
Restorative Justice as a Procedural Revolution: Some Lessons from the Adversary System

F. W. M. (Fred) McElrea¹

Why make a film today that is not relevant to today's times? By delving into history, you wind up telling a contemporary story about ourselves:

*Shekhar Kapur, Director of 'Elizabeth: The Golden Age',
Telegraph Magazine, 6 October 2007*

Introduction

In the course of preparing this chapter I have read a learned and fascinating account of the history of the adversary criminal trial in England: *The Origins of Adversary Criminal Trial* by John H. Langbein (2003). This has been instructive in several respects, not least for the thoughts it throws up about restorative justice.

Although Dr Langbein has a Ph.D. from Cambridge, he is the Sterling Professor of Law and Legal History at Yale University. In 2006 his book was awarded the Coif Biennial Book Award as the outstanding American book on law. It is based on Dr Langbein's study of the Old Bailey Session Papers, which had not previously been used as a principal source of information on the criminal trial.

1. This chapter is based on an edited version of a paper originally presented to the first plenary session of the 4th International Winchester Restorative Justice Conference, 10 October 2007.

As Shekhar Kapur suggests in the passage quoted above, by delving into history we can end up telling a story about ourselves. There are three ways in which I have found the historical exercise valuable.

First, we discover that the adversary model is largely unchanged in its essentials since the end of the 18th century—so it is very strongly entrenched, and its ethos tends to overpower alternative models. This, I suggest, is why restorative justice struggles to get off the ground. (Lawyers from the year 1800 could walk into our criminal courts today and recognise most of what they see and hear. The same could never be said of the practice of medicine, or most other professions.) Second, we realise also that the adversary model has its weaknesses as well as its strengths, and when we study these we find that the weaknesses are in the areas where restorative justice is strong. And third, a glimpse back beyond the adversary system reveals trials in which defendants always spoke, without lawyers, and court was not the only solution. Community-based options could be inventive. Restorative justice can help us reclaim some of that history.

For those not familiar with the terminology, a brief word first about the adversary and inquisitorial models of criminal justice. The term ‘inquisitorial’ is, of course, related to ‘inquiry’. In European countries other than the UK, a presiding magistrate is assigned by the court to *inquire* into the truth of the allegations. The court is responsible for deciding which witnesses will be examined, and those witnesses remain under the control of the court, although they may be questioned by counsel for both sides. The accused has a right of silence but nearly always speaks, in order to influence the outcome. All evidence is compiled in a court dossier, and the hearing is based on that dossier.

In the adversary system common in most English-speaking countries, there is a contest rather than an inquiry.² The contestants decide which witnesses they will call, and what evidence will be produced to the court. The judge’s role is that of an umpire, ensuring that the rules of a fair trial are followed and pronouncing a winner. Most evidence is given orally, not compiled in a dossier. In civil cases, and in summary criminal cases, the judge decides

2. Inquiries are, however, found in some parts of English law, e.g. in the form of a coroner’s inquest.

which side has ‘won’, while in jury trials he or she sums up the case to the jury who bring in a verdict of ‘guilty’ or ‘not guilty’.

The term ‘restorative justice’ is adequately explained in other chapters of this book and need not be dealt with again here. I have been working in different aspects of restorative justice for 23 of my 25 years as a judge, and speaking and writing about it for the last 22 years.³ This chapter builds on that experience, but from a new perspective.

Restorative Justice as a Procedural Revolution

In the 1990s it was common to see restorative justice in contrast to retributive justice.⁴ That dichotomy has somewhat broken down of late, and I suggest that the more meaningful comparison is a procedural one, contrasting restorative justice with the adversary criminal trial. Restorative justice, understood as a revolution in criminal *procedure*, can enable or lead to a re-ordering of our criminal justice objectives. Indeed, much of the appeal of restorative justice is that its strengths are the weaknesses of the adversary system, and thus the two may be seen to complement each other.

This comparison is possible even though restorative justice and the adversary trial have different roles—the former dealing with admitted wrongdoing and the latter with disputed criminal liability. (Restorative justice therefore cannot be a substitute for a trial system, of either the adversarial or inquisitorial type). Even so, the adversary process colours the sentencing process found in most common law jurisdictions. In particular:

- The sentencing process is under the control of the court with the outcome imposed from above, by a person in authority (the judge).
- Professionals play a major part, especially lawyers, but also probation officers, psychologists and other specialist advisers. The offender usually does not speak.

3. I retired from full-time judging in 2008 after 20 years on the Bench, but have continued part-time since then.

4. Probably the most influential text on restorative justice in that period was Howard Zehr’s *Changing Lenses: A New Focus for Crime and Justice*, published in 1990. This contrasted retributive and restorative views of accountability—e.g. in the table at p.202. Twelve years later, however, Zehr writes: ‘Despite my earlier writing, I no longer see restoration as the polar opposite of retribution’—see Zehr, 2002: 13 and 58–59.

- The process involves two parties, prosecution and defence. Victims are not parties, although their views are sought through victim impact statements or other means.
- In some jurisdictions, including the indictable (jury trial) jurisdiction in New Zealand, submissions are made by counsel for prosecution and defence, emphasising the two-party system. The process is mainly backward-looking, seeking a just punishment for past offending.

This strong imprint of the adversary system on sentencing should not surprise us, for sentencing was originally part and parcel of the trial process. Indeed, an accused could not put forward mitigating factors for sentencing except by giving evidence at trial—something that militated strongly against guilty pleas.⁵ And one of the functions of the jury was to ‘report any favourable circumstances ... [that] appear to them’,⁶ which the judge took into account in sentencing.

Where sentencing does differ today from determining guilt is that the court has greater power to call for the information it considers relevant. In this area it is not dependent upon counsel and is thus closer to the investigating magistrate of the European courts. (The court is still however dependent on the trial process to provide the facts upon which sentencing proceeds.)

Historical Overview

A study of the history of the adversary criminal trial is instructive in understanding both its strengths and weaknesses, and also in reminding us that the adversary criminal trial is a reasonably modern creature, dating from 18th century England. Although ancient by my country’s standards—James Cook first sighted New Zealand in 1769—this is in the ‘modern’ period of history.

Most law students have heard that before trial by jury, ‘the means of proof [were] solemn formal oaths and ordeals designed to elicit the judgment of God’.⁷ These included the ordeal of fire (carrying a red-hot iron in the hand), and—after the Norman Conquest of 1066—the ordeal of battle. What is not so well known is that even within the history of jury trials there were

5. Langbein, 2003: 20.

6. *Ibid.*

7. Pollock and Maitland, 1952: Vol.1, 74.

two distinct phases prior to the evolution of the adversarial criminal trial in the 18th century.

Initially jurors were local people expected to know what had happened, or at least able find out from local sources. They came to court to speak of what they knew, not to listen to evidence. This type of trial prevailed until the end of the Middle-Ages (about the 15th century). Langbein attributes its demise in part to the vast social dislocations of the Black Death plague of 1348–9, and other social changes.⁸ By the 16th century juries were drawn from a much wider area and consequently lost the ability to apply local knowledge. Instead they became passive triers of fact, listening to the evidence of the parties and sometimes other witnesses, in what Langbein calls the ‘altercation trial’ that lasted throughout the 16th and 17th centuries (the ‘early modern’ period).

