



Towards a

Restorative

Society

a problem-solving response to harm

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This pamphlet is published by Make Justice Work as a contribution to debate. The views expressed are not necessarily those of MJW.

TOWARDS A RESTORATIVE SOCIETY

A problem-solving response to harm

Martin Wright

Take a room full of people, describe a crime, give some information about the offender, and ask them what sentence they would impose. You can be sure that their answers will vary widely. Even among judges or magistrates there would be considerable differences. If you go to different parts of the country there will be further discrepancies, and still more if you go to another country. The answers you get now will be very different from, say, 15 years ago. In a word, there is no such thing as the 'right' sentence.

The reasons for this are clear, yet there has been little discussion of them. The first is that there is no rational basis for the length of any sentence except by comparison with other sentences, and the second is that sentencing has multiple intentions which are incompatible with each other. There is no way of measuring the precise seriousness of a crime, nor the precise pain caused by a punishment, and even if there were, there is no logical way of relating one to the other (Wright 2008b: chapters 5, 6). For some, according to an old judicial cliché, the 'clang of the prison gates' is enough to deter them; for others, surviving a 'tough' sentence is a proof of their own toughness. The same sentence will have a very different impact on different people, depending whether they are sent to an ancient, a modern or an open prison, whether they have a supportive family, a family that wants to be supportive but cannot afford visits – or none.

The other major failing of the current criminal justice system is that it is centred on the offender; its procedure ignores victims or even mistreats them. There have been recent attempts to improve their treatment, but they have not addressed the basic problems. Some recent legislation has fallen into the trap of assuming that whittling away the safeguards for defendants is somehow in the interests of victims; politicians should remember that the conviction of an innocent person, just as much as the acquittal of a guilty one, lets the real perpetrator go free, which neither victims nor the rest of us want.

This pamphlet will consider, first, the confused logic on which present policies are based; second, measures that could make a difference within the existing range of policies; third, how a restorative approach could make a difference, with a look at objections and tensions as well as benefits; and, finally, how its principles could be put into practice throughout society, using a restorative theory of social justice.

Long-standing fallacies

The Palace of Justice in Brussels is a massive stone edifice, in an eclectic style, with hundreds of rooms and thousands of metres of maze-like corridors. To build it, many homes in the poor district known as Gibbet Hill were destroyed. The architect, Joseph Poelaert, had little previous experience but would discuss the project with no one but the Ministry of Justice. He refused to show his drawings to anyone, and the construction rambled on for many years, with no clear plan. He became mentally deranged and bedridden, and died while the work was still in progress. Is it unfair to suggest that this is an apt metaphor for the criminal justice system?



Figure 1: The Palace of Justice, Brussels

Rationales for sentences are a mixture. People, especially judges, speak of 'deterrent' sentences. The intention may be symbolic: to 'send a message' that certain acts are condemned; but condemnation on its own does nothing to increase our understanding of why crimes are committed, so that we can take action to reduce them. Some judges and magistrates intend prisoners to take part in rehabilitative programmes in prison, if any are available. Or it may simply be to keep the offender out of circulation. If Humpty-Dumpty had been a judge, he might have said 'When I pass a sentence, it means just what I want it to mean – neither more nor less.'

But we all know that on this side of Alice in Wonderland's looking-glass most ex-prisoners (67 per cent) re-offend, and the younger they are, the higher the rate at which they return. For 18–21 year olds, the reconviction rate within two years is 78 per cent, and for boys under 18 it is 82 per cent. How does this suggest that 'prison works'? The sentence length is irrelevant to a person who doesn't believe that he or she will be caught, or doesn't care. Many prisoners harm themselves, from frustration or despair. Only a small proportion receive training, education or therapy when they need it, and even fewer as prisons become more crowded; any beneficial effects are all too easily nullified by the effects of prison itself, and

especially by lack of support after release. The reconviction rate is even worse than at first appears, because every time a person is sentenced to imprisonment, the probability that he or she will reoffend is increased. For example, among adult offenders sentenced in the first quarter of 2007, 25.2 per cent of those with no previous custodial sentence re-offended. When they had one previous custodial sentence, the proportion jumps to 40.3 per cent, with two previous, 48.9 per cent, and so on until 76.4 per cent of those with 11 or more prison sentences offend again. For juveniles, the rate jumps from 36.2 per cent with no previous custodial sentence to 80.5 per cent with one previous and 89.1 per cent with more than six previous custodial sentences (Answer by Maria Eagle to Parliamentary Question by Rt Hon. Keith Hill MP, 29 October 2009).

Lord Justice Auld, in his review of the criminal courts (2001: 387), warned against regarding sentencing as a solution. He said that:

I have always been of the view that we expect too much of the courts as a medium for reducing crime, for remedying wrongs to victims and society and for rehabilitating individual offenders.

Despite this, when there are widely reported cases of a particular kind of crime, in no time politicians call for higher maximum sentences, and sometimes for a minimum sentence as well. Like wallpaper in a house developing cracks because of structural flaws, an increase in sentencing is both the easiest and the least effective way of dealing with the problem. It needs to be recognised that to react to current events, such as the use of mobile phones by motorists or the use of guns, merely by raising maximum sentences, is no more than a token response.

The essential point is that it is difficult to be clear about the multiple aims of sentencing. The *Criminal Justice Act (CJA) 2003*, sec. 142, defines the purposes of sentencing as:

- a) The punishment of offenders
- b) The reduction of crime (including its reduction by deterrence)
- c) The reform and rehabilitation of offenders
- d) The protection of the public
- e) The making of reparation by offenders to persons affected by their offences

David Blunkett, as Home Secretary, made it sound even simpler: his 'two very clear objectives' in dealing with street crime were 'to punish offenders and reduce re-offending' (*Reducing crime – changing lives*, 2004).

It is worth looking at another kind of crime, whose name, regulatory offences, disguises the fact that the effects on their victims can be just as serious as those of 'street crimes', including deprivation of property, injury and even death. Yet a review of 'better regulation' of these crimes concludes that a sanction should:

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance. (Macrory 2006: 11)

Thus the emphasis is on prevention, on depriving the offender of any advantage gained by the crime, and restoring the harm suffered by the victim where appropriate; punishment for its own sake is almost incidental. There is no clear reason why similar priorities should not be used for 'street crimes'.

There is a comfortable assumption that the aims set out by the *CJA* and Mr Blunkett can be combined: that while a person is being punished in prison he or she can undergo rehabilitation, and the public is protected. In fact these aims are contradictory. The more punitive, the less rehabilitative. Protection of the public is almost always only temporary, and prison incurs a high re-offending rate, just as a mortgage incurs interest. The greater the deterrence, the greater the lengths to which offenders will go to escape conviction. And so on. Psychological research shows that punishment simply does not achieve the intended aims, or at best only under certain conditions and for a short time (Wright 2008: ch. 2). The Home Office report optimistically entitled *Making Punishments Work* (Halliday 2001: §§1.62–1.65) concludes yet again that what primarily deters is the likelihood of detection; changes in the 'going rate' of sentencing for particular offences would not be justified. Professor Andrew Ashworth has also shown that any effect of a 'deterrent premium' in excess of the 'proportionate' sentence cannot be supported by criminological evidence. Many offenders are unlikely to deliberate rationally about probable penalties. In a word, 'the rhetoric of deterrence should be discarded' (Ashworth 2002: 872).

A basic problem is that the *CJA*'s first aim, punishment, is not really an aim, but a strategy intended to achieve other aims. It is essential to look at those aims and see whether they could be achieved by a method with fewer unwanted side-effects. One major aim is to symbolise the seriousness of the harm caused by the crime. This could be achieved more constructively by the amount of reparation that the offender makes. An extreme example is the former cabinet minister John Profumo, who resigned after admitting that he had lied to Parliament and spent the rest of his life making reparation for his errors through community service. To be sure, he did so voluntarily, but compulsory service is also possible, even for serious crimes. In South Africa, a woman who killed a young burglar but was unlikely to commit further violence, and who had four dependent children, was given a sentence of eight years' imprisonment

suspended for three years, on condition that *inter alia* she apologise to the victim's mother (High Court of South Africa, Transvaal Provincial Division, *State v. Maluleke and others*, CC 83/04). Another case was cited as a precedent, in which community service coupled with suitable conditions was imposed for homicide (*State v. Potgieter* 1994(1) SACR 61(a)).

We all know that many people are in prison whose offences and life histories make it absolutely the wrong place to send them. Many of them come from a grossly deprived background, and the help they need in overcoming this is much harder and more expensive to provide in prisons, especially overcrowded ones. Many are mentally disturbed, possibly as a result of previous prison experiences. Prison governors, who should know, have called for a reduction in numbers. Locking up fewer prisoners means that better prisons are possible. So it should be obvious that if prisons are overfilled with people like these, the way to relieve the pressure is not to build more prisons but to provide more suitable facilities in the community, or institutions designed to deal with such people. We know that many young people come from dysfunctional families and have missed out on school (Stephenson 2007); so how can their behaviour possibly be improved by disrupting their families still more and sending them to institutions which stigmatise them and provide little or no education? What is the point? Is it *likely* to make them want to behave better, or to enable them to do so? Prisons manufacture social exclusion, family break-up and homelessness. Most hardened criminals are hardened in prison; the place to learn how to behave in the community is the community. For the few who require institutional detention for the protection of the public, specialist facilities are needed; yet the government is doing the opposite, by converting Ashworth mental hospital into a prison. As the criminologists Lawrence Sherman and Heather Strang (2007: 12) have put it: 'the criminal justice system is itself a cause of crime – a cause on which government should be tough'.

