

From England

FROM RETRIBUTION TO RESTORATION: A NEW MODEL FOR CRIMINAL JUSTICE

by Martin Wright

‘Don’t do as I do, do as I say’. Does our system of punishment cause more violence than it cures ? In 1987 Martin Wright looked at what was then a new way.

Mr A’s wife died of cancer, and he gave up his job to look after his children. One of them was beaten by a teacher; Mr A went to see the teacher and assaulted him. For this he was sentenced to six months’ imprisonment. An arrangement whereby his brother-in-law would look after the children did not work out, and they were taken into care – all the more traumatic for them since their mother, when she was alive, sometimes used to say ‘If you don’t behave yourselves, I’ll have you sent away.’

Six weeks before Mr A was due for release, the borough housing department decided to terminate his tenancy, and only action by a friend and two voluntary organisations (one of which paid the rent) averted this. On one occasion the children lost their prison visiting order, and again an outside organisation had to intervene, to enable them to visit their father.

How can imprisonment be justified in such circumstances ? asked the Howard League in its newsletter. Was any attempt made to bring the two men together? To provide Mr A with a home help ? To explore other possible responses? These might have worked in his particular case, but there are other ways of helping (and inducing) people to behave, besides the threat of punishing them if they don’t.

DO AS I SAY

What were the effects of this chain of events ? We don’t know what the teacher said to the boy, but the message he gave by his actions was: ‘Behave or I’ll use force.’ Then the father gave the same message to the teacher, and the State, through the court, gave it to the father. Thus, each in turn used the very method it condemned, in order to try to impose its will: ‘Don’t do as I do, do as I say.’

Most of the nearly 50,000 men and women in prison have not even committed an act of violence; a third of them are inside for offences that are trivial by any standards. The catalogue of what it does to them is only too familiar. They are separated from their families, who also suffer, though not convicted of anything. They are mixed with other offenders, with whom they can exchange criminal attitudes and techniques – as has been pointed out by reformers ever since George Fox saw it happening at first hand in the seventeenth century. They are given little opportunity to work, let alone acquire skills; on release, they are labelled with a stigma which makes it difficult to obtain accommodation (imprisonment often makes people homeless, as it nearly did for Mr A) or legitimate work.

Prison rules compel unquestioning (and often resentful) obedience rather than responsibility; and all punishment is based on fear, which as Archbishop William Temple said, makes people think of themselves, not of others – such as the victims of crime.

All this is well known; so why do our courts still send so many people to prison, and why does public opinion not protest? The reasons are complex. There are offenders who even penal reformers agree must be detained, though not in existing prison conditions; but people do not realise how few they are, and how many others are in prison for minor offences.

Some will say that the offender knew the risk he was taking, and can't complain if the penalty is imposed. This argument, which could be used to justify any form of torture, misses the point; it is the behaviour of us, as members of society, that is being questioned. Degrading punishments degrade us. 'Inasmuch as you have done it unto one of the least of these my brethren, you have done it unto me.' (Matthew 25:40). How can it be right to condemn people to conditions unfit for animals, with inadequate exercise, work, education and even sanitation? Even if the Victorian slum fortresses were replaced with nice new buildings, the other unavoidable flaws of prisons would remain.

There are two possible answers. The tough-minded one, given by a group of Quakers in a pamphlet called *Six Quakers look at crime and punishment*, is that punishment, like war and torture, is wrong in principle. The other is that it would be justified, as a regrettable necessity, if it could be shown to work – or rather, if no more humane method could work equally well. As Bentham said: 'Unless you have a reasonable prospect of preventing more pain than you inflict, you should not punish at all.'

SYMBOLIC

But what is meant by ‘working’ ? If it means preventing these individuals from offending again, it is not notably successful: at least 50 per cent of prisoners re-offend within two years of release, and for juveniles the figure can reach 85 per cent. If it is intended to frighten others into law-abiding behaviour, the crime figures do not suggest that it is very effective; and the United States, where prison sentences are even worse, is more violent than Britain.

Probably the overriding aim of courts is not practical, but symbolic: they feel that they must show offenders and everyone else how much law-breaking is condemned. The amount of the punishment, or the length of the prison sentence, is the conventional way of doing so. The side-effects are disregarded – except that, sadly, a large amount of humanitarian effort, much needed elsewhere, has to go into alleviating the damage and suffering caused by the punishment. A Dutch criminologist, Professor Louk Hulsman, has said that the three greatest causes of human misery in history have been disease, the military, and the criminal justice system.

‘Rehabilitation’ is often offered as an alternative: broadly, this means helping people to behave well, rather than threatening them if they behave badly. Criminologists argue with each other whether it ‘works’, although, it seems at least no more ineffective than punishment; but it lacks the symbolic condemnation which punishment provides. Punishment is often demeaning, whereas rehabilitation, offered to those offenders who are disadvantaged, can help them, voluntarily, to catch up on skills which the rest of us enjoy.

