

2013

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Wright, M. (2013) 'Restorative Justice: Its Relationship to Law and Society', Plymouth Law and Criminal Justice Review, 5, pp. 72-79. Available at:

<https://pearl.plymouth.ac.uk/handle/10026.1/8990>

<http://hdl.handle.net/10026.1/8990>

The Plymouth Law & Criminal Justice Review

University of Plymouth

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RESTORATIVE JUSTICE: ITS RELATIONSHIP TO LAW AND SOCIETY

Paper presented to Plymouth Law School, 26 September 2012¹

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Introduction

Let us start with a typical example of restorative justice in action.

A young boy, 'Tom', had been convicted of damaging a lorry. When he was visited, it was apparent that he came from a disorganized family, but a youth worker visited him, and discussed the effects of crime on victims and ways in which he might make reparation. The victim, 'Mr Roberts', was then visited, and he explained the specific effects on him; on a further visit, this was described to the young person, who had admitted breaking into the lorry.

When Mr Roberts was asked whether he would accept an apology, at first he was very angry, and said he wanted to 'chop the offender's hands off'. This raised doubts about whether the case was suitable for mediation; but such initial reactions are not unusual, and after he had told the worker more about the background, it was decided to go ahead.

Mr Roberts was the manager of an engineering factory, and was very tired of having to get up in the middle of the night to call the police and deal with the damage caused by burglars and vandals. With three very young children, he and his wife did not get as much rest and relaxation as they needed. He was also concerned that if the youth had released the brake of the lorry, or tried to drive it out into the road, either the youth or other people might have been killed. He wanted to meet Tom face to face and tell him how he felt.

¹ The author presented his paper previously following an invitation by the Plymouth University Student Group of the Howard League for Penal Reform, a long-established charity which campaigns to reform criminal justice by reducing prison numbers, improving conditions, and increasing the proportion of community-based sanctions.

² Dr Wright is a founding member of the Restorative Justice Council, seminal restorative justice author and practising restorative justice facilitator. Martin is a leading penal reformer in the UK as a former Director of the Howard League for Penal Reform and Policy Officer at Victim Support. His academic titles include Librarian of the Cambridge Institute of Criminology, Senior Research Fellow, De Montfort University, Leicester and Honorary Fellow of the Institute for Conflict Resolution, Bulgaria. Martin's publications include *Justice for Victims and Offenders* (1996), *Restoring Respect for Justice: A Symposium* (1999), *Making Good: Prisons, Punishment and Beyond* (2008) and most recently [*Towards a Restorative Society: a problem-solving response to harm*](#) (2010) published by the RJC. Not content with contributing academically and through his advocacy, Martin trained as a restorative justice facilitator and is an active volunteer mediator for CALM mediation service and Lambeth Mediation Service. In recognition of his outstanding contribution to restorative justice he was presented the European Restorative Justice Award by the European Forum for Restorative Justice in 2012.

When Tom was told about the effects of his actions on Mr Roberts, he was willing to meet him, accept responsibility for what he had done, and apologize. Both were prepared separately for the meeting, and told about the mediation process and its rules. When they met, there was little for the mediators to do: the exchange of views went very well, ending with Mr Roberts calling Tom 'son', offering him a handshake, then putting an arm round his shoulder and wishing him well for the future. Tom was surprised that he had been treated fairly, reasonably and respectfully by Mr Roberts. When a check was made some months later Tom had not offended again, although he had been considered a high risk.

Of course not all cases will turn out so well, but the restorative process, including the dialogue between those affected, does at least encourage positive outcomes, unlike the formal court procedure. Meanwhile some facts and figures will give a reminder of some of the reasons why the existing system is not fit for purpose, focusing on prisons because they are the most serious response to crime in civilised Western countries. Here a caveat in the opposite direction is needed: in spite of the adverse circumstances, some good work is done in prisons, but there is not nearly enough for all who need it, and the fact of imprisonment is itself counterproductive in many cases.

