Restorative Justice as a Response to Sexual Offending　Addressing the Failings of Current Punitive Approaches

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Abstract

This article explores the use of restorative justice as a response to sexual crime. The management of high risk sex offenders, particularly in the community post-release, has been a key focus of contemporary popular and political debates on sexual offending. Many offenders fail to come to the attention of the criminal justice system. For those that do, there is the almost blanket application of recent control in the community measures such as sex offender registries and community notification which have failed to prevent reoffending. The response by the media and the public to the presence of sex offenders in the community may also impede offender rehabilitation. The use of punishment alone via formal criminal justice is, therefore, an inadequate deterrent for sexual crimes. Although controversial, this article advocates the use of restorative practices with sexual crime as a proactive, holistic response to the problem and ultimately as a more effective means of reducing the incidence of sexual offences and sex offender recidivism.[1]

Key words: restorative justice, sex offender, recidivism, risk management

The Failure of the Punitive Response

The case for restorative justice as applied to sexual offences is often based on a twin premise - the failings of current punitive responses and the prospect of offering a more viable solution to victims, families and communities affected by sexual offending (Finstad, 1990; Braithwaite & Daly, 1994; Hudson, 2002). Formal criminal justice is often limited in its response to these types of offences (McAlinden, 2007). The very nature of the system means that, at best, it can only ever hope to deal effectively with those offenders who have already come to the attention of law enforcement authorities. In practice, this actually covers a very small number of offenders. Some estimates, for example, suggest that fewer than five per cent of sex offenders are ever apprehended (Salter, 2003). Evidence from self-report studies also suggests that those convicted of sexual crime often reveal the commission of many more offences than are reported to authorities by their victims (Groth et al, 1982; Abel et al, 1987). One of the underlying facets of sexual crime, particularly child sexual abuse, is that it often remains hidden and undisclosed. The low number of prosecutions for sexual offences have variously been attributed to low levels of reporting (Grubin, 1998; Myhill & Allen, 2002) and recording of sexual offences, and evidential difficulties and victim anxieties about the trial (Hudson, 2002). At the same time, research demonstrates that instances of reoffending may be confined to a small group of sex offenders (Hanson and Harris, 2000; Hanson et al, 2003), particularly where no treatment has been undertaken (Hanson et al, 2002). Thus, as this article will suggest, targeted interventions should sensibly be aimed at probing this level of unknown risk as well as addressing the needs of the small known high risk group.

On another level, there is little empirical evidence to support the fact that the range of recent measures put in place to manage or control sex offenders in the community prevent reoffending (Bedarf, 1995; Plotnikoff and Woolfson, 2000). Measures such as sex offender registration and community notification, common to many jurisdictions, and novel probation conditions imposed in the United States may actually impede offender reintegration (McAlinden, 2005). Registration of the offender s name and address and notification of this information to the community, in the form of wanted posters , on-line databases or door-to-door by the offender in person, may result in a social stigma being attached to the offender (Massaro, 1991; Bedarf, 1995: 911-3; Earl-Hubbard, 1996; Kimball, 1996; Van Dujn, 1999). Similarly, in response to the limitations of the conventional options of prison and parole, a minority of American judges have also begun to use shame penalties as part of modern probation conditions for sex offenders (Massaro, 1991: 1886-90; Kahan, 1996; Karp, 1998: 281-83). These measures, which have variously required offenders to post signs on their car or home to expose their offending past, also result in public shaming, condemnation and stigmatisation of offenders (McAlinden, 2005).

In a similar vein, the emotive popular response to sexual crime by the media and the public, which can also be framed in punitive terms, has also prevented the reintegration of sex offenders. The media have tapped into public anxiety and fear concerning sex offenders with the adoption of name and shame campaigns[2] which encourage public outcry and often vigilantism (Ashenden, 2002; Williams & Thompson, 2004). Cases continuously appear in the media of children in particular abused or murdered by habitual sex offenders. In England and Wales, some of the most high profile of the recent cases include those of Sarah Payne, and Holly Wells and Jessica Chapman, known euphemistically as the Soham murders. The media have used these unusual and particularly heinous crimes to indict the system as a whole and to demonstrate the failure of the authorities to protect children. Far from securing the rehabilitation of offenders, the net result of this response is often the opposite. At best, offenders may be labelled and stigmatised, and ostracised from the rest of the community. At worst, they may be subjected to violence and vigilante activity and ultimately re-offend (Edwards & Hensley, 2001; McAlinden, 2005).