This is the chaotic edifice of mixed messages and contradictory aims that has been constructed by Parliament and the courts. They are not the sole architects of this confusion: the courts have, although many would deny it, allowed themselves to be swayed by calls for 'toughness' from politicians, who in turn stand in fear of simplistic headlines and leaders in newspapers. To be fair, the judiciary has protested strongly on several occasions when the politicians have forced the judges' hand by legislation requiring minimum sentences, and they objected to the sentencing guidelines introduced under the Coroners and Justice Act 2009, which seem likely to increase sentences on those who need help rather than punishment. This lack of a principled policy is responsible for the record prison population, which in turn contributes to the high reconviction rate among those from whom prisons are supposed to protect us. In the last century the motto of the probation service was to 'advise, assist and befriend'; this was changed to the impersonal 'enforcement, rehabilitation and public protection'. Now the service has been combined with the Prison Department to form the bureaucratically named National Offender Management Service. This

terminology significantly leaves out the fact that behaviour depends on support and relationships, on the motivation inspired by encouragement and by trying to earn the good opinion of people you respect; it symbolises the pressure being placed on the service to move from a personal to a production-line mentality. The Austrian probation service has adopted the name 'New Start' (*NeuStart*): could we not find a similarly optimistic title?

However, the appearance of a conflict between politicians and the judiciary should be avoided: there should be seminars for judges, politicians and journalists to increase awareness of the limitations of sentencing and the need to look into more far-reaching ways of reducing social conflict. It is important to clarify the concept of 'punishment'. In its narrow sense of measures primarily designed to be unpleasant, it seems clear that the state is only justified in doing this to its citizens if it has been shown to be *more* effective, and to have fewer harmful side-effects, than any less damaging measure. Even if punishment passed that test, it comes up against the problem of fairness. Academic theorists assume the desirability – and indeed possibility – of 'sentence levels that are proportionate to the wrongs involved' (Ashworth 2002: 872). But if we take 'effective' to mean that the punishment symbolises the seriousness of the offence, first, there is no consistent way of measuring that (for example, is slight violence more serious than a big fraud?), second, there is no way of calibrating penalties to make them 'proportionate' (is a short prison sentence worse than years of probation or community service?) and no logical way of matching the one to the other (a given crime may be 'worth' one amount of punishment in one country and a quite different amount in another – or even elsewhere in the same country).

If 'effective' means preventing re-offending, or deterring others from offending in the first place, no one knows how much punishment it would take to achieve either of these, and to use more than necessary would be wrong. There is a moral problem about using one person as a 'scarecrow' to frighten others: as Lord Justice Asquith said 50 years ago: 'an exemplary sentence is unjust; and unjust to the precise extent that it is exemplary' (quoted in Wright 2008a: 191). Even if the right amount could be determined, it would conflict with fairness: for many desperate, petty offenders, only a drastic sentence would deter them, or it might even come as a relief from battling to live in an uncaring society, whereas for some major criminals, such as businessmen or lawyers tempted to defraud their clients, a high likelihood of conviction, loss of status and repayment of the stolen money would deter them at least as effectively.

No amount of sentencing advisory committees and the like can resolve these basic contradictions; as a result they have in effect given up the attempt to base the lengths prison sentences on their effects, and based them solely on an attempt to quantify the seriousness of the crime, a way of keeping the score. In a word, neither effectiveness nor fairness is achievable, and even less so if attempts are made to combine them. We need to clarify the aims that we are

trying to achieve, and think of the best ways forward. We cannot assume that the same measure can achieve all of these aims.

Clarifying the aims

The first aim should be prevention, which as Lord Justice Auld suggested is properly located in social policy rather than criminal justice, through policies that make crime less likely to occur; sentencing people *after* they have committed a crime is shutting the stable door after the horse has bolted. An important contribution to this could be the spreading of restorative practices such as peer mediation in schools, as will be described below.

The second, when despite preventive efforts crimes occur, is to offer assistance to the victim, if there is one and if he or she needs it. This can be done by Victim Support and other agencies; when the offender is known, victims will often welcome the offer of restorative measures such as victim–offender mediation, which give them the opportunity to express their feelings and ask the offender questions.

The third is to demonstrate how serious the offence was. It is done partly by the amount of help given to the victim, although this is not much publicised. The main focus is on the amount that is done to the offender, if he or she is identified, with the assumption that this will be something unpleasant. Years in prison are, as much as anything, units of disapproval, which could be expressed just as well, and more constructively, by the amount that the offender is required to do by way of reparation.

Fourthly, there is a need to try to persuade the offender not to repeat the offence, and others not to do so in the first place. Punishment is not necessarily the best way to do this, and in any case it depends not only on the sanction imposed, but on what comes after it: what opportunity the offender is given to be reintegrated into the community. There is a widespread idea that the way to do this is through being ‘tough’. To rely on deterrence is to assume that scaring people is the best way to persuade them to behave with consideration for others. Related to this is the aim of scaring potential offenders. It is a truism that the actual basis of deterrence is the fear of being caught; the likely punishment self-evidently only influences a person who knows what penalty to expect *and* believes he or she is likely to be caught *and* convicted, *and* cares about the consequences. Additionally, punishment has the serious weakness that it uses the very method that it condemns: the use of superior force to compel another person to behave in the desired way. The public is not so vindictive as is commonly assumed by politicians and the media.

Finally, there is physical restraint, which is only necessary where the crime was serious enough and there is a serious risk that the other measures would not be

adequate to prevent a repetition. It is usually assumed that this must mean prison, but for many kinds of offence and offender it would be enough to debar them, under supervision, from certain activities (driving a vehicle, running a company, working with children). Another problem is that most prisoners are eventually released, and there is, as we have seen, a risk that imprisonment increases the likelihood that they will re-offend. This risk can only be countered by improved regimes in prisons – difficult when they are overcrowded – backed up by support post-release. It is assumed that offenders are sent to prison as a punishment; instead, they could be sent there to make reparation.

If the third and fourth of these aims (symbolising seriousness and preventing repetition) can be achieved without the use of imprisonment, it does not seem sensible to use it. The obvious way is to use reparation instead. This would have the same effect of marking the *relative* seriousness of offences: sentences would be near the maximum for serious offences, reduced for mitigating circumstances, and so on. It would be combined with support in the community; reintegration would be easier because the person would be seen not just as an ‘offender’ but as a person who had made amends through a useful piece of work. Fines, similarly, would not be regarded primarily as punishment, but as reparation to the community for the harm caused; and compensation to the victim would take precedence (as is supposed to happen at present). Although we do not often look to Russia for ideas on penal reform, we might consider, for offenders who have jobs, the idea of ‘corrective labour’, by which the offender keeps his job and pays a proportion of his salary for a period of time (Russian Federation, 1999, article 50). For offenders with personal problems which made it difficult to comply, taking part in suitable treatment and training would be regarded as a valid part of the reparation.

Making a difference now

It seems clear that on practical and financial grounds, as well as ethical ones, there is no justification for sending people to prison unless this can be conclusively shown to be *more* effective in reducing crime and affirming society’s norms than other sanctions. Hence one does not have to be an abolitionist to call for a moratorium on further prison construction until there are enough community service placements, treatment facilities for addiction or mental illness, and other necessary facilities. No court should send an accused person to prison because the right treatment or community sanction is not available outside. In this, as in so much else, we could learn from New Zealand. Far from trying to bring more young people to court, the law there lays down that criminal proceedings should not occur if other methods of addressing the problem are available, measures that address offending behaviour should strengthen the family, sanctions should involve the least restrictive alternative, and should take heed of the interests of crime victims (New Zealand 1989, quoted in Immarigeon 2004: 145–6).

There are numerous projects for different kinds of need; they should be maintained and new ones developed as required. After a spell of pessimism in the 1970s and 1980s, more recent reviews of research have found that community-based programmes can show a substantial reduction in reconviction rates – notably the comprehensive study of alternatives to prison by Professor Sir Anthony Bottoms and colleagues (2004). Effective programmes build on participants' strengths, with a problem-solving approach, and the development of relationships characterised by openness, warmth, enthusiasm, directiveness and structure (Raynor 2004). It is encouraging that there is greater 'judicial continuity': more judges and magistrates are taking an active interest in what happens to the person whom they have sentenced.

