

Punishment should fit  
the crime not the  
criminal



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“Tough on Crime” is one of the continuously fashionable slogans to be heard from politicians and police by the public throughout the world. The slogan creates connotations and inflames debate throughout the justice system. The result for the criminal justice system is as predictable as it is inevitable. Everything in the world has a context. This essay, using the juvenile justice system as evidence, takes its departure from colonisation and presents a journey that pragmatically adjusts the focus of the system from the crime to the offender’s characteristics and circumstances. This assignment looks .....

In pre colonisation times, Maori justice would look to an offender’s whanau for the reasons and responsibility for their offending.[1] In this model offending was not based on the crime or the offender individually but rather looked to the balance of the relationship between the communal groups. The approach was victim centred requiring the offence and subsequent punishment to be determined from the victims’ perspective. These values and practices were oppressed as part of the Maori assimilation into the coloniser’s legal system for 150 years until the enactment of the Children, Young Persons and Their Families Act in 1989, which revolutionised the judicial response to youth offending by reintroducing the restorative justice model.

## **Crime Control Model**

Packer described the purpose of the crime control model as “repression of criminal conduct [i]as by far the most important function”.[2] The theory is informed by the belief that if crime is not dealt with then a general disregard of laws will develop which will lead to a diminishing of security of freedom

and property rights.[3]In this context the crime control model was tasked with providing society an assurance of personal and property liberty.[4]

To do this there was a focus on the crime committed rather than the personal circumstances of the offender. However in 1840 New Zealand received the common law from the UK. The common law had developed over a long period that the conduct of those who did not appreciate the wrongfulness of their actions should be excused.[5]Offenders younger than 7 years old, as a conclusive presumption, were held to be incapable of committing crime (doli incapax). Until a person reached the age of 14 years old there remained a rebuttable presumption that they lacked criminal capacity. After attaining the age of 14 an offender was responsible for their criminal actions. In 1974 the NZ legislature defined the age below which there is no criminal responsibility to be 10 years old. The age a youth can be prosecuted was maintained at 14 years.[6]

## **UN Convention of Children**

Punishment should be in keeping with a child's age because of their "vulnerability to harm, their more limited understanding of the world and their greater susceptibility." [7]

140 signatories representing 193 parties [8] make the United Nations Convention on the Rights of The Child (UNCROC) the most ratified UN treaty ever. As of January 2011, all countries of the UN except Somalia and the United States have ratified the Convention. [9] The convention promotes the idea of special protection for children in trouble with the law. [10] The convention defines a child until they reach 18 years old. [11]

In 2003 the UN committee on the rights of the child recommended that NZ raise the minimum age of criminal responsibility to an internationally acceptable level.[12] In October 2010 the Legislature widened the jurisdiction of the Youth Court to allow prosecution to include 12 and 13 year olds who commit serious offences.[13] The majority of the Select Committee in their report to Parliament considered

with its specified principles and objectives, diversionary nature, and family based decision making processes, would still ensure that 12 and 13 year olds would be dealt with appropriately to their age.[14]

However the Human Rights Commission submission to the committee considered

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (' Beijing Rules') consideration of whether a child can live up to the moral and psychological components of criminal responsibility. That is, whether a child by virtue of his or her individual discernment and understanding can be held responsible for antisocial behaviour. If the age is too low or there is no limit at all, the notion of responsibility becomes meaningless.

Only a minority of young offenders in New Zealand (those arrested and charged) experience a court process. The youth court, which replaced the Children and Young Persons Court in 1989, is a branch of the district court and deals only with young offenders. Its procedures and practices are modified somewhat, but generally speaking it is run in much the same way as the adult criminal court except that it is closed to the public. All young

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people appearing in the youth court are represented by a lawyer (youth advocate), and, as noted above, judges cannot sentence young offenders without referring them first to a family group conference. In accordance with the philosophical underpinnings of the 1989 act, judges are expected to endorse the recommendations of the family group conference wherever possible. They are also expected to try to involve young people and their parents in the court processes and decisions, and to avoid the use of court orders unless absolutely necessary (McElrea 1993). Their role, therefore, is very different from that of judges in conventional adult and youth courts.

## **Welfare Model**

form in the nineteenth-century debates about the establishment of separate institutions and courts for juvenile offenders. 1 The 'child savers' sought to pro-

mote the welfare of children by diverting them from the heavy-handed criminal courts, the more formal court procedures, and contaminating goals.

At the same time, reformers sought to divert 'pre-delinquents' from a career of crime, by inculcating 'appropriate' moral and religious values in children.