The altercation trial of the 16th and 17th centuries

Langbein takes the term ‘altercation’ from the commentary of the eminent Elizabethan writer, Sir Thomas Smith, written about 1565. Smith describes a lawyer-free ‘altercation’ between citizen accuser and citizen accused the purpose of which was to see how the accused responded in person to the prosecution case.⁹ In such trials the central questions were: what really happened, and did the accused really do it? The accuser and his witnesses would speak (on oath), the defendant (speaking unsworn) would reply to the accusing testimony, and (said Smith) ‘so they stand a while in altercation ...’¹⁰ — or, as Langbein puts it, in ‘this unstructured bicker’ of accusers and accused.¹¹ As he notes, such trials ‘had a formless or wandering quality that resembles ordinary discourse, a conversation of sorts, lacking the crisp division into prosecution and defense case that we now expect’.¹²

The fuller text of Smith’s account in his Chapter 23 is worth repeating:¹³

8. Langbein, 2003: 64.

9. Langbein, 2003: 13, 146 and 271.

10. *Ibid.* 13 and 321.

11. Langbein, 2003: 259.

12. *Ibid.*

13. Smith, c1565: 99–100.

The Judge first after they be sworne, asketh first the partie robbed, if he knowe the prisoner, and biddeth him looke upon him: he saith yea, the prisoner sometimes say nay. The partie pursuivant [prosecutor] giveth good ensignes verbi gratia [for example], I knowe thee well ynough, thou robbedst me in such a place, thou beatest me, thou tookest my horse from mee, and my purse, thou hadst then such a coate and such a man in thy companie: the theefe will say no, and so they stand a while in altercation, then he [the prosecutor?] telleth al he can say : after him likewise all those who were at the apprehension of the prisoner, or who can give any indices or tokens which we call in our language evidence against the malefactor. When the Judge hath heard them say inough, he asketh if they can say any more : if they say no, then he turneth his speeche to the enquest [jury]. Good men (saith he) ye of the enquest, ye have heard what these men say against the prisoner, you have also heard what the prisoner can say for himselfe, have an eye to your othe, and to your tuetie, and doe that which God shall put in your mindes to the discharge of your consciences, and marke well what is saide.

While there is no mention here of defence witnesses, Langbein (2003: 51–56) explains that they were allowed, but unlike prosecution witnesses: (i) they were not bound over by the JP to attend at trial (and were unlikely even to be contacted by an accused held in custody); and (ii) until Parliament intervened in 1702, they did not give their evidence on oath. (The accused's evidence remained unsworn until the Criminal Evidence Act of 1898, ostensibly to spare him the choice between defending himself and damning his soul through perjury.)

Langbein notes that the English criminal courts were 'determined to hear the accused speak in person and unaided at oral public trial'.¹⁴ Elsewhere he notes: ¹⁵

The logic of the early modern [altercation] criminal trial was to pressure the accused to speak, either to clear himself or to hang himself. Having to conduct his own defense obliged the accused to become an information resource for the court.

14. Langbein, 2003: 61–62.

15. Langbein, 2003: 36.

The altercation trial was defended by the noted 19th-century legal historian Sir James Fitzjames Stephen. Whilst aware of the shortcomings of this system, he explained:¹⁶

The trials were short and sharp.... They were directed to the very point at issue, and, whatever disadvantages the prisoner lay under, he was allowed to say whatever he pleased; his attention was pointedly called to every part of the case against him, and if he had a real answer to make he had the opportunity of bringing it out effectively and in detail.

Noticeable in these accounts of the altercation trial is the absence of lawyers. Although it must have often worked great injustice, the justification given in the early 17th century by Sir Edward Coke, Lord Chief Justice of England, was that 'a defendant's plea of not guilty goeth to the fact best known to the party'.¹⁷ Or, as it was put a century later by William Hawkins, 'everyone of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer ... it requires no manner of Skill to make a plain and honest Defence'.¹⁸

Another feature of the times was the absence of professional prosecutors. Police prosecutions did not commence until the 19th century, after the formation of full-time police forces. Previously all prosecutions were what today would be called 'private' prosecutions. It was up to the complainant (the citizen accuser) to prosecute the case, if it was to be heard at all. Some help was available to the prosecutor from the local (unpaid) justices of the peace, to whom the crime was reported. It was his task to prepare pre-trial 'depositions'¹⁹ by recording the statements of accuser (and any other prosecution witnesses) and accused, before making any committal for trial.²⁰

The JPs' role in questioning the accused and other witnesses gave them a role in the investigation of crime similar to that now undertaken by the

16. Stephen, 1883: Vol.1, 355.

17. Coke, c.1620s–1630s: 137.

18. Hawkins, 1716, 1721, Vol 2: 400.

19. See further Langbein, 2003: 40–41.

20. Until the 18th century the JPs had no power to dismiss felony charges for lack of evidence — instead the filtering out of weak cases was done by a 'grand' jury of 23, as distinct from the trial jury of 12 citizens (the 'petty' jury).

police. However, while accusers were forced to speak at trial, so was the accused. Since juries were no longer a source of information, the altercation trial induced the accused to disclose what he knew about the matter.²¹ This view of the defendant as a source of information is something that has since been lost from the criminal law — (I suggest) to our detriment.

The evolution of the adversary system

Langbein considers that the transition from altercation to adversary trial occurred gradually, with no central design, and without its participants foreseeing the outcome. In essence, the adversary trial evolved in response to a series of problems, particularly for defendants. Some of these have parallels even today.

There were heavy burdens on citizen-prosecutors. The time, effort and cost²² involved in gathering witnesses and getting their evidence taken by the local magistrate (JP) was a disincentive to many people, so that many crimes were not prosecuted. In response to this, there were formed many mutual associations²³ for the prosecution of felons, and as well solicitors (often the clerks to the JPs) came to play a role in pre-trial work, especially the drafting of indictments and preparing proofs of the evidence for the citizen-prosecutor.

- Solicitors became commonly used by those who could afford them, i.e. the wealthy, but were sometimes disreputable and unscrupulous — the ‘Newgate solicitors’.²⁴ However this assistance to citizen-prosecutors, by JPs and sometimes solicitors, was one-sided and seen as unfair to the accused.
- A further factor against the accused was the practice of offering rewards, equivalent to many years’ income for humble folk, which often led to

21. Langbein, 2003: 64–65.

22. Court staff were dependent upon fees for their living (Sharpe, 1980: 110–111). Not until the 1750s did Parliament empower the courts to reimburse the costs of poor prosecutors and witnesses who secured the conviction of felons.

23. Langbein, 2003: 131–136.

24. An anonymous tract published in London in 1728 was entitled *Directions for prosecuting thieves without the help of those false guides, the Newgate Solicitors* [Sic. Eds.] (Langbein, 2003: 124).

perjured evidence (some engineered by disreputable solicitors) and therefore unjust verdicts.

- The unfairness was compounded by some judges who prior to the Act of Settlement of 1701 were not independent of the Crown and whose bias was seen most clearly in treason trials. Parliament intervened, therefore, to allow defence counsel at trial,²⁵ but only in the case of treason trials (the Treason Trials Act of 1696).
- In the early 18th-century, judges started to allow defence counsel in felony trials, at first only in special cases, such as with a foreign or sick accused, but then more generally. Although by 1753 counsel perceived a 'right' to counsel, even at the end of that century only one-quarter to one-third of defendants at the Old Bailey had the benefit of counsel.²⁶
- However the pressure on the accused to speak was maintained by limiting defence counsel to cross-examination of witnesses — they could address the judge on legal matters but were not allowed to address the jury on the accused's defence.²⁷ The impact of defence counsel was further limited to the few cases in which the accused could afford counsel's fee.
- Defence counsel changed the dynamic of the felony trial by sometimes addressing the jury (by surreptitious means²⁸ — they had no right of address until Parliament intervened with the Prisoners' Counsel Act of 1836), by developing out of the privilege of witnesses a right of silence,

25. Defence counsel had previously been allowed to argue points of law upon the indictment, but this was at the pre-trial stage.