There should also be a review of past projects which were successful but were terminated because funding came to an end. Adequate funding should be guaranteed as long as the project is working effectively. (The question of monitoring 'effectiveness' needs to be addressed.) Three examples: a project in Marylebone, where a coffee stall was used to attract 'unattached' young people and make a relationship with them. Because the funding was time-limited, the last few months had to be spent trying to find other people or groups with whom the young people could make contact (Goetschius and Tash 1967). The Wincroft Youth Project developed programmes to work with 'maladjusted and delinquent' young men (as they were then referred to), largely by enabling them to run the project themselves. There were fewer reconvictions, as compared with borstal (young offender institution), but this project also was funded for a limited period (Smith et al. 1972). A programme of a different kind was carried out by Social and Community Planning and Research (SCPR) and the National Association for the Care and Resettlement of Offenders (now known as Nacro) in the Cunningham Road Housing Estate in Widnes, Cheshire. Instead of holding public meetings, which tend to attract a self-selected group of people, they asked one household in every eight to provide a 'consultant', who was paid a small fee. The focus was not only on crime but on 'incivilities', and the researchers used their status to get senior people from local agencies to come and hear for themselves what life on the estate was like. Long-neglected repairs were carried out, people got to know each other, and a residents' association was formed. Vandalism went down and the quality of life improved (Hedges et al. 1979).

Existing measures should be re-examined, and the ways in which 'success' is measured. For example, if anti-social behaviour is seen as a problem, the aim should obviously be to stop the behaviour; making an Anti-Social Behaviour Order (ASBO) is not necessarily a 'success', especially as about 40 per cent of them are breached. Many cases should first be referred to mediation, where the alleged troublemakers can give their account of events; it is often found that the complainant has also not behaved well, and both can agree about their future behaviour. If necessary a more formal 'acceptable behaviour contract' can be made. Both these agreements require the consent of the person concerned, and are therefore more likely to be kept; they also cost much less than an ASBO.

Similarly, there should not be a target of maximising the number of cases brought to court, if diverting them out of the system could resolve them to everyone's satisfaction.

'Transferable funding'

What sentencing can do is to refer offenders to programmes suited to their needs, if this has not been done at an earlier stage. Under the present system we have a nonsensical situation: many offenders have mental health needs, for example; but because suitable treatment is not available, courts feel obliged to send them to prison; prisons become overcrowded, but instead of providing the mental health facilities, the government says that the courts in their wisdom have created a need for prison places, so more prisons are built. Money saved from building and running prisons could be devoted to, among other things, projects designed to meet particular needs that had been identified among offenders. A project designed for this purpose, meeting specific criteria, especially built-in evaluation, would be funded to an adequate standard to give it a fair chance of proving itself. If a project is working well after (say) two years, it should be able to apply for 'exemplary project' status: with guaranteed funding for (say) five years, including an allowance for publications, and for staff time required for explanations to visitors and training for those who wish to start similar projects.

Why isn't it done? Bureaucratic sclerosis prevents funds from being transferred. It is well known that prison creates at least as many problems as it solves, and costs much more than most alternatives (each new prison place costs £100 000, and running costs currently average about £40 000 per prisoner per year). A major problem in changing to alternatives is that they are funded from a different source, so that money saved on prisons is not transferred to meet the extra cost incurred by the agency running the preferred programme. Jon Fayle, formerly head of policy, juvenile secure estate and demand management at the Youth Justice Board, has pointed out that a child in care can cost a local authority a lot of money, which the authority can save if the child is transferred into the youth justice system; but if the cost still had to come from the same budget, there would be a financial incentive to look after the child in the community (Fayle 2007).

Similarly with adults. At a time of public spending cuts, it makes no sense to demand savings across-the-board, when a small increase in probation could produce much greater savings in the prison budget. In a borderline case, if a probation officer writes a pre-sentence report recommending a non-custodial programme and the court accepts it, the probation service has to deal with the individual but receives no extra resources for doing so.

This could be overcome by a transfer process:

- a) Probation officers preparing pre-sentence reports (PSRs) study their caseload to identify a recurring local need, e.g. treatment for drug or alcohol addiction, anger management, literacy, accommodation, mentoring, vocational skills.
- b) The probation service locates or establishes a programme for individuals with this type of need.
- c) Where appropriate criteria are met (to avoid unsuitable referrals), PSRs recommend a non-custodial sentence including participation in that programme.
- d) For each person by which the prison population is reduced, a sum of up to (say) three-quarters of the average annual cost of a prison place is transferred to the programme, and one-quarter is used for crime reduction programmes. As the funding is not new but transferred, this protects against 'net-widening' (drawing more people into the criminal justice system).
- e) Independent researchers monitor the programme to ensure that only appropriate cases are referred, and that the recidivism rate is no higher than that of prison.

This encourages probation officers to plan new projects to meet local needs, and it has been found that there is a tendency for programmes to achieve better results when they are new (Raynor 2004). Given the current average annual cost of a prison place, every reduction of 1 000 in the prison population would free up to £40 million for transfer in this way (perhaps less at first, because some would be required to reduce overcrowding). Before long, the prison population could be reduced sufficiently to allow prison wings or whole prisons to be closed, or planned prisons (especially the misconceived and widely criticized 'Titan' prisons) to be cancelled. The incentive for probation officers is job satisfaction, including a more personal relationship with their clients, and improved promotion prospects. Offenders would have the incentive to show that they can respond to the trust placed in them. This system was demonstrated in California in the 1960s; over a five-year period from 1966, \$96 million worth of prison construction was cancelled, and institutions closed, or never opened after being built, saved a further \$90 million. The expenditure on the probation subsidy programme, as it was called, was \$60 million, and the net saving over five years was therefore \$126 million at 1960s prices (Wright 2008a: 152–6): It is important that the sums transferred keep pace with inflation.

If a programme is introduced at the beginning of a financial year, and transfer payments made promptly, it is possible for the start-up costs of the programme to be refunded before the end of the financial year.

Another method aiming at a similar result is known as 'Justice Reinvestment'. It has been pointed out, for example, that in one area (Southampton) the cost of imprisoning 241 offenders in one year for an average of 2.6 months would have paid for 370 people to go on a 12-week residential drug rehabilitation course. But

if the local authority fails to pay for the latter, the centrally funded prisons have to pick up the bill. It is therefore suggested that all costs should be borne by the same local budgets; some of it could be used to raise material and social standards in the most deprived areas from which, at present, the greatest numbers offend and are sent to prison (Allen 2007: Ev 71; Allen 2008).

Media

Tabloid headlines on the lines of 'We must be crazy: burglars who ruin our lives just get a ticking off in soft-touch Britain' (*Daily Express* 15.4.2006: 1) are all too familiar, and it is more serious when a newspaper with a more educated readership takes a similar line. Launching a 'Make Britain Safe' campaign, the *Sunday Telegraph* (25.6.2006) published a four-page supplement including an article by Dr David Green, director of the think tank Civitas, recommending that we 'solve the problem' by doubling the prison population and locking up persistent young offenders for a minimum of 12 months (p. 18). Professor Bottoms (2004: 66) points out that Civitas has quoted selectively from research evidence, omitting important and generally recognised points, for example that the greater certainty of being caught and convicted has a greater deterrent effect than increased severity of punishment.

Some sections of the media are guilty not only of circulation-chasing headlines, but also of mental laziness, in promoting without question the assumption that 'toughness', such as naming-and-shaming and imprisonment, is the best way to promote social cohesion, and that non-custodial sentences are a 'let-off', allowing the offender to 'walk free'. It would be helpful if judges who impose constructive sentences instead of punitive ones could simultaneously issue press statements explaining the background, before journalists have time to jump to the wrong conclusions, and if academics and non-government organisations (NGOs) could demand the right of reply to inaccuracies and simplistic half-truths, pointing out, for example, that there is no one-size-fits-all way of dealing with wrongdoing in all its multifarious forms. People commit different kinds of crime for different reasons: understanding that does not mean excusing it but makes it possible to work out sensible ways of dealing with such people and, if possible, preventing them from committing further crimes.

Opinion-formers, especially politicians, need to stand up against facile oversimplification, supported by the knowledge that, despite the headlines, the majority of the public, including victims, is not as vindictive as is commonly assumed. The British Crime Survey, for example, found that only about a third of victims of burglary or mugging wanted 'their' offender to be imprisoned (Mattinson and Mirrlees-Black 2000: Tables A6.2 and 6.3). More recently, an ICM survey found that about two-thirds of crime victims do not believe that prison works to reduce offences such as shoplifting, stealing cars and vandalism, and more than half thought that paying back to the community by doing compulsory work would be effective (Smart Justice 2006); another, for the Ministry of Justice,

found that 81 per cent of victims would be in favour of community sentences if they prevented an offender from re-offending, and would prefer an effective sentence to a harsh one. Despite this, the ministry perversely (or cynically?) chose to headline its press release 'Victims of crime want punishment' (Ministry of Justice 2007). There are indications that victims who have met their offender feel less angry and vengeful, especially when the offender is young; greater use of restorative measures can therefore be expected to assist in changing attitudes. Most offenders, too, regard the process as fair, so that their respect for justice is increased.

That said, however, for more serious crimes people do want the seriousness of what they have suffered to be recognised. Reparative measures need to be appropriate and properly carried out, but the harm caused by the crime may be measured in terms of reparation as effectively as by punishment.

