

Restorative Justice : Alternative Approaches

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I. RESTORATIVE JUSTICE

A. Introduction

John Ralston Saul points out in his book *The Unconscious Civilization*¹ in a chapter entitled "The Great Leap Backwards", that our society is in a crisis. The United States has 1.5 million of its citizens in jail. That is triple the figures of 1980. The United States rate of incarceration is approximately 500 per 100,000 population. If locking up those who violate the law contributed to safer societies, the United States would be the safest country in the world. In 1991, the United States Senate Judiciary Committee described their own country as "the most violent and destructive nation on earth".²

Canada's rate of incarceration is the fourth highest in the Western world at 130 per 100,000 population. The current federal correctional budget is 1 billion dollars. Costs are projected to be 1.25 billion dollars by the year 2000 if changes are not instituted.

The annual total cost of crime in Canada is estimated at 46 billion dollars. 9.7 billion dollars is spent on the actual operation of the criminal justice system.³

A recent study by the Rand corporation forecasts that by the year 2002 in California 18% of the State budget will go to corrections and only 1% to higher education.

Should Canada repeat the costly approach and very poor results of the United States? We are at a crossroads. Canada cannot afford either fiscally or morally to incarcerate people in the future the way we do in the present.

We should be asking ourselves : where will this take us if we continue on this track? This is a picture of failure. What ails our paradigm of justice? What are the solutions? We need to find viable alternatives to incarceration.

B. The Need for a Paradigm Shift

It strikes me that *Bill C-41* presents an opportunity to catalyse a desperately needed paradigm shift. A general principle that runs through *Bill C-41* is that incarceration should be reserved for only those that deserve that sanction. Alternatives should be used for those who commit offences but who do not need or merit incarceration.

It strikes me that such an approach would promote the protection of the public by seeking to separate the most serious offenders from the community. It would allow less serious offenders to remain in the community with effective community-based

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1. J.R. Saul, *The Unconscious Civilization* (Toronto : ANANSI, 1995).
 2. Report of the Standing Committee on Justice (February, 1993).
 3. National Crime Prevention Council (1996).

alternatives; supported by appropriate conditions. It would also mean that public funds could be used for incarcerating and treating the more serious offenders.

C. Basic Concepts of Restorative Justice

Restorative Justice is a philosophical framework which has been proposed as an alternative to the current way of thinking about crime and criminal justice. Restorative Justice emphasizes the ways in which crime harms relationships in the context of community. Crime is viewed as a violation of the victim in the community not as a violation of the state. The offender becomes accountable to the victim and the community and not to the state.⁴

One of the key proponents of the Restorative Justice approach is Howard Zehr. The amplification of the theory is found in his work *Changing Lenses : A New Focus for Crime and Justice*.⁵ He contrasts the definition of crime in two divergent paradigms at page 181 as follows :

Retributive Justice : Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.

Restorative Justice : Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.

Restorative Justice recognizes the desire for greater reconciliation between the victim and the offender for turning responsibility for crime back to the offender's victim and communities and for less professional criminal justice involvement in resolving dispute. These objectives are complemented by a growing disenchantment with the ability of the mainstream criminal justice and correctional system to meet public expectations and individual needs.

The concept of Restorative Justice represents an effort to make response to crime more egalitarian and communal than can be achieved in the mainstream justice system.

Restorative Justice defines accountability for offenders in terms of taking responsibility for actions and taking actions to repair the harm caused to the victim and the community. Restorative Justice provides for active participation by the victim, the offender and the community in the process of repairing the fabric of community peace.

4. Minnesota Department of Corrections (January, 1995).

5. H. Zehr, *Changing Lenses : A New Focus for Crime and Justice* (Scottsdale, PA : Herald Press, 1990) at 181.

Rupert Ross in his book *Returning to the Teachings*,⁶ warns us that it is wiser to take a risk with restorative justice than it is to condemn the notion from the outset, without giving it a chance. He states we should be on guard for the "not unless you do it better than we're doing it" syndrome. Restorative Justice programs must be measured not against a perfect justice system but against the present justice system. The present justice system is far less than perfect.