26. Langbein, 2003: 170.

27. Langbein, 2003: 254–255.

28. 'In practice ... it proved hard to stop defence counsel from making small interjections that were argumentative in character' (Langbein, 2003: 297). Sir James Fitzpatrick Stephen remarked that 'cross-examination tended to become a speech thrown in the form of questions' (Stephen, 1883: Vol.2, 431). Editorial note: There has been some revisionist history in recent years and with a high public profile. John Hostettler and William Braby have explained how William Garrow and others changed the nature of the trial and the role of counsel: see *Sir William Garrow: His Life, Times and Fight for Justice* (2009), Sherfield-on-Loddon, UK: Waterside Press. This was also aided by the BBC's involvement in 'Garrow's Law'.

and by focusing the court’s attention on whether the charge had been proved, rather than on the accused’s response to it.²⁹

- The growing aversion to the death penalty in the second half of the 18th century played a part in these developments.

An Overview of Adversarial and Restorative Processes

Against this background, what are the weaknesses of the adversary system (including those identified by Langbein) and what relevance do they have to restorative justice? I set these out first in summary form and then expand upon my answers.

	Adversarial procedure	Restorative processes
1	Central control with imposed outcomes (requires huge state resources)	Community-based, consensual model (requires some community resources)
2	A two-party system (victims excluded)	Multi-party system, with victims central
3	Process dominated by professionals — hence —	Professionals have support roles only — hence —
4	... system favours the wealthy wealth not a factor
5	... truth often suppressed	... truth is highly valued

29. The standard of proof ‘beyond reasonable doubt’ appeared in the 1780s, apparently as an initiative of the judges (Langbein, 2003: 263–265).

	Adversarial procedure	Restorative processes
6	Focus is on whether offence is proved	Offence admitted—focus on putting right
7	Little incentive on offenders to speak	Offenders do speak, and are valued as a source of information
8	Outcomes restricted by law	Flexible and often creative outcomes
9	Distorted by harsh penalties	Usually avoids harsh penalties
10	Procedure often formalistic and archaic	Informal, adaptable processes
11	A method of prosecution	Can follow or be alternative to prosecution
12	Emphasises the defendant's rights	Emphasises responsibilities

1. Imposed versus consensual outcomes

We are well accustomed to the current, western model of justice in which the outcome is imposed by an authority figure. However the notion of consensual outcomes (now common as mediation in civil disputes) is far from new to English law, even in the context of crimes. Anglo-Saxon (and other) law had a system of monetary compensation known as 'bot' or betterment. The offender could settle the matter by making *bot* to the injured party and paying *wite* to the king, according to an established tariff. As is explained by Pollock and Maitland;³⁰

30. 1952: Vol.2, 450–451.

Every kind of blow or wound given to every kind of person had its price ... Gradually more and more offences became emendable [able to be paid for]; outlawry remained for those who would not or could not pay. Homicide, unless of a specially aggravated kind, was emendable; the bot for homicide was the wergild³¹ of the slain.

Even in later times, prosecution was far from an automatic response to offending.

...for centuries [before the 19th-century] the English system had worked on the principle that indictment before a court was the last resort to be tried; there were all sorts of alternative informal means which the potential prosecutor might try to use short of formal prosecution. What the 18th-century gentry and aristocracy valued, was the discretion which the system left them free to exercise ...³²

(One could add that such discretion to prosecute (or not) remained part of the criminal law and today forms the basis of many alternative measures, some referred to as 'diversion'.)

And from another author:

...there was a wide variety of informal sanctions through which indictable behaviour might be controlled or punished: dismissal or chastisement by an employer; informal coercion or admonition by a priest or landowner; arbitration; and control through the poor law ... It must be remembered, moreover, that the law itself had at its disposal a number of means for dealing with the petty offender other than by indicting him. Three of these [were] summary conviction before a justice or justices, binding over [to keep the peace] and the use of the house of correction ...³³

A delightful example, from the restorative viewpoint, is that of George Hawkins, caught stealing wood from the landed gentry in 1674. 'Hawkins was made to set his mark³⁴ to a paper which admitted his fault, expressed

31. The statutory sum that would atone for the death.

32. Philips, 1980: 158.

33. Sharpe, 1980: 117–118.

34. He was, we assume, illiterate and had no signature.

his sorrow for it, and contained his promise never to do the like again.’³⁵ The records of the ecclesiastical courts provide another example:

When a dispute arose between two women ... a co-parishioner declared ‘I would to God yow two were frend[es], for this is not the best meanes for neighbours to sue another.’ The two women agreed to settle their differences, and drank a health to each other to symbolize their reconciliation. The deposition relates how ‘Katherin tooke the cupp and dranke to the said Emote who thanked her and ... tooke the cupp of her and dranke of yt’.³⁶

Perhaps western societies have expected too much of the adversary system, loading it up with more and more responsibilities at the expense of local solutions. History shows that it can co-exist with less formal, more community-based means of dealing with wrongdoing. A change back towards greater use of these alternatives would be consistent with the modern emphases on decentralisation, on strengthening communities, and on concerns about the spiralling cost of court-administered and prison-based criminal justice.

In the process other benefits are likely to ensue. For example, because restorative justice operates only by consent—both in respect of process and of outcomes—it has a higher proportion of reparation agreements fulfilled than the courts achieve with reparation orders. One Canadian study showed that victims seeking restitution for material harm were more than four times as likely to receive it as victims whose cases went to court.³⁷ In my view this is due to the greater value which people attach to arrangements they have made themselves, compared to those imposed on them.

2. The exclusion of victims

Western legal systems deal with criminal offending as a matter between the State and the defendant. It is the state, or an agent thereof, that prosecutes. In lower courts this is often the police, and in higher courts the Crown.

35. Sharpe, 1980: 113.

36. Sharpe, 1980: 112, citing the records of the Archbishop of York’s Consistory Court—unfortunately from an undefined time.

37. Reported in Sherman and Strang, 2007: 58. See e.g. the Australian National University research, known as RISE (Reintegrative Shaming Experiments).

Victims are not regarded as parties to criminal proceedings, and their role is usually little more than as witnesses, if they are involved at all.

A large body of literature is now devoted to the problems of victims in our criminal justice systems. Politicians have been alert to the views of lay people on this subject, but lawyers have mostly not understood what all the fuss is about. For me the principal benefit of restorative justice is the fact that victims are involved in, and central to, its procedures.

Langbein does not address the low profile of victims in the adversary system, perhaps because: (i) he favours the inquisitorial system which is still essentially a two-party, state-controlled system; and (ii) victims remained involved as prosecutors (as well as witnesses) in the development of the adversary criminal trial in the 18th century, the period under consideration by Langbein. It was only after the Metropolitan Police Force Act of 1829 that a recognisably modern constabulary was established and took over from citizen-accusers the burden of prosecution.

Indeed, Langbein's account shows victims (accusers) closely involved as prosecutors and witnesses, to the point where it was a burden to them. What restorative justice offers victims is not an engagement in a combative and time-consuming, formal process but a chance for victims to meet offenders in a supportive environment, have their anger and hurt acknowledged by the offender, obtain information that is important to them and (most likely) an apology, and discuss how matters can best be put right.

