

## Restorative Justice\*

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It is a privilege to be here today with so many people whose writings coming out of this country and from our visitors have influenced my work for a long time and I am looking forward to meeting some of them for the first time. It is the first time I have met Howard Zehr and Jim Consedine, Moana Jackson, Allison Morris, Gabrielle Maxwell, Julie Leibrich, Tony Marshall and not least of all Fred McElrea, who are all here on the programme for this conference. These are all people whose work I have read with great benefit and my colleagues in general in Australia as well.

I am going to seek today to broaden the restorative justice debate by talking about crimes of the powerless and crimes of the powerful within a restorative justice framework. It is a paper that I have not given before and I must apologize to the commentators for not getting a typescript to them.

I thought I would make things a little easier for Jim Consedine by starting with reading a passage from his book. (It is a strategy that I recommend to you for getting benign comments from a commentator.) There was a passage that I found particularly moving. He was talking about the smile of Nelson Mandela and the joyous dance of Archbishop Desmond Tutu, as they cast their first ever vote in a general election in South Africa.

Even more striking was the message they jointly shared with the watching world. After years of enslavement, imprisonment, violence, poverty, oppression, death and racism of the worst kind, their message was not one of vengeance, punishment, just desserts, but of restoration, healing, mercy and forgiveness. Here was restorative justice in practice on a global scale.

They gave spiritual and moral direction to the whole world, and there is an important sense in which New Zealand has given spiritual and moral direction not only to us in Australia, but to the whole world. It is particularly exciting that the new South African government has picked up Maori ideas of justice, and is beginning to implement the idea of family group conferences from New Zealand. I think that should be something about which you feel very proud as a people, particularly Maori people of course, but also Pakeha New Zealanders who have been in the business of saying to us, in other countries that there are important things to learn from Maori traditions of Justice.

There are many versions of restorative justice as Howard Zehr explains in his presentation. I like to describe my theoretical approach as civic republican and there are two strands to that way of conceptualizing it. First, it implies a notion about restoring equality: that crimes of the powerless and crimes of the powerful both have a common source in the qualities of wealth and power in the societies in which those crimes occur. By reducing inequality, we can simultaneously reduce crimes of the powerless and crimes of the

\* The following text is an edited transcript of Professor Braithwaite's address.

powerful. Crimes of the powerless are to do with the notion of certain fractions of society being exploited, crimes of the powerful are bound up with the notion that other fractions of society exploit and through redistribution of power in the society, one can deal in a sense simultaneously, structurally with both crimes of exploitation and crimes arising from being exploited historically.

The second important theoretical strand is the idea of reintegrative shaming. The notion here is the claim that societies with lower crime rates are the societies which shame more effectively, and shame in a particular way which is reintegrative. The basic idea here is that there are two ways of thinking about how you transact shaming, reintegrative or stigmatizing shaming. Reintegrative shaming is shaming within a continuum of respect. This very much connects with Howard Zehr's idea of respect begetting respect, and disrespect begetting disrespect. Disrespectful shaming is likely to make our crime problems worse, because of all of the work that we have from criminology on how stigmatization can deliver young people, and adults as well, into the hands of criminal subcultures, where people who have a status problem, through powerlessness and rejection by the wider society, can solve that status problem through identification with a criminal subculture. It is one of a number of ways in which it can be solved. Happily, there are more constructive ways in which it can be solved. The core idea is that we need to distinguish between reintegrative shaming, which is shaming within a continuum of respect, and disintegrative shaming, or stigmatization, which is disrespectful shaming, the shaming that is about casting out, shaming that is not only focusing on the wrong of the act, but on the person as an evil person, whereas reintegrative shaming is about disapproving of the criminal act within a continuum of approving of the person as a good and respected person.

Now what is interesting about family group conferences from that theoretical perspective, is the genius of the structure of the conference in its simplicity. The invitation list, who comes along to the conference, is the most important part of that. But the agenda of the conference is also important. Through inviting the victim along and supporters of the victim to communicate the consequences of the criminal act, we structure shaming into the conference. The invitation of the offender's key supporters structures reintegration into the conference so long as the job has been done well of inviting those along who really are the people who care most about and enjoy the strongest relationship of respect for the offender. That is the most crucial part of the simple genius of the family group conference idea.

Our preliminary family group conferencing program at Wagga has been very encouraging. Reoffending rates have been about half of the rate for cases going to court. But we cannot be sure that this is not just due to a selection effect, that the easier cases are going to conferences. So we have in place in Canberra a random assignment experiment, to give a more definitive assessment of the circumstances where it works well, and what are the circumstances where it does not work or does not work so well. The evidence that we do have at the moment is more systematic and more persuasive from the areas of the crimes of the powerful rather than the crimes of the powerless. This is because a number of colleagues and I have been engaged in an evaluation of enforcement strategy for nursing home regulatory enforcement.