Sometimes the rehabilitative approach has been seen as ‘curing’ offenders, as if they were generally ‘maladjusted’ or ‘sick’. Reacting against this view, C.S. Lewis said that ‘to be cured against one’s will and to be cured of states which we may not regard as a disease is.... To be classed with infants, imbeciles and domestic animals’, and compulsory ‘treatment’ is therefore also demeaning; offenders’ dignity should be preserved, and he felt that this can only be done by punishment.

INSTEAD OF PUNISHMENT: WHAT THE BIBLE OFFERS

There is another way. Justice can be restorative, rather than retributive. Public opinion is more ready to accept this than politicians and leader-writers give it credit for. Several surveys have shown a large majority in favour of compensation and community service, rather than imprisonment, at least for some types of crimes. The last two Criminal Justice Acts and the Bill currently

(March 1987) going through Parliament, put much more emphasis on compensation by the offender; the Act of 1972 introduced community service orders as a means of indirect reparation.

Both Christian and Jewish teaching show the way. (In quoting the Bible I am not trying to say 'It is true because the Bible says so,' which is a problematic line of argument; but only that the great Biblical teachers had similar insights long ago.) It sometimes seems that the only relevant line from the Bible that most people have heard is 'An eye for an eye and a tooth for a tooth.'(Exodus 21:24).

But Jewish teaching is clear that this is to be interpreted as restorative; make good the value of the damage you do; and limiting: the reparation must be proportionate to the offence. For those who go on to argue 'a life for a life', it is worth remembering that God firmly forbade any revenge-killing of Cain.(Genesis 4:15.)

Jesus did not contradict the old law, but took it further. 'An eye for an eye,' in his teaching, became 'love your enemies'.(Matthew 5:38-45). The theme recurs throughout the New Testament, in different contexts but surely with the same message: do not return evil for evil, but use good to defeat evil. (1 Peter 3:9; Romans 12:17-21; 2 Corinthians 2:5-11; 1 Thessalonians 5:14-15.) The woman taken in adultery was told 'Go, and sin no more.' (John 5:53-8:11). The present day equivalent would be a conditional discharge.

This story illustrates another principle: that those who 'have a beam in their own eye' should not judge others.(Matthew 7:1-5). 'Let him that has no sin cast the first stone.' This too is repeated (Romans 2:1-6; James 4:11-12.) It suggests that we should not scapegoat the offender, but look at our own shortcomings, which would not only take away our moral right to condemn others, but may even, in some cases, be part of the cause of their misconduct. If those of us who have jobs will not make the sacrifices necessary to reduce unemployment, can we sit in judgement on those who are out of work ?

There is little in the New Testament about reparation; St Paul does say, however: 'The thief must give up stealing, and instead work hard and honestly with his own hands, so that he may have something to share with the needy.'(Ephesians 4:28). This sounds a little like the modern concept of community service orders; by working for others, offenders can indirectly make up for harm done. The emphasis is rather on repentance and forgiveness. Of course, the offender cannot be forced to repent, nor the victim to forgive; nor has the State the right to forgive on the victim's behalf. But it can respond in a way that encourages such responses by the parties themselves.

MAKING RESTORATION WORK IN PRACTICE

Reparative approaches such as compensation orders and community service orders do not entirely solve the court's difficulty in deciding how much to impose. Nor do they deal with another criticism of the present system: it takes the whole affair out of the hands of the parties directly involved. As Professor Christie has said, the conflict is 'stolen' from them by the professionals – lawyers, social workers, probation officers. In courts, people are actually prevented from telling what they feel to be the whole truth – the rules of evidence prevent them from giving what they regard as the background of the incident. In law one side usually 'wins', the other 'loses'; the process does not reconcile them.

Another way of resolving conflict is being developed: mediation. Suppose Mr A lived near a community centre. Instead of coming to blows he could contact the centre, which would invite the teacher to attend a mediation session with him, in the presence of two trained volunteer mediators. After getting both parties to agree to the ground rules, the mediators would ask Mr A, as complainant, to give his side of the story, with no interruption from the teacher. There would be no rules of evidence: he could raise any incidents that had been fuelling his dissatisfaction.

The teacher would reply, likewise without interruption. There could then be a general discussion, at which problems can be brought into the open; usually each side reveals feelings and grievances of which the other knew nothing. The mediators use their skill to bring out the story, while keeping the temperature down; and they look for points which might form the basis of an agreement. Sometimes they talk to each party alone, to see whether there are things which he does not want to say in front of the other, and to discover what he wants most: the sticking point without which he will not be satisfied.

Finally they work towards an agreement, which is written down in clear terms, such as 'Mr A will go the head teacher if he has any problems in future; Mr B will consult Mr A in the case of serious misconduct by Billy A'. It would even be possible to include the son in the mediation, and invite him to work out an agreement such as 'Billy A will do his homework, will not be rude to Mr B; and will go to see his form tutor if there are any problems; Mr B will arrange for Billy to move to a different set for maths.' (Agreements should have two sides.)

