

9th February 2002

The Right Honourable The Lord Woolf
Lord Chief Justice of England and Wales
Royal Courts of Justice
Strand, London WC2A 2LL
By Fax 0207-947-7512

Re: Home Office Restorative Justice Research

Dear Lord Woolf:

I write in response to Judge David Pitman's letter of 7th February concerning the Home Office Research Programme on Restorative Justice in the London Crown Courts of Blackfriars, Snaresbrook, Wood Green and Woolwich. He raises important issues. You have already dealt with the first and central issue in your remarks last October 25 to the Youth Justice Board at Church House on "Restorative Justice."

In order to allow us to complete our proposed research in the Crown Courts, it may be best to allow each judge to resolve these issues on a case-by-case basis for the time being. Permanent guidance may be based on a firmer foundation if it awaits the outcome of our research, rather than being based on hypothetical questions. The following analysis attempts to show how the research we propose fits within current law, and does not require any new statutes or case law to address Judge Pitman's three main questions:

1. Should time in custody be reduced on the basis of mitigation by restorative justice?
2. If so, how should parity for offenders be reconciled with mitigation by restorative justice, if some victims refuse to meet with offenders?
3. How should parity for offenders be addressed in the course of a research programme which randomly assigns only half of the eligible offenders to restorative justice?

The short answer we have recommended to all Crown Court judges in the experiment is that they follow case law to sentence as is appropriate in each case. To the extent that they have a range of choices, they may wish to consider offenders' attempts to offer restorative justice in the same light as any other form of mitigation.

The long answers that support this short answer follow below.

- 1. Should time in custody be reduced on the basis of mitigation from restorative justice?**

We do not, as Judge Pitman suggests, ask that judges sentence offenders *more* severely if they do not offer a restorative justice agreement in mitigation. Rather, we ask judges to consider sentencing offenders *less* severely in terms of custody if they do present restorative justice agreements—and to consider whether the agreement could constitute a part of the sentence. Yet Judge Pitman is quite right in saying that we are not telling Judges how to sentence. We are simply asking them to help test new tools.

Accordingly, we plan to offer two versions of the restorative victim-offender agreements in cases for which custody is likely to be imposed. One version describes what the offender undertakes to do if a community sentence is imposed. The other version describes what the offender would do during or after a sentence to time in custody. The scope of possible reparations may be different in the two cases, but that simply gives more information to the sentencing judge. If the judge chooses a community sentence, that sentence could require completion of the terms of the restorative justice agreement.

We would also suggest that restorative justice is actually neither more nor less severe than time in custody. It is simply different.

For over three millenia, restorative justice has been a part of the “natural law” of virtually every human culture and religious tradition (J. Braithwaite, “Restorative Justice,” in M. Tonry, ed., *THE HANDBOOK OF CRIME AND PUNISHMENT*, Oxford University Press, 1998.) It has been seen primarily as a means of repairing harm and preventing future crime, rather than expressing moral outrage at past evil. Yet restorative justice has almost always operated in conjunction with other principles of justice, rather than in isolation or as an alternative. Restorative justice need not be mutually exclusive of retributive, deterrent or incapacitative goals, even though some of its advocates prefer to see it that way.¹

The premise of our Home Office-funded research is that restorative justice can indeed “co-habit,” as Judge Pitman puts it, with criminal proceedings. No new legislation was sought to authorise our tests. Existing principles of sentencing, including mitigation, were judged to allow sufficient scope for the insertion of restorative justice into current practises.

Most emphatically, we do *not* call on judges to abandon their obligation to consider retribution, deterrence, and incapacitation as considerations in their sentencing decisions. Rather, we are simply asking judges to consider whether restorative justice conferences prior to sentencing would affect their response to your message at Church House last October (The Lord Woolf, “Restorative Justice,” 25 October 2001):

1. Don’t send people to prison unless it is really necessary.
2. If you are sending them for short-term, pause before you do so—ask yourself, if you are going to sentence for 12 months would 6 months be sufficient to achieve exactly the same benefits for the public, at lower cost to the Treasury and our prison system. If 6 months is what you have in mind would not 3 months do? If 3 months will do, what about 1 month?”

