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Restorative Justice: The Challenge of Sexual and Racial Violence

BARBARA HUDSON*

The paper reviews the theory and policy proposals of recent formulations of abolitionism and restorative justice. Challenges are posed to some of the assumptions of abolitionism by considering its applicability to acts of violence against women, children, and minority ethnic citizens. In particular, the assumptions that dangerous offenders are few, and that the 'meaning' of a harmful act is negotiable between perpetrators and victims, are called into question. The symbolic function of criminalization and penalization is discussed. The paper considers whether the strategies suggested by recent proponents of forms of abolitionism and restorative justice can satisfy doubts about the adequacy of earlier abolitionist formulations in relation to both the symbolic and instrumental functions presently served by criminal law.

Whilst calls for further criminalization and penalization of racial, sexual, and domestic violence are understandable, the abolitionist case that retributive justice is more likely to increase rather than reduce such violence, and to leave victims unsatisfied, is defended.

INTRODUCTION

This paper focuses on one major theory, and reflects on one important controversy about its application, which has appeared in the writings of critical/abolitionist criminologists during the last few years. A significant development during the late 1980s and the 1990s has been the elaboration of the idea of *restorative justice*, as an alternative to retributive justice; an urgent, and as yet unresolved, controversy has been whether an abolitionist/restorative perspective is appropriate with regard to crimes against women,

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children, and minority ethnic citizens. These debates reflect the significance for abolitionists and other penal reformers of the 'get tough' penal climate, and also the rise in influence of victims' movements and the successes of feminists and others in urging that sexualized and racialized violence needed to be taken more seriously by 'progressive' criminologists as well as by legislators and policy-makers.

Two publications which appeared in 1986 summarized the main currents of European abolitionist thought at that time, and gave hints of what was to be elaborated during the next ten years. Herman Bianchi and Rene Van Swaaningen's edited volume contained twenty papers which were presented at the Second International Conference on Prison Abolition in Amsterdam in 1985.¹ As the conference title implies, it was focused mainly on the abolition of imprisonment, although some papers did look towards the replacement of the whole criminal justice system with something along the lines of the 'alternative dispute settlement' procedures which existed in some places in North America. The ideas put forward in the volume were the well-known abolitionist proposals for a moratorium on prison building, decriminalization of some offences, and moving from criminal law towards civil law/community court procedures. In the main, abolitionism and the informal justice movement were separate, even if their practical proposals sometimes appeared very similar. Abolitionism was a vision without a strategy; informal justice was a practice without a theory.

In the same year, a special issue of the journal *Contemporary Crises* contained papers which tried to give abolitionism a stronger theoretical base than previously. A paper by Heinz Steinhert, for example, showed that with a different (more realistic, he claims) set of assumptions than those on which crime policy is usually based – more realistic especially than the assumption that punishment is an appropriate and effective means of reducing crime – an alternative strategy for reducing the influence of harmful behaviour could rationally be derived.²

In the 1990s, writers sharing or sympathetic to abolitionism or at least drastic reduction of the penal sphere have further developed ideas about procedures which could replace those of present criminal law and about changing the normative orientation of law from retribution to restoration.³ As well as European abolitionist theory, these contemporary reformers have found theoretical grounding for their proposals in the work of Habermas and in feminist and postmodernist jurisprudence.

1 H. Bianchi and R. Van Swaaningen (eds.), *Abolitionism: Towards a Non-Repressive Approach to Crime* (1986).

2 H. Steinhert, 'Beyond Crime and Punishment' (1986) 10 *Contemporary Crises* 21.

3 J. Braithwaite, 'Inequality and Republican Criminology' in *Crime and Inequality*, eds. J. Hagan and R.D. Peterson (1995); R. Van Swaaningen, *Critical Criminology: Visions from Europe* (1997).

FROM ABOLITIONISM TO RESTORATIVE JUSTICE

European abolitionism is a movement as well as a theory, as Sim demonstrates with reference to England and Wales, which has campaigned for the rights of prisoners and for improvements in prison conditions, as well as for reductions in the use of imprisonment.⁴ In the 1970s and 1980s, European abolitionists were much influenced by Thomas Mathiesen's succinct posing of the reform/revolution dilemma: if abolitionists propose reforms, implementation of these may strengthen the institution which they so dislike, by making it seem less oppressive or arbitrary; if they publish more radical suggestions for change or abolition, they are likely to be marginalized and have no influence on actual prisons and punishments.⁵ Mathiesen therefore suggested that abolitionists should not disclose their final objectives, but should campaign against the worst aspects of imprisonment, such as punishment blocks, the use of drugs in prisons, lack of legal representation in disciplinary hearings. The result of this campaigning to rid the prisons of their worst evils rather than theorizing to formulate an alternative to a punishment system produced some important local improvements in prison conditions,⁶ but left in place a repressive, punitive criminal justice system, with prison at its centre.

In the 1980s, prison numbers grew, prison conditions became harsher, and so-called alternatives to custody came to incorporate more and more of the pains of imprisonment. The work of Michel Foucault and Stanley Cohen drew attention to the 'dispersal' of the disciplinary mode of punishment that is most fully realized by the modern prison, throughout society.⁷ If 'prison' was not merely a building, but a principle – the coercion of time and space⁸ – then not only was abolishing some of the worst features of prisons insufficient to make the response to crime more humane and constructive, but abolition of prisons themselves was also insufficient. The target for abolition had to become punishment itself.

If prisons were to be abolished but not punishment, then there would be no check on the intrusiveness or unpleasantness of community punishments: what is the point of abolishing prisons, if electronically monitored curfews and house arrest turn homes into prisons, or if community service orders impose hard and degrading labour combined with the intrusiveness of body searches and urine testing? Only if punishment itself is called into question

4 J. Sim, 'The abolitionist approach: a British perspective' in *Penal theory and practice: tradition and innovation in criminal justice*, eds. A. Duff et al. (1994).

5 T. Mathiesen, *The Politics of Abolition* (1974).

6 Sim, *op. cit.*, n. 4.

7 M. Foucault, *Discipline and Punish: the Birth of the Prison* (1977); S. Cohen, 'The Punitive City: Notes on the Dispersal of Social Control' (1979) 3 *Contemporary Crises* 339; S. Cohen, *Visions of Social Control* (1985).

