

Restorative Justice and the Practice of Imprisonment

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It is widely believed that, in the aftermath of wrongdoing, justice is achieved if the wrongdoer experiences pain in proportion to the magnitude of his or her wrongdoing. In contemporary society it is further believed that, in the aftermath of criminal wrongdoing, the state has sole responsibility for imposing such pain.

Restorative justice challenges such beliefs (see Johnstone, 2002 and Van Ness and Strong, 2006). One of its central tenets is that justice in the aftermath of wrongdoing requires that the harm done to people and relationships be repaired; it is not enough — and it may not even be necessary — that the wrongdoer experiences pain. Another tenet is that the direct victims of criminal wrongdoing and people closely connected to them — along with offenders and people closely connected to them — should be given leading roles in the process of deciding what to do about the offence.

This paper explores the implications of these tenets for the practice of imprisonment. One implication seems clear: restorative justice, by putting in question a core belief underlying the practice of imprisonment, raises serious questions about the validity of the practice. More recently, however, restorative justice advocates have become more interested in reforming the practice of imprisonment in line with the principles of restorative justice. This development is controversial within the restorative justice movement, with many advocates arguing that restorative justice is best pursued, 'not as a policy of prison reform but as an alternative to prison' (Guidoni, 2003: 66). This paper will examine the arguments of those who are sceptical about 'restorative prison' projects.

Undermining the practice of imprisonment

If we start with the belief that justice requires us to impose proportionate pain upon offenders, imprisonment seems like a useful and indeed indispensable social practice. It causes pain by depriving prisoners of something which is cherished by most people in contemporary society: freedom. Moreover, the amount of pain caused can be varied, albeit crudely, by changing the length of a prison sentence. Imprisonment also enables other central goals of

criminal justice — such as incapacitation — to be achieved concurrently.

Imprisonment also has advantages over other conceivable ways of imposing pain upon offenders. The monetary fine, for instance, also deprives people of something highly cherished in contemporary society and enables the quantity of pain to be varied. Accordingly, it is the most commonly used punishment for many types of offence. However, there are enforcement problems in that many offenders will fail to pay or be unable to pay. Also, fines can be paid by people other than the person on whom they are imposed; as a result the wrongdoer might undergo little pain and somebody else who was not personally culpable might incur pain. More generally, the fine can have a differential impact in a society where money is very unevenly distributed. A particular problem is that it can enable very wealthy offenders to commit wrongs with near impunity.

Imprisonment also compares favourably as a mode of pain imposition with corporal punishment, in that it is much less offensive to contemporary sensibilities. And, it compares favourably with 'community punishments' which tend to be perceived by the public as insufficiently painful as a response to serious wrongdoing (Kahan, 1996).

Of course, imprisonment also has disadvantages compared with these other ways of imposing pain. In particular, as critics incessantly point out, it is very costly and has a whole range of unintended harmful consequences. Advocates of restorative justice frequently reiterate these standard criticisms. In addition, however, they challenge the very assumption upon which imprisonment is based: that justice requires the imposition of pain upon offenders. By arguing that there are other and better routes to justice in the aftermath of crime, restorative justice attacks the idea of imprisonment at its heart.

Restorative justice advocates also suggest that, if we accept that restitution or reparation is essential for the creation of an experience of justice, imprisonment becomes problematic as an obstacle to justice. It creates psychological obstacles, in that imprisoned offenders are likely to regard their prison sentence as adequate amends for their crime and hence are unlikely to agree that they have a liability to contribute further to repair

of the harm they have caused. But, even if they did recognise such a liability, their imprisonment makes it difficult for them to fulfil it. Having been cut off from the possibility of earning significant money, they are not in a position to pay restitution. And, being deprived of their freedom, they are not in much of a position to undertake reparative work.

Furthermore, imprisonment acts as an obstacle to having restorative processes. A central idea of restorative justice is that personal encounters between offenders and victims to discuss the harm done and how it can be repaired can be very beneficial for both parties. For instance, through such encounters, offenders become more aware of the harm they have caused to another person with whom they can empathise, and victims become divested of fearful images and benefit from the opportunity to express and have validated their feelings about what happened. However, such encounters are very difficult to arrange even when both parties are in the community. When one party is imprisoned, the difficulties are compounded.

