

P R I S O N

Is there any alternative?

A NEW ZEALAND SNAPSHOT

Papua New Guinea National

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Judge S A Thorburn
District Court
Auckland

Dantés passed through all the degrees of misfortune that prisoners in their dungeons suffer. He commenced with pride, a natural consequence of hope, and a consciousness of innocence; he then began to doubt his own innocence, which justified in some measure the governor's belief in his mental alienation; and then falling into the opposite extreme, he supplicated, not Heaven, but his gaoler.

THE COUNT OF MONTE CRISTO

Alexander Dumas

circa 1845

Dantés prison may not be like a prison of today, but the effect of long term deprivation of liberty on his mind is still the experience of the modern prisoner.

Vivien Stern, in her outstanding book "*A sin against the future*" (Penguin: 1998) provides a wonderful insight into the role of prisons in the international community portraying graphically and in great detail the diverse characteristics and cultures of prison institutions. She traverses the history of the modern prison and makes clear what we all know, that worldwide, prison is being resorted to more and more with the inevitable universal trait that countries are having to build more prisons to cope with escalating rates of sentencing. Notwithstanding this, throughout the world, crime and violent offending in particular, continues to increase.¹

Stern provides detailed information of rates of imprisonment per 100,000 of population. She cites Nelson Mandella who suggests that the extent to which a community resorts to prison and the way it treats its offenders, is a gauge to measure the heart and soul of that community. The inference is of course that the more people who are imprisoned per 100,000 of population, the more concern there must be that the community is lacking heart and/or soul.

The statistics reveal some alarming insights. For example, the former Soviet Block and the United States imprison in excess 700 people per 100,000 of population – that rate being about 400% more than the next highest rate (New Zealand).

¹ Vivian Stern at the time was a Senior Research Fellow at the International Centre for Prison Studies, King's College, London.

The paradox of the Soviet/US figures cannot go unnoticed. One country has the tradition of restriction on individual liberty and freedom, and the other has the tradition of being the champion of freedom and liberty.

New Zealand stands next on the grid. Her population is around 3.6 million and with 5,000 sentenced prisoners – around 140 per 100,000. By comparison, the State of New South Wales imprisons around 100/100,000, Queensland around 75/100,000, and Victoria around 55/100,000.²

The numbers of offenders being sentenced to imprisonment has been significantly and consistently rising in New Zealand over the years. Professors Morris and Young observe that since 1985 the rate per 100,000 of population has doubled with a projection in their view that by the year 2005 the rate of imprisonment will be 190/100,000.³

Furthermore, it is universally accepted that re-offending rates of prisoners, particularly those who have served long sentences, are very high. In New Zealand there is a re-offending rate after release from prison of around 80% within 5 years.⁴ On the assumption that a person offends in the first instance because of some dysfunctional feature and/or aberrant attitude, it seems that prison does little if anything to address key factors of offending, and if the recidivism rates tell the truth, then in an overwhelming number of cases offenders are presented back into the community at the conclusion of a sentence, more debilitated than when the sentence began. That raises the question of the purpose being served by prisons as we know them at present. Each community has to decide that for itself.

² Inmate numbers taken from Conviction and Sentencing of Offenders in New Zealand: 1991 to 2000 (Philip Spier) Ministry of Justice, p 77. Also Census of Prison Inmates: 1997 (Barbara Lash) Ministry of Justice p 21. Furthermore, valuable information about New Zealand imprisonment rates and international comparisons is contained in a Ministry of Justice report The Use of Imprisonment in New Zealand (1998).

³ *Reforming Criminal Justice: reflecting on the present and imagining the future*: joint lecture 29 September 1998 Victoria University.

⁴ This rate is generally accepted – no objection having been taken to it being referred to in the House by the Minister, recorded in Hansard 9.1.2000. The phenomena of recidivism has been described as a 'revolving door' in New Zealand by Anne Clark, General Manager, Community Probation Service, in a presentation at the International Corrections and Prisons Association Conference in Hungary, October 1999, supported by a slide showing reconviction resulting in imprisonment at 80% within 5 years. Another Ministry of Justice publication '*Sentencing in New Zealand: A Statistical Analysis* (Triggs) 1999 p.139 table 11.1 records an 81.1% reconviction rate of all offenders sentenced to prison within two years of release.