In short, these difficulties when taken together point to the need to re-examine the current regulatory framework for sexual offending and to consider alternative responses to sexual crime. Restorative justice is ultimately presented as a more humane reintegrative approach to sex offender rehabilitation. In particular, there is a reduced chance of the negative side effects which underpin the current focus on measures such as registration, notification, shame penalties and residence restrictions. Moreover, restorative interventions have the potential to increase offender accountability by encouraging more victims and offenders to come forward. Despite the concerns of critics, restorative justice may provide a positive means of dealing with the offender s needs in terms of risk management and successful rehabilitation, and also of addressing the concerns of victims and communities in terms of effective public protection.

Restorative Justice and Serious Forms of Offending

Restorative justice views crime not as a violation of a legal norm which necessitates punishment but as harm to people and relationships and, as the term suggests, seeks to redress or restore that harm (Van Ness & Strong, 1997). In this respect, restorative or reintegrative approaches are usually based on the following core aims: engaging with offenders to help them appreciate the consequences of their actions; encouraging appropriate forms of reparation by offenders towards their victim or the wider community; seeking reconciliation between the victim and offender where this is desirable; and the reintegration of the offender (Zehr, 1990; Braithwaite, 1999). It should also be noted that restorative justice generally assumes that the offender has already assumed responsibility for an offence. It is therefore, not a fact-finding process aimed at determining guilt, but

concerned rather with developing an appropriate response to acknowledged behaviour.

Restorative justice is in one sense a catch-all term which has been use to cover an increasingly wide range of programmes and practices that seek to respond to crime in a more constructive way than through the use of traditional criminal justice approaches (Galaway & Hudson, 1996). The main variants, however, are mediation and conferencing. Victim-offender mediation can take place instead of or before or after formal processes and allows victims and offenders to meet in the presence of a trained mediator (Marshall, 1991; Davis, 1992; Umbreit, 1994). Family group conferencing adds further perspectives to the basic mediation model in the form of those of the families of the victim and the offender and often the wider community. Some of these schemes are police led and in most the outcome of the conference is at least subject to approval by the court (Retzinger & Scheff, 1996; Morris & Maxwell, 2000).

Traditionally, restorative justice has been confined to low-level crime and commonly used with first time or young offenders. In the United Kingdom, for example, it has been used to change the emphasis of criminal justice in key areas such as youth justice.[3] The restorative conferencing programmes in England and Australia deal only with adult and juvenile offenders charged with moderately serious crimes. Similarly, New Zealand applies restorative practices to adult offenders who have committed relatively serious offences (Morris & Maxwell, 2003) and to all juvenile crimes except murder and manslaughter (Morris & Maxwell, 2000).

More recently, however, a number of initiatives have developed which routinely use restorative interventions for adult offenders and for very serious social problems. For example, it has been used in the Truth and Reconciliation Commissions of South Africa (Villa Vincenzo, 1999) and Rwanda (Drumbl, 2000) in relation to genocide, mass torture and rape and with respect to paramilitary violence in Northern Ireland (McEvoy & Mika, 2001). In the United States, victim-offender mediation has also been used with homicide and sexual assault and even between a murderer on death row and the family of his victim (Umbreit et al, 1999).[4] Similarly, intimate abuse circles have also been proposed and subsequently considered by American judges as a restorative response to domestic violence (Mills, 2003). These circles, closely based on restorative models and derived from the Truth and Reconciliation Experience of South Africa, are similar in some respects to their Canadian counterpart, circles of support, which will be discussed further below. They provide a forum for addressing the abusive dynamic and, depending on the extent of the violence and the wishes of the couple, may involve both parties and a care community, comprised of family, friends or the clergy, who come together to promote recognition, responsibility and change. Indeed, it is perhaps the extension of the restorative paradigm to sexual offending which remains the most controversial.