So, not surprisingly, advocates and supporters of restorative justice are highly critical of the practice of imprisonment. Indeed, restorative justice is often presented as an alternative to imprisonment and the movement as a whole has significant roots in the prison abolition movement (Van Ness and Strong, 2006: 17-18). Yet, as some observers quite convincingly argue, the restorative justice movement has had little success in its efforts to encourage the use of restorative interventions as *alternatives* to imprisonment. Rather, restorative justice has been used predominantly in cases which would not usually result in a prison sentence. Russ Immarigeon, in particular, states:

Restorative justice measures rarely divert anyone from imprisonment, particularly in the United States, although this also seems the case in Australia and Canada. Some evidence exists that New Zealand is using restorative justice as an alternative to detention, but even that evidence is weaker than one would hope for (2004: 144).

Immarigeon nevertheless endorses the aspiration of replacing imprisonment with restorative justice measures in a significant number of cases. In order to achieve this aspiration, he argues, the restorative justice

movement must identify and address the impediments to the development of restorative justice as an alternative to imprisonment. He himself identifies four steps that need to be taken:

- ❑ *Incorporate 'displacing imprisonment' into the definition of restorative justice:* Standard definitions of restorative justice fail to include the objective of displacing penal confinement. Reducing incarceration needs to be included in standard lists of the goals of restorative justice and given prominence in discussion and debate.
- ❑ *Educate professionals:* According to Immarigeon, educational efforts need to be focused not on the public — who are less punitive than often supposed — but on professionals working directly with offenders and victims in criminal justice, the media, mental health and social services. These are the people best positioned to influence those wielding financial and political power.
- ❑ *Pursuing displacement of imprisonment in practice:* Immarigeon recommends that those implementing restorative justice measures should ensure that the offenders they work with are in fact prison-bound. He also argues that part of the intervention should be planning and advocating sentences that exclude imprisonment.
- ❑ *Shift in research focus:*

Immarigeon argues that few researchers explore the success of restorative justice schemes in diverting people from imprisonment, and that this needs to be redressed.

Within the restorative justice movement, many no doubt will disagree with at least some of Immarigeon's specific proposals and may have other ideas about what can and should be done. Nevertheless, Immarigeon's article is important in that it challenges the restorative justice movement to reflect critically on the extent to which it has succeeded in achieving the aspiration of reducing society's reliance on imprisonment and it challenges the movement to examine critically what it is doing, and what it could and should be doing, to achieve this aspiration.

Restorative justice in prisons

In recent years, some within the restorative justice movement have begun to think about its implications for the practice of imprisonment in a rather different

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way. Accepting that the goal of a large scale replacement of imprisonment with restorative justice is unlikely to be achieved in the short-medium term, they are campaigning for and experimenting with the application of the principles of restorative justice within prison settings¹.

Within the restorative justice movement, this development is quite controversial (Edgar and Newell, 2006: 22-3). As we have seen, for many of its advocates one of the main purposes of restorative justice is to steer offenders away from punitive and segregative sanctions — which are exemplified by imprisonment — into restorative programmes that benefit rather than damage them and at the same time better meet the needs of victims and communities. From this perspective, the idea of restorative justice in prisons is contradictory and dangerous. The offender will be severely harmed by the experience and nothing that comes out of a restorative justice programme will be able to offset that harm. The coercive, segregative and authoritarian nature of the prison will, in any case, undermine any efforts at genuine restorative justice, which requires voluntary involvement, engagement with the community, informality and flexibility. Worst of all, the very fact that ‘constructive’ programmes such as restorative justice are taking place in prisons will simply make imprisonment a more attractive option for sentencing authorities and will enhance the legitimacy of imprisonment in the minds of politicians and the public.

