

## Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

### Aboriginal Legal Theory and Restorative Justice:

#### Part Two

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*Editor's note: The following is the second and final part of Mr. Guest's article "Aboriginal Legal Theory and Restorative Justice". Part one appeared in the Spring 1999 issue of Justice as Healing (vol. 4, no. 1).*

The use of restorative approaches gives the offender the experiences of the victim. The building of connections between the actions of the offender and the consequences of those actions upon the victim, the victim's family, the victimizer's family, the community and all his/her relations is a necessary part of the learning process. Only when the offender understands the full extent of the consequences of their actions will thoughts equivalent to a conscience enter into an offender's risk profit analysis. These aspects of teaching, inculcation, or brainwashing are important elements in the individual development of an internal moral code. "Being your own person" reduces crime. The intensification of an external legal code cannot reduce crime to the same extent that a self-policing moral code can.

Teaching is the distinguishing point between defining a person acting badly and a bad actor. Whether it be in the Aboriginal or non-Aboriginal community, a person may act upon false presumptions in new situations and disturb the ethos of the community. The distinguishing point, in how these two distinct communities would dispose of this type of case is stark. The mistake would be recognized within the Aboriginal community. The lack of knowledge shown by the victimizer would be addressed and reparations would be made. Within the existing criminal justice system there is no middle ground between guilty and not guilty. "I did it, but ..." is not a plea but an admission of guilt carrying the full weight of the prescribed punishment. "I didn't know ..." is sure to receive a rebuke of "ignorance of the law is no excuse." The existing criminal justice system is malignant and completely incapable of teaching without first inflicting harm. The use of mitigating circumstances in sentencing or even the use of alternative sentencing does not mitigate the use of coercive force. Abuse is not a proper precursor to learning and healing; respect is. It seems an oxymoron to state, "I sentence you to heal" and is reminiscent of an exorcist crying "I cast the devil out of you." The difference between the two systems is too great for the implementation of restorative justice principles to become fully effective. There first needs to be a realization that the existing criminal justice system is a failure. Secondly, that people who commit crime can be characterized by: (1) lack of knowledge; (2) not acting with consideration of others; or most seriously, (3) not being capable of acting with consideration for others.

All three types of criminals are capable of learning, but, in the case of career criminals, predatory criminals or psychopaths this approach may not work and these criminals may be bound to repeat their crimes. However, it could be argued that the criminal justice system also fails in the same regard. How do you protect society from those without consideration for other people. If you can not teach people to respect and empathize with others then incarceration may be necessary as a replacement for the Aboriginal practice of banishment. In fact, public safety may be the only legitimate use of incarceration. The public safety concern leading to incarceration would have to be predicated on the subjectivity of the individual victimizer and not under the principles of a uniform external legal code.

The attempt to institutionalize restorative justice approaches within the existing criminal justice system have unveiled several problems that warrant close scrutiny. Restorative Justice processes are holistic approaches to problems of conflict. The use of Restorative Justice processes within the linear criminal justice system present problems where these processes are used in inappropriate situations. This is not the

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typical excuse of “oh that can’t work in that situation.” In fact I advocate that within a Aboriginal justice system every type of situation can and should be addressed using restorative justice approaches. However, the use of a restorative justice process within the linear criminal justice system raises issues regarding the level of coercion or the size of the stick being placed above the head of the victimizer. This sword of Damocles defeats the open, honest and respectful discourse sought by invoking the use of the Restorative Justice holistic processes within the criminal justice system. Victimizer, victims and communities cannot hope for resolution of their problems when the constant threat of incarceration chills the air. When an offender opens his/her mouth, they forego the institutionalized safeguards protecting them from the full coercive effect of the criminal justice system. The use of a family group conferencing is probably inappropriate after a charge has been laid. The use of a sentencing circle is inappropriate where there exists the chance that the recommendations of elders and community members will not be respected by the judiciary. The use of Restorative Justice principles is inappropriate where the actors within the criminal justice system are not knowledgeable in the process or lack confidence in the use of the process; either results in a danger that the process will be incapacitated.

Where the use of Restorative Justice processes within the criminal justice continuum is most appropriate must be carefully considered. There remains the real danger that reforms in the area of restorative justice will be a simple repackaging and relabeling of the existing criminal justice system. That these attempts will be used to deflect criticisms levied against the criminal justice system by the many reports and commissions. And that these attempts at reform will come to be embodied within statistical data used to “prove” that restorative justice doesn’t work.

The most appropriate place for Restorative Justice processes remains to be within separate aboriginal justice systems existing within Aboriginal communities. The diversity of Aboriginal cultures makes it difficult to generalize to this extent. However, for the purpose of this short and robust article I will simply state that Aboriginal societies are marked by a horizontal social structure. (Rupert Ross. *Returning to the Teachings*. pg.123) The use of offender and victimizer are often used interchangeably; but each is different in the center points of their address. The use of the word offender highlights the person who has created outrage because their act is judged to have transgressed the moral or legal code of society. This implies the action of the individual in the context of judged expectations. The central concern with the use of the word offender is the lack of acknowledgment for the victim. The very terminology of the criminal justice system ignores the victim and instead concentrates on the offense of a code. The use of the word victimizer centers the concern around the victim. The victimizer is linked in an unhealthy and destructive relationship with the victim. The length of the relationship may only be of short duration but its destructive effects can have great longevity and dire consequences. This words victim and victimizer complement each other and highlight the creation of an imbalance; an imbalance that must be addressed by the victimizer. The use of the term victimizer highlights an important distinction between the two systems and is the more appropriate term when discussing the restorative justice. (Rupert Ross)

This is a distinguishing point in the use of language. The difference between the statement, “X is good”, and the statement “I think I liked X” portrays the difference in the use of language between Aboriginal people and non-Aboriginal people. The former statement, while more powerful, leaves no doubt and little room for another opinion. The latter opinion suggests a preference of the individual and invites other opinions without the potential for confrontation.