Howard Zehr paints a gloomy picture of the prospects of a retributive system having much likelihood of rehabilitating an offender, saying:

“Retributive theory argues pain will restore a sense of reciprocity, but the dynamics of shame and of trauma help explain why this so often fails to achieve what is wished for either victim or offender. Retribution as punishment seeks to vindicate and reciprocate, but is often counter-productive”

And further:

*“In the world of criminal justice, prison walls are overwhelming realities. Within these walls of concrete and razor ribbon we keep people locked up out of fear, pointing fingers of blame and shame, guarding others from them. But the outer walls of prison are mirrored by inner prisons. Within each prisoner – and within each victim – and indeed within each of us – there are parts of ourselves that we keep locked up in segregation, pointing fingers of blame and shame, guarding these parts from others. All of us have traumas; all of us have inner wounds, parts of our personalities that we hide. We are apt to sentence these parts to life without parole. We all need healing”.*⁵

The slides now shown are comments attributed to one Judge Dennis Challeen which might seem like streams of consciousness but ought to illustrate the points being made by Zehr.

(Slides 1,2 & 3)

Is the prison there solely to punish? In that case, rehabilitation has to be addressed through some separate avenue. Is it there to punish and also rehabilitate? In that case the statistics would demonstrate an appalling failure in respect to rehabilitation. Is it there solely to keep the community safe? In that case rehabilitation is irrelevant – removal of the dysfunctional person being the only objective.

⁵ These comments were made by Howard Zehr in a lecture entitled ‘*Journey to belonging*’ delivered at Massey University, Albany, Auckland, New Zealand, 28 April 2000: Conference [Peacemaking and Peacebuilding for the New Millennium](#).

Reality requires acceptance that inmates will one day be released back into the community. A community which does not face that and does not show any interest in rehabilitation, is a community which is only but a thin line away from endorsing the death penalty and/or the concept of permanent removal of its offenders by re-establishing penal colonies or something of that nature. Given the testament of history, it is to be hoped that this age of abounding knowledge could guarantee more astute humanitarian management than has been the case in the past.

The prison is a fairly modern phenomenon and can be traced back to the powerful influence of the Quakers. In the United States some prisons are still known as Penitentiaries. Juvenile venues have been known as Reformatories, and throughout the world departments responsible for prisons are known as the Department of Corrections. Such terminology is not accidental. The Quakers developed the modern concept of prison as a place of confinement believing that prisoners could make amends with God through repentance and reflection, compelled by the isolation of an austere cell. The principle was simple, - self-rehabilitation through remorse, confession and a promise to change made in solitude in the presence of God.⁶ Such idealism seems but a faint spot on the horizon represented today only by the anachronistic terminology, for by and large prisons are no longer places of reform, correction or penitence.

Until we find a better way to deal with offenders that does not include resorting to prison, or until we re-construct the ways in which our prisons are conducted and administered, we are most illogically and irrationally perpetuating a system that is compounding the very problem it is there to solve, and we are heaping expense upon the taxpayer in an exponential or compounding way with no qualitative result. Some areas now are finding that the call for more prisons because of the escalation of crime is requiring a greater allocation of funds from the State budget than is given to education for children.⁷

⁶ Stern in "A Sin Against the Future" has a section on the history of the modern prison covering the Quaker influence. On the internet I found an article from Villanova Catholic University of Pennsylvania USA by Cook published in Winter 2000, entitled "A Brief History of American Prisons from Solitary Cells to Supermax". The Quaker influence is recorded therein.

⁷ In an outstanding series of 10 radio broadcasts in 1996 by the Canadian Broadcasting Corporation entitled "Prison and its Alternatives" the State of California was referred to in the first tape as an example of this.

The challenge for a symposium such as this is to declare what purpose or goal is to be adopted for its criminal justice system. Is the system to be dominated and over-arched by one consideration only such as removal of offenders from the community? Or should the focus be on making the community healthier by dealing with the causes of dysfunction, requiring acceptance of responsibility by an offender (which may well include punishment), and addressing the needs of victims ?

The first paradigm is simple and sharp. It is based upon the removal of the aberrant citizen being the end in itself. I suggest that paradigm could quickly lead to acceptance of capital punishment. The second paradigm requires commitment to a society where the culture is one of citizen to citizen respect, with pride in and passion to be known as a conciliating and restoring community which takes responsibility for and addresses dysfunction within it.