8 B. Hudson, 'The rising use of imprisonment: the impact of decarceration policies' (1984) 11 *Critical Social Policy* 46.

is it clear that criticisms of prison conditions, lack of rehabilitative facilities, and so on cannot be remedied by more and better prisons, or by reproducing the prison in the 'community facility' or the 'day centre'.⁹

At the same time that the intrusiveness and pain of the punitive network was being acknowledged,¹⁰ increasing attention was being paid to the differential impact of state punishment on the unemployed, on minority ethnic groups, on the mentally disordered: punishment was recognized as the 'penalizing circuit' of the poor.¹¹ It was held to be inimical to social justice and doing nothing to reduce levels of crime.

Beyond the world of academic criminological debate, the growing influence of the idea of the offender as a member of an 'underclass', committed to a criminal value-system and therefore unamenable to reform and rehabilitation was underpinning the toughening of community punishments as well as the harshening of prison regimes, whilst criminological and political recognition of the victim was adding another ingredient to the ideology of law and order. In Europe as in the United States of America, the political manipulation of the suffering of actual victims and of the fears of potential victims has provided further impetus for the move towards harsh, incapacitative penal policies. One of the ironies of recent penal developments is that a long-standing abolitionist argument against present penal systems is that all the resources of criminal justice have been used for punishment of offenders, with almost nothing being done by way of crime prevention or support or recompense to the victim – we have, as is often said, a punishment system not a justice system. Thus Nils Christie in a celebrated paper argued that the criminal law appropriates the experiences of victims, substituting the state for the individual as victim and leaving no place in the criminal justice process for victims to tell their stories.¹² Abolitionists have also argued that punishment does nothing to prevent crime – that social policy rather than penal policy is needed to reduce the pressures on people to turn to illegal means to secure their wants and necessities.¹³ And yet, it is in the name of community safety and acknowledging victims' demands for both retaliation and protection that policies such as three strikes, mandatory minimums, and their English and European equivalents have developed.¹⁴

By the end of the 1980s, the 'negative reform' strategy advocated by Mathiesen seemed inadequate to meet the challenge of the new law-and-order climate; new theories and strategies have accordingly been developed by penal abolitionists and penal reductionists which try to address the claims of actual victims and communities of potential victims on criminal justice

9 B. Hudson, *Penal Policy and Social Justice* (1993).

10 N. Christie, *Limits to Pain* (1982).

11 B. Laffargue and T. Godefroy, 'Economic Cycles and Punishment: Unemployment and Imprisonment' (1979) 13 *Contemporary Crises* 371

12 N. Christie, 'Conflicts as Property' (1977) 17 *Brit. J. of Criminology* 1.

13 Hudson, *op. cit.*, n. 9.

14 A. Sarat, 'Vengeance, Victims and the Identities of Law' (1997) 6 *Social and Legal Studies* 163.

systems. What has emerged as a positive alternative to retributive criminal justice, is *restorative justice*. The overall purpose of restorative justice is not to inflict punishment in proportion to the seriousness of the offence, or to incapacitate offenders so that they pose no further risk to the public, but 'the restoration into safe communities of victims and offenders who have resolved their conflicts'.¹⁵

The main principle of this approach is that the task of criminal justice should be the restoration of relationships, and balances of advantages and disadvantages, that have been fractured by the harmful action (the 'crime', in the present vocabulary of criminal justice). This basic principle is common to many formulations, but a particularly well-reasoned and thorough exposition is given by de Haan. He uses the term *redress*, arguing that the restorative process is started by a 'victim' claiming redress: 'To claim redress is merely to assert that an undesirable event has taken place and that something needs to be done about it.'¹⁶

Claiming redress would initiate a dialogue about the nature of the event that has taken place, and about what needs to be done to put matters right. The idea of redress rests on the assumptions that:

- (i) what we presently call crime is a complex event, which will have a different meaning according to the circumstances of the offender, the victim, and the community, and the relationship between them;
- (ii) all parties to the event deserve a hearing, and that they have claims on the justice process.¹⁷

The strengths of restorative justice, its proponents claim, are that it makes the perpetrator face the fact that real harm has been done to an actual victim by his or her action; that if the perpetrator is a party to the outcome, he or she is less likely than with a punitive system to displace remorse for the action into resentment of the punishment; above all, it is much more likely than the present system to provide for a balance between the needs and rights of both offenders and victims. With a punitive system, there is always a tension between recognizing the harm to the victim and protecting the rights of the offender. In terms of the critique of law posed by Derrida and other deconstructionists, 'justice' would be more closely approached than with a punitive system because the process would recognize the perpetrator and victim in their individuality, rather than approximating the crime to a general legal category and the harm to that which would be felt by a standard, average, victim.¹⁸

15 D.W. Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Crim. Law Forum* 251, at 258.

16 W. de Haan, *The Politics of Redress: Crime, Punishment and Penal Abolition* (1990) at 158.

17 B. Hudson, 'Restoration, reintegration and human rights: punishment in a socially just justice system' (1995) 9 (Howard League for Penal Reform seminar, 'Punishment in the year 2000', Edinburgh).

18 J. Derrida, 'The Force of Law: the Mystical Foundations of Authority' (1990) 11 *Cardozo Law Rev.* 5–6, 960; D. Cornell, *The Philosophy of the Limit* (1992) ch. 6; C. Douzinas and R. Warrington, 'The Face of Justice: A Jurisprudence of Alterity' (1994) 3 *Social and Legal Studies* 405.