D. Offenders Role

In the existing criminal justice system there is a concentration on legal issues and the possibility of avoiding punishment, offenders are not required to realize the harm they have done. Incarceration by itself may be considered a relatively easy sentence compared to the Restorative Justice approach which holds offenders directly accountable to victims, confronts them with the personal harm they have caused, and requires that they make real amends to the victim and the community. In the existing system offenders are in a passive role and in effect are protected from confrontation by the nature and the structure of the system. In the Restorative Justice approach the offenders become active participants in reparation.

E. Victim's Role

In Restorative Justice crime victims are offered more opportunities to regain personal power. Currently victims frequently feel left out of their own cases except as witnesses. Zehr emphasizes that victims have many needs. They need the chance to speak their feelings, experience justice, and have the power restored to them that has been taken away from them by the offender. Restorative Justice allows for victim involvement in determining how those needs can be met.

F. Community Participation

The entire community bears some responsibility for all its members including the victim and the offender. The community is responsible for supporting and assisting victims, holding offenders accountable and insuring opportunities for offenders to make amends.

6. R. Ross, *Returning to the Teachings* (New York : Penguin Books, 1996).

G. Key Assumptions

The Restorative Justice framework is based on the following assumptions :

- a) Crime results in injuries to victim, communities and offenders;
- b) All parties should be included in the response to crime including the offender, the community and the victim, if they wish;
- c) The victim is central to the process of resolving the crime and the harm done;
- d) Accountability is based on accepting responsibility and repairing harm done;
- e) Crime is defined as an act against another person or the community rather than an act against the state. The state has an interest in resolving the problem but is not the primary actor;
- f) The offender becomes primarily accountable to the victim and the community, not the state;
- g) Restoration, or making things right replaces the imposition of punishment for its own sake at the highest priority of the system. Restitution would become common, not an exception;
- h) Results in the Restorative Justice models are measured not by how much punishment was inflicted but how much reparation was achieved;
- i) Crime control rests primarily with the social system. The criminal justice system can only have a marginal impact on the level of crime because it can only respond to crime after it occurs. Therefore a significant component of Restorative Justice has natural link to the work of crime prevention;
- j) Offenders are accountable for their individual choices but communities are also accountable for conditions which may exist that contribute to crime.

H. What Does Restorative Justice Look Like in Practice?

- a) Support and assistance are provided to victims and families of victims;
- b) Restitution is given priority over other financial obligations of the offender;
- c) Offenders face the personal dimension of the harm caused by their crime through victim/offender mediations, victim panels or community panels;
- d) Victims have the opportunity to help shape the obligations placed on the offender for repairing the harm;

- e) Sanctions which repair the harm of the crime are given higher priority than sanctions imposed just for punishment.⁷

II. ALTERNATIVE RESTORATIVE JUSTICE MODELS

A. Family Group Conferences

1. Introduction

This notion began in New Zealand and was legislated in 1989. It is a concept that incorporates some basic Maori concepts of conflict resolution.

In 1989, there were 2000 young offenders in secure custody in New Zealand housed in 24 facilities. Forty-three percent of those were Maori. Today there are three facilities with under 100 bed spaces.⁸ New Zealand diverts 90% of its young offenders matters out the traditional youth court system. It does so in a very strategic four-funnel system which tries to divert young people out of the mainstream system at every conceivable opportunity. It does so principally by informal cautions, formal cautions and the use of Family Group Conferences. The number of prosecuted cases for defendants aged 17, 18, and 19 years dropped by 27% over the five years from 1987 to 1992.⁹

The total budget for youth justice in New Zealand dropped from 34.5 to 27.5 million between 1991 and 1994. The amount allocated for operational expenditure declined from 11.5 to 4.5 million in a country of approximately 4 million people. (A comprehensive discussion of the Family Group Conferences concept is found in *Family Group Conferences — Perspectives on Policy and Practice*).¹⁰

2. Background

Conferencing represents a social philosophy which encourages citizens to be directly involved in decisions that affect their lives. It is in a sense a direct form of participatory democracy. (A comprehensive practical guide and discussion of Family Group Conferencing is found in *Real Justice Training Manual*).¹¹

There are two principle themes : repair the damage and minimize harm; maximize social justice for the victim, the accused, and the community.

