

Restorative Justice and the Law: the case for an integrated, systemic approach¹

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1. Introduction

The growth in the range, diversity and geographical spread of restorative justice initiatives in recent years has been remarkable. Even more remarkable is the extent to which restorative justice thinking appears to be increasingly influencing the direction of criminal justice policy-making at almost every level: international, governmental, and also sub-governmental within a wide range of criminal justice agencies, including the police, probation service and prison service. As its influence develops, however, one inevitable consequence will be to expose ever more starkly a number of significant 'fault-lines' within the restorative justice 'movement', necessitating some fundamental reappraisals of hitherto taken-for-granted assumptions, and some difficult policy choices regarding the future direction of restorative justice endeavours. In this paper I will address three of the most important fault-lines that delineate different strands of restorative justice thinking, and will attempt to 'map out' the policy implications that are associated with each tendency. In doing so I will argue the case for restorative justice to be conceptualised and developed as a fully integrated part of the 'regular' criminal justice system, with the important proviso that the system itself needs to be radically and systematically reformed in accordance with restorative justice precepts.

2. Restorative justice fault-lines and their policy implications

In the early days of the restorative justice movement, there was a tendency to portray the relationship between the emerging restorative justice approach and the regular criminal justice system in highly dichotomous terms, as being 'polar opposites' in almost every respect. The best-known and most influential

example involves Howard Zehr's (1985, 1990) powerful use of photographic metaphors involving the imagery of 'changing lenses' to reveal radically different perspectives on a given subject. His writings probably did most to popularise the portrayal of restorative justice as a completely new paradigm that has little or nothing in common with the regular criminal justice system. Although he was by no means the first to advocate the need for an alternative paradigm, others had done so on grounds that only loosely anticipated the restorative justice movement. Some (for example Cantor, 1976), had advocated a wholesale substitution of civil law for criminal law processes with a view to 'civilising' the treatment of offenders, while others (for example Christie, 1978), had argued in favour of informal methods of offence resolution that would return criminal conflicts to the parties directly involved with a view to empowering them.

Although the tendency to dichotomise may be understandable when advocating new concepts to people who may be unfamiliar with them – since it may enhance their appeal when contrasted with existing institutions that are widely, and often justifiably, felt to be failing - it may also be misleading. It may mislead firstly by exaggerating the differences between the two systems, and playing down their similarities; and secondly by implying that the two systems are more homogeneous than they really are, thereby overlooking important differences (or shades of opinion) *within* each system.

The tendency to 'play up' differences between the two systems is illustrated by the long-running debate over whether restorative justice measures are 'punitive'. Some restorative justice advocates (see e.g. Wright, 1991: 15 and 1996: 27; Walgrave, 1999: 146) deny that they are punitive - regardless of the way they are actually perceived by their recipients - on the

ground that their primary purpose is intended to be 'constructive'. This denial that restorative justice is engaged in the business of punishment is then contrasted with the conventional criminal justice system. The latter *is* characterised as punitive - even though the deprivations that it imposes may be identical to those entailed in restorative justice measures - because they are said to be inflicted 'for their own sake' rather than for any 'higher' purpose.

I have argued elsewhere (Dignan, 2002) that this purported distinction is misleading because it relies for its effect on the confusion of two distinct elements in the concept of intention. One element relates to *motive* for doing something (its intended purpose); the other (which we may think of as the element of *volition*) refers to the fact that the act in question is being performed deliberately or wilfully. However, the reason for taking issue with those who insist on distinguishing between punishment and restorative justice interventions is not just that the purported distinction is misleading; nor is the debate a mere semantic quibble. It arises from a concern that it is likely to be harmful to the cause of restorative justice to deny that it is also engaged in the business of punishment. For if we were to accept such a distinction, then there would be no obligation to provide any moral justification for imposing restorative justice interventions on offenders in the way that there is for punitive interventions; nor would there be any need to specify any limits on the extent or intensity of those interventions.

However, those restorative justice advocates who insist on such a distinction would do well to recall that similar 'motivational' arguments were used by previous generations of penal reformers in support of *rehabilitative* measures that were also claimed not to be subject to the same normative restrictions as punitive measures, because they, too, were said to be inflicted

with purely benevolent intentions. They would do well to remember also that such arguments were justifiably challenged,² and ultimately rejected, on the ground that they failed to provide adequate safeguards to protect offenders from being treated unjustly.

A far more principled, defensible, and strategically advisable line³ for restorative justice advocates to adopt in my view is to accept that whenever pain or unpleasantness of any kind is *deliberately* imposed on a person this calls for a moral justification and needs to be subject to normative restrictions. This applies regardless of the motive for inflicting the pain or unpleasantness and irrespective of the name that is given to it, whether this be punishment, treatment or a restorative justice 'sanction'. So, instead of engaging in such fine semantic distinctions, there is a far more urgent need for restorative justice advocates to articulate and refine a clear set of normative principles that are capable of providing a coherent and defensible normative framework for the practice of restorative justice, whatever form it takes. Although this is not the aim of the present paper, it is an issue that I have tentatively addressed elsewhere (Dignan, 2002; see also Cavadino and Dignan, 1997).

Conversely, the tendency to 'play down' similarities between restorative justice approaches and the conventional criminal justice system is exemplified by a reluctance to acknowledge that the latter may also comprise certain restorative elements (in the form of 'compensation orders' 'reparation orders', or even certain forms of 'community service', for example), however attenuated they may appear in the eyes of some restorative justice advocates. Instead of depicting the relationship between restorative justice approaches and the conventional criminal justice system in terms of a dichotomy of opposites, therefore, it may be more helpful to think in terms of a continuum of

restorative approaches (see Dignan and Marsh, 2001). These might range from fairly narrowly focused court-ordered reparative measures on the one hand, to potentially much more wide-ranging restorative measures that may have resulted from some form of inclusionary decision-making process at the other end of the spectrum.

A third weakness that is associated with this ‘dichotomising tendency’ is its implicit assumption that the two contrasting models are themselves relatively homogeneous, thereby glossing over important distinctions (including major differences of opinion) *within* each model. With regard to the restorative justice model, there are at least three major sets of ‘fault-lines’⁴ that delineate significantly different strands of restorative justice thinking.