Restorative Justice and Sexual Offences

Although the use of restorative schemes with sexual offences is at present far from widespread, a few isolated initiatives have developed which are based on reintegrative or restorative principles. In South Australia, for example, young people charged with sexual offences, who admit their behaviour, are diverted from court processes and instead participate in a family conference (Daly, 2006). Recently, the family decision making model in Australia and North Carolina has also used a conference-style process with children and families affected by child sexual abuse and domestic violence, although usually the offender is excluded from this process (Pennell & Burford, 2001; Pennell, 2006). In Arizona, the RESTORE programme is using restorative justice to address date and acquaintance rape by first time adult offenders and those charged with misdemeanour sexual offences in a collaborative programme between Pima County Attorney s Office, the Southern Arizona Center Against Sexual Assault, and the College of Public Health, University of Arizona

(Koss et al, 2003).

One of the most established programmes, however, is perhaps circles of support and accountability. Circle programmes have been used in Canada for more than 10 years to deal with the reintegration of selected high risk sex offenders at the end of their custodial sentence (Cesaroni, 2001; Petrunik, 2002; Wilson et al, 2002).[5] More recently, circles have been extended to other jurisdictions such as Northern Ireland and England and Wales on a pilot basis. Here they have been used to support the work of the police, the probation service and other agencies in the multi-agency approach to sex offender risk management. At a broad level, these schemes involve the development of restorative support and treatment networks for sex offenders where the community works in partnership with the offender and professional agencies. The use of community resources is, therefore, considerably greater than in the two main models of mediation and conferencing.

Circles are based on the twin philosophies of safety and support concerning reintegration   they operate as a means of addressing public concerns and also the offender s needs. The circle is focused on the development of a network of informal support and treatment individually tailored around the offender, who is the core member, involving the wider community in tandem with state and voluntary agencies. The offender and other members of the circle enter into a signed covenant which specifies each member s area of assistance. The scheme provides high levels of support, guidance and supervision for the offender, which can mediate between the police, media and the local community to minimise risk and assist with reintegration. The offender agrees to relate to the circle of support, pursue treatment and to act responsibly in the community. The offender has contact with someone from the circle each day in the high risk phase just after release. The life of a circle extends as long as the risk to the community and the offender are above average (McAlinden, 2005). Circles aim to allay the fears of the local community, and at the same time, reduce the likelihood of further offending by holding the offender accountable to their commitment not to re-offend. To this end, early evaluations have produced positive results.

The Effectiveness of Restorative Justice

Proponents of restorative justice contend that it is more likely than retributive justice to reduce the incidence of crime because of its central concern for the safety of victims. It addresses crime at the macro level as well at the micro level   it recognises the need for building safe communities as well as the need to resolve specific crime problems. The preponderance of evaluation studies have been carried out on the two main models of mediation and conferencing (Miers et al, 2001; Kurki, 2003). At a general level, these studies have demonstrated that restorative justice can have a reductive effect in certain cases and can change the behaviour of some offenders. On the whole, however, there is more evidence that restorative justice is effective in reducing either the frequency or severity of reoffending for juveniles than in the case of adult offenders (Sherman et al, 2000; Morris & Maxwell, 2003).

