

**John Braithwaite**  
*Restorative Justice and Responsive Regulation*

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The traditional approach to criminal justice faces the challenge of balancing multiple goals – usually expressed as deterrence, incapacitation, rehabilitation and retribution – that focus on crime control. In his book, Professor John Braithwaite seeks to advance the importance of restorative justice and responsive regulation in answering several significant questions that classical criminal justice models and assumptions leave unanswered.

In the preface he opens with the postulation that restorative justice involves a different kind of thinking about traditional notions of classical criminal law theory. Professor Braithwaite undertakes a rather onerous task. Not only does he seek to address the shortcomings of criminal justice within the domestic sphere, he also seeks to address corporate crime, world peacekeeping and sustainable development.

The merits of restorative justice are laid out with the key appeal lying in victim empowerment. The deficiency of ‘mainstream’ justice is the fact that the victim in many ways does not have control over the process. Professor Braithwaite notes that the scepticism relating to restorative justice seems anchored in the fact that it prescribes broad standards but notes that this is important to avert a legalistic regulation of restorative justice.<sup>1</sup>

He notes that indigenous communities, specifically Native American communities,<sup>2</sup> seek to institutionalise equality rather than hierarchy and thus put the problem in the centre, not on the person, a very important dimension in restorative justice. In tackling the question of responsive regulation, Professor Braithwaite asserts that the hard question is how to

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<sup>1</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 15.

<sup>2</sup> *Ibid* 25.

decide when to punish and when to persuade. He advances the view that the responsive regulatory pyramid<sup>3</sup> is an influential policy idea. A strong argument is made for the fact that regulation is seen as more legitimate and procedurally fair if less coercive social control mechanisms are tested first. He argues persuasively that restorative justice works best with the spectre of punishment in the background but never threatened in the foreground.<sup>4</sup> This is all the more forceful as it is backed by empirical evidence gathered from various studies and restorative justice activities.

In operationalising victim restoration, Professor Braithwaite delves into a range of empirical studies. The key element that I isolate is that restorative justice provides an important avenue to meet the emotional needs of victims, which in normal adversarial proceedings does not happen. Prosecuting a case in violation of the rules just to obtain a conviction may not necessarily satisfy the victim. It is important though that restorative justice processes not be elitist in order to facilitate a rich dialogue among victims and offenders on why the law is important.

Professor Braithwaite draws on a wide range of scenarios ranging from nursing home regulation and corporations to drink driving. The choice of scenarios is rather divergent but Professor Braithwaite supplies the golden thread – restoring victims, offenders and communities. Classical criminal law theory has almost exclusive focus on the actor but this does often obscure the structural reality that underpins the actors conduct. For crimes to be crimes, there must be individual acts, but the way in which individual guilt is managed is an important but often forgotten aspect of the criminal justice process.

Chapter 4 advances a set of theories aiming to explain why restorative justice works and is superior to classical criminal justice models. The recognised punishment objectives of a court system fall within the generally accepted spectrum of deterrence, retribution, rehabilitation and incapacitation. However, these premises leave open questions that the pragmatic advances of restorative aspects on the overall criminal justice strategy seek to answer. Under various heads – shaming theory, defiance theory and self-categorisation – the notion of classical criminal justice that persons commit crimes when the expected value of doing so exceeds the cost of punishment is put under the microscope. Social values can help reinforce the rational, utility-maximising actor.

Restorative justice, it is argued, facilitates removing crime prevention from its marginal status in the criminal justice system and mainstreaming it into the enforcement process. 'Restorative justice has the making of a better theory of crime prevention than the situational crime prevention tradition.'<sup>5</sup> The key issue is 'shame in the eyes of those we respect and

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<sup>3</sup> Ibid 31.

<sup>4</sup> Ibid 35.

<sup>5</sup> Ibid 73.

trust.<sup>6</sup> Professor Braithwaite cautions that modern societies (especially Western societies) are not 'places with the interdependence and community to allow the experience of shame and reintegration to be a reality.'<sup>7</sup> Nonetheless there is room for the idea of integrative shaming to be communicated within a continuum of respect for the offender.