The first fault-line relates to the concept of ‘restorative justice’ itself, and the way this has been defined by restorative justice advocates. It encompasses an important split between those who conceptualise restorative justice exclusively or primarily in terms of a particular kind of *process*, and those for whom the concept also extends to *outcomes* of a particular kind, irrespective of the decision-making process that is involved. The second fault-line relates to the focus of different restorative justice practices, and the primacy or ‘standing’ that is accorded to each of the main ‘stake-holders’ – victim, offender, community and state – with regard to specific offences. And the third fault-line relates to the kind of relationship that is envisaged between restorative justice initiatives – whatever form they take - and the ‘regular’ criminal justice system. To some extent, as we shall see, there may be a tendency for attitudes to ‘polarise’ in a consistent direction, or in the same ‘plane’, across all three sets of fault-lines and, to that extent, the fault-lines themselves may help to delineate a number of quite distinct lines of potential

development for restorative justice to take in the future. Or so I shall be arguing. But first it is important to expose the three principal fault-lines themselves and the differences of opinion with which they are associated.

3. First restorative justice fault-line: process vs. outcome definitions

Despite numerous attempts, it has not been possible for restorative justice advocates to formulate a definition of the concept that all are able to subscribe to. On one side of this 'definitional fault-line' are those who conceive of restorative justice as a distinctive type of decision-making *process*. Tony Marshall's formulation (1999:5) of this process – as one that enables those who have a stake in a specific offence to 'do justice' by collectively resolving how to deal with its aftermath and also its implications for the future - epitomises this perspective. Most restorative justice advocates and practitioners who conceive of restorative justice as a distinctive process for dealing with crime and its aftermath also subscribe to certain core ethical values that underpin the process itself. They include the need for consensual participation on the part of the principal stake-holders; for dialogue based on the principle of mutual respect for all parties; for a balance to be sought between the various sets of interests that are in play; and for non-coercive practices and agreements. Another significant attribute of the process is its forward-looking, 'problem-solving' orientation (Dignan and Lowey, 2000: 14). Such values provide an important and welcome acknowledgement of the potential abuses to which informal restorative justice processes might otherwise be subject. Where they are respected and enforced – and particularly when they are incorporated into more detailed sets of ethical standards for regulating restorative justice practices⁵ - they may provide valuable safeguards to minimise the risk of abuse.

Although the formulation proposed by Tony Marshall is reasonably flexible, since it incorporates a variety of possible processes (including victim offender mediation, various forms of conferencing and sentencing circles), in another sense it is also highly restrictive. For the adoption of a process-based definition of restorative justice also appears to limit its scope – possibly drastically – firstly to those cases that are deemed appropriate for this kind of intervention, and secondly – within this category - to those in which both parties are willing to participate and abide by the ground rules.

Different jurisdictions have adopted different policies with regard to the first of these issues, though all of them are inherently problematic. In New Zealand, for example, family group conferencing is currently restricted in the main to young offenders whose offences are considered too serious to be dealt with by means of a police warning or diversion. In other words conferencing is reserved as a routine alternative to prosecution in the youth court. There may be strong arguments in favour of this approach, since conferencing is undoubtedly a resource-intensive process, and it may make sense to limit its use to cases where the victim's need is felt to be greatest. But the effect is to restrict the scope for this kind of restorative justice process (together with its potential benefits) to a minority of those New Zealand young offenders whose cases are formally dealt with by the criminal justice system, and to withhold it from the majority of young offenders – and also their victims - who are cautioned by the police.⁶

In other common law jurisdictions the tendency has been to restrict the use of restorative justice processes to the less serious offences that are committed by young offenders, either by linking them to police cautioning initiatives⁷ or to relatively minor court-based disposals. For example,

offenders in England and Wales who are given reparation orders⁸ might be involved in mediation meetings with their victims, though this is just one of a number of possible forms that reparation might take, and will only happen where the victim is willing to take part. In addition, offenders who are prosecuted for the first time, and who plead guilty, are in most cases now automatically made subject to a referral order,⁹ which requires them to participate in a meeting, the purpose of which is to conclude a contractual agreement binding the young offender to an agreed 'programme of behaviour' for the duration of the order. Victims are among those who might be invited to take part in such meetings, but again only if they wish to attend.

The effect of this approach is to withhold the availability of restorative justice processes from cases that are deemed to be too serious, which are therefore prosecuted and sentenced in the normal way. And even though the pool of less serious cases is potentially far greater – as in New Zealand - the fact that restorative justice processes of any kind will only be resorted to where the victim's consent is forthcoming has so far restricted their use in practice to a tiny minority of cases only. Indeed the rate of victim participation that has been reported in connection with a variety of recently introduced restorative justice style processes aimed at young offenders has been little better than the rates that were achieved by two experimental schemes catering for more serious adult offenders in the period preceding these recent reforms.

Thus, Umbreit and Roberts (1996: 27), for example, reported that only 7 per cent of all referrals to two well-established and highly respected English Victim Offender Mediation Projects (Coventry and Leeds) during 1993 participated in direct (face to face) mediation.¹⁰ Similarly, following the

introduction of reparation orders in the Crime and Disorder Act 1998 only 9 per cent of these involved mediation between victims and young offenders during the time of the pilot evaluation (Holdaway et al., 2001: 89). Reports on the evaluation of the referral order pilots also suggested a low rate of victim participation in the new youth offender panels (Newburn et al., 2001a and b; 2002). The final report of the evaluation indicated that victims attended panel meetings in only 13 per cent of cases in which an initial panel was held, and in respect of which there was an identifiable victim. Finally, preliminary reports from the Thames Valley restorative cautioning project likewise indicate that the levels of victim participation in this police-led conferencing initiative are much closer to those encountered in other restorative justice processes in England and Wales than to its Australian or North American counterparts, where victim participate rates have been very much higher.¹¹

To some extent the disappointingly low rates of victim participation that have been reported recently in England and Wales may reflect shortcomings in the way some of the newer restorative justice-type initiatives have been implemented.¹² A lack of adequately trained and suitably experienced practitioners may also have been a contributory factor (though the low level of victim participation predates these latest initiatives). Nevertheless, if those who advocate an exclusively process-based definition of restorative justice insist that it must involve those with a stake in the offence, and that the 'eligibility' for the process is restricted to those cases that can satisfy the exacting ethical standards outlined above, then it follows that the scope for restorative justice processes may be quite narrow. Moreover, the prospects for future development and expansion would also appear to be correspondingly limited, at least in the short term.