In considering the crime-reduction aims of sentencing, judges might note the fact that restorative justice has been found, for violent criminals in Australia, to reduce repeat offending by 38% relative to criminal proceedings without restorative justice (L. W. Sherman, H. Strang and D. Woods, *RECIDIVISM PATTERNS IN THE CANBERRA RE-INTEGRATIVE SHAMING EXPERIMENTS (RISE)*, Australian National University, 2001, www.aic.gov.au/rjustice/rise/index.html). Until similar research can be completed in the United Kingdom, it seems reasonable to consider possible crime reduction benefits as part of your Church House analysis (The Lord Woolf, “Restorative Justice,” 25 October 2001):

Among the choices we should be considering, where it is appropriate to do so, is taking action which falls within the label ‘restorative justice.’... We have to find ways of breaking the vicious cycle of repetition of offending, punishment, release, re-offending and punishment again! ‘Restorative justice’ cannot be the sole answer to this problem but can assist. What you have to discuss today is how to maximise that contribution.

The purpose of our research in the UK is to test the hypothesis that restorative justice—added to criminal justice—can maximise the chances of breaking that cycle of re-offending. As a practical matter, few offenders may participate in restorative justice if they see that it has no effect on sentencing. Yet as criminologists, we do not presume to tell judges how to sentence. We merely suggest, with you, that they take restorative justice agreements into account in deciding how much custody is appropriate.

2. How should parity for offenders be reconciled with mitigation by restorative justice, if some victims refuse to meet with offenders?

This question was first identified by Sir Anthony Mason, former Chief Justice of Australia, in what Dr. Strang calls the “paradox of the merciful victim” (A. Mason, “Restorative Justice: Courts and Civil Society”, in H. Strang and J. Braithwaite, eds., *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE*. Ashgate, 2001). To the extent that victims may participate directly in sentencing decisions or recommendations, as they do on some occasions in New Zealand and Canada, it is true that offenders with more merciful victims may be punished less severely than offenders with less merciful victims. If two offenders with identical records commit identical offences causing identical harm, there would be a troubling loss of parity in sentencing offenders differently based upon differences in victims’ mercy.

The situation is quite different in the experiments we have designed for the English Crown Courts. No one in our programme has suggested that victims should determine sentence length, of course, but Judge Pitman rightly asks whether that could be the indirect effect of victim decisions. If a victim who refuses to meet with an offender thereby denies the offender the opportunity to undertake restoration, but restoration taken as mitigation could lead to many fewer months in prison, then would the principle of parity in sentencing be violated? There are multiple answers to this question:

- a. In our research programme, very few, if any, offenders will be denied the chance to offer restorative justice mitigation simply by the decision of one victim.** If the victim will not meet with the offender, then the police will invite the victim’s spouse to do so. If the spouse is unwilling, a sibling will be invited. If no family members are willing, then a witness to the crime will be invited. If no witness is available, then an ambulance driver who saw the victim in pain

will be invited. If none of these persons can attend in person, but some or one would offer a written statement, the statement will be read aloud to the offender in the restorative justice conference. The Metropolitan Police are committed, for the course of our research, to finding anyone who was affected by the crime who would be willing to communicate with an offender about the harm the crime has caused. This commitment, in cases for which restorative justice has been selected by the research design, will virtually eliminate any difference in mitigation caused by differences in victim preferences. This means that if our system works to reduce repeat crime, we will have tested a system that offers a mitigation opportunity to virtually all offenders with personal victims.