Australia has national standards about the quality of care in nursing homes. Inspectors visit those nursing homes to assess whether there is compliance with those particular laws. Now our research group have been the primary consultants to the Australian Government on regulatory strategy in that area, and have been in the business of writing consultancy reports about how that regulatory strategy should be transacted. Of course our approach has been to commend a restorative justice based approach to that area of regulation. This is the way that it works on the ground. There is an inspection of the nursing home, which tends to be by a team of two or three people, one of whom is always a nurse. They check compliance of the facility with various standards with regard to fire, safety, quality of the food, quality of the health care that is delivered and a variety of other things, confidentiality about resident records, the whole range of things that are important for the quality and integrity of care in nursing homes. After their inspections, they sit down with management of the nursing home, but not just with management. The event is rather like a family group conference, in that representatives of the residents' committee are often involved if the residents elect a committee. The inspectors will sit down with the residents, with the victims if you like, during the inspection process as well. Then at the end of the process they will sit down with management, representatives of the residents' committee, and the residents' committee if they're particularly concerned about what is going on, can bring in an advocacy group from outside, with those advocacy groups being funded by the government, to restore the imbalance of power in this particular regulatory context. They can also invite relatives in if they want, and that happens from time to time. So they will sit down and discuss the areas of non-compliance that have been discovered in the nursing home, and they will come up with a plan of action, very much as in a family group conference. There will be an agreement ultimately reached as to what will be done to come back into compliance with the law, and then the inspection team follows up to ensure that compliance occurs. Now, one of the things we measured in our evaluation of whether this regulatory strategy was working was of the ideology of these inspectors. Did they believe in disapproving of conduct when they saw it? And when they did express any disapproval, was it an ideology that was reintegrative or stigmatizing? And what we found was that the inspection teams which had an ideology which was more about reintegrative shaming did much better than other inspection teams at improving compliance with those laws between the first point of time and one or two years later. The regulatory inspectors who had stigmatizing ideology, actually made things worse.

The other important result there was this. The worrying result was that we put all of this effort into training inspectors into having a restorative justice ideology, but most of them were not persuaded. It was much more common for inspectors to stick with an ideology of being tolerant and understanding and just trusting business than it was to have a strategy that involved laying disapproval on the line. And stigmatization was also more common than reintegration. So it works, but it does not work very well in persuading the people who have a culture of being either captured or stigmatized.

In respect to corporate crime I used to think that the concern ought to be one of reducing inequality. As the poor suffer so badly at the hands of the criminal justice system, I believed we ought to equalize the scales of justice by being more punitive towards white collar criminals. However, it seems to me today that this can be an extraordinarily counterproductive strategy for the powerless who are the victims of the crimes of the

powerful. That is the point I now want to go on to develop. It is the idea that we can use a restorative justice strategy in the area of crimes of the powerful, including corporate crime, including crimes against women, domestic violence and so on, where there are equally profound inequalities of power. What I suggest is to have a kind of a pyramidal approach to your regulatory strategy where there are these imbalances of power.

What I want to do is to explain what that might mean. Now we might want to try different cuts at restorative justice. With family group conferences, you should not give up after your first conference. The same applies to meetings with nursing home proprietors who break the law with regard to care of their residents. You should not give up after one of those conferences when they fail to deliver the goods. You come back and re-engage with them. But if the attempt at restorative justice fails, we have the option of escalating to a deterrence based strategy, so we impose a fine on the nursing home. We do not allow them to take any new residents into the nursing home, until they put the problem right. Sometimes the deterrence strategy fails. When that fails we might move to a more incapacitative strategy. With crimes of the powerless, incapacitation is usually conceived as locking people up so they cannot do any more violence. With crimes of the powerful, incapacitation is a much more attractive strategy. So we can incapacitate a law-breaking nursing home by withdrawing their licence, by suspending their licence. The approach I am suggesting is that we keep trying restorative strategies until they have clearly failed. Then we try deterrence until that fails. Then we try incapacitation. All of these justice strategies do fail a lot of the time but we shift towards a dynamic strategy when dealing with crimes of the powerful.

Imbalance of power is the key underlying concern with all of this. That is one reason why we've got to be willing to escalate to deterrence and incapacitation with crimes that involve inequality of power, such as rape, for example. But there are some other important things to say about inequality of power and how the restorative justice approaches which are at the base of the pyramid themselves involve an important response to that. One of the criticisms of victim-offender mediation is that we have inequality of power. You can have a mediation going on between a man and woman, between an adult and a child, between the school bully and a nerd. There is an imbalance of power in each of these dyads. Part of the genius of family group conferences is that it is not a dyadic encounter. It is a meeting of two communities of care, both of which contain men and women, adults and children, on both sides, so that the structural inequality begins to be addressed within the simplicity of the conference process and that is true with these nursing home regulatory encounters as well. The capacity exists to bring in advocacy groups to support inspectors who are likely to be captured and to have elected residents' committee representatives and this, in a sense, restores an imbalance of power as well.