One response to these problems has been to relax the 'eligibility' criteria, in effect, for example by developing forms of restorative justice practice that do not depend on direct participation by victims. The use of 'indirect mediation', involving the mediator as a 'go-between' is one of the earliest and best-known adaptations of this kind.¹³ Analogous techniques have also been developed in connection with the Thames Valley style restorative cautioning scheme, whereby police facilitators may seek to convey the absent victim's perspective during the 'conference'.¹⁴ Attempts have also been made to relax the criteria for participation by offenders, notably in New Zealand, where a formal admission of guilt is not insisted upon provided an offender 'does not actively deny' responsibility for the behaviour that gave rise to the charge.

On the other side of the 'definitional fault-line' are those (e.g. Bazemore and Walgrave, 1999: 48; see also Dignan, 2002) who take the view that the process-based definition of restorative justice is at best incomplete, because it has nothing to say on the subject of '*restorative outcomes*', or how these might be defined and evaluated. The neglect of any reference to restorative outcomes in the definition of restorative justice is problematic on a number of counts. First, with regard to restorative justice processes of the 'standard' type, that do involve participation by the appropriate parties, it is important for others – not just the parties themselves - to be able to say what counts, or does not count, as a 'restorative' outcome. In principle it seems desirable to be able to do this with reference to criteria that may be derived either from the definition itself, or from objective normative standards that are accepted as underpinning the definition. This may be particularly important when juvenile offenders are concerned, even when their own families are involved in the process for, as Braithwaite's (1999: 66-7) example of the authoritarian 'Uncle

Harry' reminds us, families are not necessarily the most effective guarantors of 'fair outcomes' that also reflect the best interests of the children for whom they may be responsible.

Second, the need to be able to determine what counts as a 'restorative outcome' is arguably all the more important in cases that are dealt with by means of 'non-standard' restorative processes, as when the victim is absent. This is partly because it may be more difficult to determine what might count as an appropriate form of 'direct reparation' when the victim is not present; and partly because it may increase the likelihood of a power imbalance. The risk of this happening may be even more acute when the offender is confronted by one or more 'authoritative figures' – especially if the police are involved in the process, as in some forms of police-led conferencing - rather than the victim. Cases such as these raise serious doubts regarding the extent to which the *process* can be fully restorative in such circumstances, whether from an offender's or a victim's perspective, and make it all the more important to consider what should count as a restorative *outcome*.

The third and most important problem that is posed by a failure to address the issue of restorative outcomes is that it leaves restorative justice advocates with nothing to say regarding the way cases should be dealt with that – for whatever reason - do not lend themselves to some form of informal offence resolution process. More specifically, it represents a missed opportunity to consider whether, and if so how, restorative justice thinking might contribute to a broader and much more far-reaching programme of reform encompassing the entire penal system. Instead, by tying the definition of restorative justice to a particular kind of informal dispute-resolution processing it increases the likelihood that restorative justice theory and

practice will largely be confined to a set of diversionary practices operating on the margins of the regular criminal justice system.

4. Second restorative justice fault-line: 'civilian' vs. 'communitarian' tendencies

Restorative justice advocates are united in their belief that the conventional criminal justice system is seriously flawed on two principal counts: first in the way it defines crimes as offences 'against the state'; and second in concluding from this that the appropriate response should be based on official assessments of what the 'public interest' demands (Dignan and Cavadino, 1996: 155). This has the effect of relegating all other interests (including those of the victim, the offender and 'the community') to a subordinate status at best, and relevant chiefly as a means of determining what the 'public interest' might entail. Beyond this 'unity in opposition', however, there are important differences of opinion within the restorative justice movement, even among those who subscribe to a 'process definition'. These differences relate to three main sets of issues: first the precise range of interests that need to be accommodated when dealing with an offence; second the extent to which it is felt important for these interests to be represented in the appropriate decision-making process; and third the extent to which it is considered that such interests need to be reflected in the outcomes that emerge from that process. As with the definitional issue, these differences represent a second significant 'fault-line' within the restorative justice movement: one that relates to the identity of the key 'stakeholders'; the most appropriate 'forum' or decision-making process in which they should be represented; and also the rôle they are expected to play in determining the outcome of this process.

One side of the fault-line is represented by a 'civilian' tendency, for whom the key stakeholders are thought to be the parties who are most directly affected by an offence. When taken to its logical conclusion (as in the writings of Gilbert Cantor, 1976), the appropriate decision-making forum for resolving disputes of this kind is one that is analogous to a civil court system, though many restorative justice advocates (e.g. Wright, 1991) would prefer to substitute informal methods of offence resolution such as face-to-face mediation, which allow far greater involvement by the parties themselves both in the process itself, and also in determining the outcome. The arguments in favour of such an approach (assuming the parties agree, and subject to the safeguards considered above) are highly persuasive in the case of less serious offences, since the most important interests in play relate to the personal harm that is experienced by the victim. And even in more serious cases it may be argued that the victim should be entitled to receive reparation from the offender for the personal harm that has been sustained, including the opportunity to take part in a process of mediation if desired.

In its most uncompromising form, the 'civilian' approach would favour mediation as the *sole* response to an offence, even in cases such as this, but this argument is much more difficult to sustain. The problem with this extreme variant of the civilian tendency is that it collapses the distinction between crimes and civil wrongs and, in so doing, fails to acknowledge that offences – particularly where they are serious - may have broader social implications which go beyond the personal harm or loss that is experienced by the direct victim (Duff, 1988; Dignan and Cavadino, 1996). By redefining the concept of crime as a purely interpersonal matter, other relevant interests are neglected. The most important of these is the anxiety that may be caused to potential victims since their presumption of security may be undermined, especially in

the case of a particularly serious offence (Watson et al., 1989).

Consequently, in cases such as these, the use of informal dispute resolution processes such as victim offender mediation is unlikely to be acceptable as the *sole* response, even though there may be scope for it to feature as *part of* the overall response to an offence.