In relation to the use of restorative justice with sexual offending, an archival study of nearly 400 court and conference cases of youth sexual assault in South Australia demonstrates that the conference process may be less victimizing than the court regime and may produce more effective outcomes (Daly, 2006). Overall the prevalence of reoffending was much higher for those young offenders dealt with by the court (66 per cent) than by the conference process (48 per cent). There is little empirical data available on circles given the relative newness of the concept. The available research evidence demonstrates, however, that circles can be effective in managing high risk sex offenders on at least two levels: in reducing recidivism rates (Wilson et al, 2002) and in engaging communities in the reintegrative process (Quaker Peace and Social Witness, 2005: 5). One such evaluation of circles in Ontario found that high-risk sex offenders receiving assistance via a circle

re-offended at a lower rate incrementally in comparison with a control sample (Wilson et al, 2002). In comparing the expected recidivism rate of these offenders with the actual observed rate, sexual recidivism was reduced by more than 50 per cent (Wilson et al, 2002: 378). Moreover, each incident of reoffending was less invasive and severe than the original offence for which the offender had been imprisoned (Wilson et al, 2002: 378). Early evaluations of these projects in England and Wales have also shown that circles have been effective in reducing expected rates of recidivism and assisting in offender rehabilitation. Moreover, despite tentative beginnings, communities were willing to play a constructive and supportive role in this process (Quaker, Peace and Social Witness, 2005). It remains unclear from the empirical evidence to date what particular features of the circle environment help to reduce offending behaviour. It may be the case that the simple provision of extra focused support reduces subsequent deviant behaviour.

Some argue that the use of formal reconviction rates does not always provide an accurate picture of actual deviant behaviour following intervention (Friendship & Thornton, 2001; Friendship et al, 2002). In this respect, the literature also refers to pro-offending or offence related behaviour which might precede eventual recidivism (Falshaw et al, 2003). Research also suggests that this soft data , routinely held by circles, is highly important in evaluating the effectiveness of interventions through the identification of a possible return to offending behaviour (Bates et al, 2004; Quaker Peace and Social Witness, 2005: 18). In this vein, in the pilot projects in England and Wales, only eight core members out of a total of 20 were identified as displaying early recidivist type behaviour including carrying out activities which were known to be part of the modus operandi of previous offences. Of these offenders, only three men were recalled to prison for breaching the terms of their release, none of whom had committed or been reconvicted of further sexual offences. One core member, however, was reconvicted for breaching a sexual offences prevention order (Quaker Peace and Social Witness, 2005: 6, 21).[6] This offender secretly purchased a car, part of his modus operandi of previous sexual offences of abduction, and two girls aged 6 and 14 were found in his flat. In each case, the recall was facilitated by information passed to the authorities by circle members. Without the intervention of the circle at such an early stage, progression to re-offence and subsequent re-conviction may well have occurred (Quaker Peace and Social Witness, 2005: 22). These findings are highly indicative of the accountability aspect of the work of circles and demonstrate effectively the critical role that they may have in managing the risk posed by dangerous sex offenders in the community. Indeed, circles of support have in this way a proven role to play in detecting and managing dynamic risk posed by sex offenders in the community. Moreover, they also highlight that the circle model potentially offers professional agencies a clear means of actively and positively engaging with the local community on contentious sex offender issues (Quaker Peace and Social Witness, 2005: 18).

At the same time, many restorative justice initiatives have objectives which are much broader than traditional regulatory responses which generally use recidivism rates as the key indicator of crime control. Aside from reoffending or re-conviction rates there are other important measures of outcome. Any future evaluative framework would also have to include other measurable criteria such as overall contribution to community safety, victim, offender and community involvement, responses to the needs of victims and satisfaction rates, offender reintegration, improvement in the relationship between offenders and their families and the local community and reparation to victims and the wider community (Maxwell & Morris, 1999, 2002).

Criticisms and Concerns

There are a number of arguments traditionally put forward by opponents of restorative justice as applied to sexual crime. In essence, for these critics, sexual offending is considered an inappropriate or unsuitable area within which to use a restorative response. In the main, it has been

suggested by the detractors that restorative justice trivialises what are very serious criminal offences, particularly where children and the vulnerable are concerned; it fails to promote offender accountability and allows the offender to reject responsibility for the offence; it reproduces and reinforces the power imbalance entrenched in abusive relationships and leads to possible re-victimisation; and it encourages vigilantism.