Restorative justice is, however, more than just victim-offender mediation — indeed, given that wrongdoing must be admitted, it is not mediation at all.³⁸ It should involve other community members, particularly friends or family of the victim and offender but also people who might help suggest solutions to problems for the wider community. Not only is the larger group usually more resourceful, but it sometimes allows a slightly wider view of responsibility for the offending.³⁹

38. Mediation makes no assumptions about wrongdoing, and both sides are expected to compromise to reach agreement. See, further, Zehr, 2002: 9.

39. For example, victims may complain of disinterest by the prosecuting body, or contributing actions by other authorities — e.g. poor street lighting not fixed, or delays in providing safe systems.

3. The dominance of professionals

Langbein's account traces in valuable detail the way in which lawyers not only became involved in criminal trials but came to totally dominate them, to the exclusion not only of the accused but in some respects the judge. Lawyers often coached witnesses in what they would say, spoke for and on behalf of the accused, and helped the accused draft his (unsworn) trial statement. They took over from the judges the role of examining the witnesses.⁴⁰ Langbein sums up defence counsel's 'commandeering' of the trial as ending the altercation trial, silencing the accused, marginalising the judge, and breaking-up the working relationship of judge and jury.⁴¹

It is an interesting observation of Langbein that the dominance of lawyers in English criminal trials came about as a 'remedy for one-sidedness', that remedy being 'two-sidedness'. No thought seems to have been given at that time to 'the truth-seeking Continental model', possibly because it still permitted torture (called half proof)⁴² and was discredited on that account.

What restorative justice offers is an escape from 'two-sidedness' by including the victim (and others), encouraging the discovery of shared needs and obligations, and limiting professionals' roles to that of supporters. Judges never attend restorative conferences. If lawyers are present, they are not advocates: offenders must be allowed to speak for themselves. Lawyers can give advice if sought, and indeed can be a source of information about the criminal justice system for all present. In New Zealand, police officers are encouraged to attend; they do so not as a prosecutor but as a representative of the public interest whose presence often assists victims. (In youth justice matters, police 'youth aid' officers attend every family group conference, and are highly valued for their professional contributions.)

In fact most adult restorative conferences take place without lawyers or police present. The freeing up of criminal justice from the domination of professional groups is a major advantage of restorative processes. Matters

40. The judge's part in questioning the accused seemed not to have the partisan features of cross-examination by counsel. 'The judge commonly questioned the participants to fill out the testimony they volunteered, and called upon the accused to respond' (Langbein, 2003: 253).

41. Langbein, 2003: 17.

42. Langbein, 2003: 84 (re two-sidedness) and 339 (re torture). Torture had been allowed in England between about 1540 and 1640 but only for Privy Council investigations, mostly in cases of treason (Langbein, 2003: 340).

proceed (under the guidance of a facilitator⁴³) on their merits, rather than on technicalities; the people most affected by wrongdoing are empowered to deal with the results as best suits them; and the cost to the parties and the state is much reduced.

4. The 'wealth effect' of adversary trial procedure

Adversary criminal procedure privatizes the investigation and presentation of evidence. Such a procedure is intrinsically skewed to the advantage of wealthy defendants, who can afford to hire the most skilled counsel and to pay for the gathering and production of defensive evidence.⁴⁴

It follows from what has just been said under the previous heading that most people do not feel the need of lawyers in restorative processes, and so all parties, rich and poor, are on a much more even footing. (However it is important that the parties are not prevented from getting legal advice, and have access to their lawyer in private when they desire advice.) Accordingly, the wealth effect described by Langbein is absent from restorative justice.

Legal aid has not overcome the problems of the wealth effect, at least to any marked degree. In most legal systems the top lawyers generally do not handle legal aid cases, and the financial restrictions on legal aid mean that there are large numbers of litigants not poor enough to receive legal aid but not rich enough to afford competent counsel for any length of time.

Where wealth can be relevant is in the means available to the offender to make reparation to the victim. This can of course produce different outcomes, which are a fact of life for court and non-court systems, but it does not mean that the wealthy come out of restorative justice better off than the poor, for three reasons.

First, reparation can be made in different forms, including unpaid work for a victim, or for a charity nominated by the victim. The court cannot order such work. Secondly, where offenders attend with family or community supporters, the wider group often accepts some responsibility in the matter, or for other reasons wishes to see the victim compensated. Thus it is common for reparation to be made by one or more members of the wider

43. Facilitators must be professional, and in New Zealand are trained according to best practice, but their role is to allow others to express themselves, not to assert their own views.

44. Langbein, 2003: 102–103.

group, usually with reimbursement promised to them by the offender. This sort of result is rare in court processes. Thirdly, victims who have attended a restorative conference are surprisingly understanding of offenders' problems, especially if they see them also as the 'underdog'. In my experience it is almost unknown for a victim not to agree to an outcome because insufficient money has been offered. However, the wealthier offender will be expected to make fuller reparation, precisely because he has more to offer.

5. Suppression of truth — the 'combat effect'

Two-sided partisanship may indeed have been better than one-sided partisanship, but it was still a poor proxy for truth-seeking.⁴⁵

Langbein describes as a 'fundamental structural flaw' the combat effect that became apparent in the later 18th-century:

By the combat effect, I refer to the incentives to distort or suppress the truth, for example by concealing relevant witnesses, withholding information that would help the other side, preparing witnesses to affect their testimony at trial (coaching), and engaging in abusive cross-examination.⁴⁶

Abusive cross-examination is referred to as 'trying the victim',⁴⁷ as is well understood by rape victims. In 1787 Sir John Hawkins, a prominent London magistrate, expressed his concern that such tactics deterred citizen prosecutors from going to court, because they 'may be entangled or made to contradict themselves, or each other, in a cross-examination, by prisoner's counsel ...'.⁴⁸

The most aggressive of defence counsel seems to have been one William Garrow. His tactics were the opposite of the counsel of perfection of one Thomas Gisborne in the 1790s:

[H]e will not defame the witnesses of the adverse party; nor ... strive to rob their testimony, which they are of the credit it deserves. He will not overawe [witnesses] ... by brow-beating and menaces, nor impose on their simplicity by

45. Langbein, 2003: 332.

46. Langbein, 2003: 265.

47. Langbein, 2003: 295.

48. Quoted in Langbein, 2003: 296.

sophistry and cunning. He will not ... insidiously labour to extract from their words a sense foreign to their intentions. He will abhor the idea of drawing those who appear against him into any seeming contradictions and perjury, when he perceives their meaning to be honest and their story in reality consistent.⁴⁹

Few judges today would see this as a realistic account of the role of counsel under the adversary system. Many counsel see it as their job to deprive opposing testimony of the credit it deserves, to brow-beat (though not to menace) witnesses, and to get opposing witnesses to say what they do not mean. While judges can intervene to ensure that witnesses are not treated unfairly, there is a limit to how far they can do so without 'descending into the arena' or 'entering the fray' which they are not meant to do.

A common method of attempting to discredit the evidence of a witness is to point to allegedly inconsistent statements by the witness — e.g. earlier statements not containing the same detail as now given in court. Research summarised at a conference in Cambridge⁵⁰ showed that the assumptions made in this form of reasoning are often wrong. A paper presented by Dr Katrin Muller-Johnson, 'Eye Witness and Ear Witness Testimony', explained that:

- In mock crime scenarios, 97 per cent of witnesses provided a later statement with inconsistencies.
- Providing additional information in a later interview is common (found in 98 per cent of one survey), but such information has a high level of accuracy (87 per cent, compared to 95 per cent of the original evidence).
- The difference between the two accounts may be explained by different 'retrieval cues' (e.g. questions) leading to different answers.
- The number of inconsistencies and contradictions was unrelated to the accuracy of the witness's consistent statements.
- Police officers taking statements rarely record all information supplied, yet such information later given by the witness is (wrongly) treated as being especially suspicious.