On the other side of this particular fault-line is the 'communitarian' tendency, which accepts that the victim's personal losses are not the only key interests in play. It favours some form of 'conferencing' process rather than a conventional court hearing as the most appropriate forum within which the key stake-holders, including the wider community, can be represented. There are a number of important differences in the way 'the community' is defined by different conferencing advocates, however, and once again it may be helpful to think in terms of a continuum within the communitarian approach rather than a single model. Some advocates of a conferencing approach identify the key stake-holders as encompassing all those who are 'concerned' in some way about the offence. They include those who are concerned for the well-being of either the victim or the offender, those who have concerns about the offence and its consequences, and those who may be able to contribute towards a solution to the problem presented by the offence. Collectively, this group of potential stake-holders is sometimes referred to as the 'community of interest' (Young and Morris, 1998: 10), though 'offence community' might be an even more apposite term.

For other conferencing advocates the concept of 'community' means more than simply an extension of the 'bilateral' approach that is associated with the civilian tendency and also encompasses the 'community at large', whose interests may be 'represented' by those acting in an 'official' capacity

such as the conference facilitator. Braithwaite and Mugford (1994: 147) and Moore (1993: 30), for example, have suggested that, in cases where the breach of social norms that is involved in an offence is inadequately addressed by the outcome that may have been negotiated between the conference participants, the facilitator has a duty to stress the wider public interest, and to seek to ensure that this is also reflected in the resulting plan of action.

This may be acceptable when the social norms in question are those that are associated with the liberal and tolerant 'republican' political tradition that Braithwaite himself espouses (Braithwaite and Pettit, 1990). But what when this is not the case, as when 'restorative justice' processes are advocated within the context of local sectarian communities? Many of these are authoritarian, intolerant and unrestrainedly punitive in their attitudes towards 'wrongdoers', and possibly also towards those who are perceived to be deviant, or simply those who reject the prevailing social norms. And what when those informal community justice processes are intended to operate without recourse to the regular criminal justice system which, for all its failings, does at least afford some degree of protection against abuse of power and denials of due process? This is not a mere hypothetical example, and concerns have been raised (e.g. Cavadino et al., 1999: 48-50, Pavlich, 2000; Crawford and Clear, 2001; Walgrave, 2002) regarding the risks that restorative justice processes and rhetoric might be invoked to provide a façade not only for illiberal populism, but also for vigilantism and community despotism. These risks are not confined to divided and polarised communities such as might be found in parts of Northern Ireland (see Dignan and Lowey, 2000) but are just as real and immediate in many 'ordinary' non-sectarian communities throughout England and Wales, as the recent

controversy over the treatment of paedophiles all too graphically demonstrates.

In this section I have identified a split within the restorative justice movement between those who advocate a 'civilian approach' and those who advocate a 'communitarian approach' as alternatives to the regular criminal justice system. In both cases, I have suggested that these divergent tendencies are best seen as a continuum and that both may result in undesirable consequences, if taken to extremes. Although I believe that both mediation and conferencing have an important and valuable part to play as part of the overall response to crime they seem incapable of displacing altogether the 'regular' criminal justice system; nor does it seem desirable that they should. This conclusion throws into even sharper relief the third and, in many respects the most fundamental fault-line of all, concerning the relationship between 'restorative justice' on the one hand and 'criminal justice' on the other.

5. Third restorative justice fault-line: 'separatist' vs. 'integrationist' tendencies

Particularly in the early days of the restorative justice movement, there was a tendency for some of its most enthusiastic supporters (see e.g. Fattah, 1995; 1998) not only to contrast it with the regular criminal justice system in the highly dichotomous terms to which I referred earlier, but also to present it as an alternative paradigm, that might, one day, come to displace the latter. However accurate or inaccurate such predictions may turn out to be in the fullness of time, they were barely plausible in the absence of reasonably coherent and realistic 'transitional strategy', which was missing from most early accounts of restorative justice. Other restorative justice proponents

have shown a surer appreciation of the '*realpolitikal*' context within which the fledgling movement was struggling to assert itself.

Once again, however, two distinct schools of thought can be identified. On one side of this third restorative justice fault-line are those who argue for restorative justice programmes to operate completely outside the existing criminal justice system, in a supplementary capacity, rather than as a fully-fledged alternative to it.¹⁵ Although this completely 'separatist' approach afforded a number of advantages during the early 'developmental' phase of the movement, these benefits were greatly outweighed by the considerable limitations that came to be experienced once the emphasis shifted from 'innovation' to 'implementation' (Dignan and Lowey, 2000: 47). One of the biggest drawbacks with stand-alone programmes is the difficulty they almost invariably experience in recruiting and retaining sufficient numbers of referrals to remain viable. Another problem is the risk of 'double punishment' for offenders, if they take part in restorative justice programmes that operate entirely outwith the regular criminal justice system. But the biggest drawback of all with the 'separatist' approach is that 'it virtually ensures that a restorative justice approach will in practice be doomed to a precarious and marginal existence at the periphery of the criminal justice system. Consequently, whatever potential such an approach might have to offer as a means of contributing to the long-overdue reform of the existing criminal justice system is likely to remain unfulfilled' (Dignan and Lowey, 2000: 48). If restorative justice is not to be 'doomed to irrelevance and marginality' in this way, then some form of accommodation with the regular criminal justice system will need to be devised, though it would be foolish to pretend that this approach is free from dangers of its own. One of the most obvious of these is the risk of

co-optation, which could result in a distortion of its principal aims and a compromise of its own distinctive ethos.¹⁶

On the other side of the ‘implementational fault-line’, John Braithwaite has recently proposed a model showing how such an accommodation might be reached. This is reproduced in Figure 1, below.