The emphasis of restorative justice is on 'right relationships' rather than 'right rules'; restorative justice thus has much in common with Pepinsky and Quinney's 'peacemaking', and it also has much in common with the 'ethic of care' of feminist jurisprudence.¹⁹

It is, say its proponents, more likely than retributive justice to reduce the incidence of crime because of its concern for the safety of victims: as Van Ness explains, restorative justice addresses crime at the macro level as well as the micro level – addressing the need for building safe communities as well as the need for resolving specific crimes.²⁰

Abolitionists have long recognized some possible problems both with the abolition of imprisonment, and with the abolition of punitive justice and its replacement by a more restorative-oriented justice. Difficulties arise with regard to reactions to persons who pose clear danger to others; to persons who will not agree to offer redress or to refrain from similar behaviour in future; to behaviour where the perspectives of perpetrator and victim are so opposed as to be non-negotiable, and to the impact of restorative procedures on the acceptability of behaviour in the community.²¹ These problems are posed most acutely if one imagines replacing punitive justice by restorative justice when the behaviour concerned is violence against women, children, or minority ethnic citizens. My purpose is to consider these dilemmas, and to ask whether the most recent formulations of the restorative paradigm propose viable and appropriate remedies for these most serious kinds of harms.

THE FAILURE OF CRIMINAL JUSTICE

It is common cause among those advocating women's rights, child protection, and the protection of minority communities that traditional criminal justice has failed to provide remedies for violence against women, children, and minority ethnic victims. The failings of criminal justice are well documented, especially in the case of violence against women.²² They include social and judicial attitudes which have regarded matters that happen in the private domain as no concern of criminal law; attitudes among police and prosecutors that victims are unlikely to sustain complaints and that therefore action is generally wasteful of time and effort; humiliating and intrusive interrogation of victims to determine issues of consent or provocation; victims' unwillingness to press charges because of fears of retaliation;

19 H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990); H. Pepinsky and R. Quinney (eds.), *Criminology as Peacemaking* (1991); Hudson, op. cit., n. 9, ch. 6; C. Smart, 'Feminist Jurisprudence' in *Law, Crime and Sexuality*, ed. C. Smart (1995).

20 Van Ness, op. cit., n. 15.

21 H. Bianchi, 'Abolition, assensus and sanctuary' in *A Reader on Punishment*, eds. A. Duff and D. Garland (1994).

22 R.E. Dobash and R.P. Dobash, *Women, Violence and Social Change* (1992).

difficulties of obtaining corroborating evidence when abuse takes place in private, and so on. These obstacles to obtaining remedy (and getting the behaviour stopped!) are especially formidable in the case of ethnic groups such as Britain's Asians, who risk rejection and hostility by their relatives and neighbours if they turn to the police and the courts.²³

Racial violence has been difficult to measure.²⁴ Even when policy suggests that racist elements should be considered as aggravating circumstances leading to enhanced penalties, and when police forces take an inclusive approach to recording cases as racially-linked (including offences on the basis of victim characteristics and/or victim reporting of the offence as racially motivated, rather than excluding cases unless the arresting officer or other official assesses the case as racially motivated), the racial aspect tends to be lost as the case progresses through the various criminal justice processes. In a survey of cases recorded by Northumbria Police as racially linked, my co-researchers and I found that cases of abuse and harassment or other public order offences tended not to be prosecuted, usually for lack of evidence; in cases such as theft and robbery from Asian or other minority shops and homes, the racial link 'disappeared' from agency information systems and the cases were prosecuted and sentenced like those with white victims. Again, the usual reason given was lack of evidence for the racial motivation. A recent report by the group Human Rights Watch documents alarming levels of racial violence in England and Wales, and deplores the failure of criminal justice to prosecute and penalize the perpetrators.²⁵

The most notorious case recently in Britain has been the murder of Stephen Lawrence, a black youth who was killed by a group of white youths, whilst he was waiting for a bus. Although a number of white young men have been identified as responsible for the killing, they have not been convicted because of lack of evidence. The Lawrence family and their supporters say that evidence was not obtained primarily because police approached their investigations with the view that Stephen Lawrence and his companion must have been engaged in some sort of unlawful activity, and that the death must have been the result of some sort of spontaneous fracas amongst lawless youth, rather than a law-abiding, hard-working student engaged on peaceful, proper activities being attacked by racist thugs. This case demonstrates a further difficulty which black victims have in obtaining remedy through criminal justice: they are more readily seen as 'suitable enemies' than as 'ideal victims'.²⁶ (This same problem, of having to fit the constructions of 'ideal victim' in order to obtain conviction of one's

23 *id.*

24 B. Bowling, 'Racial Harassment and the Process of Victimization: Conceptual and Methodological Implications for the Local Crime Survey' (1993) 33 *Brit. J. of Criminology* 231.

25 *Observer*, 11 May 1997.

26 N. Christie, 'The Ideal Victim' in *From Crime Policy to Victim Policy: Reorienting the Justice System*, ed. E.A. Fattah (1986).

aggressor, has affected women, for example prostitute women or other independent, sexually-active women, attempting to bring rape charges.)

Criminal justice has failed to deliver on the first demand made by feminist and anti-racist activists calling for increased criminalization or for alternative forms of justice – to make evident the extent of racialized and sexualized violence – because of the obstacles to reporting, prosecution, and conviction that it poses. Criminalization means that most offenders are left free to continue their activities, and most victims are left unprotected.

Those urging that racial and sexual violence should be taken more seriously, including groups such as the Commission for Racial Equality, have complained that even where prosecutions are successful, penalties are insufficient.²⁷ Fines and community penalties too often induce resentment and the desire for revenge, rather than repentance, in the perpetrator, and provide no protection for the victim or other potential victims. If criminalization and penalization are the ways of demonstrating that society is opposed to certain behaviours and takes them seriously, then the message given by the composition of prison populations in Britain, the United States of America, and similar countries is that racial and sexual violence are less serious wrongs than burglary, theft, and many other property offences. Women's groups, and anti-racist campaigners, therefore, have been demanding not only higher rates of arrest and prosecution, but also tougher penalties for those committing offences of racial and sexual violence.

Acknowledging that in Scandinavia, as elsewhere in Europe, women who would support reduced imprisonment for the property crimes of the poor, demand more and longer prison sentences for sexual and domestic violence, Liv Finstad urges abolitionists to take up the challenge of devising more constructive ways of responding to sexualized violence precisely because of its damaging, domineering, harmful nature: if these most serious of crimes could be dealt with without imprisonment, the case for abolition of imprisonment for other, less serious, crimes would be established.²⁸ Finstad insists that any non-imprisoning response to sexual violence must satisfy certain demands:

Guilt and responsibility must be firmly and unequivocally attached to the perpetrator; protection and compensation must be effected for the victim; the extent and seriousness of sexualized violence must not be made invisible.