Although the media are quick to criticise, television has shown that it can sponsor imaginative projects; is there any reason why print media cannot do the same? There have been at least three projects recently reported on television (Jamie Oliver's restaurant, 'Ballet changed my life' with Birmingham Royal Ballet and Youth at Risk, and Monty Don's gardening project), in which young people from at-risk or delinquent backgrounds were given the chance to show what they could achieve when they worked as a team and when someone believed in them. Newspapers could be encouraged to do likewise, subject to undertakings to safeguard the participants. Projects like these, instead of demonising young people and assuming that they will behave badly unless dragooned and threatened, put trust in them and aim to show them, and the rest of us, what they can achieve if given the chance. They follow the inspired humanity of Winston Churchill's famous words as Home Secretary in 1910:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, ... tireless efforts towards the discovery of curative and regenerating processes and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man – these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it. (quoted in Blom-Cooper 1988: 14)

In the same way this proposal, instead of demonising the media (as liberal critics are apt to do), aims to bring out the best in them, confident that there is also creativity and humanity, if you can only find them, in the heart of a newspaper editor – and readers might welcome reassuring stories as much as scary ones.

Making things better: restorative justice

One of the key events which led to the rebirth of restorative responses to crime occurred in 1974 in the town of Elmira, near Kitchener, Ontario. Two young men got drunk and caused a trail of destruction, breaking windows and mailboxes and slashing tyres. They were awakened from their hangovers by the police, and convicted on 22 counts of criminal damage. Their probation officer, a young Mennonite named Mark Yantzi, suggested that it would make more sense if instead of merely being punished they faced their victims and offered to make amends. To everyone's surprise the judge agreed, and Yantzi took them to meet almost all their victims, who expressed their feelings, often forcibly. One said how terrified she had been when a stone crashed through her window. Compensation was agreed, and they got summer jobs to make about \$550 each, to pay for damage not covered by insurance. Another victim said, on receiving the cheque, 'I never expected to see that money – I think I'll spend it in a very special way to help somebody else.' They were also fined \$200 and placed on probation for 18 months. In the wake of this, a Victim Offender Reconciliation Program was set up; later the judge retired and became a volunteer.

Nearly 30 years later, a man who had decided to settle down after a somewhat disorganised life attended a course on law and security and heard the lecturer tell this story. He realised that his youthful escapade had become a textbook account of the beginnings of restorative justice and was so impressed that he signed up as a volunteer himself (Caldwell 2002).

Developments at home and abroad

Early writing on restorative justice drew a sharp contrast between criminal justice and restorative justice. Criminal justice, it was said, saw crime as a violation of law and the state, required the state to determine blame (guilt) and impose pain (punishment), and focused on what the offender 'deserves'. Restorative justice sees it as a violation of people and relationships; it involves victims, offenders and the community in an effort to put things right, focusing on what the victim needs and the offender owes. Criminal justice allocates blame and punishment; restorative justice holds the perpetrator responsible and requires him or her to make things right. More recently, writers like Howard Zehr have suggested that retributive and restorative justice are not polar opposites but have much in common; they differ in the way by which the balance should be restored. They should be seen rather as a continuum in which we aim to move as far as we can toward the restorative end of the spectrum (Zehr 2002).

Restorative methods can be used at all stages of the process, including self-referral to a mediation centre before the criminal justice system has even become involved, right through to post-sentence. They can be implemented in different ways. In victim–offender mediation victims and offenders meet one to

one, with mediators, and perhaps with a relative or friend for moral support. In family group conferences, on the New Zealand model, extended families can be brought in as well. Community conferences also include relevant members of the local community, for example a representative of an association of small shopkeepers or of an alcohol recovery project; and in the sentencing circles which have been pioneered in Canada the court room is turned into a community conference with lawyers and the judge also present. This method could be adapted to the community courts, introduced in about twelve places in England since 2006. The different models incorporate the principles of restorative justice to a varying extent; some allow more decision-making to the participants, others include more community participation. They have in common the basic principles of restorative justice: to enable those directly affected to decide who has been harmed, how it can be put right, and by whom?

In England and Wales the widest application is for juveniles appearing in court for the first time and admitting their offence: the court must make a 'referral order' referring them to a 'panel' (unless the case is too minor or too serious). The panels are restorative to the extent that they are focused on remedial action rather than punishment. Victims can be invited to take part (but this does not happen often enough) and two of the panel members are trained volunteers from the local community. Other people can be brought in to support the victim and offender, but apart from the offender's parents this is also relatively infrequent; and even if victims are present, they and the offenders are allowed only limited influence on the outcome. The Youth Justice Board is trying to increase victims' participation. For adult offenders and their victims little is in place at present; a restorative meeting could take place under the terms of a conditional caution (introduced in the *Criminal Justice Act 2003*, and being 'rolled out' from 2007 onwards); but this will depend on the availability of a national network of local mediation centres to arrange the meetings.

An example shows how the English system works. It does not illustrate a perfect version of restorative justice (if such a thing exists); but it shows an approach to it within an existing criminal justice system.

A teenager was caught grabbing a woman's handbag outside a bus station late at night. He and his victim were willing to meet, with a youth worker; his mother and the victim's husband also came. He admitted the offence, and explained that he wanted money for clothes to take part in a big celebration; he apologised both to the victim and to his mother for the distress he had caused them. He was doing well at school, and was afraid that this incident would harm his prospects. The victim said she was not concerned about the money, but she wanted him to do some community service for people less fortunate than himself, to make him realise how lucky he was.

It was arranged that he would work for a project which helped disabled children to learn to ride on horseback; he would avoid certain young people with whom he had been associating; and that his school would allow him to stay and complete his examinations.

This case, from one of the youth offender panels introduced in England in 1999, shows that victims are not always primarily concerned about money, or even about punishment. Community service can be relevant to an offender, and to the victim's wishes, even if it is not related to the offence; and it probably has more value if the offender can meet face to face with the people who benefit. Control over young people's behaviour can be exercised by agreement, not necessarily by the order of a court.

There are some programmes in Scotland, and an organisation, Restorative Practices Scotland, has been formed to promote them. In Northern Ireland restorative principles are built into the system for juvenile offenders, by the *Justice (Northern Ireland) Act 2002*. Cases can be diverted pre-court, and those which come before a court must be referred to a youth conference, with the exception of the most serious crimes. Researchers found that 'For victims, the notion of punishment was secondary to meeting the young person and receiving an explanation for their actions. A significant number of victims (79%) attended because they wanted to help the young person'. (Campbell et al. 2005). The number of children sentenced to immediate custody dropped from 139 in 2003 to 89 in 2006 (Jacobson and Gibbs 2009). There is however little community participation apart from those who take part in the family group conferences.

The practice is also taking hold in Europe and beyond. The Council of Europe has drawn up guidelines on the basic principles, and issued a handbook on how to introduce them (Council of Europe 1999, 2007; Aertsen et al. 2004). In Norway, mediation is available nationwide for civil disputes and certain types of offences, and in Austria for all but the most serious juvenile cases and many adult ones – including cases involving family violence, where special techniques and safeguards have been developed. The National Commission on Restorative Justice, in the Republic of Ireland, after a review of European developments, has recommended its wider use (Martin 2009). The European Forum for Restorative Justice has initiated projects, with European Union (EU) support, to develop practice in central, eastern and southern Europe (information on its website www.euforumrj.org). A *Handbook on Restorative Justice Programmes* has also been produced by the United Nations (2006).

Principles, objections, tensions and benefits

The idea is clearly spreading; what are the principles on which it is based? Restorative justice is fundamentally different from conventional criminal justice in two main ways: its process and its philosophy. The criminal justice process is

designed to answer the questions: did this person commit certain actions which the law declares to be criminal and, if so, what punishment (or possibly rehabilitative measures) should be imposed on him or her? Because convicting and punishing someone is a serious matter, defendants normally have a lawyer to speak for them, and consequently are required to say little or nothing themselves. If they deny the charge, an adversarial process takes place; if the victim is called as a witness, defending lawyers commonly regard it as their duty to attack or undermine the victim's credibility as a witness, and if the offender is convicted, to deny or minimise the harm suffered by the victim, so that the court will impose a lighter sentence or less compensation. This fails to give the victim recognition of the seriousness of what he or she has suffered. Attempts to allow victims to make written or even oral statements in court do not provide for the dialogue which is a central feature of restorative encounters.

The restorative process operates differently. When the accused admits at least some involvement in the harm which the complainant has suffered, they are offered the opportunity to meet in the presence of a facilitator. In some programmes other people can be present, such as the offender's family, supporters of the victim, and possibly other members of the community who have been affected. The questions asked are different: Who has been hurt? What are their needs? Who has an obligation to meet these? (Zehr 2002). This makes a huge difference. It gives the victim an opportunity to express their feelings, tell the offender the effects of what he did, and ask him or her questions – some of which only the offender can answer. It makes them less fearful of being re-victimised, and greatly improves the likelihood that the victim will receive an apology or compensation, if that is what they want. Many of them also want to motivate the offender to make better use of his life.

As for the offender, it brings home to him that he has not merely broken the law but has harmed someone; then, instead of stigmatising him in ways that will make it more difficult for him to behave in the way expected of him, it allows him to back up his apology in a tangible way, and show that he can do better. It is not surprising that this has generally been found to lead to a lower rate of re-offending (Liebmann 2007: ch. 14; Sherman and Strang 2007; Shapland et al 2008). The community service order, introduced in 1972, was an opportunity to put this principle into practice; the present minister of justice however has chosen to call it 'unpaid work' or 'punishment' and to require offenders to wear stigmatising clothing while doing it (Lewis 2008), which is both unimaginative and unlikely to be effective.