Figure 1. A partially integrated ‘twin-track’ model of restorative justice

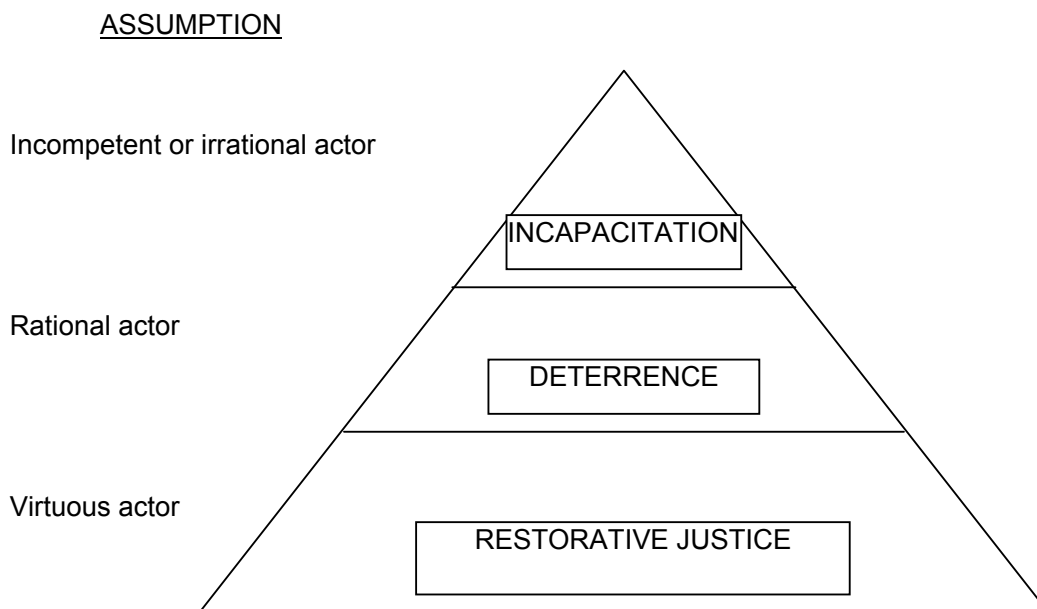


Figure 1: Toward an integration of restorative, deterrent and incapacitative justice

Although Braithwaite refers to the model as an *integration* of restorative, deterrent and incapacitative strategies, it may be more apposite to think of it as incorporating a *hybrid* or *twin-track* approach, in which restorative justice processes operate *alongside* deterrent and incapacitative measures rather than one that is systemically reorganised according to restorative justice principles. Thus, at the base of the enforcement pyramid, a restorative

justice approach to criminal law enforcement is reserved exclusively for virtuous or well-intended actors (including repeat offenders up to a point) who are willing to enter into informal restorative justice negotiations in good faith. To guard against the risk of rational actors who might be tempted to pursue a 'free-loading' strategy by making a deceitful pretence at participating in a restorative justice negotiation, however, Braithwaite envisages an enforcement strategy based on the principle of 'active deterrence'. The latter involves the strategic use of *escalating* threats in response to recalcitrance on the part of the offender, and could result in custodial incapacitation. This aspect of Braithwaite's approach has provoked understandable concerns on the part of deserts-based theorists, who are alarmed at the absence of proportionality constraints. The danger with this kind of twin-track approach is that it could readily lend itself to an escalation in the level of punitive responses towards repeat and recalcitrant offenders.¹⁷ Moreover, it does nothing to address the manifest defects of the existing system of punishments, about which restorative justice enthusiasts and just deserts proponents alike are justifiably critical.

If restorative justice is to play a part in addressing these defects, then it will need to be founded on a very different type of enforcement strategy to the one proposed by Braithwaite. This in turn will necessitate a reconceptualisation of restorative justice itself so that it is no longer tied to an informal consensual decision-making *process* requiring active participation by all the relevant stakeholders. For provision will also need to be made for all those cases that are deemed ineligible or inappropriate for referral to a diversionary informal restorative justice process (the 'recusants, the rejected and the recalcitrant', to use Ashworth's (2000: 9) alliterative terminology).¹⁸

Figure 2 shows an alternative enforcement model¹⁹ that I have previously proposed in a slightly different context (Dignan, 1994),²⁰ in which restorative justice is intended to operate as a systemic and fully integrated part of the 'regular' criminal justice system. One of the most important features of the model, however, is that the latter is itself radically reformed according to restorative justice precepts. This is essential in order to avoid the risks of co-optation that were referred to above. A second feature of the model is that it is intended to apply to both juvenile and adult offenders.

Figure 2. Towards a systemic model of restorative justice

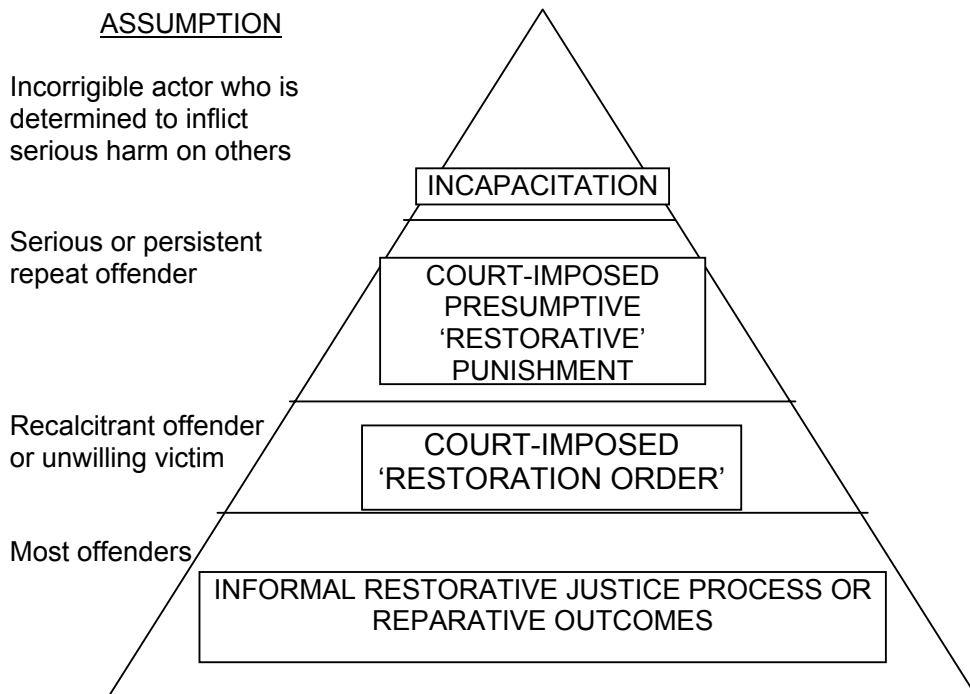


Figure 2: Toward a form of replacement discourse based on a 'systemic' model of restorative justice

First, with regard to those offences that are currently diverted from prosecution by means of a caution or warning, a system that is formulated along restorative justice lines would need to incorporate procedures for ensuring that, where appropriate, the needs of victims could be satisfactorily addressed. This could either take the form of a police-led conferencing

approach, of the kind described above, or alternatively the police or other appropriate agencies (prosecution authorities for instance) could be given the power to promote or impose suitable reparative undertakings. For example, an offender might agree to apologise to a victim, or to provide direct reparation if appropriate and desired by the victim, or alternatively might be required to undertake a limited amount of indirect reparation for the benefit of the community. Before the introduction of the recent youth justice reforms in England and Wales, limited attempts had been made in some areas to develop such an approach, which was known as 'caution plus'. Likewise, the police in New Zealand also have similar powers when dealing with the 70 per cent or so of offenders who are cautioned each year, though this mechanism for securing 'restorative outcomes' is usually overshadowed by the attention that is devoted to the much better known family group conferencing system.