Taking England and Wales as an example - neither the best nor the worst of prison systems - in December 2011 the prison population was over 87,000 (156 per 100,000 of the population), but the number of work places was only about 24,000. Ten prisons were from 159% to 196% overcrowded. Although about 48% of prisoners are at or below the level expected of an 11-year-old in reading, 65% in numeracy and 82% in writing, only about a fifth of prisoners with serious literacy or numeracy needs enrol on a course that would help them. In 2010 there were 26,983 incidents of self-harm in prisons, nearly half by women although they comprise only 5% of the population in custody (Prison Reform Trust 2011).

The Prison Reform Trust reports that 'Maintaining contact with children is made more difficult by the distance that many prisoners are held from their home area. ... in 2009 there were 753 women held over 100 miles from home [and] Imprisoning mothers for non-violent offences has a damaging effect on children and carries a cost to the state of more than £17 million over a 10 year period' (Prison Reform Trust 2011: 29). 'The average personal cost to the family and relatives of a prisoner is £175 per month' at a conservative estimate (Prison Reform Trust 2011: 28). 'During their sentence 45% of people lose contact with their families and many separate from their partners'; 'the odds of reoffending were 39% higher for prisoners who had not received visits whilst in prison compared to those who have; [and] an average of 40% of prisoners reported difficulties with sending or receiving mail'. In England and Wales, only about one third of prisoners have work, much of it menial, and the average working week in 2009-10 was 11.8 hours (Prison Reform Trust 2011: 30, 67)

This is by no means only a British problem; the Newsletter of the International Centre for Prison Studies (www.prisonstudies.org) lists country after country where prisoners are overcrowded or otherwise ill-treated. It is no use dismissing this situation with clichés like 'They deserved it' or 'They should have thought of that before'; the relevant question is, 'Is this treatment *likely* to make them willing or able to avoid committing crime in future?'

1 Restorative Principles

What are the restorative principles which are being proposed? The essential basis is that when harm is caused, the principal response should be to repair it. To decide on this, there is a dialogue (with a facilitator), involving those primarily affected. One-to-one meetings of victims and offenders, with mediators, are often referred to as 'mediations'; if a wider group is brought in, they are 'conferences', with 'restorative justice' (RJ) as the generic term for both. 'Reparation' is action to make amends, repair damage or benefit the community, but can take place without such a dialogue. The starting point for RJ is acceptance by the perpetrator of his or her involvement in the alleged offence, and participation in the restorative process has to be with consent (so if the accused denies involvement or refuses to take part there must be a trial). Once the basic situation is accepted, and its effects discussed, the focus is on the future: what can be done towards making things right and preventing a recurrence? The differences may be summarized in tabular form, although the distinctions are not as cut-and-dried as this suggests:

Conventional

What crime was committed?

Who was to blame?

Focus on facts

What punishment is appropriate?

Process based on power, authority

Restorative

What happened?

Who is affected

Encourages expression of thoughts feelings

How can things be made better?

Process includes discussion, aims at agreement

Taking this as a basis: what needs to be improved, and what does RJ offer? Let us consider four aspects: How could the CJS be improved? How could it be transformed? How, in practice, could such a system be delivered? And how can restorative justice be extended to restorative practices in other spheres of life?

2 How could the CJS be improved?

There are ways in which the criminal justice system could be improved without radical

change. Many would argue for reduction in what has been called the 'overreach of the criminal law', by using other means to promote desirable behaviour. It has been said that 'good social development policy is the best criminal policy' (Kinnunen et al. 2012). Some actions can be kept off the statute book altogether and dealt with for example by persuasion, taxation and other regulation and (in the case of addictive behaviour) health education,. Where an action is criminal, it need not be prosecuted (in England and Wales) if it is 'not in the public interest' to do so, for example if the defendant has put right the loss or harm (Crown Prosecution Service 2000, sec. 6.5(h)).