These are the demands made of justice processes by other writers who either advocate or are sympathetic to restorative justice, for example, Braithwaite and Daly.²⁹ I would endorse them, and again, I would insist on parallel demands for any response to racial violence.

27 Dobash and Dobash, op. cit., n. 22; M.D. Fields, 'Criminal justice responses to violence against women' in *Penal theory and practice: tradition and innovation in criminal justice*, eds. A. Duff et al. (1994).

28 L. Finstad, 'Sexual Offenders Out of Prison: Principles for a Realistic Utopia' (1990) 18 *International J. of the Sociology of Law* 157.

29 J. Braithwaite and K. Daly, 'Masculinities and communitarian control' in *Just Boys Doing Business? Men, Masculinities and Crime*, eds. T. Newburn and E.A. Stanko (1994).

RACIALIZED, SEXUALIZED, AND DOMESTIC VIOLENCE: THE POTENTIAL OF RESTORATIVE JUSTICE

Even if more cases could be prosecuted successfully, the dilemma highlighted by Finstad, Meima, Braithwaite and Daly, and others who take up the challenge of abolitionism's response to sexualized and racialized violence, is that of moving away from punitive reactions which – even when enforced – further brutalize perpetrators, without, by leniency of reaction, giving the impression that sexualized or racialized violence is acceptable behaviour.³⁰ As Sim summarizes the dilemma in relation to rape:

The lenient sentences for such crimes and the symbolic messages which men take from leniency can be contrasted with the fact that longer prison sentences offer no solution to the problem of rape and indeed may simply exacerbate the problem at an individual level by placing the rapist in a masculine culture which reinforces the misogynist fantasies that were part of his behaviour patterns outside the walls.³¹

This statement points to the fact that there is an important difference between racial and sexual crimes, and the street crimes of the powerless which seem to be the behaviours which most abolitionists have most clearly in view. This difference is that, as shown above, sexual, domestic, and racial violence has not, until very recently, been taken seriously. These crimes have been over-tolerated, whereas burglary, car theft, street robbery, and the like have been over-penalized. In other words, the censuring, moral-boundary-declaring, symbolic purposes of criminal law have already been served in relation to these latter types of offences, whereas with racialized and sexualized violence, the symbolic force of criminal law has only recently, and only partially (especially in the case of racial violence) been deployed to demonstrate that society, at least in its official organization, disapproves of these forms of behaviour.

Sim's words echo Garland's description of the 'tragic quality' of punishment: that it is simultaneously necessary to symbolize the state's authoritative disapproval of certain forms of behaviour and futile in its effects at controlling that behaviour.³² Certainly, it is desirable for society to demonstrate that it is opposed to racial and sexual violence. On the other hand, could not the response to such behaviour be organized according to a logic that makes for more effective remedies than either doing nothing (or, at most, very little), or punishing offenders by confining them in settings where their racist and sexist attitudes, and their fantasies of violence and sexuality, will be further fuelled? Garland's depiction of the tragic duality of punishment refers to its expressive and instrumental functions, which may often

30 Finstad, op. cit., n. 28; M. Meima, 'Sexual Violence, Criminal Law and Abolitionism' in *Gender, Sexuality and Social Control*, eds. B. Rolston and M. Tomlinson (1990); Braithwaite and Daly, id.

31 J. Sim, review of Bianchi and Van Swaaningen, op. cit., n. 1 (1990) 18 *International J. of the Sociology of Law* 97.

32 D. Garland, *Punishment and Modern Society* (1990) at 80.

be in conflict. Abolitionism and other critiques have usually concentrated on the instrumental aspects of punishments, and left its expressive tasks unaddressed. If restorative justice is to provide an adequate response to racial and sexual violence, its processes and remedies will have to address both the expressive and instrumental functions of traditional retributive criminal justice.

The argument of abolitionists such as Bianchi and Mathiesen with regard to people who pose a clear danger to the physical safety of others is generally that there are few such offenders; incapacitative institutions where they can be restrained and kept away from potential victims therefore are needed, but there is need for only a small number of such facilities, and imprisonment as the response to crime can become the exceptional rather than the normal practice. Violence against women, children, and minority ethnic citizens is, however, widespread and frequent. Chesney-Lind and Bloom report that an estimated three to four million women are battered in the United States of America every year according to a former Surgeon General; that population surveys estimate that 21 to 30 per cent of United States women will be beaten by a partner at least once in their lifetimes; that almost half of all batterers beat their partners at least three times a year.³³ The 1996 British Crime Survey reports 1 million incidents of domestic violence, with the caveat that this is likely to be an undercount.³⁴ As revealed by the survey, domestic violence accounted for more incidents than stranger violence of all kinds. From the figures given in the survey, domestic violence certainly appears to be a more serious problem than mugging (street robbery): 990,000 reported incidents of domestic violence compared with 390,000 reported incidents of mugging; victims were also more likely to sustain injury in domestic violence, with only 31 per cent of reported domestic violence incidents resulting in no injury compared to 67 per cent of muggings.³⁵

Not only is domestic violence widespread, it is increasing, and whilst some of the apparent increase can perhaps be attributed to increased reporting, there is no doubt that the behaviour is widespread, and that it continues to be under-reported. The same sort of detailed figures are not available for racial violence, but police forces throughout England and Wales have recorded rising levels of racial attacks and harassment throughout the 1990s. Home Office figures show that police recorded 12,222 racial incidents in 1995/96, 3 per cent more than in 1994/95.³⁶ It is widely accepted that racial violence is significantly under-recorded, partly because of the difficulties of ascertaining racial motivation, and partly because of under-reporting by victims and their communities who lack confidence that the police and other enforcement agencies will

33 M. Chesney-Lind and B. Bloom, 'Feminist Criminology: Thinking About Women and Crime' in *Thinking Critically About Crime*, eds. B.D. MacLean and D. Milanovic (1997).

34 Home Office, *The 1996 British Crime Survey, England and Wales* (1996) at 28.

35 *id.*, at p. 65.