For cases that are too serious to be diverted in this way, the standard response for the vast majority of criminal offences, as in Braithwaite's model, would be for the matter to be dealt with by means of the most appropriate restorative justice process (victim offender mediation, restorative conference etc.). Provided that reparation is agreed and performed to the satisfaction of both parties, and at least where there is no evidence of a lengthy history of similar offences, the fact that the offender has been willing to make suitable amends should normally be taken as evidence of a renewed respect for the rights of others. In the absence of any other 'public element', the case for any additional punishment in such cases would appear very weak. However, it would still be desirable to incorporate some form of 'judicial oversight' in such cases.²¹ This is partly to ensure that whatever is agreed by the parties does not exceed a reasonable level of reparation, and partly in order to safeguard the public interest (i.e. the human rights of people other than the individual

victim and offender), for example in cases where the victim does not seek any reparation from the offender despite suffering serious personal harm.

Recourse to the courts would not normally be allowed unless either the accused denied guilt, the victim was unwilling to participate in any way, the parties were unable to reach agreement on the subject of reparation or the offender refused to make reparation as agreed. In cases such as these (which include not only Braithwaite's rational free-loading actor but also other cases in which informal restorative justice processes might not be considered suitable), the court would necessarily become the 'default option' (see also Wundersitz, 1994: 94). However, the sentencing powers of the courts would be restricted in such cases to the imposition of a 'restoration order', which would either entail compensation or reparation for the victim, or else some form of restorative justice-based community service. There would thus be no need for a strategy of 'active deterrence', of the kind advocated by Braithwaite, since the court would in principle be able to enforce compliance on the part of offenders making a deceitful pretence at co-operation.

In more serious cases, (including cases in which the offender has unreasonably refused to make adequate amends, or there is a prolonged history of repeat offending followed by a refusal to make adequate reparation), greater weight would need to be placed on the 'public' aspect of the offence. In cases such as these, the offender could be said to represent a potential threat to the rights of other law-abiding citizens, whose interests therefore need also to be taken into account in determining the final outcome. However, this 'rights-based' approach also requires the 'private element' to be addressed. Consequently, an opportunity should still be afforded for suitable reparation to be informally negotiated in such cases. And due weight would

need to be given by the court to the outcome of such negotiations when determining the kind and amount of additional punishment that might be appropriate, since a willingness to undertake reparation does represent an acknowledgement that an offender has done wrong. It could also indicate a commitment to respect other people's rights in future. Where no adequate reparation is forthcoming, however, or reparation alone is not an adequate response to the 'public' element that needs to be addressed, what principles should apply regarding the type and amount of punishment to which an offender should be liable?

6. Rethinking the rôle of non-custodial penalties within a systemic model of restorative justice

If restorative justice *is* to furnish a more constructive alternative to the current repressive approach, it will be necessary to reformulate the existing range of punishments so that, as far as possible, every kind of penalty applies restorative justice principles in the pursuit of restorative outcomes. Some existing forms of punishment are already geared (in principle at least) towards the pursuit of broadly restorative outcomes – notably compensation orders and reparation orders. At present, however, the way in which compensation works is far from ideal from a restorative perspective (Cavadino et al., 1999: 175). Compensation orders are not always considered despite a statutory duty on courts to do so. And even when compensation is imposed, the duty to take the offender's financial circumstances into account means that it may not represent the full amount that the victim has lost as a result of the crime, particularly where the offender has committed a number of offences with multiple victims. Moreover, the victim often has to wait a considerable time for any compensation to be paid, frequently in small sums according to the

means of the offender; and often having to go back to the court when instalments are missed.

Furthermore, the *kind* of reparation that such penalties are capable of providing is inferior in many respects to the kind of reparation that might be expected to emanate from an appropriate restorative justice process. For example, it is far less flexible, is less likely to address the particular needs and sensitivities of the parties, and lacks the empowering potential that may ensue when victims and offenders are given the opportunity to participate actively in the offence resolution process. But in less serious cases that do not lend themselves to restorative justice processes for one reason or another, the use of a compensation (or reparation) order is nevertheless likely to result in a more constructive and restorative outcome than is likely to emanate from most other conventional forms of punishment, particularly if it is modified to take account of some of the operational shortcomings identified above.

Another conventional form of punishment that could in principle be modified in pursuit of restorative outcomes is the fine. This is not the case at present, since the revenue that is generated by fines is paid to the Treasury. But in principle it would be possible to strengthen the reparative potential of the fine. One way of achieving this would be to develop closer links between the fine and the compensation order, which might also attend to some of the deficiencies that have already been noted. For example, the income from fines (and also from proceeds that are confiscated from convicted offenders) could be used to create a 'Reparation Fund' that would enable victims to be compensated immediately.²² The fund could then be reimbursed by the offender at whatever rate the court feels is appropriate after taking account of the offender's financial circumstances. There is still an important distinction

between the fine, a financial compensation order that is imposed on an offender by the court, and a voluntary agreement on the part of an offender to make reparation (whether financial or non-financial) to a victim. Although the latter is preferable, it is not always achievable and, in such cases, it would be consistent with the idea of restorative justice as a form of 'replacement discourse' to develop a much more explicit and transparent link between crimes which infringes the right and well-being of others, including the community at large, and the principle of reparation for such wrongs.