The New Zealand Police have a slogan on their letterhead*“Making safer communities”*. The first paradigm might achieve safety but by something akin to détente, i.e. a brittle standoff. The second paradigm might achieve safety by relational community communication. The first paradigm is everywhere. The second paradigm is utopian.

PNG might be ideally placed before there is too much entrenchment of attitude, to sow seeds for a better way.

Throughout the world, professionals and academics in the area of criminal justice are profoundly wrestling with the challenge to think laterally and explore better ways of dealing with criminal offending. Professor Erik Luna in a lecture entitled *“Reason and Emotion in Restorative Justice”* delivered to Victoria University in 2000 had this to say:

“Some contemporary scholars have begun to question the narrow focus of criminal punishment as state-v-offender outside of the social context and exclusive of other interested parties such as victims, families and community members. Traditional sanctioning theories largely neglect the needs of those directly injured by crime and the resulting damage done to social life within an inter-connected community. At best, the duel between prosecutor and

*defendant can only tangentially serve a broader concept of justice in sanctioning. These theories also ignore the inescapable reality that criminals are made not born, that criminality is often a symptom of a much deeper problem within the offender, his family, and the community. And finally, criminal justice systems guided by traditional sanctioning theories often fail in their theoretical goals. Systems that seek to deter crime or rehabilitate offenders, frequently do neither and instead exacerbate the root causes of criminal behaviour”.*⁸

A just and effective criminal justice system should surely at least address the following, none of which are addressed in a solely retributive approach :

- Ensure that offender properly takes responsibility for the offence. This could well involve punishment.
- See that as far as possible the needs of a victim are addressed.
- Take all reasonable steps to provide rehabilitation for the offender.

In a paper published by the New Zealand Department of Justice in July 1992 the author states:

*“In New Zealand it has long been official policy that imprisonment is the sentence of ‘last resort’. The Criminal Justice Act 1954 required the Court in determining the most suitable method of dealing with any person convicted of an imprisonable offence to have regard to the desirability of keeping offenders in the community in so far as this is practicable and consonant with the safety of the community”.*⁹

This policy has over the years been imported specifically into statute, and still is and it, together with the rise of community based sentences and other provisions (for example – presumption against prison for property offences) have presumably been in pursuance of the policy.

⁸ This lecture is published in a little booklet by the Centre for Conflict Resolution, Victoria University, Faculty of Law. The quotation is found on page 2.

⁹ *Imprisonment as ‘The Last Resort’ The New Zealand Experience*, Department of Justice 1992 (author unknown) p 1.

(Slide 4 – s.7)

In 1962 the 1954 Criminal Justice Act was amended to include the first community based sentence (other than supervision), namely Periodic Detention. This was initially a weekend residential concept but soon became a non-residential sentence in which the offender surrenders to the custody of a warden operating a work centre for a period of time not exceeding 10 hours and in any one week not exceeding a total of 18 hours. The sentence can be imposed for any period of time up to and including 12 months. It is available for any offence which has a prison sentence as part of its punishment. It was regarded as an enlightened and sensible sentence, particularly for less serious offending, because it was promoted as an alternative to imprisonment and struck a balance by replacing the negative social implications of a fully custodial regime with a semi-custodial regime that enabled the offender to maintain his or her mainstream life and obligations.

It was not until 1980 that Community Service was introduced. This sentence applies also where an offender is convicted of an offence punishable by imprisonment. The Court can, with the consent of the offender, sentence that person to not less than 20 hours or more than 200 hours of community service. The probation officer approves the particular tasks or duties – that is not within the control of the court.

The 1954 Act was reviewed and replaced by a new act in 1985 which introduced another community based sentence known as a Community Programme. Like the others, this was available upon conviction of an offence punishable by imprisonment, and comprised a residential maximum of 6 months, or a non-residential maximum of 12 months, in a programme or regime with any person or agency as the Court thought fit. This sentence ostensibly paved the way for community agencies to take up responsibility for rehabilitation. It is not a sentence that the probation service organises or controls, although breaches are prosecuted through the probation service.

These 3 developments comprise (together with supervision) the extent of community based sentencing in the adult jurisdiction to date. This is about to change as I will explain later.

Section 6 of the 1985 Act was introduced, being the provision that pulled property offences away from any presumption of imprisonment.