- b. Parity in sentencing is necessarily judgmental, not mathematical, in all matters of mitigation.** Different kinds of mitigation comprise apples and oranges, which no accountant can equate. Judges are asked to balance many competing considerations in assessing mitigation, of which parity is only one. Even with a rigid and complex grid system of sentencing guidelines, perfect parity is unlikely to be achieved in actual sentencing practise. A victim's unwillingness to meet with an offender is no greater a challenge to the principle of parity than the differences in offender wealth that affect their ability to repay costs of crime, or differences in offender imaginativeness that affect their capacity to propose to undertake reparations independent of our research programme.
- c. Judges can always order reparations in lieu of custody, even without a restorative justice conference having occurred.** Parity in mitigation, if not offered to the Judge by defendants or counsel, can in effect be created by order of the court. If doing this in a very few cases is necessary to allow testing of a potentially effective new crime reduction strategy, that would seem on balance to produce more public benefit than barring restorative justice altogether from criminal proceedings.
- d. Judges can always take into account offenders offering to meet with their victims for restorative justice, even when no such meeting has occurred.** We leave it up to each judge to decide whether an offender's *offer* to meet with the victim should be given as much weight in mitigation as an *actual meeting*, with an undertaking to perform substantial acts of reparation to victims or communities. It would seem fairer to those who actually perform such work to receive greater mitigation than those who do not, yet the offer to attend a meeting where such agreements can be reached could also receive greater weight than making no such offer. But these principles might best emerge from the combined deliberation of many judges across many cases, as we gather more experience with the practise of restorative justice.

3. How should parity for offenders be addressed in the course of a research programme randomly assigning just half of the eligible offenders to restorative justice?

The principles of parity in sentencing may seem most challenged by the principles of sound research design. As developed by Sir Ronald Fisher, Sir David Cox, and others, the strongest test of cause and effect in comparisons of variable populations (from hayfields to tuberculosis patients) is the randomised controlled trial (R.A. Fisher, *DESIGN OF EXPERIMENTS*, 1935; D.R.Cox, *PLANNING OF EXPERIMENTS*, 1958). It is not possible to achieve nearly as much certainty about cause and effect without employing the mathematical principle of equal probability in assignment of different treatments to different cases. It is only by this method that we can, over large enough samples, rule

out most rival theories of causation in explaining a result. It was by this method that Sir Austin Bradford Hill proved the effectiveness of a cure for tuberculosis in 1949, and by this method that over one million medical treatments have been evaluated since then (M. Millenson, *DEMANDING MEDICAL EXCELLENCE*, University of Chicago Press, 1998).

The use of randomised controlled trials in the law has an equally long, if not as voluminous, tradition (D. Farrington, "Randomised Experiments on Crime and Justice," *CRIME AND JUSTICE* 4 1983). It is on that basis that the U.S. Supreme Court's research arm, the Federal Judicial Center, recommended that under some carefully considered conditions, experiments comparing different sentencing options on the basis of random assignment would be ethically justified. The Center's Advisory Committee on Experimentation in the Law, composed of distinguished judges and law professors appointed by Center Board Chair Chief Justice Warren Burger, concluded that

"Experimentation is an effective tool for improving the administration of justice....

Proposed innovations are frequently of uncertain value, for it is often unclear whether they will result in the improvements they are intended to achieve....

When available information is inadequate, how are these uncertainties to be resolved? The answer will often be: only by some form of experiment that permits a comparison between the results of the proposed innovation and those achieved by the existing method... **The controlled, i.e., randomized experiment is the form that permits the most reliable comparison** [bold added] (Federal Judicial Center, *EXPERIMENTATION IN THE LAW*, 1981, pp.1-2).

It is with this and related guidance that the Home Office has asked us to employ the randomised controlled trial design in comparing cases with and without restorative justice. This design necessarily requires that similar cases be treated in two very different ways. That difference would appear to raise questions about the principle of parity. But here again there are multiple answers that seem to justify our proposed procedures:

- a. **There is parity in the likelihood of all eligible cases being selected for a restorative justice conference.** Once an offender and a victim (or other person affected by the crime) have agreed to participate in the research programme, fully informed of the 50% chance of selection for RJ, they comprise an "eligible case." Each eligible case has an identical probability of being selected for the innovation we call restorative justice. Computer-generated decisions in Pennsylvania, blind to any characteristics of the parties, will insure the independence of the random allocation equality.
- b. **There is parity in the likelihood of risks and benefits.** Because we do not know for certain whether restorative justice will benefit offenders and victims, there is no known advantage that we are giving one group over another. If there were such knowledge, it would not be necessary to conduct the experiments. Until we conduct the experiments, the ethical state of "equipose" remains: each group is equally likely to be better off after the experiment is over.
- c. **There is parity among offenders involved in the same case.** Because we will include co-defendant cases in the research only if they all agree to plead guilty, we will never create a problem of parity among the defendants charged with the same crime by virtue of one consenting to the research while the other refuses.