49. Quoted in Langbein, 2003: 307.

50. Muller-Johnson, 2007.

- Inconsistency between a witness statement and what he or she says in court is probably the single most common cause of wrongful acquittals.

I do not know whether such problems affect evidence given in inquisitorial hearings, but in my judicial experience they are a regular tool of adversarial combat, and one which leaves honest witnesses feeling that their words have been twisted and turned against them.

Langbein correctly diagnoses the combat effect of the adversary process as almost inevitably producing such outcomes. He also correctly notes that there is no obligation on adversaries to put all relevant material before the court, although most countries recognise some obligation of fairness on the part of prosecution counsel. As a result, the court can proceed ignorant of highly relevant material known to one side in the dispute.

The contrast with the restorative approach could not be more marked. There truthfulness is encouraged, as it is part of the process of being accountable and accepting responsibility for wrongdoing. And because there are (ideally) more than victim and offender present, the chances of truth being suppressed are reduced. Someone present is likely to know the fuller story and refer to it. This may even be the victim, who sometimes speaks in support of an offender's explanation.⁵¹ But the most powerful and important form of truth that a victim can receive is an apology.

Further, the requirements of good practice followed by facilitators ensures that there is no 'brow-beating', that each person present is treated with respect and is able to speak without interruption, and coaching of any person present is usually easily detected and unlikely to occur. What is interesting is that lay people find restorative processes to be fairer than court procedures⁵² — which is surprising as fairness of process is considered the touchstone of the adversary system. I believe that this is because lay people value truthfulness, dislike a reliance on technicalities, and consider the willingness to hear all affected parties a virtue.

51. For example, the police summary of facts may contain elements that both victim and offender dispute.

52. This also was an outcome of the Australian RISE research, as summarised in Sherman and Strang (2007: 19). Victims experiencing restorative justice had a stronger preference for the process (69% compared to 48%) and greater satisfaction with the outcome (60% compared to 46%) than victims whose offenders were dealt with through the courts.

6. Putting the prosecution to the proof

By assuming the work of defending, and by insisting on the prosecutorial burdens of production and proof, counsel largely (sometimes entirely) silenced the accused. Shutting down the old ‘accused speaks’ trial changed the very theory of the trial. The purpose of the altercation trial had been to provide the accused an opportunity to reply in person to the charges and the evidence against him. Adversary trial put in place a new conception of the trial, oriented on the lawyers. Criminal trial became an opportunity for defense counsel to test the prosecution case.⁵³

Under the next heading we will consider the effect of silencing the accused. For the present the focus is on the notion that criminal liability is a question of whether the prosecution, without reliance on the accused, can prove the charge. Langbein is right in seeing this change brought about by the adversary system as fundamental. Here I wish to repeat what I have said before:⁵⁴

I suggest that one of the key defects in the criminal process today relates to pleading...[A] ‘plea’ of Not Guilty does not necessarily mean that the defendant denies guilt. It may mean only that the defendant wishes to ‘put the prosecution to the proof’, i.e. to see if the prosecution can prove its case. This can operate as an incentive not to accept responsibility but instead to deny all responsibility that the defendant or his lawyer thinks cannot be proved. As things stand this is not only permissible but encouraged. Further, with proceedings laid indictably (i.e. intended for trial by jury) the defendant is not even asked to plead until after a preliminary hearing [Taking ‘depositions’, writing down witnesses’ evidence in committal proceedings for transmission to a higher court, is a practice that is now effectively extinct in English committal proceedings (Eds.)]. Of course if a key element of an offence does not exist then the defendant should indeed be found Not Guilty. But if instead the prosecution should fail to prove an ingredient of the offence through the absence (or faded memory) of an important witness, or because a witness lies, or through failure to correctly recite the breath-alcohol litany in the witness box, or by simple oversight of the prosecutor, or because relevant evidence is ruled inadmissible, is justice served by a Not Guilty finding?

53. Langbein, 2003: 310.

54. McElrea, 2002.

Where the guilty are found Not Guilty by this process an injustice is done which the positivist approach does not recognise.

I therefore propose that we should do away with the concept of putting the prosecution to the proof, except where the defendant denies the charge or has no means of knowing what happened at the time. Why should not defendants be told the charge against them and asked whether that charge is admitted or denied? If it is admitted then the prosecution should not have to prove it. (Lawyers will have an important role to perform in ensuring that accused persons understand what it is they are admitting to and what defences might be available to them.) If denied it should be proved using the adversary system.

As long ago as 1995 the Attorney-General and Deputy Minister of Justice of Saskatchewan, Brent Cotter, expressed a similar view: he said the criminal justice system encourages offenders to avoid responsibility and deny, and hope you might 'get off'. In a family, such behaviour would be considered dysfunctional. In a community, he suggested, it is still dysfunctional. I agree. By organizing our criminal justice system on this premise we have discouraged personal accountability and promoted evasiveness. A tentative step in the opposite direction was taken by the New Zealand Parliament with section 7 of the Sentencing Act 2002. The list of purposes of sentencing provided by the section reads:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or
- (e) to denounce the conduct in which the offender was involved; or
- (f) to deter the offender or other persons from committing the same or a similar offence; or
- (g) to protect the community from the offender; or
- (h) to assist in the offender's rehabilitation and reintegration; or
- (i) a combination of two or more of the purposes in paragraphs (a) to (h).

The first two purposes listed were new to our sentencing jurisprudence, although they had been present in our 1989 youth justice legislation. They allow the courts to move in quite a different direction to the largely punitive route of the past. Unfortunately, only judges already familiar with restorative justice seem to have made much use of these provisions. They do however provide a statutory framework for a very different, restorative approach.⁵⁵

Even the humble mark of the thief George Hawkins⁵⁶ in 1674 signified 'his promise never to do the like again'. Victims are as much concerned about the future as the past. Once they have been vindicated by the acceptance of responsibility and (in most cases) an apology, most victims want to ensure, if possible, that this trauma will not be inflicted on them or anyone else again. If that can be achieved, some good has come out of their bad fortune. (Is this not why families of people killed in accidents often commit themselves to changing the circumstances that led to their loved one's death?) Instead of encouraging an offender to justify his conduct, and hence the suffering of the victim, restorative justice allows both sides to work towards the elimination of such strife in the future.

7. Silencing the accused

It is true, of course, that restorative justice is not a trial system, and it requires an admission of the wrongdoing before entry into the process. This does not mean, however, that comparisons are not possible under this heading. In fact the contrast between the two approaches, in terms of personal accountability, is stark. Whether appearing in a civil or criminal court, a defendant will probably have been told to admit nothing. In court the defendant says as little as possible, leaving it all to counsel. No concern is expressed for the welfare of the person hurt. There is no opportunity to talk with the victim, let alone make what for many is the natural human response, an apology.

Langbein traces the silencing of the accused as stemming from the decision to allow counsel to address the jury, coupled with the development

55. With the leadership of Britain's top judges—eminent legal minds like Lords Woolf, Phillips, Falconer, and Sir Robin Auld—there is some hope that these attitudes could change in the UK, and perhaps beyond. I do however acknowledge the leadership in New Zealand of successive Chief District Court judges.