(Slide 5 – Section 6)

The collective effect of these sections was intended to give emphasis to the principles stated in 1954 of the desirability of keeping offenders in the community, and are demonstrations of the aforesaid official policy of the Department of Justice. Even so, the “*Last Resort*” publication pointed out that in 1992, notwithstanding these provisions, increased use of imprisonment and indeed also of periodic detention and community service still marched on. It points out that in New Zealand in 1992 there were 756 persons per 100,000 of population who were under either community based or imprisonment sentences. At the same time the figures for Queensland were 478, New South Wales 391, and Victoria 204.¹⁰ The author concludes by saying:

*“Despite a long term official policy that imprisonment is reserved as the sentence of ‘last resort’ and despite the expansion in recent years of the menu of community based sentences, New Zealand’s prison population has continued to grow at an unacceptable rate”.*¹¹

I refer again to section 7 of the Criminal Justice Act 1985 which encodes the aforesaid *long term official policy*.

(SLIDE 4 again – Section 7)

Sub-section 2 must be noted because therein also is the declaration of policy that if imprisonment is to be imposed it is to be as short as it can be in the court’s opinion, consonant with community safety, a policy itself consistent with restricting the use of imprisonment.

In order, however, not to lose the concept of making the punishment fit the crime with regard to violent offenders, section 5 was enacted which required the Court to impose

¹⁰ Supra p 9

¹¹ Supra p 17

a sentence of imprisonment in qualifying circumstances, unless the Court was satisfied that there were special circumstances to avoid such.

The New Zealand Court of Appeal in 2 cases at about that time made a clear statement denouncing the gratuitous lengthening of already long sentences of imprisonment, a stance that may also be seen as consistent with the policy of s.7.

In *R v Pawa*¹² – an appeal against sentence for an offender who had raped an 8 year girl, where the sentence was reduced from 10 years to 6, the Court said (p192):

“..... We are also aware that very long sentences of imprisonment do considerable harm without seeming to achieve any kind of useful object which could not equally be achieved by a sentence of somewhat lesser duration which would itself be nevertheless regarded as severe; and the Courts cannot allow the imposition of significantly heavier or more severe kinds of punishment than is properly justified and required for the protection of the public interest”.

And in *R v Pui*¹³ – an appeal against sentence of 12½ years for rape of a woman which was reduced to 6½ years, the Court said (p197):

*“Nevertheless the circumstance of the case as a whole and the degree of culpability which they indicate must not be assessed in some kind of vacuum
.....
We agree that severe sentences are appropriate in such cases but some sense of proportion must be exercised. Must years of imprisonment be added to a sentence that would clearly be severe in itself because it already involved years of imprisonment?”*

At that time the maximum period for rape was 14 years. In 1993 Parliament intervened and increased that to 20 years.

¹² [1978] 2 NZLR 190 (CA)

¹³ [1978] 2 NZLR 193 (CA)

Since the days of *Pui* and *Pawa*, New Zealand has been racked with growing public outrage at the incidence of violent offending, and predictably this has been demonstrated by calls for tougher penalties. There have been other instances where Parliament has intervened to increase maximum penalties, and the Court of Appeal has produced a number of “*tariff*” cases which have had the effect of limiting the discretion of sentencing judges.¹⁴

Outrage, vengeance, and retribution are natural and predictable sentiments of a society in pain. However, there are frequent warnings now being given by commentators of the dangers of allowing a purely retributive sentiment to dominate community responses.

Charles Pollard, Chief Constable of the Thames Valley Police Department, London says:

*“The underlying picture is of a public who feel vulnerable to crime, disorder and fear. This anxiety can spark a chain reaction where, put crudely, fear of crime empties public spaces or makes people unwilling to intervene when they see behavioural norms being flouted; this in turn creates the physical and social conditions which act as a magnet for more serious crime. The end result can be a powerful undercurrent of public resentment that demands more punitive measures against offenders; while the critical issues of preventing and reducing offending, and creating confident communities more capable of ‘policing’ themselves, get pushed to one side”.*¹⁵

In the last New Zealand General Election there was a referendum on law and order requiring voters to answer a question with a simple tick or cross. The question was:

¹⁴ For example, *R v Mako* [2000] 2 NZLR 171 (CA) as to crimes of robbery and violence. *R v Terewi* [1999] 3 NZLR 62 (CA) as to drug offences.