Advocates of restorative justice in prisons are mostly well aware of these concerns and, indeed, readily admit that there are conflicts between the practice of imprisonment and restorative justice principles. They argue, however, that these ‘tensions’ need not and should not prevent efforts to transform the ethos of prisons by introducing restorative justice schemes within them and by using restorative justice principles to bring about organisational and cultural changes in prisons (ibid.: 23). Given that, for the foreseeable future, serious crime will continue to be met with imprisonment, the restorative justice movement needs to explore the possibilities of

restorative justice in prison whilst simultaneously acknowledging the conflicts between restorative justice and imprisonment. A ‘purist’ refusal to pursue restorative justice in the prison environment will result, it is suggested, in a restriction of restorative justice to less serious cases where it would operate as an alternative, not to imprisonment, but to some other non-custodial sanction (ibid.: 24).

Later, I will look more closely at the arguments against restorative prison projects. First, though, it might be helpful to know a little more about restorative justice programmes taking place in prisons. What are the aspirations and objectives of these programmes? What sorts of effects are they having? And, crucially, how do these programmes deal with the tensions between imprisonment and restorative justice? In the following I provide the briefest of overviews.

Aspirations of restorative prison projects

Restorative justice initiatives are taking place in prisons around the world. These initiatives vary enormously in their origins, aspirations, objectives, form and scope (Van Ness, 2007). Very schematically, one might place efforts to develop restorative processes in prisons on a continuum based on their

intended impact upon the prison itself. At one end of this continuum are projects in which efforts are made to bring imprisoned offenders to greater awareness of the harm they have caused and of their obligation to desist from further harmful acts in the future (either within the prison or on their release), but which do not explicitly seek to bring about wider organisational and cultural changes in the prison and the prison system. An example is the policy of the Minnesota State Department of Corrections, in which prisoners are encouraged and assisted to write letters of apology to their victims, with the letters then being put in a ‘victim apology letter bank’ for reading by those victims willing to do so (Umbreit et al, 2005: 266). At the other end are projects in which restorative justice principles are used as a guide to prison reform — where the ultimate goal is to create a restorative prison. Here, my focus is mainly upon the latter type of project.

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1. See Van Ness (2007) for a general overview and guide to further reading. Robert and Peters (2003) analyse one of the most ambitious projects: the ‘restorative detention’ project in Belgium: prisons. On initiatives in the UK see Stern (2005) and Edgar & Newell (2006). For developments in north America, in addition to the papers by Van Ness and Immarigeon already cited, see Toews (2006). For a useful survey of developments in the rest of the world see Liebmann (2006). Guidoni (2003), focusing on project in an Italian prison, provides a critical perspective.

A good example of this type of project is the Restorative Prison Project 2000-2004, which took place in the north east of England and which is described by Vivien Stern in the paper *Prisons and their Communities* (2005). Lofty ideals underlie this project. The International Centre for Prison Studies, which developed and managed the project, envisage it as providing a new model of imprisonment 'to counteract worldwide trends towards technological warehousing of prisoners with no social, ethical or purposive input' (ibid.: 9). Even more ambitiously, the project is seen as an exploration of the possibility of changing the prison into a very different type of institution than it has been historically. Instead of being instruments of 'retribution' and exclusion prisons might, it is suggested, be re-conceived as places where prisoners begin to repair the harm they have done, by doing positive work for the community, and in turn gain a stake in the community and win its respect (ibid.: 9-11).

In pursuit of these ideals, the project leaders identified four changes 'that would have to take place in a prison if it were to move from a retributive model to one based on the notion of restoration'.

- ❑ A new relationship between the prison and its local community should be fostered. There are a number of aspects to this: the core purpose of prisons should become to prepare prisoners for return to the community as law-abiding citizens; strong links should be created between prisons and the communities in which they are located; prison walls should become more 'permeable' with members of the community coming in to participate in its work and prisoners going out to do constructive work in the community; prisoners should go to a prison based in the community in which they are from; and responsibility for the health, education and social care of prisoners should be transferred to local bodies and authorities (ibid.: 11-12).
- ❑ Prisoners should be provided with opportunities to work for the benefit of others (as opposed to doing less meaningful work or being deprived of the opportunity to work at all). This, it is suggested, would have two important results. First, prisoners would develop their own personal qualities and adopt a more positive sense of

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identity. Second, the view of prisoners held by members of the community would change — they would be seen as people who are capable of good as well as bad actions. These two changes would reinforce each other resulting in a shift in the image of prisoners, who would be regarded as 'citizens' who are temporarily imprisoned.