Advocates have addressed these critiques concerning hard cases and how they can be overcome (Hudson, 1998, 2002; Daly, 2002, 2006; Morris & Gelsthorpe, 2000; Morris, 2002; McAlinden, 2005). They counter that even though the criminal law remains as a symbolic signifier and denouncer, restorative processes which involve the abuser s family and the community can meet the affective or expressive need for censure in sexual offences cases; that while the criminal justice system does little to hold offenders accountable and address entrenched forms of offending behaviour, restorative justice seeks genuine engagement with offenders to help them acknowledge the consequences of their actions; it focuses on the empowerment of victims in a supportive environment in which the victim can make clear to the offender the effects of the abuse on them; that by offering constructive rather than purely penal solutions, it may be invoked at an earlier stage in the victim s experience of abuse; and finally, that distortions of power, including abuse of community control, are addressed when programmes adhere closely to restorative principles.

In addition, critics of reintegrative theory, in particular, also argue that a number of difficulties including the lack of empirical research to date; the lack of social and norm cohesion in contemporary society; the difficulties in promoting social inclusion; and the contestable nature of community and partnership , mean that such schemes will not easily be implemented in Western society. Advocates, however, contend that restorative justice, as argued above, has outcome measures that are much broader than a consideration of reoffending rates (Maxwell & Morris, 1999, 2002); popular responses to sex offending demonstrate that there is clear consensus concerning the wrongness of sexual relationships between adults and children in particular (Hacking, 1999); the provision of accurate information about the nature of sexual crime and responses to it, would hopefully dispel the commonly held misconceptions, shift public opinion and help to promote social inclusion (Grubin, 1998); and finally, that the involvement of professional agencies in community-based schemes will help to keep the community in check while also ensuring state and organisational accountability (Crawford, 1999). In effect, contrary to the major arguments put forward by the critics, it is argued here and elsewhere (McAlinden, 2005, 2007) that some sex offenders may be suitable for a restorative approach in carefully managed contexts.

Restorative Justice and the Relationship with Formal Criminal Justice

One of the most contentious issues in contemporary restorative justice scholarship is the question of whether restorative justice should be integrated into the formal criminal justice system, and if so, to what extent. Some scholars continue to emphasise the difference of the restorative vision as a fundamental shift in criminal law (Zehr, 1990, 1995; Bazemore, 1996; Barnett, 2003; Walgrave, 2003). Others, however, call for recognition of alternative forms of justice and highlight the compatibility of restoration and retribution. According to this view, the two concepts may be integrated as part of the same system of justice where they would complement and work in tandem with each other rather than operate as opposing or alternative systems (Zedner, 1994; Daly, 2000; Duff, 2002, Hudson, 2002).[7]

In practice, restorative justice schemes may operate either within or outside the traditional justice system (Zehr, 1990). An example of the latter is the use of community restorative justice schemes

with paramilitary groups in Northern Ireland (McEvoy & Mika, 2001). An example of the former is the use of restorative justice as the mainstay of the youth justice system in England and Wales where the criminal justice remains as the formal backdrop which can be used as a last resort with more persistent offenders (Crawford & Newburn, 2003).8 In relation to sexual offences, however, it is contended that the focus should remain on the former only. As currently happens with circles of support, restorative schemes should be integrated into and accredited by the formal criminal justice system where local community involvement takes place in conjunction with the work of professional agencies. Such an approach also goes some way towards addressing the central concerns of critics as discussed above.

The effective management of risk, particularly post-release, has been the touchstone of contemporary criminal justice debates concerning sex offenders (Kemshall & Maguire, 2001; Matravers, 2003). Given some of the documented failings of traditional risk-based approaches to sex offender reintegration it is argued that criminal justice policy and practice need to recognise the potential offered by restorative justice. Such a strengths-based approach to reintegration is focused on developing intrinsic motivation for change in a supportive environment (Maruna & LeBel, 2002). Moving from a purely punitive response to sex offending, to one where retribution and restoration are combined, will facilitate the management of both known and unknown risks posed by sexual offenders. In short, in combination with the formal criminal justice system, restorative justice is itself presented as a regulatory approach to sexual crime.