If the case does proceed to trial and conviction, the sentence can be a restorative one. Under the Criminal Justice Act 2003 a community order (sec. 177) or suspended sentence of imprisonment (sec. 189) may include an 'activity requirement', which 'may consist of or include activities whose purpose is that of reparation, such as activities involving contact between offenders and persons affected by their offences' (sec. 201(2)). An amendment to the Crime and Courts Bill 2012 (155EZA, 30 October 2012, Hansard (HL) col. 552) shows the contradiction between current retributive and restorative policies. A new schedule (inserted before Schedule 16) states that where the court makes a community order, it must include at least one requirement imposed for the purpose of punishment, or a fine, or both. However, when a court defers passing of sentence, it may impose requirements, and the Bill now for the first time uses the term 'restorative justice requirements': in which the participants consist of, or include, the offender and one or more of the victims, and the aim is to maximise the offender's awareness of the impact of the offending concerned on the victims.

This falls short of the system for juveniles (aged 10 to 17) in Northern Ireland, where, firstly, prosecutors are actively encouraged to refer cases to conferencing; secondly, a court *must* refer all but the most serious cases to a youth conference co-ordinator, and, crucially, a Youth Conferencing Service was created to carry out this work (Jacobson and Gibbs 2009)

Lastly, restorative justice is also possible after sentence (and in parts of the United States even after a death sentence, while the offender is on death row (Miller, 2011)). This can help the peace of mind of victims and offenders, but does not save any costs of the criminal justice system, because it does not replace any of the standard process.

3 How could it be transformed?

Much of the above can be regarded as an 'add-on' to a basically unchanged system (or as

many would argue changed for the worse, especially with the new insistence that every community sentence must contain a punitive element). But is it practicable to aspire to a system transformed so as to be the other way round: with restoration and healing as the core principle, and coercion and detention (and even the courts) used only as a last resort when a restorative process was impossible (because of the unavailability or non-participation of either party), or not complied with, or would entail a serious risk of serious re-offending?

There would be four major changes. It is not suggested that these could be made overnight, but they are suggested as a starting point for a discussion of a model towards which progress could gradually be made.

New process. In place of an authority figure, in a formal setting, controlling the process and issuing orders, there would be a facilitator (or sometimes two) to guide the process with the consent of the participants. Courts would still be necessary, however, when the accused denied guilt, refused to take part voluntarily, failed to comply with any agreement made, or presented a serious risk to members of the public.

New participants. All those affected would be offered an opportunity to take part in the proceedings. The facilitator's role would be only to guide the process, although some decisions have to be made about when a participant is unsuitable or an agreement is in some way inappropriate (for example, too onerous for the offender, so that he is 'set up to fail', or not onerous enough to satisfy the community's need to feel that firm action is being taken).

New psychology. This is an area of restorative practice that needs exploration. Conventional justice assumes a behaviouristic, carrot-and-stick model of controlling behaviour, but research has shown that it is not effective, or effective only for a limited time and under limited conditions. The effects of 'conditioning' wear off; deterrence only works when a person knows what the possible punishment is, *and* stops to think about it, *and* fears it, *and* calculates that there is a strong probability of being caught (Wright 2008). It is based on control, enforced by fear of the use of power. It makes the enforcer feel strong, and tempts him to overlook the actual effects on the person punished. The restorative process is based on different qualities, and assumes that it is preferable for a society to be based on persuasion and co-operation rather than fear. The face-to-face meeting provides an opportunity for the participants to feel and respond to each other's needs and humanity, through empathy. People are not motivated only by fear, but by the desire to gain self-respect and the respect of others. A controlling policy uses prisons and electronic tags; a

restorative one encourages people to show that they can deserve trust placed in them. This statement of the ideal needs to be qualified. Firstly, if it sounds ineffective, it needs to be remembered that imprisonment has a high failure rate, apart from the time when people are actually locked up (and some crimes are committed even in prison); restorative justice has been shown to reduce the re-offending rate, though obviously not to reduce it to zero (Shapland et al., 2011). Secondly, it has to be recognised that the use of compulsion and detention is unavoidable in some circumstances: when there is a serious risk of serious re-offending, or a wilful failure to comply. To test the hypothesis that such an apparently weak policy would have hidden strength, it would be necessary to introduce it gradually, with accompanying monitoring and research.

In either case, there is a responsibility on the rest of society to make compliance humanly possible: whether a person comes out of prison determined to 'go straight', or leaves a restorative meeting feeling empathy for the victim and wanting to make amends, it is essential for 'us', others in society, to make it possible for him or her to find work, accommodation, therapy, or whatever is needed.

