

# RESTORATIVE JUSTICE

## HEALING THE EFFECTS OF CRIME



**Jim Consedine**

**Revised Edition**  
With a preface by  
Archbishop  
Desmond Tutu

In honour of

**JEAN STEWART**

prophet, activist, Christian woman,  
founder and president of the  
Movement for Alternatives to Prison

and

In memory of my niece

**SUZANNE ELIZABETH CONSEDINE**

a bright, beautiful, compassionate, loving, wise and generous spirit who  
brought an enormous amount of laughter, joy and tears to us all,  
accidentally killed at Anakiwa,  
3 August 1993

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We are all interconnected, woven together by the grace of God and the love we share. This book is a fruit of that process in which my role, though pivotal, owes much to countless others.



## Foreword

I have been involved as a practitioner in the criminal justice field for about 30 years, the last 15 of which have been as a District Court judge. For a great deal of that time I have been invaded by reservations as to our present punitive practices, which in turn have led me from time to time to question my own participation in such a system. The rationalisation that perhaps it can be better changed from within has subdued and dulled that dilemma but never laid it to rest.

For almost a decade, between 1980 and the end of 1989, I was a District Court judge in West Auckland, where I had the opportunity of observing and working with such enlightened people as Dr Peter Sharples and his team at Hoani Waititi Marae. Of particular interest was their work with Maori committees involving Maori youth who had offended. By taking matters out of the courtroom and using other venues such as marae or even school grounds, a much more egalitarian environment, I began to sense that there may be alternative ways of handling these matters.

By changing the emphasis from a punitive condemnatory stance to one where the group sought to repair the emotional and material damage of crime, I glimpsed the potential for a wider applicability of such a process and the capacity for far more creative resolution of problems.

With the advent of the Children, Young Persons and Their Families Act in 1989, particularly with the provisions for family group conferences, my enthusiasm blossomed. The undeniable success of that process with its exciting and limitless potential, particularly for victim involvement and input, has been a wonderful experience. The robustness of the exercise and the enthusiastic involvement of the police Youth Aid Section made this a most satisfying and encouraging area within which to work.

As a result various questions have presented themselves. Could we place this technique in some historical context? Is this a procedure amenable only to the Maori mind? Is this process limited only to the New Zealand situation? Does it work for other young offenders?

Subsequent interest from most of the Australian states, Britain, the United States, Sweden and South Africa has provided stimulating exchanges. In

particular, the approval and support from such distinguished international scholars as Dr John Braithwaite and Professor D. L. Nathanson, as well as constructive discussion from such New Zealand scholars as Dr Gabrielle Maxwell and Dr Allison Morris, have provided an exciting stimulus to this work.

In New Zealand the research work done by my brother judge F. W. M. McElrea after study leave at Cambridge University has added a further intellectual rigidity to the concept of a restorative model. Similarly, a recent visit by Dr Howard Zehr enabled us to compare notes on work being done independently in the United States.

Now we have this significant contribution from Father Jim Consedine. In his first section on retributive justice he articulates those flaws that I and others had sensed in our present system and, in taking a comparative view from other jurisdictions, exposes the pointlessness and waste, both in fiscal terms and, more importantly, in terms of human destruction and degradation, serving only to compound the problem rather than find the solution.

This is aptly captured in the book's introduction, where he says:

The millions of dollars we waste on building new prisons and maintaining our old ones is, generally speaking, money wasted. In no other area of public tax funds expenditure do public monies get less scrutiny in terms of positive effectiveness than in the area of penal policy.

This book is not just another diatribe against penal policy. Rather I see it as a powerful polemic, carefully sourced and widely researched, which offers a closely argued possible alternative solution.

By drawing together the universality of the restorative process with its biblical roots and even wider derivation with other cultures, the book and its message could be a blueprint for a vision that is so badly needed in contemporary Western society.

Jim Consedine's unique experience and contact with prisoners over a long period must lend to this volume a special credibility.

Apart from those marvellous insights, after so long an exposure to the raw side of humanity, it is the essential essence of Christian humanity pervading the book that makes the reader so conscious of the potential of the human spirit.

*Michael J. A. Brown  
Principal Youth Court Judge  
Auckland, New Zealand  
6 October 1994*



## Preface by Archbishop Desmond Tutu

Problems relating to crime and law and order are endemic throughout the world. The traditional methods of dealing with them are by focusing on retribution and punishment, with imprisonment the crown in 20th-century penal policy.

That this policy has been a proven failure stares out from every statistic from every country and jurisdiction. Crime rates continue to rise, imprisonment numbers mount endlessly, costs become astronomical.