In the courts many defendants plead guilty. What about those who don't? First, research has shown that the proportion of 'offences brought to justice' in a restorative programme can be up to four times as high as in criminal justice (Sherman and Strang 2007: 20, 78). Second, those who did go to court and were convicted, or who refused to take part in a restorative meeting, could still be dealt with in a restorative way. The sentence, instead of being a certain amount of

punishment, could be a certain amount of reparation. In most cases this could be done under supervision but, where there was a serious risk of serious re-offending, it would be done in custody. This, of course, would transform the ethos of prison regimes.

A strong component of the restorative vision is the involvement of the community, especially the victim and offender themselves. This was described by the Norwegian criminologist Nils Christie, in a much-quoted article: conflicts, he said, belong to the people directly involved, and should not be 'stolen' by professionals (Christie 1977). The local community can also contribute, and in this way can work out norms for themselves, rather than have them imposed.

Lord Justice Auld considered that:

[t]here is value in providing for resolution outside the courtroom so far as is consistent with justice, the public interest and efficient public administration ... (2001: 368)

and that:

[a]ny initiatives in this field should be part of an over-all and principled reform aimed at removing from the courts matters for which they are not appropriate or necessary, while leaving them, in the main, to deal with matters for which they are well suited, in particular, marking society's disapproval and safeguarding public and private safety. (2001: 388)

In sum, he recommended:

the development and implementation of a national strategy to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales. (2001: 391)

The process reflects the philosophy. We live in a controlling society: we are surrounded by CCTV cameras (for example Attewill 2008), our movements are tracked by ticket machines and mobile phone records, our personal information is recorded on databases, we are required to meet targets or be penalised, and long-established legal safeguards such as not allowing hearsay evidence or double jeopardy have been eroded (see for example Porter 2008). The pessimistic assumption is that we need to be coerced into doing the right thing, and threatened with punishment for misconduct, even on such matters as recycling rubbish (Levy 2008; Berlins 2008). The restorative philosophy is based instead on encouraging and enabling people to behave with respect towards each other, and structuring society so that they have a range of acceptable choices. Even when they cause harm, the first option should be to enable them to make amends voluntarily, with coercion used only as a last resort. As much as possible is agreed, as little as possible is imposed. Behaviour is partly a matter of

individual responsibility, but also of external pressures such as inequality, consumerism, glorification of violence and so on; the society should consider what pressures influenced the offender (and may influence others like him or her), and take action to minimise them; otherwise we are scapegoating offenders for our own failure to act: they are, in the biblical phrase, 'wounded for our transgressions' (*Isaiah 53:5*)..

Objections to restorative justice

Not surprisingly, the idea of restorative justice has encountered criticism. Some problems have occurred because the ideals are not being put into practice; others arise because it is a new idea operating on different principles. The ideal is that a person recognises that he or she has hurt someone and agrees with that person how to make up for it. It has been found that people who agree to make reparation or pay compensation are more likely to do so than if they are ordered to do it by a court. So far, so good. But then come the more awkward questions. We have to ask whether a restorative system could handle a wide variety of situations. It seems that, on occasion, some of the restorative principles would have to be over-ridden, but mostly the essential ones could be preserved.

The first step in assessing whether restorative justice 'works' (whatever we mean by that) would be to put it into practice in the best possible way, and in England and Wales that has barely happened yet. In its re-introduction to this country, in Thames Valley, it was based in the police service. Showing police officers a different way to do their job is welcome, but it led to incidents being brought into the criminal justice system which could have been dealt with informally. This tendency is aggravated by the policy of measuring 'success' by the number of arrests or 'offences brought to justice'; with the lowering of the age of criminal responsibility to 10, this is creating a generation of young people with criminal records. The term 'restorative practices' is beginning to be used, to distance these practices from the criminal justice system. However, when restorative justice is bolted on to an overtly adversarial and punitive system, there is a danger that it will take on punitive overtones. There is a world of difference between saying 'You have broken the law and as a punishment you will be made to clear up a piece of waste ground, wearing a demeaning uniform' and 'As you have damaged the community (and/or someone in it), you are to do a piece of work to make up for it; we will value your act of reparation, and help you to do better in future.' Unfortunately, as we have seen, the recent English legislation and political rhetoric use words like 'unpaid work' and 'punishment' rather than 'community service'.

In England and Wales, restorative justice is hardly available for the victims of adult offenders. For juveniles, the measures introduced in 1998 and 1999 (especially reparation orders and referral orders), although sometimes described as 'restorative justice', are structured so as to leave control of the outcome firmly

in the hands of the court or the youth offender panel. Victims take part relatively seldom, for various reasons, including the government's pressure for speedy resolution. For many people, the image of restorative justice is probably limited to a young offender, convicted of a minor offence, either facing a victim or possibly doing some community work without ever having such a meeting.

This sub-prime restorative justice has also led to the criticism that it aims to pin responsibility on offenders without taking account of their often disastrous background and present situation. This would not happen if restorative principles were properly applied, by asking the basic question 'Who has been harmed?' The victim has been harmed, and the offender should make amends for it; but when offenders have been harmed by social or parental failings, these also need to be remedied.

Tensions in restorative justice

The question 'How much?' would arise with restorative justice, as it does with sentencing, and there would still be no precise way of calibrating the offence and assessing an equivalent amount of reparation. It can be argued, however, that the idea is to empower victims and offenders to resolve matters themselves, so what is right for them is right. The best solution is probably that of the New Zealand juvenile system: restorative justice with safeguards. Three-quarters of young offenders are kept out of the system, either by being given a police warning or by being diverted to some form of relevant help, sometimes combined with reparation. About 8 per cent go to a restorative meeting (called a family group conference [FGC]), and in the most serious cases, which go to the youth court, in place of pre-sentence reports there is an FGC in which the offender, the victim and their families or supporters take part (Maxwell 2007: 114). Available community resources are explained to them and then, after 'private time' (a discussion with no officials present), they recommend an action plan, which may include an apology or reparation to the victim, and rehabilitation, support and sometimes even restrictions for the offender. If this is acceptable to those directly concerned (the 'owners' of the incident), it is normally endorsed by the court without agonising over its comparability with other cases. As a safeguard, the court retains power to modify the agreement, but this is done in only a minority of cases. There are aspects which could be improved in this system, but in general it seems to strike a reasonable balance between empowering individuals to resolve their own conflicts and avoiding agreements in which too much or too little was offered to the victim or demanded of the offender. The main function of the length of a sentence is to demonstrate how serious the crime was; for that purpose, three years' reparation will do just as well as three years' imprisonment – perhaps better, because it can achieve something positive.

Supposing the victim and offender don't agree, or a meeting is not possible or desirable for various reasons? The case would have to go to a court, but the

court would impose a sanction based on repairing harm, rather than on punishment. And what if victim and offender reach an agreement but the offender does not keep to it? First the offender would be asked if there was a reason, such as a change in his circumstances, or failure of the community to give him necessary support. For less serious offences, it could be sufficient (as in some cases now) to take no immediate action, but take it into account if he committed a further offence. Otherwise he can make an informed choice: to keep to the agreement or to return to the court.

The restorative principle of allowing the conflict to be settled by its 'owners' may be at odds with the wishes of other members of the community; so the agreement between victim and offender may be overridden in the name of proportionality or public protection. What if they reach an agreement but it is excessively onerous for the offender, or the victim has agreed to accept so little that others in the community may feel that the offender has not had to face the full consequences, and that others will try to 'get away with it'? There should be safeguards so that an offender who is anxious to please, or even intimidated, is not required to undertake an unreasonable amount of reparation. If the amount appears too small, there should likewise be a safeguard to make sure that the victim is not similarly browbeaten. If he or she is satisfied, then ideally others in the community should accept that. But after a serious crime there is likely to be a feeling that there should be reparation to the community as well as to the victim, and a court may find it necessary to add this. It should be carefully explained to the victim and offender, who might otherwise feel that their supposed 'empowerment' was a sham; and it should only involve additional reparation or compensation, not imprisonment, bearing in mind the often-quoted New Zealand case of *Clotworthy*, where the offender met the victim and agreed to pay substantial compensation (to pay for plastic surgery) and to do 200 hours of community work; but the prosecutor appealed on the ground that this was too lenient, and the appeal judge imposed a prison sentence, making it impossible for the offender to meet the cost (Braithwaite 2002: 147; Roche 2003: 212-8).

Finally, what if the offender is willing to make substantial amends for a serious crime, but people in the community fear, rightly or wrongly, that he or she may do it again? The first option would be close supervision in the community; but in cases where the risk and the seriousness of any further crime are too great, detention would be the last resort. It would be understood that it was only for the purpose of containment; the regime would not be deliberately punitive. This raises again the definition of punishment. Many people would regard being locked up, even while they undertake reparative work in a non-punitive institution, as punishment. That is a legitimate point of view, but it is surely a very different *kind* of punishment from the nineteenth-century crank and treadmill, where the very uselessness of the labour was an intentional part of the pain; or even a modern prison with its boredom, bullying and overcrowding. A further problem is 'imprisonment for public protection', introduced by the *Criminal Justice Act 2003* (sec. 225). There is concern about the number and length of sentences that have

been imposed, and the consequent substantial rise in the prison population; the chairman of the Parole Board has called for a national debate about it (Parole Board 2007: Ev 97–99).