- ❑ Prisons should have a policy of helping prisoners to understand the effects that crime has on its victims. Instilling such an understanding is both important and difficult. The whole experience of imprisonment tends to make prisoners feel victimised themselves. At the very least, coping with the hardships of imprisonment leaves prisoners with little space to think about those they have harmed.

- ❑ In dealing with the conflict that inevitably arises in prisons, much more so than in other institutions, mediation and other alternative dispute resolution processes should be preferred to more formal and confrontational methods.

Anybody familiar with contemporary imprisonment prisons will recognise that such changes would entail a complete transformation of thinking about the management and control of prisons, planning of daily routines, staff-prisoner relationships, and much else. They would also involve a fundamental shift in public perceptions of prison and

prisoners and in public understandings of the meaning of imprisonment. Stern's paper is quite candid about the enormity of the task and provides a useful discussion of what needs to happen for enduring change to occur.

Scepticism about restorative imprisonment

As we have seen, critics tend to be sceptical about the possibility of integrating the constructive ethos of restorative justice within a punishment-based social institution such as the prison. The sceptical case is well represented by Guidoni (2003). Although he himself was involved in a restorative prison project in Italy with many similarities to that described by Stern, he describes his attitude towards such projects as ambivalent. Whilst some good came from the project he was involved with, he suggests that rather than prisons being transformed in line with restorative justice

principles, the more likely outcome of such projects is the temporary adoption of limited aspects of restorative justice, which are then used to add legitimacy to an institution which remains essentially punitive.

Guidoni identifies what he sees as six of the structural obstacles to the success of restorative prison projects (pp. 62-5):

- ❑ *'Conflict over the reconstruction of the self'*: Guidoni argues that a main goal of restorative justice is to help offender reconstruct their self-image and identity. He also suggests that achievement of this goal is a pre-condition for achieving other goals of restorative justice, for example the offender taking action in support of victims. However, all prisons — even 'humane and open' prisons — destroy the self and erase identity through their mortification and degradation rituals. Imprisonment therefore works in the complete opposite direction of restorative justice.
- ❑ *'Competing with prison culture'*: The basic point here is that restorative justice requires offenders to become engaged with the world of their victims and the community. Prisons, however, develop powerful sub-cultures in reaction to their disciplinary regimes. These exert a constant pull on the offender — away from the new world they may wish to inhabit.
- ❑ *'Nonviolent conflict resolution versus prison disciplinary action'*: A central pillar of many restorative prison projects is the establishment of non-violent and negotiated forms of conflict resolution. Achieving this goal, Guidoni argues, is virtually impossible given the levels of violence within prisons and the commitment of prison administrations to harsh disciplinary sanctions.
- ❑ *'The difference between stated and perceived goals'*: Guidoni suggests that in the project he was involved with, participants took part for 'instrumental' (he could have said 'selfish') reasons, rather than because of commitment to the goals of restorative justice. Prisoners wanted to gain something from their participation in the project. But, what they wanted was not the greater awareness of the consequences of their

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behaviour and opportunity for redemption which the project was designed to achieve; rather it was things like early release and more privileges. In a similar way, prison staff, he claims, conceived the project in terms of their (non-restorative) goals: they saw it as a means of exerting greater control over prisoners.

- ❑ *'Autonomy denied'*: Guidoni argues that whereas restorative justice requires that participants be empowered and that decision making be 'democratised', prisons are hierarchical and authoritarian institutions. Restorative justice, in other words, requires professionals to think of their role in a radically different way: to become mere facilitators rather than chief decision makers. Prison staff were simply unable or unwilling to contemplate such a change.
- ❑ *'The social conditions of a restorative justice prison'*: Guidoni's basic argument here is that given the awful social conditions in most prisons (overcrowding, interethnic tensions, unsatisfactory hygiene and so on) it is unrealistic to expect prisoners to be able to focus, not on their own hardship and how to get along within such an environment, but on the harm they caused to others whose lives are probably much more comfortable than their own.