56. Hawkins, 1716, 1721: 8.

of the onus of proof as a central emphasis of the trial. As noted under the previous heading:

Shutting down the old ‘accused speaks’ trial changed the very theory of the trial. The purpose of the altercation trial had been to provide the accused an opportunity to reply in person to the charges and the evidence against him.

In restorative processes, that ‘the accused speaks’ is taken for granted. This is facilitated by the more natural structure of conversation and the un-adversarial atmosphere. It resembles much more what Langbein said of the altercation trial, which (it will be recalled) ‘had a formless or wandering quality that resembles ordinary discourse, a conversation of sorts, lacking the crisp division into prosecution and defense case that we now expect’.⁵⁷

The value of an offender speaking has several aspects. First, the offender is a source of information. It is, on reflection, extraordinary that the common law legal systems allowed that value to be lost.⁵⁸ In the home, in the workplace, at school, in recreation, when something goes wrong the very first thing we do is to speak to the people involved, to try and find out what happened, and why. The alleged offenders may have highly relevant information that helps resolve the issue, and/or prevent such problems arising in the future.

In a restorative justice setting, victims have many questions of the offender, and it is a basic need to have those questions answered.⁵⁹ These will include questions affecting the security of the victim—why had they been targeted, had the offender planned to strike again, what has been done with stolen property? There may also be questions about the incident itself, especially if the victim has no memory of it, or a loved one has died—where exactly did he die, what were his last words, did he ask for me?

Secondly, victims have a need to speak, to tell their story and to have the offender acknowledge their anger, hurts and anxieties as justified. This is part of the vindication of the victim that is so important to them. It is

57. Langbein, 2003: 259.

58. I accept that the UK has allowed some inroads into the right to silence through the provisions of ss.34 and 35 of the Criminal Justice and Public Order Act 1994, allowing appropriate inferences to be drawn from an accused’s silence when questioned by the police or at trial.

59. See Zehr, 1990: 26–28.

worth repeating the insight of Dr Nigel Biggar on this topic: 'Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim'.⁶⁰ So often what victims want to hear most is the offender's acknowledgement of the wrongdoing — that, yes, this did happen to you, and you are right to feel as you do about it. Only the offender who speaks can meet these needs.

Thirdly, the offender can help construct a new order, by participating in discussion as to how these problems might be avoided in the future. Restorative justice looks backward in order to look forward. What can be done differently in future, who should be involved, and how will it be arranged? In part this involves reflecting on the offender's explanations for his conduct, and encouraging him to make the necessary changes in his life. It may also involve changes in the community of which he is part. If he does not speak of these things there is little use other people telling him what to do.

8. Restricted outcomes

It is of the nature of a legal system that it limits the power of those in authority, and in most countries the sentences available to the court are those provided by parliament. Some flexibility arises where courts are empowered to impose special conditions of a sentence, e.g. supervision, but even then the discretion is limited by such criteria as preventing re-offending.

This point of comparison with restorative justice is not one that arises out of Dr Langbein's book. He does not suggest that prior to the advent of the adversary system there were fewer restrictions on the types of sentences. However, Dr Sharpe's essay emphasises the extent of informal punishments available through various types of social control in the 17th-century (i.e. within the span of the altercation trial). Sharpe also notes:

Students of 18th-century court procedures have shown how the letter of the law was often adjusted to the individual circumstances of offenders once they appeared in court; much of the material assembled in this essay suggests that this flexibility in treatment of the offender was already taking place before he or she came to court.⁶¹

60. Biggar, 1999: 27.

61. Sharpe, 1980: 118.

Flexibility of outcomes is undoubtedly one of the strengths of restorative justice. The story from the Archbishop of York's Consistory Court, about Katherin and Emote drinking each other's health, could have come straight out of a report of a restorative conference. I can think of many similar examples as elements of restorative outcome plans—offenders agreeing to deliver an apology *and* a bunch of flowers to a victim, a newspaper publishing its own apology to an aggrieved community, donations made to community projects, offenders working unpaid for the victim (and then being offered permanent work), new trees being planted and maintained, educative articles being written for ethnic newspapers, acknowledgements of culpability being published in directors' reports to shareholders, and that wonderful Canadian example of the young man who would normally have gone to prison for drunken driving causing the death of his two friends. That was not their families' wish. The outcome of the case after a restorative conference was an educative programme in which the defendant spoke to students at numerous local high schools. The Court of Appeal of Manitoba⁶² dismissed the Crown's appeal against the sentence of community work, with one of the appellate judges asking, 'How is the principle of general deterrence better served than by speaking to 8,200 students about the tragedy of drinking and driving?' (The court was right—the resulting reduction in road deaths for young people the next summer was very significant).

None of this should be surprising. When those most affected by wrongdoing are asked what can be done to put things right for them and their communities, the answers will tend to be individualistic and creative, not prescribed or formulaic. This has greater appeal for all parties, including offenders.

It follows that I am not a fan of the modern emphasis on 'proportionality' in sentencing as being the central factor. It *sounds* right that like cases should be treated alike, but in practice it all depends upon how you measure likeness. Usually it is by reference to only a few factors—e.g. in aggravated assault cases, the amount of force used, the injuries inflicted and the nature of the aggravating factors (such as use of weapons). Forced into such a 'sentencing grid' judges produce predictable sentences and appellate judges can

62. *R v. Hollingsby* (1995).

correct ‘error’ with real ease—indeed in New Zealand it is appellate judges (largely uninterested in restorative justice), not Parliament, that put so much weight on proportionality.

I believe proportionality is also beloved of the news media because it enables them to review the sentences of the courts and encourage public ‘outrage’ at sentences they adjudge to be too lenient. Outrage encourages higher sales and therefore profits for the media. I make no excuse for being very cynical about that, and the related rise in incidence of ‘trial by media’.

However, look more closely at the facts of two ‘apparently alike cases’ and you will find vast areas of difference. Lay people, in my experience, expect these to matter in sentencing, and do not mind apparently disproportionate sentences when the reasons are explained to them. Indeed, when they participate in devising outcomes in a restorative context, lay people are remarkably inventive and flexible in producing what they see to be a just outcome. It is a far cry from the ‘sentencing by numbers’ formulas so common in many courts.

9. The undue rigour of the criminal law

The long reign of the death penalty in English law is a memorable aspect of its history. This was not because it took time to reduce the number of capital offences, but because for some time the number of such offences was increased. Radzinowicz quotes from Sir Thomas Buxton’s speech in the House of Commons in 1821 on the law of forgery:

Men there are living, at whose birth our code contained less than seventy capital offences; and we have seen that number more than trebled.... It is a fact that six hundred men were condemned to death last year upon statutes passed within that century.⁶³

Langbein refers to the ‘truth-defeating tendencies’ operating at each stage of the criminal prosecution, which judges and others were disposed to tolerate because, in the realm of the criminal trial, ‘too much truth brought too much death’.⁶⁴ Thus, he reports, prosecutors connived with the clerks

63. Parliamentary Debates (1821), N.S. Vol.5, col.926, quoted in Radzinowicz, 1948: 5.

64. Langbein, 2003: 334.

who drafted indictments to charge simple theft rather than burglary or theft from a dwelling house. Judges would construe capital statutes restrictively, and developed exclusionary rules of evidence. (They could also recommend clemency.) Juries would down-value goods, to take the offence outside the scope of the death penalty—a practice referred to by Blackstone as ‘pious perjury’—often with the assistance of the judge.⁶⁵ By these and other means prisoners might be flogged, (from the 17th century) transported, or (from the 19th century) imprisoned, instead of being hung.