36 National Association for the Care and Resettlement of Offenders (NACRO), *Criminal Justice Digest*, no. 91 (1997) at 17.

take the problem seriously. Sexual offences, including offences against children, though now revealed as more frequent than had long been assumed, remain relatively rare. 30,0436 sexual offences were recorded in England and Wales in 1995/6, in a total of more than 5 million offences overall, but of course each and every one needs to be taken seriously.

Violence against women, children and minority ethnic citizens is deplorable, but its incidence is hardly surprising in the light of current criminological theories. New understandings of the components of 'masculinities', and especially the pressures to accomplish an identity which approximates to 'hegemonic' masculinity help explain why, in a socially unequal society which pushes so many young men into economic marginality, those who cannot demonstrate the affluence of successful masculinity will be likely to exaggerate – through violence – their claims that they are racially superior, heterosexual, and 'macho'.³⁷

As well as challenging the abolitionist assumption that the number of dangerous offenders is small, these offences challenge the argument that criminal justice is targeted against the powerless, on behalf of the powerful. Feminists who advocate imprisonment and 'zero tolerance' for domestic violence, as well as those who urge longer sentences for offences against children, and for racial violence, point out that the crimes are acted out on victims who within the crime relationship, lack power: the point of such offences is to dominate, for the offender to exercise power over the victim. Whilst it may be true that it is among the poor and the marginalized that such aggression is likely to lead to punishment rather than counselling, it must be acknowledged that the power relationships in domestic, sexual, and racial crime are different from those in property offences and other kinds of 'economic survival' crimes. The logic of restorative justice makes the relationship between victim and offender central, displacing that between offender and state, and it could therefore be argued that restorative processes would reproduce and reinforce the imbalance of power of the crime relationship, rather than confronting the offender with the power of the state acting on behalf of (in the place of) the victim.

Racial and sexual violence thus pose some difficulties for the domain assumptions of abolitionist theories. These behaviours challenge restorative justice to formulate strategies that can deal with large numbers of victims and offenders; that can provide protection and redress for victims; that can change social attitudes from tolerance to disapproval; that can inculcate remorse and a desire for change in perpetrators, and that can bring about a rebalancing of power within the crime relationship.

37 Newburn and Stanko, op. cit., n. 29; R.W. Connell, *Gender, Power and Society: the Person and Sexual Politics* (1987); J. Messerschmidt, *Masculinities and Crime: Critique and reconceptualization of theory* (1993) and *Crime as Structured Action: Gender, Race, Class and Crime in the Making* (1997).

The process model advocated by most formulations of restorative justice is that of the community forum, or, especially in the writings of John Braithwaite, the community or family conference.³⁸ This is a rather broader concept than 'mediation' or 'reparation' – sometimes advocated as an addition to present criminal justice processes, either as an alternative to prosecution (caution plus), or as an alternative to fines or communities penalties (or to damages and compensation payments in civil cases) – which signifies a remedy of conciliation and compensation worked out between victim and offender. Practices being termed 'restorative justice' by some police forces in England at the present time fit the 'caution plus' model rather than the conception of restorative justice under discussion here. The conference model of Braithwaite and other theorists assumes the involvement of other parties, and would address the 'safe community' objective as well as the relationships between victim and offender.

An implicit assumption in the ideas of meetings and forums put forward by the 1970s and 1980s abolitionists and proponents of various other forms of 'alternative dispute settlement' that is problematic in the case of these types of offences, is that there is some common understanding, some agreed perspective, which can be arrived at between victim and offender. As Finstad argues, the earlier model of informal or civil justice appears to presume that an account of 'what happened' can be negotiated which will be somewhere between the victim's and offender's perspectives, whereas, with sexualized violence, there are two separate, non-negotiable perspectives – his and hers.³⁹ This is the case, she says, wherever the offence involves huge imbalances of power between victim and perpetrator. It is also, obviously, the case where the offence involves majority and minority race or ethnicity, and even more so, when the case involves child victim and adult perpetrator.

The conference model allows for the victim to have representatives to urge her view of the events, and Braithwaite and Daly argue that one of the benefits of the model as compared with existing criminal justice processes is that a feminist – or racial/ethnic/religious – standpoint can be accommodated. Instead of having a lawyer attuned to legal criteria and world views, women's groups, community leaders, victim support movements, and the like can all be heard. The victim's perspective is made central to proceedings, whereas it is only a source of evidence (as far as rules of admissibility allow) in criminal cases. Hulsman makes a similar claim in relation to the use of civil rather than criminal procedures in cases of rape and sexual assault: the victim's definition of harm and threat is at the centre of proceedings; she is transformed from the humiliated victim of criminal proceedings to an active claimant, identifying her own requirements and drawing her own lines in future contacts with the perpetrator.⁴⁰

38 Braithwaite, *op. cit.*, n. 3; Braithwaite and Daly, *op. cit.*, n. 29.

39 Finstad, *op. cit.*, n. 28.

40 L. Hulsman, 'The Abolitionist Case: Alternative Crime Policies' (1991) 25 *Israeli Law Rev.* 681.

The point being made by these writers is that in fact it is the conventions of present criminal law which reproduce the power relations that produce racial and sexual crime: the victim is one person, on the down-side of power, confronting, and having to conform to, the gender and racial ordering of law, which is itself reflective of the society in which that law is embedded.⁴¹ Restorative justice, on the other hand, enables the parties to be equally represented; it enables other narratives to be heard; it empowers standpoints which are otherwise powerless and excluded, or at least circumscribed.

For the proponents of restorative justice, the desired outcome of these conferences would be that the offender acknowledges not just his own responsibility for the act, but also that he appreciates the victim's perspective: he should acknowledge that he performed the act; that it was wrong; and that it was harmful. He should be ashamed, and determined to avoid repetition of the behaviour. The contemporary restorative justice paradigm owes much to Braithwaite's idea of *reintegrative shaming*.⁴² He contrasts the reintegrative shaming of the good parent – who makes clear her disapproval of bad behaviour without rejecting the child – with the stigmatizing shame of modern criminal justice. Stigmatizing shame labels the person rather than the act, and imposes a status change which has generalized, deleterious, and often irreversible consequences.⁴³ In the stigmatizing processes of retributive justice, the offender is given more incentives to contest the label than to repent the behaviour; the 'sin' which people try to avoid is as likely to be that of being found out as that of behaving badly. With restorative justice, the community is involved in expressing disapproval, and in providing and guaranteeing protection and redress for victims, but it is also involved in supporting the perpetrator in his efforts to change, and in maintaining him as a member of the community.

