition the Parole Act 2002 and the Victims' Rights Act 2002 (section 9) contain provisions for restorative justice processes.

It is too early to accurately assess the official pilots. But early indications are that they are achieving a marked rate of success in all verifiable aspects. (www.courts.govt.nz/publications/news.html)

It is imperative that despite the involvement of the government in restorative justice, community groups continue to promote and use it as a means of conflict resolution outside the criminal justice processes. Restorative justice is a process big enough to underpin the Truth and Reconciliation Commission in South Africa and small enough to enable neighbours to resolve a boundary dispute. Beside the government pilot in New

³ For example, see John Braithwaite's research, *Does Restorative Justice Work? In A Restorative Justice Reader*, Ed. Gerry Johnstone, Willan Publishing, London, 2003

⁴ Helen Bowen and Jim Boyack, *Adult Restorative Justice in New Zealand*, www.restorativejustice.org.nz,

Zealand, 38 community groups continue to use restorative justice processes in local conflict situations: One such programme, Te Whanau Awhina – a programme for Maori offenders – which operates in the Hawkes Bay area, both re-offending and the seriousness of re-offending were significantly reduced compared to 100 controls matched for criminal history, demographic factors and offence characteristics who went to court. The twelve month reconviction rate was 33% for the programme, compared to 47% for controls. In another example, an adult panel system, Project Turnaround in South Canterbury, had 16% reconviction rate compared to 30% for controls.⁵

Conclusion

The nations of the world desperately need enlightenment and fresh direction in their dealings with crime and lawlessness. They desperately need a system that gives a better deal to victims, that promotes apology, healing, understanding, accountability, personal and collective responsibility, forgiveness, even reconciliation. We all need to re-learn how to practise compassion and mercy in our dealings with one another. We need a system that reduces imprisonment and only uses it as a final resort for the most dangerous offenders. Transformative and restorative processes provide opportunities for these to happen. The current retributive criminal justice system doesn't.

Many countries now are taking this message seriously. In time there should be less need for imprisonment, the common good of all will be enhanced, better social justice delivered and safer communities built.

⁵ Maxwell, Morris, Anderson (1999), quoted in *A Restorative Justice Reader*, *ibid*.

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