Crime is everyone's problem. It reflects an inability of people to be just and fair in their dealings with one another. It panders to the shadow side of human nature where greed, violence and injustice lurk in each of us. Crime is a complex issue involving family background, employment opportunities, education levels, economic and social positions, as well as individual personal choice. How much crime is committed by people who themselves are the victims of fundamental injustice? Or by people whose basic human rights have never been respected?

In South Africa, street crime has escalated with the advent of liberation. While the structural crime of apartheid is now dead, its legacy lives on in the social injustice it spawned.

The solutions are complex. Imprisonment is not an answer. It should be restricted and used only for the small minority too dangerous to live in the community. New and constructive non-violent options must be pursued to enable law-breakers to take responsibility for what they have done and encourage their attempts to repair the damage. Victims too need a better deal.

The Truth Commission is a radical effort to find new non-violent ways of confronting the enormity and brutality of injustice by seeking acceptance of personal responsibility, healing, forgiveness and reconciliation as primary objects.

So too do restorative justice processes. Rooted as they are in all indigenous cultures, including those of Africa, they offer to provide a better form of criminal justice than that which currently exists. They focus on repairing the damage done through crime, on victims' needs, and on the part God's great gifts of healing, mercy and reconciliation can also play. Restorative justice is a challenge to all caring people to create a more positive, fruitful criminal justice process to carry us into and through the next millennium.

Jim Consedine's book requires us to be creative, and to see things through God's eyes as brothers and sisters of one another. Each of us has the capacity to grow through the pain and distress crime creates. Broken though many may be by horrendous offences against themselves or their loved ones, all are capable through God's healing grace of forgiveness and mercy. This is the only road that leads to reconciliation and peace.

This very ancient yet desperately needed truth lies at the heart of this book and presents a challenge to us all. It is one we ignore at our peril.

*Desmond Tutu  
President – Truth and Reconciliation Commission  
Cape Town  
South Africa*

# Introduction

The families of two South Auckland boys killed by a car welcomed the accused driver yesterday with open arms and forgiveness. The young man, who gave himself up to the police yesterday morning, apologised to the families and was ceremonially reunited with the Tongan and Samoan communities at a special church service last night.

The 20-year-old Samoan visited the Tongan families after his court appearance yesterday to apologise for the deaths of the two children in Mangere last Tuesday. The Tongan and Samoan communities of Mangere later gathered at the Tongan Methodist Church in a service of reconciliation. The young man sat at the feast table flanked by the mothers of the dead boys.

*NZPA, 21 December 1993*

One of the most lasting television images of 1993 had to be that of the families of two South Auckland boys killed by a car welcoming, with open arms and forgiveness, the accused driver and his family.

Both Tongan and Samoan communities have a tradition of restorative justice when it comes to offending in the community. This means that the wellbeing of the community and its restoration to peace and harmony are the primary values sought in the justice process.

So restoring the young man to his family and restoring the good bonds between the two communities were the primary objects. The offer of a sincere apology and its acceptance through forgiveness and mercy form the natural flow-on from such a tradition. Sanction forms a less important part of the proceedings.

The alternative response happens in mainstream society every day. We rely too often on the law, by itself a soulless set of rules, to attempt to see justice achieved. In effect, there are no mechanisms in mainstream society for reconciliation to be achieved from such a tragedy. Within the confines of the social structures of mainstream law, apology and sorrow cannot meet mercy, forgiveness and reconciliation. Instead the victims and their families are shut out of the processes from day one, and the offender awaits his or her just desserts, often in isolation, always in fear and trepidation. This usually happens in a prison cell, cut off from grieving families on both sides of the tragedy.

The consequence of this situation is an almost total lack of healing for the offender and the victim, resulting in a residue of deep bitterness and anger that can last for years.

Would that our wider society could learn from the wisdom and traditions of Polynesian New Zealanders and other indigenous peoples. Maori have a tradition of restorative justice, still in effect in many rural areas, whereby the restoration of all concerned – the victims, the offenders, the whanau, the iwi – is the principal objective.

Such a process allows a human face to be put on offending, and allows healing to occur in place of bitterness, mercy to be effected in place of retribution, and constructive sanctions to be put in place instead of useless ones such as imprisonment.

The millions of dollars we spend on building new prisons and maintaining our old ones, generally speaking, is money wasted. In no other area of state expenditure do public monies get less scrutiny in terms of positive effectiveness than in the area of penal policy.

### **Restorative Justice**

We need to discover a philosophy that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness and mercy. That philosophical base is restorative justice.