Research by Soothill and colleagues (Soothill et al 2005) has identified three main categories of offender: known and high risk ; known, but low risk ; and unknown risk. Restorative justice, in this respect, offers a practical means of managing the risk posed by each of these categories of offender. For example, known and high risk offenders could continue to be prosecuted in the normal way and then reintegrated into the community via circles of support on release. For known and low or low-middle risk offenders, circles could be used as an effective alternative to formal state sanctioning. As now happens with young offenders in England and Wales, the legal framework and more punitive sanctions, however, can be retained for use with habitual offenders (Crawford & Newburn, 2003). This approach is similar, in some respects, to Braithwaite s enforcement pyramid which envisages restorative justice as part of an overall regulatory framework that includes deterrence and incapacitation, but not retribution (Braithwaite, 1999, 2002). Moreover, by encouraging more offenders and victims to come forward, principally by reducing public villification of offenders and the threat of punitive sanctions, it may also offer a critical means of probing and managing the unknown risk, where offenders may be strongly suspected of sexual crime but have not actually been prosecuted.

Conclusion

Restorative justice does not purport to be a panacea to the quandary that is sexual crime. Indeed, the extension of the restorative paradigm to the domain of sexual offending in itself also raises a number of difficult questions concerning what is appropriate territory for restorative justice and the legitimate role of the state in restorative processes. The advent of restorative schemes with sex offenders, such as circles of support and accountability, has heralded a new era in criminal justice and has fundamentally changed how law and society respond to sexual crime in selected jurisdictions. There is little empirical evidence that the current international fascination with sex offender registries, community notification and related measures has successfully prevented reoffending. On the contrary, such measures have been shown to potentially exacerbate the difficulties concerning sex offender reintegration and rehabilitation. The failings of such punitive and restrictive approaches, which particularly concern the community management of sex offenders, means that it is incumbent upon society and policy makers to conceive of a more effective and

creative response to these types of offences on a more widespread basis. Restorative justice, in this respect, is presented as both a practical response to sexual crime and as a way of extending the theoretical thinking on the use of restorative justice in hard cases. Restorative approaches may offer a more meaningful, progressive and less expensive approach. Such programmes may provide an effective alternative for low-to-middle risk offenders in particular, who account for the majority of offenders, especially in the context of intra-familial abuse and when operated on a voluntary basis. Its potential benefits include improving public protection, providing reassurance for communities, and helping offenders to adjust to the demands of living on the outside. It is these potential benefits, which are beginning to be supported by evidence-based research, that compel us to take restorative justice seriously in the formulation of future responses to sexual crime.

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Notes

[1] The arguments put forward in this article are drawn from a recent book by the author (McAlinden, 2007).

[2] See for example the News of the World's campaign following the death of Sarah Payne in July 2000 (Ashenden, 2002; Williams & Thompson, 2004).

[3] By virtue of a range of provisions under the Crime and Disorder Act 1998, the Youth Justice and Criminal Evidence Act 1999 and amending legislation, a range of restorative options are used with first time young offenders.

[4] Although it has been argued that to describe a process involving state killing as restorative or reintegrative is 'grotesque' and 'a contradiction in terms' (Hoyle and Young, 2002: 536).

[5] In Canada, 'sentencing circles' (SC) are commonly used as well as 'circles of support and accountability' (COSA). Indeed, the terms are often used interchangeably but are in fact two separate entities. SC can be utilised at the outset of the sanctioning process, prior to an offender becoming lodged within the system. COSA, on the other hand, focus in particular on the reintegration of high-risk sex offenders (Wilson et al, 2002).

[6] Sexual Offences Prevention Orders, enacted under Part 2 of the Sexual Offences Act 2003, can be used to prohibit the offender from engaging in specified conduct in order to protect the public from serious harm.

[7] Some restorative justice commentators, however, argue that in fact restorative justice systems are corroded by their partnership with a retributive framework (Boyes-Watson, 1999).

[8] See note 3 above.

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