Langbein provides a fine example of the cooperation of judge and jury in this process. He cites the case of Frederick Usop, charged in 1784 with theft from a dwelling-house of clothing valued at 28 shillings. Where the goods exceeded five shillings in value this was a capital offence under an Act of Parliament of 1699. Baron Eyre, the presiding judge, told the jury that the 1699 law was ‘made a century ago, [and] that which a century ago was of the value of five shillings, should rather be considered in a case like this, and in favour of life, than what we value at five shillings now; and if you are of that opinion, you may find the prisoner guilty of stealing to the value of 4s. 10d., which will acquit him of the capital part of the indictment’. The jury duly obliged and Usop was transported.⁶⁶

The growing aversion to capital punishment in the second half of the 18th-century ‘played an important role in causing the suspect premises of adversary criminal trial to go unchallenged’.

By that time the understanding was widespread that English criminal law over-prescribed capital punishment, hence that a main function of the criminal trial was to winnow down the number of persons actually executed from the much larger cohort of culprits whom the ‘Bloody Code’ threatened with death.⁶⁷

It is interesting that Parliament came to see the excessive use of harsh punishment not just as inhumane but as working against the administration of criminal justice. Thus in 1822 Sir James Mackintosh successfully moved in the House of Commons that Parliament should consider ‘the means of

65. Langbein, 2003: 334–337.

66. Langbein, 2003: 366 footnote 396.

67. Langbein, 2003: 6. And see Chapter 5.

increasing the efficacy of the Criminal Laws, by abating their undue rigour; together with measures for strengthening the Police, and for rendering the punishment of Transportation and Imprisonment more effectual for the purposes of example and reformation'.⁶⁸

What relevance might this have to restorative justice? First, it suggests that without the harshness of criminal sanctions in the 18th century, the adversary system might not have developed as it did. We can therefore speculate that the long reign of the death penalty not only distorted the development of criminal procedure but increased the need for a restorative corrective.

Secondly, part of the appeal of restorative justice to lay people today is that it reduces the use of strongly punitive measures, such as imprisonment. The UK is said to have the highest rate of imprisonment in Western Europe, and New Zealand's rate of imprisonment is even higher, though still much lower than the USA's. A less punitive regime is likely to encourage a greater acceptance of responsibility by defendants, with a reduction in trials.

In both the UK and New Zealand I suggest, prison growth has been driven largely by perceived political advantage for legislators, as it has occurred at a time when offending rates generally have been decreasing, and when criminology has shown that harsher penalties are not a better deterrent. A recent study of restorative justice results in New Zealand, measured after two years, showed a nine per cent reduction in re-offending rates (compared to similar cases not using restorative justice) *coupled with* a 17 per cent reduction in the use of imprisonment, and the use of shorter sentences—and when re-offending occurred it was half the level of seriousness compared to the original offence.⁶⁹

Restorative justice can therefore produce safer societies *at the same time* as reducing the reliance on imprisonment, with its heavy direct and indirect costs. While imprisonment may be seen as inevitable (and be recommended) in a particular case, this is unusual, even for quite serious offending. Community-based sentences are the norm, for obvious reasons—they increase the opportunities for restitution to be made to victims, they enable offenders

68. Parliamentary Debates (1822), N.S. Vol.7, H.C. 'Criminal Laws', cols.790–805, quoted in Radzinowicz, 1948: 563.

69. Similar results in other countries are reported by Sherman and Strang, 2007.

to meet their family obligations and continue in employment, and they are forward-looking for victim, offender and their communities.

10. Formalistic and archaic procedures

It is extraordinary the extent to which criminal procedure in New Zealand (and, I suspect, elsewhere) still follows practices laid down in England many centuries ago.⁷⁰ At the time of writing, indictable charges still proceed by way of preliminary hearing or ‘depositions’. These are usually conducted before justices of the peace. Normally only prosecution evidence is heard. The accused is ‘arraigned’ upon an ‘indictment’ and if he pleads not guilty the case proceeds to trial. Similar exclusionary rules of evidence apply at trial as were devised in the 18th century. Even the terms ‘guilty’ and ‘not guilty’ are terms of art. ‘Not guilty’ does not mean ‘I did not do it’ but ‘I am putting you to the proof’. To plead ‘Guilty’ does not necessarily mean ‘Yes, I did it’; it can mean ‘I would rather accept a lesser punishment than go through with a trial’.

The danger, of course, is that the law can become divorced from the common touch, and justice can be seen as little more than a game for the lawyers—and an expensive one at that. Further, the whole process can be self-defeating. The more formal and complex the procedures, the greater the chance that they will miscarry—through professional error, or witnesses losing interest in the case, or (with increasing delays) memories fading, files being lost, or other mishap.

No doubt some of these problems may be laid at the feet of lawyers—and in 1844 the *Law Times* claimed the world had long known ‘that “an Old Bailey Practitioner” is a byword for disgrace and ignominy’⁷¹—but the damage to the image of the law is none the less real, and in any event lawyers’ conduct in court is under the control of the court.

How refreshing therefore to find a process that is not run by lawyers, that uses the contemporary, informal language of ordinary people, and that can adapt to the culture of participants of different sorts. The comparison with

70. The UK Law Commission is expected to review criminal procedure in the near future. There have been attempts to simplify procedure in New Zealand.

71. 3 *Law Times* 501 (28 September 1844), quoted in Langbein, 2003: 307.

court procedures is marked, and helps explain the preference which victims have shown in many countries for restorative procedures.

But is the risk of formalism one that restorative justice also must guard against? I believe there is risk that procedures could become entrenched, and the province of ‘the initiated’. There is a delicate balance between insisting on professional competence in facilitators, and creating an elite or inner circle. Any such tendencies can be overcome by constantly refreshing the pool, and the vision, of restorative justice practitioners. Further, maintaining a multi-disciplinary approach to the teaching and practice of restorative justice is a strong incentive against becoming inbred.⁷²

11. To prosecute or not

We have already seen in section (1) above that ‘for centuries [before the 19th-century] the English system had worked on the principle that indictment before a court was the last resort to be tried’. The adversary system is of course a system of trial. I suggest that it is time once again to see it as a ‘last resort’.

A senior South African official once said: ‘Court should be the last resort, and not the only formal process’.⁷³ I wish we could hear that from justice officials in my country! Seen from afar our judiciary, legal profession and justice officials seem in general to be strongly tied to court control and the adversary model. This is a curious anomaly, as overseas people are surprised at the multi-party *political* support for restorative justice in New Zealand, as gauged e.g. in pre-election answers to a Law Society survey in 2005 — support that the justice sector has not taken much advantage of, when others overseas would give their eye teeth for it.

Also, the Treaty of Waitangi might be said to require much more meaningful action to incorporate elements of customary justice into our legal

72. AUT University’s Restorative Justice Centre of Aotearoa/New Zealand has representatives from many disciplines on its Development Board, partly to maintain the openness of the spirit of restorative justice.