Some problems arise from the relationship between restorative justice and criminal justice. Restorative methods should be used when the timing is right – but that may be different for the victim and for the offender, and pressure from the system for speedy resolution can make it difficult to arrange a meeting within the time allowed. In the ideal restorative process, the offender takes part willingly and fulfils whatever reparation he or she has undertaken; there is evidence that such undertakings are more likely to be completed if they were agreed to rather than imposed. Taking part in restorative justice is fully voluntary if it happens with no involvement of the criminal justice process, or after that process has been completed; when the alternatives are mediation or going to court, it is something of a forced choice, but at least it *is* a choice, and some do prefer to take their chance in court rather than face a difficult meeting with their victim.

There may be too high expectations from a restorative process on its own. A single meeting, even with preparatory interviews, may not be enough: the victim may want assurance that any undertakings made will be fulfilled by the offender, who in turn may need support in completing them. This may be relatively straightforward, such as providing constructive tasks in the community, but many offenders suffer multiple disadvantages, from missing their education for whatever reason to childhood abuse to homelessness; many of them have also been victims in another sense of the word – and often in the usual sense as well. It is not a question of excusing their behaviour, but of enabling them to make the amends that are required of them. Any evaluation of restorative programmes should also assess whether the community has fulfilled its part of the contract, and also, of course, whether the actual meeting was facilitated in a competent and restorative way. There is a danger that programmes that are called restorative, but which fall short in design or execution, will bring genuinely restorative principles into disrepute.

Before ‘restorative justice’ is judged, it should be recognised that there are considerable gaps between its principles and the practice that has been seen so far. In several countries it is available mainly or exclusively for juveniles, offering nothing to victims whose offenders happen to be over the age of 18. It is often limited to minor offences, although there is research evidence that victims of more serious crimes obtain more benefit from it (Sherman and Strang 2007). In particular, it is thought of mainly in relation to ‘street crimes’, ignoring the victims of white-collar offences, which can cause financial ruin (as with large company frauds), injury and death (as with lax safety procedures leading to pollution and accidents in industry or transport). One Japanese company, Chisso, in Minamata, discharged methyl mercury into the sea for many years; fish were poisoned, and people who ate them contracted what became known as Minamata disease: paralysis, mental illness, children with birth defects, and even

death. Prosecutions were brought against officers of the company, which paid large amounts of compensation; by 1998 it was essentially operating solely to provide compensation, and avoided bankruptcy only through the payment of government subsidies (which is appropriate since the government had failed to stop its lethal activities) (Wright 2008a: 264; Yokoyama 2007). The suffering and injustice suffered by over 100 000 victims of the poison gas disaster in Bhopal, Madhya Pradesh, India (Bhopal Medical Appeal 2007), would have been much reduced if Union Carbide Corporation and its owner, the giant Dow Chemical Company, had acknowledged their responsibility in a similar way. It is encouraging that the Macrory report *Regulatory Justice* (Macrory 2006) recommends a restorative way of dealing with these offences more effectively.

A key part of restorative justice is offering victims the opportunity to take part, for example in victim–offender mediation or family group meetings, but in England and Wales there has been relatively little involvement of victims, although the Youth Justice Board is trying to improve the situation. Many programmes operate with little community involvement, although there is evidence from the United States, Germany and a few places in England and Wales that non-governmental organisations and trained volunteers can deliver a professional service. It would be ironic if the conflict were ‘stolen’ by professionals again, this time by mediators. In Norway the legislation insists on lay mediators (who are paid a small fee).

Benefits of restorative justice

Restorative justice is much more satisfying to victims than criminal justice, and would be justified for that reason even if it made no difference to the reconviction rate. Victims are directly involved in the process, and can express their feelings and ask questions. Lawrence Sherman and Heather Strang, in their extensive review of research on restorative justice, found that fewer of them are left in fear of the offender. Both for violent crime and for offences against property, the re-offending rate is either improved or unchanged, except for a small number of studies in unusual situations (Sherman and Strang 2007). Restorative justice holds offenders responsible, but in a constructive way, directing their thoughts to the effects on the victim, and often their own families, rather than possible consequences for themselves. It provides the possibility of resolving the matter voluntarily, which makes any agreement more likely to be kept (Sherman and Strang 2007: 58–9). Significantly, when the state operates restoratively it applies the same principles as are expected of the offender, rather than saying ‘Don’t do as I do, do as I tell you.’ At first sight the process may be caricatured as ‘soft’, but, firstly, facing someone you have wronged, answering their questions and apologising is not easy, and victims are often impressed by the offender’s courage in facing them; secondly, it does not try to influence offenders by fear but by showing them what they have done to another person in such a way that they feel remorse, and can make up for it and earn re-acceptance. It shows them

that other people (often including the victim) want them to succeed and are willing to help them to do so. It is not based on rejecting them or making them fear the rest of society but on making them want to be part of it. Of course it will not always succeed; but there is every reason to believe that it will work at least as well as punitive methods. For example, the fact that each time a person is imprisoned, the chances that they will be imprisoned again increase, makes nonsense of the claim that prison 'works'.

As regards prevention of offending or re-offending, a restorative approach would put much more emphasis on tackling the pressures that lead to crime. Criminal justice tends to neglect these because of its dogmatic faith in the effectiveness of sentencing. Individuals would be encouraged to resist those pressures, not because of fear of the consequences to themselves, but through recognition of the effects of crime on other people.

Sherman and Strang are sceptical of the deterrence doctrine: 'If restorative justice can work to prevent crime and repair harm, it seems likely to do so by fostering remorse, not fear' (2007: 12). They conclude that while 'neoclassical theory ... centres on *punishment*, RJ [restorative justice] centres on *persuasion*. The aim of punishment is to enhance the fear of further punishment; the aim of persuasion is to enhance moral support for voluntary obedience of [*sic*] the law' (2007: 15, emphasis in original). Criminal justice, even when it imposes compensation or reparation, is based on requiring the offender to follow orders under pain of punishment; restorative justice starts by motivating them to keep promises, using enforcement only as a last resort. Sherman and Strang quote several studies showing that participation in restorative justice significantly improved the likelihood of offenders complying with restitution agreements, as compared with court-ordered payments or fines (2007: 58).

A policy which claims to rebalance the system in favour of the victim surely cannot overlook a method in which the great majority of victims receive an apology: 89 per cent of those who experienced a restorative conference, in one study, compared with 19 per cent of those assigned to court – and they were much more likely to feel that the apologies were sincere (2007: 63). Almost all studies report that victims are overwhelmingly satisfied.

When people ask 'Does restorative justice work?' they generally mean 'Does it reduce re-offending?' In a truly victim-centred system it might be thought that, even if the reconviction rate was unchanged, a process which was widely supported by victims would be justified for that reason. In fact, however, many experiments have shown that restorative justice has the advantage here too. In a large study in Australia, re-arrest of violent offenders under the age of 30 who were assigned to restorative justice dropped by 84 per 100 offenders compared with a control group (except for Aboriginal offenders, but this was too small a group on which to base conclusions). A Canadian study found that in violent families, emergency visits to homes dropped by over 50 per cent where

restorative justice was offered, compared with a 50 per cent increase in the comparison group. In a poor area of the north of England, young white male property offenders who were assigned to restorative justice conferences showed 88 fewer arrests per 100 offenders, compared with a reduction of only 32 per 100 among those who received a final warning 'talking to' from a police officer (2007: 68–9; reported in more detail by Shapland et al. 2008). There have been other experiments where the improvement did not reach statistical significance, but almost none where the re-arrest rate increased – and all this despite the fact that many programmes do not put the principles of restorative justice fully into practice.

Restorative methods have the additional advantage that they can involve the community; for example, the extended family can be brought into family group conferences and voluntary organisations can provide mediation services.

Restorative justice: the way ahead

Instead of restorative justice within the criminal justice system, or in parallel with a punitive criminal justice system, could we have restorative methods backed up by a restorative justice system? There could be a three-stage system:

- a) less serious cases referred (or self-referred) to community mediation service
- b) more serious cases reported to criminal justice system, but referred out to community mediation service in lieu of prosecution (caution, final warning, suspended prosecution)
- c) if unsuitable for mediation, or mediation unsuccessful, or agreement not kept, or too serious for (b), referred to criminal justice system for compulsory reparation (payment to charity, community service or co-operation with rehabilitative programme) imposed by the court

Restriction or deprivation of liberty would be separate measures, not as punishment but as enforcement of (c) or for the protection of the public. The ethos (and if possible buildings) would reflect this philosophy; a prison would be a place in which to make reparation, not a place of punishment.

Although there is widespread acceptance of this, at least for less serious crimes, it would perhaps be too big a leap to introduce it all at once. Implementation would be by stages: The first step could be to replace prison with reparation in the community for all offences tried in magistrates' courts. In the light of experience with this measure, imprisonment for offences with a current maximum of five years or less could be discontinued, except as a last resort in order to enforce restorative measures. Eventually, imprisonment for longer periods would only be for public protection.