This is different from the court process in several ways. No one seeks to apportion blame ('Judge not, that you be not judged'); it is not even necessary

to agree on the exact facts. Mediation agreements are forward-looking; they give undertakings for future behaviour. Once the parties are willing to meet, the great majority of mediations lead to agreements; but even if they don't, the parties usually feel they process of clearing the air to be helpful. Mediators have no authority to impose solutions; they empower people to work out their own. Nor is mediation confined to separate projects; once knowledge of its techniques spreads more widely, it could be used in many other contexts – such as schools – as a way of resolving conflict.

RECONCILIATION

What bearing does this have on crime ? In a case like Mr A's, mediation might have prevented his offence. But even if no one had thought of it in time, he and the teacher could still have gone to mediation after the assault' or the police, prosecutor, or probation officer or court could have suggested it as more appropriate than criminal prosecution. It would not deter other parents from venting their anger on teachers, it would show them that there was a better way.

A new dimension for mediation is its use with crimes committed by strangers. Several projects in England, and several dozen in Canada and the United States, have shown that similar principles can be applied to thefts, burglaries, criminal damage, and even more serious crimes. The principle is the same: meet, explain, express feelings, agree. Many of the North American projects, significantly, are called Victim/Offender Reconciliation Programs: the process is felt to be more important than the actual amount of reparation. Victims often want to see what 'their' offender is really like, to ask him questions that have been troubling them, to tell him what it was like to suffer at his hands. After that catharsis, they are often willing to forgive, and even to help him. For victims whose offenders have not been caught, and offenders whose victims do not wish to take part, there have been experiments with discussion groups where both can talk about what it is like to be a victim or an offender, respectively; many of them have found this helpful.

This approach does raise questions. How does it relate to the criminal justice process ? Could victims or offenders feel under pressure to take part against their inclinations ? Where there is no individual victim, can the offender make amends to the community ? These have to be thought through, and worked through; but as we have seen, the problems encountered in the existing system are no less serious, and potentially more damaging for individuals and for society.

MENDING

The movement towards mediation and restorative justice has two strands. One relates primarily to disputes that either would not reach the courts, or would involve civil law, or possibly a criminal act between people known or related to each other. Here mediation offers a way of enabling the participants themselves to find a solution rather than have it imposed by authority; there is also a chance of mending their relationship (or ending it by mutual agreement.) This is not without problems; for example, can mediators even things up if one party tries to dominate the other ? But it offers an attractive way of tackling conflict; pioneering projects like those at Reading, Southwark and Newham should surely be encouraged.

The second involves crimes by strangers. It is all very well showing how a few dozen projects have produced some heart-warming examples of forgiveness, repentance and reconciliation. But is this the beginning of a revolution in criminal justice, or only an example of how a few dedicated enthusiasts can bring out the best in people ? Will the Christian perspective of turning the other cheek and so on work between the government of a complex modern State and its citizens as a means of social control, or only among individual members of small communities to whom Jesus preached and Paul wrote ?

We must separate the different aims of our responses to crimes. We conveniently assume that punishment achieves both the symbolic function of denouncing crime and practical ones such as inducing the offender to mend his ways and deterring others from law breaking.

However:

We can denounce crime more constructively by doing things for the victim (and requiring the offender to do so), rather than against the offender.

For most offenders, punishment makes it harder to conform, to have self-respect and respect for others.

Deterrence is a can of worms. It is unethical to inflict extra pain on one person, in the uncertain hope of frightening others into good behaviour. It has not been shown that harsher penalties reduce crime; if they do deter, they probably influence mainly the competent rational offenders, from selfish motorists to shady financiers and drug traffickers, but not the ungifted, unskilful, weak people who comprise a large part of the criminal justice system.

Nor has it been shown that fear is the only workable basis for social control; many people behave decently because they pride themselves on it. A society's leaders can exert influence not only by force, but by force of example.

Crime prevention, then, should be a separate part of social policy, with a departmental responsibility to devise and implement strategies for reducing each type of crime. This would leave us free to respond to individual lawbreakers and their victims in a constructive way, freed from the trammels of retributivism.

It is not suggested that prisons and coercion can be swept away all at once. Mediation would have to be introduced gradually; courts would still be needed for those who did not wish to take part, although their sentencing could move from the retributive to the restorative. Prisons would remain for the dangerous few, though they would also focus on giving offenders the opportunity to make reparation, and regimes would have to be transformed. The offender has strayed from the straight and narrow, and fallen into the swamp (whether through negligence, weakness, or deliberate fault, it is not for us to say). Punishment ties a ball and chain to his leg; reparation offers him a lifeline by which he can pull himself back.

This article first appeared in the Christian magazine in July 1987, published by Marshall and Pickering. It shows remarkable insight in to restorative justice in its infancy in this country.

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