7. Minnesota Department of Corrections (January, 1995) : "Restorative Justice" (Discussion paper, New Zealand Ministry of Justice, 1995).

8. Hakiaha (1996).

9. Judge F.W.M. McElrea, "New Zealand Youth Court : A Model for Development in Other Courts?" [unpublished paper, 1994].

10. *Family Group Conferences — Perspectives on Policy and Practice*, eds. Hudson, Morris, Maxwell & Galaway (1995).

11. McDonald, Moore, O'Connell & Thorsborne, *Real Justice Training Manual*, ed. T. Wachtel (Pipers Press, 1995).

Restorative Justice is not really new. Biblical justice was restorative. So, too was justice in most indigenous cultures. In pre-colonial New Zealand, Maori had a fully integrated system of restorative justice that used Maori legal processes.¹²

Two criticisms of the current mainstream justice system are that the outcome :

- a) Does not change the accuser's behavior;
- b) Does not address the victim's needs.

Family Conferencing addresses both of these issues in a more positive fashion.

Family Group Conferencing is founded on certain theoretical explanations. The sociological explanation is put forward by John Braithwaite in his book *Crime, Shame and Reintegration*.¹³ In examining criminal behavior Braithwaite did not ask the question "Why is crime committed?". He asked the question "Why don't most people commit crime?". He theorized that shame has both external and internal components. Shame comes from family, friends and people of importance. Fear of disapproval and disgrace act on the individual's conscience. He indicated that if you use shame in a positive way (Reintegrative Shaming) you will produce a much preferable result. He juxtaposed two types of shaming :

- a) Stigmatising shaming; and
- b) Re-integrative shaming.

The following is an explanation of stigmatising versus re-integrative shame.

Stigmatising shaming :

- a) Sit in a corridor;
- b) Humiliates;
- c) Makes the accused more angry and less thoughtful;
- d) Instead of creating empathy for the victim and the accused it has the opposite effect of creating hostility for the victim in the mind of the accused;
- e) Makes the accused more resentful, angry, alienated and revenge-seeking.

Re-integrated shaming. The re-integrative shaming concept contains the following features :

12. J. Consedine, *Restorative Justice* (Ploughshares Press, 1995).

13. J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge : Cambridge University Press, 1989).

- a) The accused experiences disapproval by the community and individuals he or she has respect for;
- b) There is a clear distinction between the offence and the offender;

- c) The process recognizes the good in the offender and re-enforces confidence in the offender to make internal changes;
- d) It encourages a behavior change;
- e) It provides an opportunity for reintegration.

The psychological explanation is provided by Donald Nathanson in a book *Shame and Pride*.¹⁴ Nathanson builds on Affect and Script theories advanced by Silvan Thomkins.¹⁵ Affect theory holds that there are nine innate affects that we commonly call emotions. Affects are physiological responses common to all humans and present at birth. All humans have nine affects. They are divided into three groups, positive affects, neutral affects and negative affects.

Positive affects include the following :

- a) Interest — excitement;
- b) Enjoyment — joy;

A neutral affect is as follows :

- c) Surprise — startled;

Negative affect are as follows :

- d) Fear — terror;
- e) Distress — anguish;
- f) Anger — rage;
- g) Dismissal;
- h) Disgust;
- i) Shame — humiliation.

Different cultures encourage or suppress the expression of different affects. Nathanson developed a compass of shame. He indicates that there are four possible responses to the experience of shame. People react, actually or symbolically, by :

- a) Withdrawal;
- b) Avoidance;
- c) Attacking themselves; or
- d) Attacking others.

14. D. Nathanson, *Shame and Pride : affect, sex, and the birth of the self* (New York : Norton, 1992).

15. S. Thomkins, *Illegal Action — Official Reaction*. D. Moore, *Affect Theory, Criminology, and the Criminal Justice System. Knowing Feeling — Affect, Script and Psychotherapy*, eds. Nathanson, Norton (1996). *Shame and the Modern Self* (Australian Scholarly Publishing, 1996). D. Moore, *Shame : Human Universal or Cultural Construct?*

Anyone who has witnessed a conference will recognize all of these responses.