Towards a restorative society

Putting principles into practice

The philosophy of restorative justice has several strands. It begins in schools. One way of instilling the basic precept 'Do as you would be done by' is to teach children how to resolve conflicts, not by the use of force but by a process of listening to both sides and helping them to find ways forward that are acceptable to both. This can start with methods such as circle time, in which children are encouraged to respect each other and to express their feelings in a positive way; another method is peer mediation, in which children themselves learn to mediate between others when there is a dispute. The principles are similar to those of restorative justice: providing all concerned with time to think, someone to listen an opportunity to explain, apologise and make amends, with the hope that this will allow resentment to fade (Hopkins 2004). It has been shown to be an effective way of combating bullying, and thus reducing exclusions (of bullies) and truancy (of bullied children).

An example is Lewisham Bridge primary school in south-east London. In 2005 the school 'went restorative'. It defined this as a style in which everyone is listened to, everyone has a say and everyone is respected. A school council and other pupils' committees have been established. School rules are discussed with pupils. It uses a range of restorative practices to encourage their children – often from families coming from many parts of the world and speaking many languages – to respect each other. They learn to be peer mediators, or 'buddies'. The behaviour policy produced tangible results: in September 2004, before the new policy, there were 99 disciplinary incidents, including throttling another child, being rude to adults and fighting. In September the following year there were 14 incidents, at a much lower level, such as talking or chewing gum in class. In autumn 2004 there were five fixed-term exclusions, in autumn 2005, none. In the playground there is a Friendship Bench, where children can go if they would like to have a friend; other children may come and talk to them; if not, buddies do so, and try to join them up with a group. On the other side of the playground is a Reflective Wall, where children involved in a conflict can go until mediators come to offer their services. 'Discipline that restores' has also been practised and described by Ron and Roxanne Claassen (2008).

With this in mind we can envisage an eight-point plan for a more restorative society.

- (1) Children learn how to resolve conflicts, and to respect each other. The children who would benefit from the application of these skills and attitudes would be not only those with various labels attached to them (bully, truant, special needs, delinquent) but also future leaders, those who will have the potential to change society in this direction.

(2) It would not be assumed that the criminal justice system is the best agency to deal with any action which is capable of being defined as a crime. For example, when a dispute has resulted in criminal damage or an assault, it is often in everyone's best interest to address the dispute rather than the criminal incident, by referring the case to a community mediation centre rather than to the police.

(3) Restorative justice is about healing, and so it must begin by offering help to victims, including those whose offenders are not known. Victim support is therefore an integral part of the concept.

(4) When the offender is known, the victim would have the opportunity to meet him or her to seek explanations, so that if possible they can agree on the best form of reparation. (This contrasts with 'victim statements', which offer no opportunity for dialogue.)

(5) The harm caused by the offence would be balanced and denounced by making amends, rather than by inflicting further harm on the offender. Many victims want steps to be taken to reduce the likelihood of re-offending, for the sake both of potential victims and of the offender him or herself. The offender's co-operation with rehabilitation programmes, when needed, would therefore be regarded as a form of reparation.

(6) The community would be involved, for example by providing mediation services and, where appropriate, trained volunteer mediators (for which the magistracy and youth offender panels provide precedents). The community also has a responsibility to enable the offender to make reparation.

(7) The informal dialogue of a restorative process allows the discussion of background circumstances that would not be admissible in a criminal case. These can throw light on background factors which affect crime, such as inadequate employment, schools and housing, and there would be a system of 'preventive feedback' (see below) for passing this information on to those responsible for crime reduction strategy.

(8) Restorative justice would therefore be available at any stage: as an alternative to the court when the parties are known to each other; as diversion from prosecution; pre-sentence; as part of a sentence (subject to consent); or post-sentence/pre-release. The earlier in the process it takes place, the greater the saving of time and resources.

In keeping with the community-based philosophy of restorative justice, the principles could be put into practice by non-government organisations throughout the country, using volunteers wherever possible, and overseen by a national body responsible for support, standards and training. They could provide neighbourhood, victim-offender and workplace mediation, for example, and train school staff when required. This is easier said than done, of course, even in a country like the United Kingdom with a strong tradition of voluntary work. There would need to be a constant supply of people with the necessary time and energy, and the trustees of NGOs would need to have the necessary financial

and management skills. In countries which do not have this tradition, the optimistic view is that this will be one way of encouraging it; another way is to pay lay mediators a fee.

The usual caveats are needed about the fact that, even without a fee, volunteers are not cost-free: in addition to supervision and support, constant training is required, because they often move on after a few years; the advantage of this is that a growing number of people in the community have been involved and thus have an understanding of mediation.

Renewing the link to prevention: preventive feedback

Let us look again at the questions we are trying to answer. The criminal justice system asks: who committed a crime, and how much should they be punished? (In some cases the court orders a rehabilitative measure instead of punishment; often there is a need for rehabilitation to overcome the damaging effects of the punishment.) Restorative justice asks instead: what harm has been caused, who is affected, and what needs to be done to make things better? The atmosphere is also very different: instead of minimising the harm in the hope of reducing the punishment, offenders are encouraged to accept full responsibility so that they can wipe the slate clean. They can also explain how and why they committed the offence, and this information could be fed into decisions about social policies and attitudes, which can reduce the pressures towards crime.

For example, if offenders reveal that they dispose of stolen goods by selling them to 'honest' citizens who do not ask why the price is so low, it will bring home to other citizens that they will have to use peer pressure to let it be known that buying stolen goods is not acceptable. It is reported that British people buy £1 billion worth of goods such as jewellery and electrical items in pubs and bars, and two-thirds say they would knowingly buy stolen goods (*Metro* 8.5.2006). A study by the Centre for Crime and Justice Studies found that 55 per cent of the population between 25 and 65 years old would consider engaging in dishonesty, such as inflating an insurance claim or cheating in a second-hand sale (Karstedt and Farrall 2007). Prevention can also be considered in advance: in England at present there are proposals to introduce gambling casinos; it is predictable that a number of people will become addicted to gambling and consequently resort to crime to obtain money, and this should be considered before the idea was introduced. Similarly, anti-theft measures should be included in gadgets such as mobile phones and iPods *before* they are put on the market, not only after a large number of robberies have been committed. In the long term it will be necessary to consider whether the best way to run the economy is to employ workers to manufacture large quantities of unnecessary things, and persuade people that their lives will be incomplete if they do not buy the newest ones, with the predictable result that many of those who cannot afford them will steal them.

Some years ago the iron and steel industry introduced the concept of an integrated steelworks. In the early days of steel-making, the steel was made in a furnace, and the waste gases and heat were discharged into the atmosphere. Then it was realised that the waste gas could be used, and valuable materials and heat could be recovered from it. A steelworks which was integrated in this way was more efficient, and released fewer harmful materials into the atmosphere. Similarly, offenders may be discharged from the criminal justice system with no job, no home and a stigma which makes it difficult to obtain these necessities. Or they may be integrated as members of society after imprisonment or, whenever possible, instead of it. The process has been described in a diagram by Paul McCold (2005, reproduced with permission):

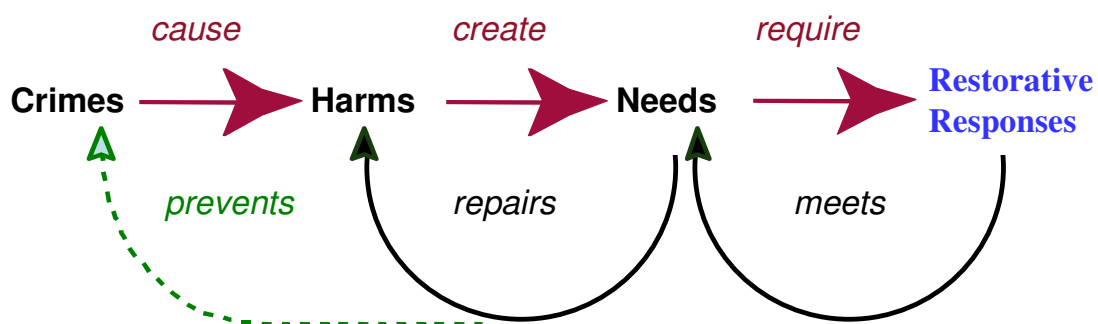


Figure 2: Preventive feedback in restorative justice

A crime usually causes harm to someone. This creates needs (for explanation, apology, compensation and so on). The needs require restorative responses, on the part of the offender or the community (and this applies to the needs of offenders also). Then, in the bottom part of the diagram, the restorative responses meet these needs and thereby repair the harms (as far as this is possible). The final link is a dotted line, because this is still only a possibility, but ideally the process should be completed by using the information to prevent crime and create a better society.

This principle could be called ‘preventive feedback’. It has been put into practice in Worcester, Western Cape, and other parts of South Africa, where restorative ideas are spreading (Skelton and Batley 2006) In a township called Zwelethamba, a Community Peace Programme (CPP) was established in 1997. It has mobilised local Peace Committees (PCs), which arrange informal but structured peace gatherings to resolve disputes. Although community-owned, it works with the formal justice system. It does not regard itself simply as offering restorative justice, but as a programme of governance, encouraging people to take on responsibility, dealing with disputes involving money-lending, child maintenance, assault and goods not paid for, and cases handled by the formal justice system. The police refer to the PC two-thirds of the cases received, which enables them to concentrate on more serious offences. The CPP pays 100 rand

(about 10 euros) to the PC members who worked on a completed case, and 50 rand to the PC itself, which uses the money to fund a community project, according to agreed criteria and by means of a structured processⁱ (Skelton and Batley 2006: 111–12). Examples of projects, which both benefit the community and provide employment are: building a children's playground, refurbishing an old people's home and loans to start small businesses (Roche 2003: 264–6).