It has sometimes been asked whether 'the community' is likely to express strong enough disapproval to induce shame; that the pomp and ceremony of the court is necessary for the shaming ritual. Current experience of responses to sexual offending show that the community is somewhat in advance of judicial attitudes: lenient sentencing for rape cases; failure to imprison wife batterers and sexual attackers have been widely criticized by publics throughout Europe, north America, and Australia. Indeed, developments such as Megan's Law in the United States of America, and similar community notification schemes in the United Kingdom and elsewhere show that the community is, if anything, too strong in its disapproval and is certainly willing to provide guarantees of enforcement of remedies.

41 R. Van Swaaningen, 'Feminism, Criminology and Criminal Law' in *Gender, Sexuality and Social Control*, eds. B. Rolston and M. Tomlinson (1990).

42 J. Braithwaite, *Crime, Shame and Reintegration* (1989).

43 H. Becker, *Outsiders: Studies in the Sociology of Deviance* (1963); A. Cicourel, *The Social Organisation of Juvenile Justice* (1956).

Racial violence provokes less strong reaction, but few would express dissent from disapproval in a public forum. Another claim made by the restorative justice movement is that progressive views about matters such as the need to express disapproval of racial harassment and abuse, and to protect minority citizens, tend to be strengthened during discussion: dissenters feel discouraged from expressing racist views, and an emergent consensus of attitude can be firmed into a resolve to act. A narrative style of proceedings can therefore not only perform the norm-affirming expressive role of adversarial criminal justice; it can also perform an additional, norm-creating role.

Abolitionists and other advocates of restorative justice here echo or draw upon Habermas's model of 'communicative morality' or 'discourse ethics': that it is in the exposition of views, the listening to accounts of harm, the attempting to justify prejudice, that more progressive moral consensus can be reached. Habermas in his two-volume *Theory of Communicative Action* develops a dialogic view of morality, in which a plurivocal evolved consensus replaces the monologic voice of law.⁴⁴ In the dialogic process of defining and legitimating norms, moral judgments are reached not by consideration of the impartial voice of – male – judicial reason, but by the communication between 'concrete others'; between participants expressing their viewpoints and needs. The condition for such debates to generate normative categories and binding decisions is the 'ideal speech situation', the creation of a situation in which all participants can take part without constraint or oppression. Descriptions of conferences and other procedures given by Braithwaite and Daly, and by Hulsman seem very much like strategies to approximate this ideal speech situation, in which women, children, and members of minority ethnic groups will be empowered and protected to an extent that is not approached by present criminal justice processes.

Habermas's theory has been criticized by writers affirming a politics of difference on the grounds that it still presupposes a negotiated outcome (*a* rational consensus); that at times it appears to submerge the 'concrete others' into a transcendental 'universal other'; and that the situation of the ideal speech situation is as abstract and unrealizable as Rawls's 'veil of ignorance'.⁴⁵ Nonetheless, the idea of a communicative or discursive ethics, together with Braithwaite's concept of reintegrative shaming, advance both the theory and strategy of restorative justice a great deal.

To make its disapproval effective, and to deliver adequate protection, a community forum would have to have resources at its disposal: anger-management or anti-prejudice courses to which offenders could be referred; alcohol projects and other programmes and facilities to help offenders deal

44 J. Habermas, *The Theory of Communicative Action*, vols. 1 and 2 (1984 and 1987); P. Pettit, 'Habermas on Truth and Justice' (1982) *Royal Institution of Philosophy Lecture Series* 207; I.M. Young, *Justice and the Politics of Difference* (1990).

45 S. Benhabib, *Critique, Norm and Utopia* (1986); Young, *id.*

with personal and social conditions which had been part of the reasons for the behaviour. There would also have to be a network of holding facilities and recourse to injunctions, curfews and the like to deter further offending and protect the victim and potential victims before the conference or forum could take place. These resources would also be brought to bear on offenders who did not exhibit the necessary shame and resolve, or whose own efforts to change their behaviour needed buttressing by some stronger sanctions, both positive and negative. And of course, these resources would have to be extensive, given the amount of racialized and sexualized violence.

The facilities needed for giving effect to decisions made by community or other forums are very similar to the proposals of state-obligated rehabilitation: society should acknowledge its part in the causation of crime by providing rehabilitative facilities which the offender can have recourse to as of right; society as victim has the right to demand that the offender acknowledges his or her own willed role in the offence by agreeing to participate in whatever rehabilitative programme is recommended.⁴⁶ The difference between state-obligated rehabilitation and restorative justice is not so much in the remedies proposed, but in the processes of decision-making. Restorative justice goes further than state-obligated rehabilitation in including determination of 'what happened' in its processes of deliberation, as well as deciding the appropriate remedy. It also goes further in calling for the replacement of the adversarial, formal court of law by a form of negotiation between parties empowered as far as possible as equals.

It is, perhaps, less the 'disapproval' element of the term 'community disapproval', that is problematic, than that of 'community'. The 'death of the social' having been proclaimed, most of us now inhabit not 'communities', but shifting, temporary alliances which come together on the basis of private prudentialism.⁴⁷ Residents' associations; parents' associations; city-centre rate-payers; shopping-mall retailers; share-holders' meetings; women's groups: these are the kinds of collectivities which claim people's allegiances now, rather than communities. The weakest point of many of the restorative justice formulations, is thus not the question of how can the power between victim and offender be balanced, but what is the community; what is the community interest, and how can it be represented? Without the concern to make safer communities, restorative justice is in danger of merely substituting civil justice for criminal justice. Without the community, restorative justice is reduced to the competing perspectives of the victim and the perpetrator, and there is no social group with reference to whom the

46 P. Carlen, 'Crime, inequality and sentencing' in *Paying for Crime*, eds. P. Carlen and D. Cook (1989); Hudson, op. cit., n. 9, ch. 5.