¹⁵ Article *Victims and the Criminal Justice System: A New Vision* (Charles Pollard) 2000 Crim.LR. 5 @ 7

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

(Slide 6)

Ninety two percent of the New Zealand voting public answered that question with a tick. It can be seen that the question is multi-faceted and can't actually be answered properly with a simply a tick or cross, but the response has been vigorously interpreted as a resounding declaration on the part of the New Zealand public to get tough and impose longer sentences of imprisonment. Since that referendum, it has been announced that the Government is planning 2 more prisons to cope with the influx of inmates already taking place.

The ethos of such a response is characteristic of what is portrayed by Stern and others as perpetuation of a retributive system that has a huge failure rate demonstrated by recidivist figures and immense direct and indirect draining of fiscal resources of the taxpayer.

In the last decade the sentenced inmate prison population has increased 37% in New Zealand.¹⁶ In that same period there has been a 100% increase in the use of prison sentences up to 3 years, about 50% increase in the use of prison sentences from 3 to 5 years, little change for 5 to 7 years, 100% increase again from 7 to 10 years, and a 500% increase for sentences in excess of 10 years.¹⁷

(Slide 7 – bar graph)

The population of New Zealand of course has grown over that period, probably I think by about one-third. But these observations about the increased use by the courts of longer sentences are indicative of the ground swell of retributive sentiment, the

¹⁶ 2000/01 Estimates Vote Corrections Report. Extrapolated also from Table 4.4 *Conviction and Sentencing of Offenders in New Zealand 1991 – 2000* (Spier) Ministry of Justice p 77.

¹⁷ These percentages are rounded and the graph extrapolated from the table appearing in Spier (supra) p 75

introduction of statutory amendments increasing penalties, tariff sentence cases and a hardening of the courts themselves.

The community is now producing publicly minded spokespeople who bluntly speak in retributive terms espousing the view that prison should only be a place for punishment and that rehabilitation is of no consequence – a clear indication of consolidation of the first paradigm previously referred to as the purpose for prison.¹⁸

In the face of this, the present Government has steered a curious but clever path to acknowledge the huge response to the referendum question. At present before the House is a *Sentencing and Parole Reform Bill* which will replace our current Criminal Justice Act 1985. The Bill has been promoted as addressing some of the concerns for harsher penalties, but it also acknowledges the multi-faceted nature of the referendum question which refers to the interests of victims. In that regard also, the Minister for Courts¹⁹ has sponsored what is believed to be the first Government promoted Court based restorative justice scheme in any adult jurisdiction, and at this point in time New Zealand is fully involved in a 4 year pilot programme of restorative justice processing in the Criminal jurisdiction of 4 District Court regions. The Minister in a speech to the House in November 2000 said:

*“Restorative Justice is based on the view that confronting offenders with the real pain and trauma caused by their actions, and holding them accountable to the victim making amends, can be a significant catalyst for change in behaviour. In prison, offenders are shut away from the gaze of those they have harmed. In facing up to the victim, carrying out restitution, attending behaviour modification programmes, being personally accountable and subject to intrusive supervision is often much tougher than a prison term alone”.*²⁰

¹⁸ For example, in the New Zealand Sunday Star Times February 24, 2002 a spokesperson for a community group known as Sensible Sentencing Trust is reported as saying ‘Prison isn’t allowed to be seen as punishment in this country because we have entered into a treaty with the United Nations. If prison was allowed to be punishment, then you don’t want to go back’.

¹⁹ Hon Matt Robson

²⁰ Hansard 3.11.2000

The new Bill contains provisions that specifically refer to the process of Restorative Justice conferencing as a factor for the Court to take into account when sentencing, and as far as I am aware, as with the Court based pilot programme, the specific inclusion of Restorative Justice terminology and processes in statute is a world first.

The Government has in these steps cleverly noted that the referendum question was as much about victims as it was about offenders, and that any response must pay heed to that . All commentators claim that from experience thus far, victims indeed do feel great benefit from victim/offender conferencing, and so the scheme of this new Bill is weighted to take that into account.²¹

In 1989 the concept of Restorative Justice (not well known by that terminology at that stage) was imported into statute law governing the way in which New Zealand Courts were to deal with juvenile offenders (14 years to 16 years). In the Children, Young Persons & Their Families Act 1989, a novel way of dealing with juvenile offenders was adopted that included family group conferencing – a form of out-of-Court meeting involving victims and offenders and their respective support persons. The conference would discuss offending that the juvenile admitted and would endeavour to produce an outcome to table before the Court describing any agreements reached as to what the young person and/or the family was to do to demonstrate acceptance of responsibility for the offending and restoration of the victim.