Feedback The last change is needed to make a real system: feedback. Whatever measures we use, we should collect information about what happened, and the pressures that led to it, and pass them to those responsible for social policy. This would be desirable in the conventional process too, but the restorative process, with its less formal, less threatening procedure, is better suited to exploring the influences in a person's life that led him or her to cause harm to other people. Often these are already well known - deprivation, poverty, lack of education, childhood abuse and so on - but this could give added weight to tackling them. There could also be less expected pressures: for example, is an apparently wealthy and successful criminal also deprived, by an upbringing or culture which has failed to instil the moral sense that would prevent them from using their abilities to benefit themselves at the expense of others?

4 Delivering restorative justice

The 'machinery of justice' is necessary to deliver conventional justice, and restorative justice will need its own machinery. This is a gap in the current legislation, referred to above: while the first relevant legislation in England and Wales created the Youth Justice Board and local Youth Offending Teams (Crime and Disorder Act 1998), and in Northern Ireland the Youth Conferencing Service was established by the Justice (Northern Ireland) Act 2002, there is no comparable provision in the Crime and Courts Bill 2012. There is presumably an assumption

that existing services such as police and probation officers will encourage courts to hand out appropriate orders and sentences, and then facilitate the victim-offender meetings; but unless they are very enthusiastic, or can show that referring cases to mediation saves them time, or see mediations added to their key performance indicators, they may not refer many cases, especially at a time when resources are under pressure. In Austria a section of the probation service is entirely devoted to 'out-of-court offence resolution ' (Hilf 2012), and in Finland the Act on Mediation in Criminal and certain Civil Cases (1015/2005) requires the provision of state finance (Kinnunen et al. 2012). There is a case for saying that if restorative justice is to be offered to as many victims and offenders as possible, who could benefit by it, there should be a service for which this is the primary function and not a subsidiary one. Advocates of community involvement would also argue for providing this by means of local NGOs. The use of volunteer mediators would encourage such involvement; it also lowers costs, which would extend the service that could be provided within a given budget, although it should be remembered that paid staff and office resources are required to recruit, train, support and supervise volunteers. In some ways the Neighbourhood Justice Panels currently being piloted resemble this model, although they are closely tied to the Ministry of Justice; but the ministry has expressly stated that no central funds are available for this purpose. A national NGO, in consultation with local services, could set standards (as the Restorative Justice Council is already doing) and monitor their implementation.

5 How can RJ be extended to RP?

The restorative idea developed in criminal justice, but its applicability was soon recognised in other spheres where discipline is needed but 'toughness' can be counterproductive, such as schools. One such school was Highfield Junior School, Plymouth, which was 'mayhem' when Mrs Lorna Farrington became head in the early 1990s. With the staff she introduced 'assertive discipline', firm without being harsh, and then used 'circle time' (a typical restorative practice) to enable children to make their own rules and handle problems, for example by valuing the person while persuading them to choose different behaviour (Highfield Junior School, 1997). Mrs Farrington told a conference in 1995, 'we are in effect running a crime prevention initiative. Our main aim is to keep 140 children out of the nick. There are 62 per cent with special needs of various kinds, and 12 who have been expelled from other schools.' (Farrington, 1995). In the city of Hull, Collingwood primary school has followed a similar path, and now everyone in the city working with children is being trained in restorative practices; the aim is to become a 'restorative city.' This would similarly form part of a crime prevention policy.

If maintaining social order and relationships is to progress from the use of force and the imposition of authority to the use of consensual decision-making and mediation, the young generation must be a good place to start. In recent years the environmental movement has begun to teach us the importance of living in harmony with the planet; now it is time to learn to live in harmony with each other.

Some of the material in this paper will be amplified in M Wright, Could a restorative system of justice be more civilised than a punitive one? 'In: D. Cornwell, J. Blad and M. Wright, eds. Civilising criminal justice: an international restorative agenda for penal reform. Hook, Hampshire, Waterside Press, forthcoming.

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