In particular,

Youths deemed to be adults because of crime committed

Uk James Bolger

## **Justice Model**

Due process

Legal rights

Europe

## **Diversion Model**

Liberal

## **Mediation & Restorative Model**

Involves Victims

Liberal

## **Welfare model**

One of the less obvious shifts away from a welfare model occurred

in New Zealand during the latter part of the twentieth century. The

New Zealand youth justice system is notable in large part because of

the emphasis that has been given, since 1989, to conferencing as a way

of resolving cases involving youthful offenders. Though conferencing

may not be seen as a "tough" response to youthful offending, its orientation

is clearly some distance from a welfare-intervention model. The

focus of a conference is more than simply a focus on the child

Youth crime is an attractive territory for political opportunism since

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tough legislation (e. g., the automatic processing as adults of youths who murder, or mandatory sentences for very serious violent offenses) can be enacted with relatively few political or financial costs. Few people- or at least few of those who appear to influence political agendas-view tough youth crime measures as being tough on youths. Instead, they are seen as being tough on crime. But tough youth crime measures have another political advantage. Compared to legislative changes that affect sentencing generally (e. g., three-strikes laws for adult offenders), a shift from a welfare orientation to a tough offensebased system for the most serious offenders will not be likely to affect many youths and, therefore, will not cost a great deal.

and New Zealand family group conferences, which do not proceed on the basis of an admission of guilt, but on the basis of the defendant “ declining to deny” the allegations. It is possible that the New Zealand approach is more just in this respect.

Restorative justice has been defined as “ a process of bringing together the individuals who have been affected by an offense and having them agree on how

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to repair the harm caused by the crime," with the goal of restoring victims, offenders, and communities in a way that all stakeholders agree is just. 30

The

system is based upon the recognition that crime harms individuals (victims) and

relationships (the victims' and offenders' respective communities).

The restorative justice model is often defined in opposition to the punitive model. 31 In contrast to the United States justice system, which is designed to

establish the culpability of the offender and to exact an appropriate punishment,

the aim of restorative justice is to establish accountability for the harm, promote

mutual understanding of its causes and effects, and develop a process to make

amends. 32 In the restorative justice paradigm, the offender is not ordinarily incarcerated, but instead is obligated to apologize and otherwise compensate the

victim, ideally receive forgiveness, and be reintegrated into the community.

33



30 John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46

UCLA L. REV. 1727, 1743 (1999).

31 See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*,

25 CRIME & JUST. 1, 4 (1999).

32 Howard Zehr, *Restorative Justice: The Concept*, CORRECTIONS TODAY, Dec. 1997, at 68,

68-70.

New Zealand adopted legislation in 1989 based on traditional Maori conflict resolution practices that emphasized the direct involvement of the family and

community of juvenile offenders in developing a plan to rehabilitate them through

“family group conferencing.”<sup>38</sup> The primary function of family group

conferencing was to decide whether to prosecute the offender and to decide about

custody arrangements or alternative sanctions.<sup>39</sup> Under the new law, diversion of

juvenile offenders to family group conferencing reduced the number of cases

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going to court by approximately 80% and cut juvenile incarceration by half.

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38Strang, *supra* note 35, at 4.

39Mark S. Umbreit et al., *Victim Impact of Restorative Justice Conferencing with Juvenile*

*Offenders: What We Have Learned from Two Decades of Victim-Offender Dialogue Through*

*Mediation and Conferencing* 9 (July 16, 2001), available at

<http://ssw.che.umn.edu/rjp/Resources/Documents/VICTIMSA.MON.pdf>.

40Ctr. for Restorative Justice and Peacemaking, Univ. of Minn., *Fact*

260 Allison Morris

*TV. Conferencing in Practice*

Since enactment of the Children and Young Persons Act of 1974, New

Zealand has distinguished between the age of criminal responsibility

(ten) and the age of prosecution (fourteen).<sup>38</sup> It also distinguished between

children (those aged less than fourteen years) and young persons

(those aged fourteen and under seventeen) and used different procedures

for these two groups when they committed offenses. Children

who commit offenses are now dealt with under the care and protection provisions of the 1989 act, and young persons who offend are now dealt with under the youth justice provisions of the 1989 act. This essay relates primarily (but not solely) to those aged fourteen and under seventeen, but first I provide a brief description of what happens to children under the age of fourteen.

Section 14 of the 1989 act defines the range of situations in which a child or young person is in need of care and protection and includes the child who has committed an offense or offenses “ the number, nature and magnitude of which is such as to give serious concern for the well-being of the child” (sec. 14[e]). The type of interventions such children can experience are similar to those that young persons who offend might experience-for example, a police warning, police diversion, or referral to a family group conference. And so what I say later about each of these applies to children who offend as well as to young persons who offend. However, the focus of this intervention tends to be different: where children are involved, the focus is intended to be

the child's welfare rather than the child's accountability. As a last resort and if lesser forms of intervention fail, an application can be made to the family court for a declaration that such a child is in need of care and protection. This has the effect of placing the child in the state's care.

From the age of seventeen, young people who commit offenses are dealt with in the same manner as adults, that is, in the district court or, if the offense is serious, in the high court. The youth court can transfer other cases involving serious offenses (e. g., arson and aggravated robbery) to the high court. There is also provision for the youth court to transfer offenders to the district court, depending on the seri-