47 P. O'Malley, 'Risk, Power and Crime Prevention' (1992) 21 *Economy and Society* 252; and P. O'Malley, 'Post-Social Criminologies: Some Implications of Current Political Trends for Criminological Theory and Practice' (1996) 8 *Current Issues in Criminal Justice* 26; N. Rose, 'The Death of the Social? Refiguring the Territory of Government' (1996) 25 *Economy and Society* 327.

offender can experience either shame or reintegration. Different versions of restorative justice or related paradigms propose different memberships of their tribunals, forums or conferences. Sometimes, 'community' appears to mean victims, offenders, those close to them, and selected 'expert' groups (for example representatives of the battered women's movement), but more often there is some fairly vague reference to wider community. All envisage some sort of 'community' representation – to arbitrate, to mobilize resources, to express disapproval, to readmit.

The problem of the offender who continues to pose danger, or who refuses to accept the account, wishes, and proposals of the victim is addressed by the various formulations, and this is an issue about which differences arise. Bianchi and some other European abolitionists propose revival of the institution of 'sanctuary', as somewhere where a person who poses danger to others can be, safe from vengeance from victims and communities, whilst awaiting processes and remedies.⁴⁸ Bianchi's description of sanctuary, however, presupposes some sort of negotiation, and upholds the right of a victim to demand a trial if the perpetrator continually refuses to negotiate. What the last resort of failed negotiations should be is unclear.

For Finstad, the last resort provision is coerced deprivation of liberty, but she invokes a medical model of hospitalization rather than a criminal model of imprisonment.⁴⁹ The danger here is that the individual becomes pathologized rather than the behaviour being condemned. Braithwaite and Daly apply the idea of an *enforcement pyramid*, with prison at its apex.⁵⁰ Depending on the willingness or otherwise of the perpetrator to accept responsibility, admit the wrongness of the behaviour, and take steps to ensure that it does not recur, an escalating repertoire of responses is provided, ranging from informal disapproval by family and friends, through reparative measures decided upon by neighbourhood conferences, through to penal sanctions and finally, for the most recalcitrant, imprisonment. Like Bianchi and other abolitionists and proponents of restorative justice, Braithwaite and Daly foresee that most offenders will come to accept their behaviour as wrong; that most victims will be content with acknowledgement of guilt, compensation/reparation, and some firm assurance (such as the undertaking of educative or therapeutic measures) that the behaviour is unlikely to recur. Unlike thoroughgoing abolitionists, however, they see that the 'big stick' of penal sanctions – including imprisonment – is necessary to reinforce the authority of restorative remedies. The big stick of imprisonment, they say, allows justice to 'speak more softly' in most cases.

The difficulty with their position is that the existence of the custodial possibility could perpetuate the present situation, which is that unless (long) prison sentences are imposed, the message of a case is that the behaviour is

48 Bianchi, op. cit., n. 21.

49 Finstad, op. cit., n. 28.

50 Braithwaite and Daly, op. cit., n. 29.

not really serious. Community disapproval, redress and attempts to change could be seen as 'getting away with it', just as the proponents of get tough sentencing designate non-custodial penalties for a range of offences now. This points to the importance of restorative responses to domestic, sexual, and racial violence being introduced in a general framework of restorative justice. They should not be used – as was the complaint against some earlier initiatives in informal justice – as second-rate justice for offences that don't really matter.⁵¹ Braithwaite has consistently argued for across-the-board reductions in the resort to punitive sanctions and the introduction of conference procedures and restorative measures for most offence types. In such circumstances of general penal deflation, introduction of the enforcement pyramid should not mean that sexual or racial violence was taken less seriously than other offence types, but it could perpetuate one of the elements of current criminal procedures that are objected to by many advocates of tougher responses to domestic violence, which is that violence appears only to be seen as serious if it is repeated.

Existence of the 'big stick' of imprisonment might well mean, in other words, that the pronouncement of a prison sentence is still the expressive yardstick for the condemnation of behaviour. Victims and their relatives might feel that their injury was being taken less seriously than an incident which did result in imprisonment: the lynch mob, after all, exists in relation to awareness of the possibility of execution and perception that this is the mark of stern disapproval. To serve the expressive functions of punishment, restorative processes will have to devise ways of clearly separating condemnation of the act from the negotiation of measures appropriate to the relationships between the particular victim, the offender, and the community.

RESTORATIVE JUSTICE OR ENHANCED PENALTIES?

Tolerance and/or denial of the extent and seriousness of crimes against women, children, and minority ethnic citizens make the demand for increased penalization understandable, but as well as believing that the infliction of suffering generally makes people worse rather than better, my own abolitionist instincts are strengthened by fear of the punitive inflation that occurs if, whenever a group gains recognition for its harms, such recognition is expressed through increased penalization. Penal measures, as van Swaaningen argues, do not have a simple *ad hoc* validity, but always have a *general* impact.⁵² Feminists may successfully persuade legislators and judges of the serious harms of domestic and sexual violence; environmentalists successfully urge the seriousness of pollution; politicians pontificate

51 M. Cain, 'Beyond Informal Justice' (1985) 9 *Contemporary Crises* 335; C. Harrington, *Shadow Justice? The Ideology and Institutionalization of Alternatives to Court* (1985).

52 Van Swaaningen, *op. cit.*, n. 41, p. 218.

about the evils of car crime and drug-taking: if all these claims lead to increased punishment of offenders, the carceral society envisioned by Foucault and Cohen would indeed be a reality! As Chesney-Lind and Bloom put it in relation to domestic violence, zero tolerance activism has supplied the system with 'new men to jail, particularly men of color'.⁵³

On the other hand, to forego penalization in a punitive society would look like tolerance of intolerable behaviour. Whilst it is correct to argue that racial and sexual violence will only be diminished by reducing the economic, racial, and sexual inequalities in power that exist in present societies, we cannot ask women, children, and victims of racial violence and abuse to wait for protection and compensation until the achievement of wholesale social transformation. We cannot, furthermore, reasonably expect them to give up such protection, remedy, and condemnation of violence as is afforded by criminal law, in present society with its systems of criminal rather than restorative justice.