A positive philosophy that embraces a wide range of human emotions, including healing, forgiveness, mercy and reconciliation, as well as sanction where appropriate, has much to offer. In New Zealand the Children, Young Persons and Their Families Act 1989 has shown that a restorative rather than a retributive philosophy bears far better fruit, but such a process is a relatively new development for modern times. Howard Zehr, an international expert in the field of criminal justice, writes:

Throughout most of Western history, crime has been understood as an offence of one person against another person, much like other conflicts and wrongs which are treated as 'civil'. Throughout most of this history, people have assumed that the central response must be to somehow make things right; restitution and compensation were very common, perhaps normative. Crime created obligations, liabilities, that needed to be taken care of, usually through a process of negotiation. Acts of vengeance could occur, but not, it appears, as frequently as is usually assumed and the functions of vengeance may have been different to what we expect. Both victim and offender had a responsibility in this process, as did the community. The state had a role as well, but it was limited and was by necessity responsive to the wishes of victims.

This is a gross simplification, of course, but to some extent our history has been a dialectic between two modes of justice: state justice and community justice. State justice was imposed justice, punitive justice, hierarchical justice. Community justice was negotiated justice, restorative justice.

State justice has operated in some form during most of Western history. However, community justice predominated until fairly recently. Only in the past few centuries did state justice win out. The state won a monopoly on justice, but only with a great fight. The victory of state justice constituted a legal revolution of tremendous import, but a revolution which has been recognised and studied too infrequently. It is no accident that the birth of prisons – a new technology for delivering doses of pain – coincided with this legal revolution.<sup>1</sup>

Restorative justice is really not 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. Many argue that the Treaty of Waitangi guaranteed its continuance. It was the traditional philosophy of Pacific nations such as Tonga, Fiji and Samoa: restorative justice was ‘the Pacific way’.

## Corporate Crime

We also need to reassess our understanding of crime and ask why it is that corporate crime advances virtually unhindered, while localised ‘street crime’ has become such an obsession for so many. The answer lies somewhere in the mixed realm of our own hidden fears and our sense of powerlessness in the face of crime, and the immense power of vested interests who gain so much from the current situation.

The *Oxford English Dictionary* gives a three-part definition for the word ‘crime’. *It is an act (1) punishable by law, (2) as being forbidden by statute, or (3) injurious to the public welfare.*

As a society we focus almost exclusively on the first and second definitions, neglecting the third. Crimes are written into law at any given point in time by governments through parliaments, assemblies, decrees or proclamations. Certain actions (for example traffic offences) are made unlawful in order to protect what politicians perceive to be the interests of the common good, or else to protect and advance their own interests and those of their supporters. Thus, what may be a crime in one country, for example prostitution or cannabis smoking, may not be a crime in another.

The first two definitions do not demand a moral underpinning, though many laws and statutes obviously have a moral dimension. It is the third definition of crime as being ‘*an act injurious to the public welfare*’ that implies a moral basis. The words demand a moral evaluation as to what constitutes public welfare or common good. This is precisely the point at issue in many areas involving corporate crime.

Corporate crime is endemic the world over. Very few are ever held responsible for its devastating effects. It reaches into virtually every aspect of our lives, yet so widespread is its influence, we are often unaware of its presence. It hits us in so many ways: from the added-on costs in our supermarkets to the pollutants in the air we breathe, from the hidden costs of our banking and financial systems to the costs of medicines we take for our illnesses. The tentacles of corporate crime touch all these areas and many more.

Yet we rarely speak of it, read of it, or hear of it for any sustained period. We have become totally preoccupied with individual 'street crime', although corporate violence and crime inflict far more damage on society than all the street crime combined. Just one major tobacco company, for example, arguably kills and injures more people than all the street thugs put together. Public corruption, pollution, procurement fraud, financial fraud and occupational homicide inflict incredibly serious damage on workers, consumers, citizens and the environment.<sup>2</sup> Ruth Morris, a world authority on corporate crime, asks the question: 'Why on earth is a criminal justice system geared to sifting the poor and minor offenders, pretending it is dealing with crime and social harm, when all the major harm is being done by the hidden rulers of our world, the multinational corporations?'<sup>3</sup>

A major reason for this is the consistent presentation by the media of crime as being primarily personal. Through newspapers, radio and especially talkbacks, and in news and entertainment on television, crime is deliberately portrayed in manageable portions of murder, muggings, burglaries and theft, allowing the age-old notion of scapegoat full rein. We all sit back in our chairs and like to see the 'baddies' caught.

The public perception of crime is largely shaped by corporate media and tabloid television, which focus overwhelmingly on street crime, illegal drug use, robberies and theft. If these media devoted proportionate time to the corporate muggings and homicides that are carried out through fraud, unsafe products, usurious lending policies, pollution, occupational accidents and starvation wages, public perceptions would shift to reflect reality more accurately. This will never happen. The same big business people who perpetrate corporate crime control the media through colossal advertising budgets, cross-directorships and ownership.