Now, with crimes of the powerful, be it crimes of male domination such as rape or corporate crimes, I am not saying that restorative justice is the main solution. It is not. It is the structural stuff that I began to talk about at the beginning of the speech; structural change for more egalitarian societies and social movement politics. Restorative justice institutions admittedly can sometimes ameliorate those inequalities in little local ways. Family group conferences can help a young offender to get a job. If there are problems of domestic violence decisions can be made to restructure the bank accounts of the family

so that the women and children in the family have access to financial independence. They have the ability to walk out because they have control of the bank accounts that they did not have before the conference. Within conferences there are little local things that are connected to structural inequalities that can be done, but more fundamental changes in education systems, work places, labour markets are obviously the most important things there. And there are implications of the theory of reintegrative shaming arising here as well.

If I think about what our deepest crime problems are in Australia, in terms of harm to persons and property, I would suggest they are corporate crime, domestic violence, and drink-driving. Why are they our deepest crime problems? I suggest that the answer is that they are forms of crimes that have been historically shielded from shame, that disapproval of those kinds of conduct has been muted and ambiguous within our culture and that has been connected to structural inequalities of power, of sorts that I hope are obvious to you in each case. I will not labour that point. The positive point is that if it is the case that these are our deepest crime problems because of the way shame is socially structured in our culture then there is a lot of hope for a social movement politics that engages with those problems: a lot of hope for a social movement against drink driving, a lot of hope for a feminist social movement against domestic violence, a lot of hope for a green social movement against corporate crimes of the pharmaceutical industry by the consumer movement. Those forms of social movement politics can actually work with those crime problems that are our deepest crime problems. They can constitute the shameful of things that were not previously shameful.

So we come to an optimistic analysis of the capacity of citizens through institutions of civil society to struggle against their most serious crime problems. It does not seem that way. One of the problems is that corporate crime does not seem to most people to be our deepest crime problem. Now that is because if armed robbery is generally regarded as shameful in the society and insider trading in the corporate sector is generally not regarded as particularly shameful, then it seems to citizens that there is a lot of armed robbery going on and not a lot of insider trading, when all criminologists know that the best way to rob a bank is to own it. So again it is connected to this social structuring of shaming in the society. And there is a connection to structural inequality in this sense as well. The problems of racism and discrimination against women are not particularly shameful kinds of activity. So we need a normative theory which I suggest might be a republican theory about what should and should not be shameful and which also would lead to the conclusion that racism and discrimination against women should be shameful. The failure of those kinds of activities in society to be viewed as shameful is connected to our crime problem.

Conferences can be used with corporate crime. The nice thing about complex organizational crime is that there are many possible preventive targets. If you fail with prevention at one level of the organization, you can try the level above, and each subsequent level, until you find a soft target. Indeed, the soft target who really is vulnerable to shame might be the chairman of the board. There is a lot of potential with a restorative justice strategy, of trying restorative justice at different levels, but then accepting that, at the end of the day, one may have to escalate up an enforcement pyramid into deterrence and incapacitation.

## Restorative Justice—Commentary

*Rev Douglas Mansill*

*Presbyterian Minister, Former Prison Chaplain*

The following comments stem from experience in trialing four restorative justice initiatives with adults. In one case the referral came from the District Court. In the other three instances, I took the initiative to ask the court to proceed in this way as I already had pastoral involvement with each of the situations concerned.

Broadly speaking the issues that have arisen out of these cases, fall into two main areas of consideration: the operation of the restorative justice process itself; and the interface of the restorative justice process in dealing with adults within the current justice system operating in Aotearoa/New Zealand.

### The operation of the restorative justice process itself

In some of my discussions with research workers from within the Justice Department I have been asked whether I opt for victim/offender or reintegrative shaming models of operation. I believe that this is the wrong sort of question to be asking. The issues are not about the absolute rightness or wrongness of any one particular method of operating, but rather about the appropriateness of choice for facilitation. We need to perceive restorative justice as a process which seeks to restore victim, offender and their community of interest to a state of wholeness and well-being after wrong or hurt has been inflicted on one or more people by others. The resources to be used for implementation of this process must be appropriate to the task in hand, whether they be community group conferences employing reintegrative shaming dynamics, one-on-one interviews between victim and offender with a mediator acting as referee, or some other appropriate process. People involved in the facilitation of restorative justice need to be aware of, and prepared to use a variety of means of implementation. My practical experience thus far would indicate that elements of more than one model of operation are often present anyway and facilitators need to be open to the use of a variety of options at their disposal for best effecting the end aims of the process.

There is a need to be careful about the terminology that is used to describe participants in the restorative justice process. In particular I have some reservations about the use of the terms “victims” and “offenders”. I am open to suggestions in this respect, but I have sat at family group conferences and community group conferences and found myself asking the question: “Who is the actual victim here?” As the stories unfold, it often becomes clear that many so-called offenders are themselves victims; that families and supporters of both parties can be victims; and that even the police who have had to intervene in the matter in question, can be seen from this perspective. Negative labelling and stereotyping can have an adverse effect on promoting moves towards restoration of wholeness, and at times focus attention away from the issues under consideration — accepting of responsibility for harmful actions and finding ways towards restoration of