The constructive engagement that is fostered through the conferencing process enables people to move beyond shame. In this setting, shame is experienced when a person recognizes damage to their emotional bonds with others. When offenders demonstrate shame in a conference, that is a sign they feel regard for their victims and for other conference participants and want to make or re-establish a connection with them.

People are encouraged to express their feelings in a conference. The conference process is designed to minimize negative affect and maximize positive affect.

Family Group Conferencing offers an opportunity to address the perception in some quarters that our societies' institutions seems powerless to stem rising tides of negative behavior and violence that threaten community schools and neighborhoods. Failure to address emotions and involve the victims and the offenders and their respective communities is a fundamental flaw in the current mainstream justice system. Family Group Conferencing addresses these flaws.

The conference model encourages affect expression, fear, distress, discuss or negative affects, then it moves at the end to encouragement of positive affects. At the end of the process, negative affects are minimized and positive affects are maximized.

Conferencing provides a constructive mechanism that engages all participants. When offenders demonstrate shame, it is a sign that they feel and show regard for victims. That is the point that they want to re-connect or re-establish a positive relation and a reintegration with the community. Only by experiencing the feelings of the victim can the accused recognize the impact of his or her behavior on others. This model produces a high victim-satisfaction rate which is key to a success in operation. The Australian police-based model or Wagga Wagga model has some critics. The critics say that the police are to controlling. The response by the developer of the model, Terry O'Connell, is that the police are in a unique position in the community. They have credibility and respect and therefore command a formal presence. Their presence puts the victim at ease. The police-based model is not the only effective one. We know that through the development of Aboriginal community justice workers, community justice committees, and the Sparwood, B.C., model that there are other facilitators which can be used to effectively deliver the family group conference concept.

The conference process deals with an incident by involving those affected in a way that allows the harm to be repaired. The process focusses on the deed, not the doer, on the crime, not the accused, therefore it does not destroy an already fragile and fractured ego. It is the behavior that is not acceptable, not the accused person. The process is structured to reflect the accused reality and the victim's financial situation. The definition of community is not based on a geographic or racial criterion. The definition of a community is the accused and his or her care-giving group and the victim and his or her care-giving group. Also any person affected by the crime.

The powerful and positive effects of family group conferencing comes not just from the restrictive values embodied in it but also because :

- a) It involves more people in the community;
- b) It acknowledges a wider range of people being victimized;
- c) It allows for a wider range of participants to express emotions about the impact of the crime;
- d) It makes a more deliberate distinction between condemning the offences and not the offender.

Conferencing is a form of diversionary process which provides :

- a) Restitution for material loss;
- b) Symbolic reparation with endowment and forgiveness;
- c) Personal satisfaction and closure.

Conferencing is neither victim-centered nor is it offender-centered, it is incident-centered. There is a balance with equal weight given to the victim's need.

B. Sentencing Circles

1. Background

Over the last decade the relationship between Aboriginal people and Canadian justice system has been the subject of reports from over 30 public enquiries, task forces and Royal Commissions. These reports have consistently concluded that Aboriginal people regard the existing justice system as alien and incapable of meeting their legitimate needs and expectations. These reports have documented that Aboriginal people in Canada experience disproportionately high levels of arrests, convictions and imprisonment and once they are in prison are less likely to have the benefit of early parole.

The present system does not command Aboriginal allegiance because it does not reflect Aboriginal values. It is often seen as an imposition of the values of another culture which presumes to know better.

The rate of incarceration of Aboriginal people is nearly four times the national average.

The adversarial nature of the criminal justice system operates as a significant barrier to community acceptance of Aboriginal communities. Traditional Aboriginal approaches to justice are generally based on integrated, consensus-based, Restorative Justice approaches. The principles that support those approaches are not easily reconciled with the adversarial, evidence-based mainstream justice system. The situation is

aggravated by the fact that many Aboriginal people do not understand the justice system, a system which knows relatively little about the customs and traditions of Aboriginal people.