Yet all over the world the politicians and this same media have foisted upon the public the notion that major welfare payments to the unemployed, the sick, the hungry and the homeless are unaffordable because they cost too much. Beneficiaries are often presented as parasites preying off the common purse. Benefit fraud is almost a *cause celebre*. People everywhere are being made to work for their dole money as if they were responsible for their own plight. Yet, for example, in the United States, tax breaks and handouts for the rich (\$448 billion) consume four times the amount that is spent on the poor through benefits (\$130



billion).<sup>4</sup> Legal it may well be, but morally, this is big crime.

We are left with the question: what is real crime and who are the biggest criminals? Until we start to focus on crime in its global corporate context and not restrict ourselves merely to the localised street version, we will never learn to identify and grapple with some of the biggest criminals in our society. And we will never create a society where the common good is achieved, where people are truly respected for who they are, where true justice prevails.

The early chapters in this book will look specifically at the abysmal failure of the retributive system to administer justice fairly. The latter chapters provide insights as to how other cultures and traditions have fared under a restorative system.

The law imposed by the English, wherever they colonised, was the law always of a conquering empire. The English did to others what the Roman Empire had attempted with them – imposed their own form of imperial law. In essence it was hierarchical and centralised. In criminal matters it was retributive in nature, vengeful and punishing in effect. The restorative indigenous law of Ireland, Africa, Asia, the Pacific and the Caribbean was crushed and replaced by the imperial law of empire.

This book poses a question to nations seeking freedom and independence from former colonial masters: should not the philosophy underpinning criminal law also be reviewed? If, as this book alleges, the retributive system of criminal justice imported with colonisation is proving to be as disastrous as the statistics demonstrate, should not a free and independent nation shrug off the worst of its features, particularly if a local indigenous model promised to work better?

This book argues that the very ancient but very modern system of restorative justice would produce much more benefit for victims, offenders and society generally. Our resources and energies would be much better spent following such a philosophy. Do we really want to live in fear of criminals and violence? Many do already. Insecurity and fear are the dominant factors in their lives.

But that need not be. There are other ways: better ways, more positive and constructive ways, ways that will heal the hurt and pain of victims of crime using holistic and creative means. Why carry all that pain for a lifetime when, if the opportunity were provided, it could be dealt to and integrated into our lives? The results would lead to healing and peace of mind and a resumption of normal life.

It cannot happen under the present retributive criminal justice system. It could happen for many under a restorative one.

## Footnotes

1. Howard Zehr, *Justice: the Restorative Vision*, Mennonite Central Committee, US Office of Criminal Justice, 1989
2. Russel Mokhiber, *Multinational Monitor*, December 1993
3. Ruth Morris, *From Misery Justice to Transformative Justice*, paper delivered at ICOPA Conference, Auckland, March 1997
4. Mark Zepezauer and Arthur Neiman, *Take the Rich Off Welfare*, Odionian Press, Tucson, Arizona, 1996

SECTION ONE

# Retributive Justice

Each year jails take large numbers of hopeless people  
and turn them into bitter hopeless people.

*Time*, 28 June 1993

## CHAPTER ONE

# Retribution: A Dead-End Street

Wayne, one of four children, was only five years old when he first got into trouble. He ran away from home and hid in a vacant house from which he stole some food. His drug-addicted mother had already had a child die at birth and another from a preventable disease at three years of age. His father, also an alcoholic drug addict, had recently returned from yet another term of imprisonment for violent assault, burglary and assorted drug offences.

When I was called to the house, Wayne was in his bedroom crying from the hiding his father had given him. His parents were anxious about how to keep him at home in the future. His thrashing wasn't an issue with them – that was the way they usually dealt with the children when they were naughty. In their own way they really did care for him and realised that their own dysfunctional behaviour was largely responsible for his plight. They didn't really know where to turn for lasting help.

The family was caught in a vicious cycle of deprivation, violence and hardship, alleviated by drugs and alcohol when money allowed. The parents' solution to their own relationship problems was usually violent, either verbally or physically. Social Welfare's options were limited. They were, on occasion, appalled at the standard of lifestyle of the family, but rightly recognised the love, tenderness and bonding that was present when things were 'going right'.

At four years of age, Wayne's chances of a drug-free or jail-free life were already minimal. His models of adult behaviour all involved violence, drugs, alcohol, unemployment and struggle. While there were brief periods of real stability and joy in his childhood, they were few and far between.

There was no possibility of his mother becoming and remaining drug-free because there was no programme within 800 kilometres that could provide the means of her coming to terms with her addiction while remaining bonded to her children. The resources were simply not there. There were no social or community workers equipped to help her learn good parenting or support her on her 'bad days'. The only option she felt she had was to call social workers at the centralised