The Juvenile Court was presided over by designated Judges one of whom was Judge Fred McElrea of the Auckland District Court who began to speak for the adoption of such a process in the adult jurisdiction. In 1994 when presiding in the adult jurisdiction he took an initiative and adjourned a sentencing to enable a minister of religion who had been observing criminal proceedings, to facilitate a meeting between offender and victim and report the outcome back to the Court. That was the first of many referrals over the next few years as judges from time to time followed that lead in selected cases.

²¹ For example, in a paper entitled '*Restorative Justice : An Overview*' by Helen Powell, written for the Youth Justice Board for England and Wales, 7 October 1999, paras 22 and 23 state that assessments of direct victim and offender meetings carried out in the late eighties showed that 75% or more of the victims held the outcome in high satisfaction in some studies, and as high as 96% were satisfied or very satisfied with the process.

By this time on the international scene, Restorative Justice was being discussed more and more and works such as Howard Zehr's "*Changing Lenses*"²² were increasingly quoted.

In parallel with the public acclamation for harsher penalties, the Restorative Justice movement also spread rapidly in New Zealand generating tremendous interest throughout the country. Community groups and volunteers were meeting and inviting people such as Judge McElrea, Father Jim Consedine, and others to address them.

The movement produced such a groundswell that it could not be overlooked, and with the previous experiment of the Youth Court being internationally acclaimed, there was little doubt that the same benefits could be translated to the adult jurisdiction if development was carefully controlled.

So therefore the Government announced the 4 year pilot programme and now District Courts in selected areas in New Zealand are making referrals in quite serious matters of criminal offending to restorative justice conferencing. Broadly, the categories of offending are property offences where there is a sentence of two years of imprisonment or more, a range of other offences with penalties from two to seven years (excluding domestic violence and some other offence categories), common assault, and death or injury driving offences.

The process requires a clear and unequivocal admission of guilt and a Judge who is searching for a just outcome, can evaluate agreements reached at the conference, and use this information to craft appropriate sentencing permissible within the framework of the law. The State, whom the Court represents, symbolically stands aside for the time being to allow the parties to become the central focus. The next slide is of Howard Zehr's comparison between the retributive and restorative models and shows how the emphasis does shift from the state to the individuals.²³

(Slide 8)

²² *Changing Lenses* : Zehr, herald Press (1990)

²³ Supra p.181

There can be no doubt that successful restorative justice conferences with rich outcomes will from time to time be an element of circumstance used by a Judge to avoid what might otherwise have been a likely prison sentence.

Clauses 7, 8, 10 and 14 are provisions in the new Bill that relate to sentencing purposes and principles and demonstrate the blending of firm directions to impose stern sentences with a continuation of the policy to sentence in the least restrictive way. A more careful reading of these clauses is warranted for indepth consideration. (Copies of these clauses are available).

To complete matters, it must be pointed out that the new Bill has redefined community based sentences and there will now be one generic sentence (apart from supervision) of "*community work*". Community work can be imposed where an offender is convicted of an offence punishable by imprisonment, the sentence being expressed in hours - no less than 40 nor more than 400, to be served within 12 months if 200, and 24 months if 400. The probation officer places the offender with an approved work centre or agency.

This change will mean that the former sentences of Periodic Detention and Community Programme are abolished, and the sentence of Community Service is really renamed – Community Work with a greater number of hours available than previously. A sentence of supervision may be imposed concurrently with a Community Work sentence.

There is another dimension emerging in the development of legal analysis that as I understand it is arising out of growing dissatisfaction with legal fictions such as the state standing in the shoes of victims and therein being deemed to protect victims' interests. Consensus between the actual parties involved in dysfunction is now becoming regarded as a legitimate goal for a legal process, so a new jurisprudence is emerging - *Therapeutic Jurisprudence* . Perhaps experience in the civil arena over the last few years of litigants preferring mediation over Court process has provided a basis upon which analysts of renown have been encouraged to talk along similar lines in the pursuit of just outcomes in respect to crime. John Braithwaite of the Australia

National University – begins a recent paper addressing the development of legal processes taking into account non-legal consequences, by saying:

*“Therapeutic Jurisprudence instructs us on the enormous impact the justice system can have on people’s psychological and physical well-being. Understanding this is also a large part of what motivates Restorative Justice. Both traditions share an interest in how to overcome the problem of criminal offenders denying the pain of their victims, both for the sake of healing the offender and preventing further victimization. Restorative Justice and Therapeutic Jurisprudence share a commitment to an evidence-based structure, including the use of rigorous social science methods in pursuit of an understanding of the effect of legal practices on people”.*²⁴

I think the emergence of this new jurisprudence may be based on the overdue need for realism that often due process through traditional Court avenues can be quite destructive and more alienating to parties who are in dysfunction, and that a just outcome is unlikely to be achieved without some element of consensus that can be found in conciliation, reconciliation or restoration. The public needs to be shown that a better outcome for society and for victims of crime can be achieved than is being achieved at present, but may only be achieved when the community is prepared to entertain responses to crime that go beyond retribution alone.

If our communities are to have heart and soul, they must have a passion for becoming safer through reintegration and not alienation, and I suggest for this symposium which is boldly gathered to address traits that are beginning to cause concern in this community, there is a real and timely opportunity to adopt and settle policies by drawing upon alternative views importing restorative and therapeutic principles for the development of a more successful criminal justice system.

S.A.T.
Auckland, NZ
27 February 2002

²⁴ *Restorative Justice and Therapeutic Jurisprudence*; John Braithwaite ANU (date unknown)

Slide 1

“TEACH THEM A LESSON”

Judge Dennis Challeen - Wisconsin, U.S.A.

We want them to have self-worth -
So we destroy their self-worth

We want them to be responsible -
So we take away all responsibilities

We want them to be part of our community-
So we isolate them from our community

Slide 2

We want them to be positive and constructive -
So we degrade them and make them useless

We want them to be non-violent -
So we put them where there is violence all around them

We want them to be kind and loving people -
So we subject them to hatred and cruelty

We want them to quit being the tough guy -
So we put them where the tough guy is respected

Slide 3

We want them to quit hanging around losers -
So we put all the losers in the state under one roof

We want them to quit exploiting us -
So we put them where they exploit each other

***We want them to take control of their own lives,
own their own problems and quit being a parasite -***
So we make them totally dependant on us

Slide 4

General limitation on imprisonment

- (1) Where an offender is convicted of an offence punishable by imprisonment, the court shall, in considering the sentence it should impose, have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with promoting the safety of the community.
- (2) Where the court considers that it should impose a sentence of imprisonment, the term of the sentence shall be as short as is, in the opinion of the court, consonant with promoting the safety of the community.
- (3) This section shall be read subject to section 5 of this Act.

Slide 5

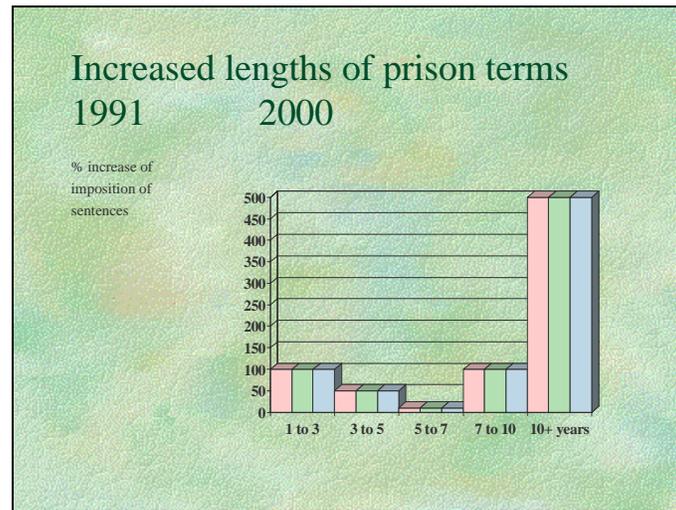
Offenders against property not to be detained except in special circumstances

Where an offender is convicted of an offence against property punishable by imprisonment for a term of 7 years or less, the court shall not impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, any other sentence that it could lawfully impose would be clearly inadequate or inappropriate.

Slide 6

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

Slide 7



Slide 8

Retributive Justice

Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.

Restorative Justice

Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.

Changing Lenses: Howard Zehr (Herald Press, Pennsylvania) p 181