What should be taken from feminist, anti-racist, and other 'zero tolerance' campaigners is that racial, sexual, and domestic violence should always be taken seriously. Spousal violence should not be dismissed as 'a domestic', of concern to no one outside the household; a victim's claim of racial motivation should be taken seriously; children should be listened to and any violence (sexual or non-sexual) against them should be regarded as reprehensible. From the abolitionists, however, we should learn that punishment is morally problematic in that it involves the state inflicting pain or deprivation on an individual; that it adds the suffering of the offender to the suffering already endured by the victim; that it deflects attention from the victim; that it generally offers little by way of protection and usually makes people worse rather than better. Punishment therefore needs justification, not just in general but in every particular case, and more constructive, less violent responses to the most serious forms of anti-social behaviour need to be developed with some alacrity.

The positives of restorative justice – compensation as of right; hearing the harms endured by the victim as well as weighing the evidence against the offender; considering how best to ensure the restoration of relationships between victims, offenders, and relevant communities – should be pursued as priorities. The negative reforms – abolishing imprisonment as a normal response to injury; finding restorative, rehabilitative alternatives to punishment in most cases – should be part of an overall move to a less retributive, more restorative justice. These reforms will need to be accompanied by vigorous 'policy preparation' along the lines suggested by Braithwaite and Mathiesen: that is, vigorous social education to make sure that domestic, sexual, and racial violence is behaviour which is strongly and generally disapproved, and about which perpetrators feel a strong sense of shame.⁵⁴

53 Chesney-Lind and Bloom, *op. cit.*, n. 33, p. 46.

54 Braithwaite, *op. cit.*, n. 42; T. Mathiesen, *Prison on Trial: A Critical Assessment* (1990).

On the other hand, shaming should be of Braithwaite's reintegrative variety, rather than the rampaging vengeance that is being seen in some 'community' naming-and-shaming responses to sexual offending.

What abolitionists and other penal reductionists fear is that responsiveness to the legitimate claims for attention by victims, and acknowledgement of the seriousness of racial, sexual, and domestic violence will further fuel the harsh penal politics of these law-and-order times; it is also likely that unchecked punitiveness in relation to offences where corroborative evidence is difficult to obtain will lead to the adoption of civil law standards of proof, but with such cases resulting in criminal law punishments. What we also strongly suspect is that penal toughness towards racial, sexual, and domestic violence would only be inflicted on the poor and marginalized, with the powerful continuing to perpetrate their racist and misogynist behaviour behind closed doors: penal toughness will lead, to paraphrase Reiman, to the rich getting counselling and the poor getting prison.⁵⁵

I am aware that I, like others who have addressed these difficult issues, am not coming to any firm or innovative conclusions. I can merely urge more abolitionist thinking about the problems posed by behaviour that is seriously harmful and widespread; that has not been subject to vigorous condemnation and penalization by the state, and which involves the exercise of power by offenders over victims. In particular, the problems of identifying the relevant 'community' and securing its participation, representation, and co-operation, and the problem of the last-resort sanction for recalcitrant offenders, need to be addressed.

Whatever the difficulties, however, the core principles of abolitionism hold true: the punitive power of the state needs to be curbed not expanded; penal strategies will be directed predominantly at those who are powerless and marginalized in the wider society, even if they are more powerful than their victims in the individual crime relationship; and punishment is more likely to reinforce racism, sexism, and other anti-social attitudes than to produce the chastened anti-racist and anti-sexist good citizen. The work of Braithwaite and Habermas provides a considerable advance in the theoretical resources available to restorative justice, whilst experiments with family conferences, community forums, and other processes being carried out in Australia, New Zealand, the Netherlands and elsewhere provide valuable experience in the viability of extending restorative justice processes to more serious forms of crime.

The key to reconciling the problems and possibilities of restorative justice lies in creative consideration of its relationship to formal criminal law. Problems of how to deal with recalcitrant offenders; how to ensure that restorative procedures are not seen as second-class justice; how to balance expressive and instrumental functions of justice; and above all, how to ensure that the voice of any party does not become submerged in an emergent

55 J.H. Reiman, *The Rich Get Richer and the Poor Get Prison* (1979).

unitary consensus all turn on the relationship between the discursive processes of restorative approaches and the role of formal law in modern societies in relation to defining relationships and allocating rights.

The developing perspective of 'guaranteeism' proposes a role for law as guarantor of rights, both general, in the sense of protecting human rights for all, and specific, for example, women's rights.⁵⁶ Formal law could stand behind restorative justice procedures as a guarantor of rights: that each party has certain rights which cannot be overridden by any decisions arrived at by consensus or majority. It could mean, for example, that an offender's rights would be protected against a vengeful community; that a victim's rights would be protected against a community view which did not take the harm seriously; that either party would have rights guaranteed against persuasion of the group by a stronger advocate. Guaranteeism would protect rights enjoyed in a generality of situations and contexts against the outcome of negotiations in a particular situation and context. This is quite different from the role of law in the present criminal justice system, which can adjudicate between competing rights, and which can order the suspension of certain rights (including, in the United States of America, for example, the right to life). If penalty in modern societies is, as Foucault has described, a political economy of rights, then a role for law as guarantor of rights would be a progressive and appropriate development.

Further elaboration of Habermas's discursive ethics, especially as informed by feminists and those more generally engaged in developing philosophies of difference, and of perspectives such as legal guaranteeism, may solve many of the dilemmas of restorative justice. In particular, such work could enable restorative justice to maintain an orientation towards the 'others' involved in conflictual situations which is the essence of the problem-solving restorative approach in contrast to the rule-following retributive approach. Less easy to envisage, at least in present-day Britain and the United States of America, is recovery of a culture of social inclusion which would underpin and support the development of processes whose outcome is shaming that was reintegrative rather than eliminative, and where the ultimate goal is the enhancement of social justice. This is the most intractable problem in the path of restorative justice, and it is one that is beyond the ability of proponents of any theory of penal reform to solve.

56 T. Pitch, *Limited Responsibilities: Social Movements and Criminal Justice* (1990, English ed. 1995); Van Swaaningen, op. cit., n. 3.