The liberal vision of reducing crime by attacking its social causes is important. The characteristic self-righteous tenor of 'just desserts' hides shame behind impersonal rhetoric about technical culpability.<sup>8</sup> A wider social net can facilitate the negative aspects of an offender's conduct to get through to concerned third parties and rebound back to the offender in a positive manner. The issue of rehabilitation, the centrepiece of classical criminal justice is addressed. It is noted that though rehabilitation is a laudable aim of mainstream criminal justice, its stance robs it of spontaneity and engenders reactance. Restorative justice is more act-focused and less focused on the offender as a person, more victim-focused and less offender-focused, meaning that the process is less stigmatising and more dignified for the offender. 'Plural understandings of a crime problem are needed to stimulate a disparate range of action possibilities that can be integrated into a hedged, mutually reinforcing package of preventive policies.'<sup>9</sup>

Whether the offence is tax evasion or drink driving, deterrence theory presupposes a rational, utility maximizing actor. The key problem with this premise is that it can be dangerously misleading. It is argued that the reason big sticks rebound is to be found in the psychology of cognition as well as the psychology of emotion.<sup>10</sup> 'Disinterested gatekeepers' ought to be harnessed, especially in the realm of corporate crime. Perhaps there is no greater canard than the idea that punitive justice provides needed therapy for individuals, and that nothing assuages anger or restores dignity like 'classical' punishment. Restorative justice identifies with the importance of looking at a crime as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves. Dialogue among a wider range of citizens beyond the offenders themselves means that the ripple of general deterrence spreads out more widely.

In Chapter 5, Professor Braithwaite tackles the concerns about restorative justice. From a conceptual point of view, Professor Braithwaite makes strong cogent arguments, but I fear the economic dimension is perhaps not dealt with at sufficient length. Restorative justice, though meritorious, may perhaps present society with a much larger bill! I also have a problem with Professor Braithwaite weaving in between the worlds of business and inter-personal conflicts in society.

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<sup>6</sup> Ibid 74.

<sup>7</sup> Ibid 77.

<sup>8</sup> Ibid 81.

<sup>9</sup> Ibid 100.

<sup>10</sup> Ibid 105..

In Chapter 6, Professor Braithwaite takes the large leap to the international arena arguing about world peacemaking and the benefits of restorative and responsive regulation. The efforts of Metternich and Castlereagh are noted but caution is given of the differences between contemporary world order and post-Napoleonic Europe in which these diplomats operated. In the context of international relations I am tempted to disagree marginally with Professor Braithwaite and instead advance the opinion that perhaps Theodore Roosevelt was right – speak softly but carry a big stick – people will listen and listen carefully. The weakness of Professor Braithwaite’s arguments is that they seek to cover an expansive and complex field rather lightly. This is not helped by the fact that he touches on such divergent issues – drugs for the population, donor relations, civil wars – losing Braithwaite’s postulations.

I am afraid that I consider Chapter 7 on sustainable development rather difficult to anchor in the overall scheme of the book. I fail to make the linkage between world peacemaking and sustainable development as I understand it. I see the chapter on sustainable development as the weakest link in Professor Braithwaite’s book. Nonetheless, eloquent arguments relating to youth development, enriching civil society, the matter of corruption and tax integrity are made. I concede that corruption is an issue in sustainable development, but then it is thrown in with a hodge podge of other ideas that stretch sustainable development far too wide and render the chapter weak in structure.

In concluding, Chapter 8 reaffirms the importance of justice at an individual level in promoting social order. The notion of accountability operates at three levels – literal, organizational and social – it is important that mainstream justice takes this into account in developing strategies. Attention needs to be paid to how restorative justice can be integrated into the criminal justice system. Its importance lies in behavioural, material, emotional and cognitive outcomes for victims, offenders and societal members. Overall the book is an interesting read full of dynamic well-presented ideas on restorative justice. Professor Braithwaite’s extensive research and work in the field shines through strongly.