Assessing the critique

How damaging are these criticisms? In my view, Guidoni succeeds in identifying a number of aspects of imprisonment which conflict with the ethos of restorative justice. What is less clear, however, is that the obstacles identified by Guidoni are particular to the prison, although they may well be more pronounced within prisons. For instance, the reconstruction of the self is surely extremely difficult to achieve in any context (Sullivan and Tifft, 2001) and there are of course renowned examples of it being achieved in prison. The pull of delinquent sub-cultures has long been recognised as a major obstacle to *any* effort at personal reform. The tendency to resolve conflicts by imposing solutions coercively from above is pervasive in contemporary society. People outside prison, as much as those within it, tend to enter restorative justice with a thin commitment to its ethos, something that seems

to change once they actually enter the process. Persuading professionals to take a back seat and to let lay people take control of deliberation and decision-making is a problem that dogs any attempt to de-professionalize or democratise decision-making processes. And, the social conditions in which of many offenders live outside of prison are by no means conducive to restorative justice.

In pointing these things out, I do not mean to question the claim that there is a huge gap between the environment of a prison and the ethos of restorative justice. Rather, my point is that there is also a very large gap between the environment of many parts of contemporary society and the ethos of restorative justice. This, of course, is precisely why restorative justice is such a challenging (and for many hopelessly aspirational) idea.

Another question we need to ask is how immutable are the obstacles to restorative justice identified by Guidoni. He seems to think they are unalterable. Hence, he describes them as 'structural' (p. 61) and quotes with approval the following from Stanley Cohen: 'The core of a prison system — detention with the purpose of punishing criminals within buildings which are separated from the rest of society — cannot be changed. The prison is exactly this; either we eliminate the institution entirely, or we keep it ... intact'². In expressing approval of this idea, Guidoni seems to be asserting dogmatically the precise claim which advocates of restorative prison projects contest. Edgar and Newell (2006), for instance, identify very similar obstacles, but seem to think they leave some space for successful experimentation with restorative justice and that such experimentation might even result in a reform of the prison environment.

In fact, the difference between Guidoni, on the one hand, and Edgar and Newell, on the other, is largely one between a structuralist pessimism about the possibility of reform and a very cautious optimism. The preferred option of the pessimists, not to try to reform

the institution but to eliminate it entirely, is of course not unreasonable. But, what one would then expect is a clear strategy for achieving this goal and clear defence of doing nothing about existing prisons in the meantime. In the absence of this, the preferred option of the optimists — to try to reform the institution whilst recognising and 'running the risk of being coopted into the prison's ideology of punishment' (Guidoni, 2003: 66) does not look unreasonable.

The main objection to this from the pessimists, is that experiments with restorative justice in prison will enhance the image of legitimacy of an institution which, in their view, lacks any legitimacy. I cannot see this as a significant danger. It would only become a salient issue if the legitimacy of the prison was already in doubt. My guess is that the standing of imprisonment in the eyes of the judiciary, politicians and the public, is already sufficiently high that experimentation of restorative justice will have relatively little impact upon it.

Conclusion

The restorative justice movement has implications for the practice of imprisonment in two ways. On the one hand, it puts in question a belief — that wrongdoers deserve pain — which goes to the heart of imprisonment, and therefore suggests that the practice lacks validity. On the other hand, it suggests that the practice of imprisonment might itself be reformed so that it serves restorative rather than punitive functions. Within the restorative justice movement, these are sometimes seen as alternative strategies between which one must choose. The overall thrust of this paper has been to suggest that both strategies can be pursued concurrently. It is possible to raise doubts about the validity of imprisonment, by undermining faith in the idea on which it is based, whilst also working to improve the practice as it currently exists.

A full list of references is available from the author.

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2. This is Guidoni's translation of a passage from an article by Cohen in Italian.