It may also be possible to adapt other penalties, such as the community service order, to ensure that they are capable of producing more reparative outcomes (Cavadino et al., 1999: ch. 4; Walgrave, 1999), though it will almost certainly be necessary to divest them of their more overtly repressive and denunciatory elements in order to do so. Thus, as Tony Bottoms (2000) has recently pointed out, the community service order can be, and often is, conceptualised in an unambiguously punitive manner as a 'fine on the offender's time', as where an offender is required to undertake meaningless and sometimes demeaning tasks that are unrelated to the crime.²³ However, it can also be conceptualised in a straightforwardly reparative manner as a more constructive and meaningful undertaking that is more closely related to the original offence, particularly where the victim is keen to receive direct reparation. Alternatively, it could be conceptualised as a more broadly restorative or reintegrative intervention. This might be attempted, for example, where the task is related to the offender's skills or interests, or is intended to reinforce the offender's sense of self-esteem by providing a meaningful and worthwhile service to others. It is important to note at this point that, although these 'reparative' or 'restorative' variants of the community service concept are preferable in my view to the more

denunciatory and repressive versions, they are nevertheless still punitive. For, however benevolent the motive for resorting to them, they are nevertheless imposed deliberately on offenders, and require them to act in ways that they would not otherwise have wanted to. So their imposition still requires a defensible moral justification, and needs to be subjected to appropriate normative restrictions regarding length or severity, just as with any other punitive intervention.

With regard to other forms of non-custodial punishment, the restorative potential may not be so clearly discernible, but is rarely completely absent. In the case of probation, for example, attempts to promote compliance with the law by engaging in normative dialogue with an offender have some affinity with the kind of discourse that is encouraged during restorative justice processes such as conferencing. In principle it would be possible to move probation practice much closer to a model involving the 'dialogic regulation of social life' of the kind that is posited by Braithwaite (1999: 60) as part of the conferencing process. This might be done, for example, by encouraging probation officers to involve other people - including those that the offender cares about and also victims where appropriate - during discussions about the offence and the offending behaviour that gave rise to it.

Even the imposition of more restrictive measures such as curfew orders (with or without electronic monitoring) could in principle help to promote restorative outcomes; for example if they are adopted to enable an offender to maintain a job and so undertake financial reparation for a victim instead of being given a custodial sentence.²⁴ However, there is also a danger of 'up-tariffing' where such measures are used as substitutes for other forms of non custodial punishment, or the conditions that are imposed are so restrictive that

the offender faces an increased likelihood of imprisonment in the event of a breach (see also Roberts and Roach, 2002). The risk of up-tariffing is likely to be lower where such measures are introduced within the context of a 'systemic' model that prioritises restorative outcomes, but it would be naïve to imagine that it could be eliminated altogether; hence once again the need for effective constraints on the amount of punishment that can be imposed (see Dignan, 2002), and for effective procedural safeguards to ensure that those constraints are observed.

It is also worth noting that even within a punishment system in which the primary aim is to repair the harm caused by an offence and promote the restoration of victims, offenders and communities, this does not necessarily preclude the pursuit of other sentencing aims such as rehabilitation or even public protection in appropriate cases (see below). Indeed, many victims would like to feel that any response to their offence would reduce the likelihood of others being victimised in the way they have been, irrespective of their views on the subject of personal reparation for themselves.

7. Rethinking the rôle of imprisonment within a systemic model of restorative justice

So far I have been arguing that, even in cases for which informal restorative justice processes may be inappropriate, inapplicable or inadequate by themselves, it is possible to envisage a range of non-custodial court-imposed punishments that could be adapted to promote restorative outcomes. To this extent, at least, restorative justice could form the basis of a 'replacement discourse' in which the emphasis would be on more constructive and less repressive forms of intervention.²⁵ The use of custody would not normally be permitted within this kind of approach because it is rarely

consistent with the pursuit of restorative outcomes. For that reason, it would not be routinely available as either a purely punitive or a deterrent measure, whether in an active or passive sense.

The use of custody would not be prohibited altogether, however, since some offenders do threaten the freedom and well-being of others to such an extent that protective measures are called for. But it would need to be strictly reserved instead for incorrigible offenders who pose a serious and continuing threat to the personal safety of others.²⁶ Even where custodial sentences are warranted, however, much more could and should be done to promote restorative outcomes, for example by enabling offenders to undertake adequately paid work in prison in order to provide financial compensation for or on behalf of their victims. Moreover, experience in a wide range of penal jurisdictions has shown that there is also scope for facilitating victim offender mediation in appropriate cases within a prison context. In England and Wales, for example, some victim offender mediation services (notably those serving the West Yorkshire²⁷ and West Midland areas) have regularly mediated in serious cases where the offender is either still serving, or has recently been released from, a custodial sentence. In Belgium each of the 30 prisons now has its own restorative justice counsellor, whose responsibilities include the facilitation of a wide range of restorative activities (including but not restricted to mediation between victim and offender where requested) during the detention period (Verstraete et al., 2000).

Equally important, however, is the need to apply wherever possible relevant insights that are derived from experience with informal restorative justice processes to the regulation of social life *within* the prison setting. Thus, much more could and should be done to foster constructive and

mutually respectful relationships between staff and prison inmates, since such interactions normally afford the only context within which any kind of constructive dialogue, emotional engagement and behavioural or attitudinal change is likely to be possible (Cavadino and Dignan, 2002: 214ff). Within this setting, there is also a strong argument for adopting normative or 'moralistic' forms of reasoning with offenders. This kind of 'relational' approach is not only more humane and respectful of the rights of offenders, but offers a potentially much more constructive and effective approach than the cruder forms of instrumental reasoning based on sanctions and incentives that have typically been favoured – all too often with predictably damaging consequences - in the past (Liebling, 2001).

8. Conclusions

In this paper I have identified a number of potentially seismic 'fault-lines' running through the restorative justice movement. In the early days of the movement, the existence of these fault-lines was of relatively little consequence and, indeed, was almost entirely overlooked. But as the influence of restorative justice grows stronger, and particularly as it increasingly attracts the interest of criminal justice and penal policy-makers the existence of such fault-lines can no longer be overlooked; nor can their significance be denied. For it is important, not only to be aware of the different tendencies within the movement, and the policy options with which they are associated, but also to be prepared to make some hard choices about the directions in which, and terms on which, restorative justice policies should be developed in the future. In this paper I have argued against the tendency to equate restorative justice exclusively with a particular kind of informal dispute resolution process; against the tendency to adopt extreme and potentially damaging 'civilian' or 'communitarian' positions; and against a

policy of 'separatism' vis-à-vis the regular criminal justice system. Instead, I have advocated the need to be at least as much concerned about the promotion of restorative outcomes as the promotion of restorative justice processes; and the need for restorative justice to operate within, and as a fully integrated part of, the regular criminal justice system. But above all else I have argued for restorative justice precepts to be used as a catalyst for reform of the entire criminal justice and penal systems. My hope is that the promotion of 'restorative outcomes' may become the primary goal of the entire system instead of an incidental product of an admirable process that functions intermittently and inconsistently on the margins of that system.