In New Zealand, facilitators of family group conferences are getting together to identify clusters of cases from a particular location or schools; they bring together people from within the system to see why young people are choosing to offend, and what might be done to address these influences (Sawatsky 2009: 59).

Another example might be that young people's stories may point to government rules that make it difficult to stay out of trouble. When a young person who has been forced out of an abusive home reaches the age of 16, support from social services can be cut off; if he or she then enters full-time education, housing benefit can be lost. Anomalies like these should not wait until a separate research project happens to uncover them, instead the information should be passed directly to educational and vocational authorities, so that obstacles to self-improvement could be removed. Courses should be structured so that they can be combined with full- or part-time jobs. People who have successfully completed programmes should be recruited to run the programmes and to suggest other reforms. These kinds of preventive feedback should be built into the system.

A restorative process would then be a learning process. The offender would learn the effects of his or her actions, and the victim and members of the community would learn about the background of the offender and the offence. When an offender is threatened with punishment, such explanations are suspect, because they are likely to sound like excuses designed to mitigate punishment, and so they are discounted. In serious crimes, the offenders are often written off as monsters. But when the process is restorative, it is still fair to ask the offender to make reparation within his or her ability, so there is no reason to mistrust the explanations. We can learn from them, help these offenders and others from similar backgrounds, and possibly make changes in society, especially the upbringing of children, to reduce the likelihood of crime.

A restorative philosophy of social justice

Two main questions face us when we try to create a society acceptable for everyone: how do we try to persuade people to act in a way that does not harm others, and how do we respond when they do cause harm? Restorative justice offers one path towards an answer. It is more than a programme: it is a different philosophy.

It starts from the basis that social interaction should be voluntary where possible. A real-life parable may indicate the direction in which a restorative approach would take us.

The old way of breaking in wild horses, in the Wild West of America, was to tie them to posts, then to take a heavy tarpaulin or weighted sack and throw it over the horses, which terrified them; as they tried to escape they often injured themselves. This was continued for about four days. Then one leg of each horse would be attached to its head, forcing it to stand on three legs, until their resistance was broken and the spirit driven out of them. There would be more injuries where the ropes had chafed. Then they were saddled, ridden, and if necessary whipped until they obeyed. The whole process took about three weeks. That was the cruel and inefficient method used by Monty Roberts's father, and many like him, who regarded horses as dangerous animals – which, when treated in that way, they could be. But Monty, as a teenager, observed horses in the wild, learnt their body language, and found that they responded when he used it. In his book *The Man Who Listens to Horses* (1998) he describes his method. He took a typical wild filly into a round pen, faced her squarely, lifting his arms a little and opening his fingers. He locked his eye on to hers. The horse ran round the ring. After a while she cocked one ear towards him, and soon she lowered her head and made licking and chewing movements with her mouth. This Monty translates from what he calls 'Equus' language as meaning: 'If I can be allowed to eat safely, we can come to an agreement, let's talk.' Soon she ran along with her nose a couple of inches from the ground; then she came up to him and followed him round, to show that she trusted him. Instead of three weeks, this process took half an hour; he repeated it many hundreds of times. The horse could then be saddled and ridden. Similar methods could be used with 'remedial' horses, which misbehaved in various ways, often as a result of earlier ill-treatment; and not only with horses – Roberts and his wife successfully fostered over 40 children.

The old method parallels the belief of the warden of Auburn Prison, New York, in 1821, who believed that breaking the spirit of prisoners was necessary in order to develop good work habits and a religious attitude for penitence (Shichor 2006: 99). How is this relevant to restorative practices? Let us draw a one-sided but not wholly inaccurate sketch of present-day Western society. A major part of the attempt to preserve social order consists of threats of unpleasant consequences. If you behave badly you will get an Anti-Social Behaviour Order (ASBO), probably with a curfew. You may be named-and-shamed in the local media; this is sometimes called 'demonising' young people, but in fact is uncomfortably close to bullying them. If you breach the ASBO you may go to prison. A crime hits the headlines – the maximum penalty is increased, or a minimum sentence is introduced. When you come out of prison you may be electronically monitored –

in addition to the CCTV we are all subjected to. It is assumed that the consequence of offending behaviour should be punishment, and hence attempts to explain it are regarded as excuses, to escape or minimise the penal sanction. The message is: 'Don't do that, or it will be the worse for you (if you're caught).' This has to overcome a credibility gap: people often believe that they will not be found out, or can escape conviction. The gap has to be plugged by making people believe in the efficiency of the police and courts.

The restorative message, by contrast, is positive: 'Do this, and it will be better for you and all of us.' The other part is: 'Don't do that, because (whether you are caught or not) someone else would be hurt.' (There are some cases where no individual victim is hurt, but the action harms the community, or the person him or herself, in the case of drugs.) Here there is also a credibility gap, of a different kind. The person has to believe that a pleasanter life is available, if he or she takes the advantages offered. The advantages must *be* offered: rehabilitative training, work, accommodation, opportunities for reparation – and respect..

This is not based on a crude behaviourist (carrot-and-stick) philosophy, but on building self-esteem, by providing paths by which everyone can fulfil their desire to count for something. The public would be shown that wrongdoing can be 'paid for', not by undergoing pain but by making reparation; this would also show that offenders have good qualities, which would build their self-esteem and make their re-acceptance into the community easier.

The debate about criminal policy is often carried out on the assumption that there are two principles, the control of crime and the maintenance of human rights and due process of law, which balance or even contradict each other. This has been particularly pronounced in the context of the 'war against terror', but it extends to criminal policy in general. The former prime minister, Tony Blair, has written that:

Over the past five or six years, we have decided as a country that except in the most limited of ways, the threat to our public safety does not justify changing radically the legal basis on which we confront this extremism. Their right to traditional civil liberties comes first. I believe this is a dangerous misjudgment. (*Sunday Times* 27.5.2007)

This ignores the fact that ruthlessness by the state can be used by criminals, or terrorists, to rationalise their own retaliatory lack of scruples; they will say: 'Two can play at that game.' It also fails to understand that 'tough versus lenient' is not the only choice. Our picture of society does not have to be based on a 'battle model', in which 'good' and 'bad' elements are at war; we should rather aim for a 'family model' of society, in which an offender is not an enemy to be punished or even expelled, but a 'wayward child' to be persuaded to remain in the family and respect its other members because they treat him or her in the same way (Griffiths 1970, quoted by Wright 1996: 138-9)). Of course society has to protect itself; but not by treating everyone with suspicion and every offender as a

potential recidivist, to be checked, watched, electronically tagged and recalled to prison for the slightest infringement.

In the criminal justice context, restorative approaches work on the basis of 'remorse, not fear' (Sherman and Strang 2007: 12). They point out that '[t]he aim of punishment is to enhance fear of further punishment; the aim of persuasion is to enhance moral support for voluntary obedience to the law' (2007: 15); and they contrast a way of maintaining social order based on keeping promises with one that depends on requiring people to follow orders (2007: 58).

These ideals have as long a history as punishment. The aim of biblical justice is the concept of *shalom*, which means more than 'peace': it includes material well-being and prosperity, right relationships and moral integrity. 'Since biblical justice seeks to make things better, justice is not designed to maintain the status quo. Indeed its intent is to shake up the status quo, to improve, to move towards shalom' (Zehr 1995: 140). On another continent, indigenous peoples of North America do not use judgmental language: for them, according to Rupert Ross, a prosecutor who has spent time with First Nations people in Canada, an individual is not 'an offender', but a person who has committed an offence and has many other attributes as well. They avoid labels like 'right' and 'wrong', speaking instead of practical considerations: 'If you don't tell the truth, your fellows won't trust you and you'll shame your relatives. You'll never get along in the world that way' (Ross 1996: 107). Ross explains that their languages have very few nouns (implying a fixed essence), but describe energy (changing relationships) with verbs (1996: 110–17). The Peacemaker in a dispute does not label actions as 'bad' or 'good', but describes them as *hashkeeji* (tending towards disharmony) or *hozhooji* (tending towards harmony). People are not forever one thing or another; they can and do change (1996: 123).

Perhaps the best summary of the values to which restorative justice aspires is contained in the word *ubuntu*, described by Archbishop Desmond Tutu (1999: 34–6) (from the Nguni group of languages in South Africa). People who have it are 'generous, hospitable, friendly, caring and compassionate. They share what they have.' A person with *ubuntu* has 'a proper self-assurance that comes from knowing that he or she belongs to a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.'

The case presented here is not for one more technique for dealing with offenders. It is for a different way of approaching the question of wrongdoing in a society. Strategies are used because they respect human values, not just because they reduce the risk of crime. They will be based on respect: not requiring 'them' to respect 'us' but everyone to respect each other. The guiding principle will not be to drive people to good behaviour by toughness, but to lead them to it, keeping the use of force to the minimum required for the protection of the public. This will be a society which persuades people, and if necessary

enables them, before resorting to coercion; the methods it uses are in harmony with those which it tries to uphold among its citizens.

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