- d. **We suggest no less parity than is currently found in sentencing differences across differences in prosecutors, defense counsel, judges and courts.** The proposed use of random assignment should create differences in sentencing outcomes no greater than those found in the current range of sentencing variations.
- e. **There is a balance of considerations between parity of treatment in an instant case and effective treatment for all offenders and victims in the future—including those people consenting to participate in the experiment.** Parity is not the only value to be preserved in the criminal justice process. Parity that is blind to ineffective practices is hardly to be preferred over parity that is blended with a means of finding more effective tools for sentencing. The ethical justifications for random assignment of different treatments are well established in the literature on medical and research ethics, and arguably apply just as much to sentencing as to life-saving promises of surgical innovations for some and not other dying patients.

If the result of the restorative justice process is defined as “less severity” relative to the amount of custody that might otherwise be imposed, less severity can at least be justified for the moment by the potential benefits of the research. The ethical principle of “less severity” in legal experiments, as Professor Norval Morris argued in his inaugural lecture at the University of Chicago Law School (“Impediments to Penal Reform,” *THE UNIVERSITY OF CHICAGO LAW REVIEW* Vol. 33, No. 4, 1966 at 648), is very different from—and more justifiable than—the idea of making sentences *more* severe on an experimental basis. Since a crime-reducing experiment in less severity could ultimately benefit all offenders, as well as society, the immediate parity issues must be weighed against more harms in the future if we do *not* conduct the experiment.

SENTENCING IMPLICATIONS

What does all this mean for our proposed research in the Crown Courts? It means that judges will face four new classes of cases after guilty pleas for 1) robbery and theft from person, 2) burglary, 3) assaults including GBH, and possibly 4) criminal damage:

- Cases in which a restorative justice agreement has been presented to the judge as mitigation prior to sentencing.
- Cases in which the offender was willing to participate in restorative justice, but no victim or suitable person affected by the crime would cooperate.
- Cases in which the offender and victims were both willing to meet before sentencing, but for reasons of unrelated to the randomised trial (such as transportation problems and time limits) no restorative justice agreement can be offered as mitigation.
- Cases in which offender and victim were willing to meet, but solely for reasons of research protocol no restorative justice agreement can be offered as mitigation.

The last kind of case is strictly a temporary issue of research design. It will disappear immediately at the end of the randomised trial. Its existence is justified solely by the benefits of conducting the randomised trial, and would never become a part of everyday practise. The first three kinds of cases, however, would be likely to become part of the criminal sentencing environment if the research found that restorative justice was a fair and effective way to help victims and reduce crime.

We have much to learn from the judges who will consider these four situations on a case-by-case basis. What the best ways of dealing with them may become clearer after we conduct the research. In the meantime, the position we have taken in speaking with Crown Court judges has been almost universally accepted: each judge must decide how best to deal with the sentencing decision in light of all the information they have.

I am taking the liberty of sending a copy of this letter to His Honour Judge Igor Judge at the Lord Chancellor's Department, who has been our sponsor in inviting Crown Court Judges to become our partners in research, and to the four Resident Judges who have graciously welcomed us to their Courts: Her Honour Judge Shirley Anwyl in Woolwich, His Honour Judge Leo Charles in Snaresbrook, His Honour Judge Allan Hitching in Blackfriars, and His Honour Judge Shaun Lyons in Wood Green.

I would be happy to answer any other questions or concerns you may have about Judge Pitman's letter or my own. I would also be happy to arrange an opportunity for you to meet with the four Resident Judges to discuss these matters, since they have provided me with so much thoughtful guidance. Whatever you may decide to do about these questions, if anything, I thank you for your interest in our work.

Yours ever,

Lawrence W. Sherman

(Footnotes)

¹ Judge Pitman

's reference to the statement of the Mennonite Central Committee US implies that we had endorsed its content. Far from it. The statement was inserted in the briefing materials for Judges at Snaresbrook without our knowledge by one of our partner agencies in the Restorative Justice Project, and does not reflect the view of either the Home Office nor the Justice Research Consortium.