The non-Aboriginal community generally has difficulty accepting that there is more than one way to look at the world. Further, they have difficulty accepting that Aboriginal people do in fact look at the world from a different perspective. We need to accept that proposition. This is critical. If we accept that notion, we must then turn the telescope around and look through the other end; we have to see justice from the Aboriginal perspective.

Aboriginal people have a different notion of justice. It is not a set of rules to achieve some abstract notion of justice. Rather it refers to a natural order in which every one and everything is interrelated. Justice does not stand outside society as a system but sits within it as a part of the fabric of the society. It is part of the responsibility felt by each member of that society for one another. Justice requires a holistic approach.¹⁶ When a crime occurs it is seen as a hurt against a community of people not as against abstract state. So in addressing crime there is more emphasis placed on modifying future behavior than on penalizing the wrongdoer for past misdeeds. This emphasis on Restorative Justice or Justice as Healing, on making hold that which is broken, necessarily involves the community at large for it was the community that was damaged. Justice is about restoring harmony in the community.¹⁷ The common goal is to provide safe communities and reduce crime. We must acknowledge that we might have to reach that goal using a different track.

The Aboriginal Justice Strategy, (April, 1996) is designed to promote a paradigm shift in the delivery of justice to Aboriginal people. It was during the work of the first Aboriginal Justice Initiative that significant progress was made through the development of sentencing or peacemaking circles. We can use the flexibility inherent in the existing system to promote healing and restoration.

Discretion must be more widely and more wisely used by the three gatekeepers in the system; the police, the Crown and the judge. Sentencing circles provide an opportunity for greater community participation in sentencing of offenders in criminal justice. The community provides input to the judge at the time of sentencing and the judge is expected to consider their submissions.

2. The Process

The active participation in the process by the offender allows him the opportunity to regain control over his life. He provides direct input into the sentencing design and in doing so must provide a direct insight into the underlying causes for his criminal acts.

Community support for both victim and the accused strengthens the accused, supports the victim and in effect promotes community wellness.

16. S. Henderson, *Exploring Justice as Healing* (1995).

17. R. Barsh, *Evaluating the Quality of Justice* (1995).

The sentencing circle process provides an opportunity to address the underlining causes for criminality. The process promotes a paradigm shift from a focus on curing the symptoms which manifest the criminality to a focus on examining and curing the causes of the criminality.

One of the main goals in the sentencing circle process is to arrive at the most effective intervention vis-à-vis the accused and the community. The challenge to the community is to assist the court in finding and providing community-based resources for that intervention. The discussion and comments by the participants eventually leads to a consensus. The judge has discretion to either accept or reject the recommendation of the community in the sentencing circle process, and may impose a sentence which he or she feels more appropriate but not necessarily that which was recommended by the consensus in circle process. It may well be that at the end of the process the judge would feel that the sincerity of the accused was called into question in the circle or some other component which would not give confidence to the judge arose, for instance, if the community resources were not of sufficient capacity to carry out the proposed sanction. The judge, therefore, retains complete and absolute discretion on that issue. The sentencing circle process is a very emotional and compelling experience.

It recognizes that incarceration may not be the most effective sentencing tool in every case.

The foundation for sentencing circles was created by Judge Barry Stuart in the landmark case of *R. v. Moses*.¹⁸ There have been over 600 sentencing circles in the Yukon Territory, as well as in many other places in Canada. For instance, in Northern Saskatchewan, Judge Fafard has conducted over 150 circles. There have been very Crown appeals from sentences imposed by Judge Fafard in this process. This suggests that the Crown prosecutors have a high degree of confidence in the process.

The effect of the circle process is to challenge the professional monopoly on decision-making and to encourage the community to take ownership of issues that are really theirs in the first place. "The circle setting dramatically changed the roles of the participants, as well as the focus, tone, content and scope of discussions", stated Judge Stuart. Criteria for a sentencing circle has been developed and used in Northern Saskatchewan by Judge Claude Fafard and colleagues in the Saskatchewan Provincial Court as follows :

- a) The accused must agree to be referred to the sentencing circle;
- b) The accused must have deep roots in the community in which the circle is held and from which the participants are drawn;
- c) There are elders which are respected in the community who are willing to participate;

18. *R. v. Moses* (1992), 71 C.C.C. (3d) 347.