73. Chief Director: Court Services, Pieter du Rand, speaking at the Restorative Justice and Community Prosecution Conference of the National Prosecution Service, Cape Town, 21–23 February 2007.

system (as distinct from our court system). Restorative justice is an obvious way to do this without setting up separate courts for Maori.⁷⁴

Restorative justice can operate as part of the sentencing process,⁷⁵ or following sentence, or by way of diversion from prosecution, or from court. It is in its diversionary aspects that I suggest restorative justice may have the most to offer. About one half of youth justice cases in my country since 1989 have been dealt with at family group conferences without referral to court.⁷⁶ This resulted in large reductions (of around two-thirds to three-quarters) in the numbers of young persons appearing in court and being held in custodial facilities. I have advocated a type of community resolution centre that would allow diversion for adults to operate on restorative principles.⁷⁷ Based on our youth justice experience, this has the potential to take large numbers of adult offenders out of our courts, and out of prison. I am not speaking here of diversion only of first offenders or of minor offences. This is already occurring. It is the additional benefits of diverting reasonably serious offending, even by repeat offenders, that will pay the biggest dividends.

12. Rights and responsibilities

The last point of comparison relates to the question of rights. It seems to be a feature of modern legal process that it is almost entirely rights-focussed, and predominantly it is the defendant's rights that are promoted. The New Zealand Bill of Rights Act, modelled on North American experience, says plenty about defendants' rights but nothing about their responsibilities, and nothing about the rights of victims. Rights are a lawyer's dream, giving ample scope for litigation (sometimes on quite obscure points), plenty of opportunities for delaying trial (and therefore justice); and further scope for the defects of the adversary system to be seen.

We are right to be concerned about false convictions, but at least where they occur there is ample incentive to appeal the result. Appeals by the prosecution are much harder to argue, and most uncommon. This may reflect

74. For further comment on the potential role of restorative justice in New Zealand in integrating customary principles and practices into the law, see McElrea, 2007.

75. As to the New Zealand legislation and experience, see McElrea, 2007: 2–5.

76. Conferences of this type are described in McElrea, 2007: 8–9.

77. See e.g. McElrea, 2007: 9–11.

the adage that it is better that ten guilty men go free than that one innocent man be convicted. I suggest that it is dysfunctional to regard a false conviction but not a false acquittal as a miscarriage of justice. The answer lies not in making it easier to gain convictions, but in actively encouraging the acceptance of responsibility by offenders. This is not done by balancing a largely punitive regime with plenty of chances for proof to fail—which is what we seem to do at present.

Some Final Thoughts

I come back to the suggestion that all offenders, young and old, should be asked whether they admit the allegations, and encouraged to find in the benefits of restorative justice an incentive to put things right not just for others but for themselves. This is the way we behave in social groups, whether the family, at work or in clubs and societies. Why should offenders against the law not be treated the same way? I am not suggesting that the answer be given on oath, or that any pressure be allowed to answer in a particular way.

In New Zealand we need to make greater use of the restorative justice facilities available, and the provisions made for restorative processes in the Sentencing Act, the Victims' Rights Act and the Parole Act (all 2002). That effort must continue. However it will not be enough.

The conclusion I have reached is that without strong leadership at the most senior levels of the judiciary, then so long as restorative justice is dependent on the courts, its emergence into a full, mainstream model could take as long as the gestation period of the adversary system, which was about a century. The adversary ethos is so deeply imbedded in our legal structures, the legal profession, and the judges, who (in common law countries) are drawn from the profession, that restorative justice is continually pushed to the margins, despite the encouragement of the legislators.⁷⁸

Without a change in direction I fear that some of Professor Sherman's examples will be apposite, such as the 42 years it took the British Navy to accept the evidence that lime juice could prevent scurvy, or the 56 years it

⁷⁸ Section 9 of the Victims' Rights Act lays a non-enforceable obligation on all lawyers, judges, prosecutors and others to encourage meetings between victims and offenders in suitable cases where there are suitable facilities. In my experience the section is simply ignored by most involved in criminal justice—with of course some notable exceptions.

took to produce a ban on smoking in the workplace and confined public spaces, after publication of the evidence linking smoking with cancer.

I suggest therefore that the answer lies in developing restorative justice both inside and outside of the courts, in parallel structures — e.g. by making the restorative process the normal, or default position, but on a voluntary basis, using community resolution centres that deal with both civil and criminal cases. Only where matters cannot be resolved on a consensual basis in this way — or where the agreed outcome was not implemented — would cases divert to the courts.⁷⁹ (Other parallel structures are the education system, where restorative justice is thriving, and the health system — the Copenhagen Centre for Victims of Sexual Assault described by Karin Madsen (2004), is based in the health sector, not the justice sector.)

For only when restorative justice comes out from under the adversary umbrella will it get its share of sunshine and water, and be able to thrive.

References

- Biggar, N. (1999), 'Can We Reconcile Peace with Justice?' in Enright R. D. (ed.), *Community Forgiveness and Restorative Justice. Essays from the Criminal Justice System and the Peace Movement*, 27.
- Coke, E. (c.1620s–1630s), *The Third Part of the Institutes of the Lawes of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes*, London: Posthumous publication, 1644.
- Hawkins, W. (1716, 1721), *A Treatise of the Pleas of the Crown*, London.
- Institute of Criminology (2007), 'Evidence: Possibilities and Challenges, Validity and Value', Cambridge, 24 September.
- Langbein, J. H. (2003), *The Origins of Adversary Criminal Trial*, Oxford: Oxford University Press.
- Madsen, K. S. (2004), 'Mediation as a Way of Empowering Women Exposed to Sexual Coercion', *Nordic Journal of Women's Studies*, 12 (1) 58–61.
- McElrea, F. W. M. (2002). 'Restorative justice — a New Zealand perspective', Paper for the conference 'Modernising Criminal Justice — New World Challenges', London, 16–20 June 2002.

79. I have described such a model in other papers, starting in 1998, and will not repeat it here. See e.g. McElrea, 2007: 9–11.

- McElrea, F. W. M. (2007), 'Customary values, restorative justice and the role of prosecutors: a New Zealand perspective', paper given at the conference 'Restorative Justice and Community Prosecution Conference of the National Prosecution Service', Cape Town, South Africa, 21–23 February 2007.
- Muller-Johnson, K. 'Eye witness and ear witness testimony', paper presented by.
- Philips, D. (1980), "A new engine of power and authority": the institutionalisation of law enforcement in England 1780–1830' in Gatrell, V. A. C., *et al.* (eds.), *Crime and the Law: The Social History of Crime in Western Europe Since 1500*, London: Europa Publications Ltd., 155.
- Pollock, F. and Maitland, F. W. (1952), *The History of English Law Before the time of Edward I*, Cambridge: Cambridge University Press.
- Radzinowicz, L. (1948), *A History of English Criminal Law and its Administration from 1750*, London: Stevens & Sons Ltd.
- Sharpe, J. A. (1980), 'Enforcing the Law in the Seventeenth-century English Village' in Gatrell, V. A. C. *et al.* (eds.), *Crime and the Law: The Social History of Crime in Western Europe Since 1500*, London: Europa Publications Ltd., 97.
- Sherman, L. W. and Strang, H. (2007), *Restorative Justice: The Evidence*, London: The Smith Institute.
- Smith, T. (c.1565), *De Republica Anglorum*, L. Alston (ed.), Cambridge: Cambridge University Press.
- Stephen, J. F. (1883), *A History of the Criminal Law of England*, London.
- Zehr, H. J. (1990), *Changing Lenses: A New Focus for Crime and Justice*, Scottdale, Pennsylvania: Herald Press.
- Zehr, H. J. (2002), *The Little Book of Restorative Justice*, Intercourse, Pennsylvania: Good Books.

Case

R v Hollingsby (1995) 103 CCC (3d) 472.