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¹ An earlier and much less developed version of this paper was presented at the fifth international conference of the International Network for Research on Restorative Justice for Juveniles, entitled 'Positioning Restorative Justice', which was held in Leuven on 16-19 September 2001.

² See for example the American Friends Service Committee, (1971); and also the Canadian Ouimet Report (Canada, 1969) as cited by Roach (2000: 265).

³ To insist on distinguishing between punitive measures and restorative justice measures is strategically inadvisable because it is likely to alienate other campaigners for penal reform, notably those associated with the just deserts movement, who might otherwise be supportive of a more principled approach.

⁴ There is arguably a fourth fault-line, separating those restorative justice advocates whose approach is principally 'offender-focused', and those whose approach is principally 'victim-focused', but this is not an issue that I am proposing to address in this paper.

⁵ As in the 'Standards for Restorative Justice' (SINRJ) that have been formulated by the Restorative Justice Consortium (1999 and 2002).

⁶ According to police data for 1998/9, 23 per cent of young offenders coming to the attention of the police were warned, and 60 per cent were diverted. Just 6 per cent were referred directly by the police to a family group conference, and a further twelve per cent were arrested, most of whom would be referred to a family group conference by a Youth Court judge prior to sentence (Morris, 2001: 20).

⁷ As in the 'Wagga Wagga' model that operated, for a time, in New South Wales (see Moore and O'Connell, 1994), from which a number of other police-led conferencing initiatives have been derived, including one operating in the Thames Valley in England (see Hoyle and Young, 2002). The latter has been endorsed by the Home Office (2000) as a model for other police forces to emulate.

⁸ These were introduced by the Crime and Disorder Act in 1998 and were implemented nationally in June 2000, after a period in which they were piloted in a small number of areas.

⁹ Introduced by the Youth Justice and Criminal Evidence Act 1999. Like the reparation order, these were also piloted at first, and were 'rolled out' nationally in April 2002.

¹⁰ See also, Miers et al. (2001: 25). This government-funded study of seven English restorative justice schemes (five of which dealt principally with juveniles and two with adults) reported even lower rates of direct mediation for all but two of the schemes (both of which dealt with juvenile offenders) in which the rates were 13 per cent and 19 per cent.

11 Very high rates of victim participation have been reported from some Australian
police-led restorative cautioning projects, notably the Canberra RISE experiment, and
also the Wagga Wagga conferencing evaluation. Here, recorded rates of victim
participation are as high as 85 per cent (Braithwaite, 1999: 22) and over 90 per cent
(Moore and O'Connell, 1994) respectively. In marked contrast, the rate of victim
participation in the Thames Valley Cautioning project was 16 per cent overall,
diminishing slightly over the three years of the project (Figures calculated from Table
1.1 in Hoyle and Young, 2002).

12 Various problems have been identified. They include tensions between conflicting
objectives such as a desire to 'speed up' the system of trial and the need to allow
adequate time for victim consultation; and also difficulties arising from the restrictive
way in which recently introduced data protection legislation has been interpreted; see
Dignan 2000; Holdaway et al. 2001 for further details.

13 Another approach involves the use of 'surrogate' victims, though care is needed both
in the selection and preparation of such victims to ensure both that they are suitably
motivated and that they are not themselves further victimised as a result of their
experience (Dignan, 2000: 25).

14 Likewise, the referral order evaluation reported that a range of creative and innovative
approaches was being developed in some of the pilot areas, to promote other forms
of victim input into the panels (Newburn et al., 2002: p. 44).

15 Those who have advocated a 'separatist' or 'stand-alone' approach as the basis for
developing Restorative Justice programmes include Wright, 1991; Marshall and
Merry, 1990; and Davis, 1992.

16 Such problems were associated with some of the earliest attempts to develop
restorative justice initiatives alongside the regular criminal justice system (Davis et al.,
1988; 1989).

17 Such concerns are by no means fanciful. In England and Wales the Halliday report
(2001: 15) recommends the introduction of an explicit presumption that the severity of
a sentence should no longer be determined primarily by the seriousness of a given
offence, but also by the degree of persistence shown by an offender.

18 Similar considerations may also apply even in those jurisdictions (for example New
Zealand), where restorative justice processes such as conferencing have been
mainstreamed, in cases where victims decline to participate or offenders prove
recalcitrant.

19 This model was itself adapted from one that had originally been proposed by
Braithwaite (1991) in the context of business or agency regulation.

20 As part of an initial attempt to set out a 'transitional strategy' showing how restorative
justice might be integrated into the regular criminal justice system. In the meantime,
Walgrave's proposals for the reform of the Belgian juvenile justice system have
independently developed along broadly similar lines. See Geudens et al., 1997;
Walgrave, 2000.

21 As in the New Zealand family group conferencing model.

22 Similar forms of hypothecation already operate within the criminal justice system; for
example the channelling of the confiscated financial gains of drug offenders into
programmes working to combat drug abuse and proposals to channel income from
speeding fines to cover the cost of installing and operating road-side cameras.
Moreover, the government has recently indicated (Home Office, 2001: para. 3.118),
that it is contemplating the creation of a Victims Fund to ensure that every victim
receives immediate payment of any compensation that is ordered.

23 For example one of the areas piloting reparation orders under the Crime and Disorder
Act 1998 routinely required offenders to redecorate 'derelict' houses that no one lived
in (Holdaway et al., 2001: 91)

24 The use of conditional sentences of imprisonment in Canada provides an interesting
example of an attempt to pursue restorative outcomes in sentencing as an explicit
alternative to imprisonment (see Roberts and Roach, 2002) even though the
Canadian sentencing system as a whole falls a long way short of the 'systemic'
approach that is advocated here.

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- ²⁵ At the risk of being overly repetitive, this argument is not based on a dichotomous approach, in which restorative justice interventions are heralded as an alternative to punishment; rather, the latter are advocated as a less destructive form of punishment, albeit one that still stands in need of moral justification and has to be subject to the standard normative safeguards that have been referred to above.
- ²⁶ There may also be a case for using imprisonment as a default sanction in order to secure compliance with a non-custodial order, but this would only be justifiable in fairly limited circumstances where the offence itself was serious and all other non-custodial options had been tried and failed.
- ²⁷ See, for example, Wynne, 1996.