- d) The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing;

- e) All disputed facts have been resolved and the accused has either been found guilty or plead guilty;
- f) The case is one in which the court would be willing to take a calculated risk and impose a sentence outside the usual range, emphasizing rehabilitation rather than punishment.

These criteria are designed to ensure that the risk associated with diversion away from incarceration has a probability of success.

The circle process enhances the information given to the judge. It also enhances the options available to the judge. It involves the community in several ways : it empowers the community to assume ownership for resolving their own issues, it restores a sense of collective responsibility to the community, it restores a sense of self esteem to the individual and to the community in a collective way.

Victim support is also essential. The justice system focusses principally on the accused, whereas this process balances the rights of the accused and the victim and shifts the emphasis to at least an equal support for the victim. The community resources are not only used to serve the accused needs for rehabilitation but also the victim's need for reintegration and restoration of harmony. The process forces the accused to confront directly the individual that he has harmed including that person's family. The accused is forced to confront the heavy disapproval of his actions by his peers in the community in general. The accused is forced to do so in a very public and emotional setting. The accused is challenged to take responsibility and control for his action and to publicly undertake in a social contract to direct the change required in his life.

The sentencing circle shifts the emphasis to dealing with the underlying causes of crime and addressing those issues by the accused in his community. This shifts the emphasis away from purely retributive and punitive aspects of sentencing to reintegration, reconciliation, rehabilitation, and restoration of the accused, the community and the victim to harmony. The sentencing circle produces a sentencing plan which is a scheme for participation of the accused in the community addressing issues in a more comprehensive way than traditional mainstream sanctions. The sentencing circle process gives the accused an opportunity to visibly demonstrate remorse and publicly acknowledge his wrongdoing. The process promotes reconciliation. The process mobilizes community resources. The process incorporates Aboriginal cultural values.

III. COMPONENTS OF SUCCESS

Judge Barry Stuart says : "Community development, is as central to the work of Circles as community justice." This is one of the fundamental advantages of Circles over formal justice systems. Unlike Courts that focus principally on changing the behavior of offenders, Circles focus on a much broader range of changes. Circles strive to change relationships by changing the circumstance of offenders, victims, and of their respective lives and "communities".¹⁹ Offenders who change and return to personal environments that have not changed, soon return to old behaviours, old habits. The state cannot create, and cannot afford to continue trying to create, professionals or institutions to replace the powerful influences for changing anti-social behavior and for maintaining socially responsible conduct that families and communities can provide. It makes no sense to keep trying to do so. Both short and long-term gains flow from strengthening families and communities.

In his book *Returning to the Teachings*,²⁰ Rupert Ross advises "If we fail to organize all aspects of our lives, including our work, around making positive or healing contributions to a relationship, then we are actually making negative contributions instead. Healing is not just a form of emotional or psychological surgery you reach for after there has been a significant injury. Instead, healing is seen as an everyday thing, for everyone, something which, like sound nutrition, creates health. In another words, the healing perspective must be built into the attitudes which shape every aspect of every day".

I recognize that restorative justice models are not a catholicon for all the social ills in the community. The credibility of any restorative justice model is directly proportional to its effectiveness. Its effectiveness is directly proportional to the quality of community resources and the willingness at acceptance of the community to integrate and implement the model.

I believe we should be courageous in exploring options that will provide safer communities and a higher quality of justice. I believe we must find alternatives to incarceration which are credible and effective. These alternatives must come from the community. They must be owned in the community, in the sense that they are community-based and community-paced. We need to allow communities to solve community problems utilizing community resources. We need to create partnerships in the community. I believe lessons learned from the Aboriginal approach to justice, justice as healing, will be transferable to the Canadian Justice System. The experience in New Zealand and Australia demonstrates that if you want to shift the paradigm, and have a political will to do so, you can. If we continue in the current path, we will face a picture of failure. The risk in exploring Restorative Justice Models is fully justifiable.

19. "Building Community Justice Partnerships : Community Peacemaking Circles" (Justice Canada, 1997).

20. R. Ross, *Returning to the Teachings* (New York : Penguin Books, 1996).