



## **Do We Need Criminal Law? Professor Leslie Thomas KC**

**20<sup>th</sup> April 2023**

Welcome to the fifth lecture in this series.

It is an honour to be here with you tonight to discuss the future of the law. As we all know, criminal law has been a cornerstone of legal systems across the world for centuries. Its purpose is to provide a framework for defining and punishing behaviour that is harmful to society. But criminal law has never been uncontroversial. It is often criticised for serving the interests of the ruling class, repressing the poor, meting out brutality, and disproportionately harming people of colour and disabled people.

In this lecture, we will take a critical look at criminal law and examine alternative models of justice that prioritise repairing harm, addressing the root causes of criminal behaviour, and promoting community healing. We will explore restorative justice, community-based justice, and transformative justice and consider their potential as alternatives to criminal law. We will look at critiques of the criminal justice system from both abolitionist and reformist perspectives. Finally, we will choose between abolitionism and reformism, and attempt to answer the central question: do we need criminal law?

### **What Is Criminal Law For?**

Criminal law differs from civil law in that it is punitive, rather than compensatory. In a civil case, the primary goal is to compensate a person, usually financially, for a wrong done to them. By contrast, in a criminal case, the primary goal is to punish a person – to inflict suffering on them by way of retribution for a wrong they have committed. The deliberate infliction of suffering has always been politically, morally and philosophically controversial. That gives rise to the basic question of why we have criminal law at all.

We don't have time for more than a very broad overview of the philosophy of punishment. But, broadly speaking, there are two main justifications for criminal punishment. One is retributivist, based on the idea that a person should be punished for their wrongdoing simply because they deserve to be. The other is consequentialist, based on the idea that punishment serves certain positive social ends. For example, punishment may deter the offender from re-offending. It may deter others from offending. It may incapacitate the offender so as to prevent them from offending again. And it may rehabilitate the offender, encouraging them to change their behaviour in future.<sup>1</sup>

When judges sentence, they usually take into account all of these objectives to some degree. In England and Wales, section 57 of the Sentencing Act 2020 tells judges that, in adult criminal cases, they must have regard to the following purposes of sentencing:

- the punishment of offenders,
- the reduction of crime (including its reduction by deterrence),
- the reform and rehabilitation of offenders,
- the protection of the public, and
- the making of reparation by offenders to persons affected by their offences.

Let's now look at some criticisms of criminal punishment as administered in contemporary societies.

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<sup>1</sup> Stanford Encyclopaedia of Philosophy, "The Moral Permissibility of Punishment" <https://iep.utm.edu/m-p-puni/#H1>

## Critiques of Criminal Law

Critiques of the criminal justice system can be broadly divided into reformist and abolitionist critiques. Broadly speaking, reformist critiques accept that the criminal justice system should continue to exist in some form. They argue for reforms within the system, such as sending fewer people to prison, greater use of alternatives such as non-custodial sentences and restorative justice, better prison conditions and better-funded legal aid. Abolitionists, by contrast, call for the abolition of criminal punishment altogether. Famous abolitionists include Angela Davis, who wrote the landmark book on the subject “Are Prisons Obsolete?”,<sup>2</sup> and Mariame Kaba. In this lecture, we’re going to be engaging with both reformist and abolitionist critiques.

Without further ado, let’s turn to some of the core criticisms of criminal law.

The first critique is that the criminal justice system overwhelmingly criminalises the poor, not the rich. It prioritises the property of the rich at the expense of the lives of the poor. This is not a new critique. As Anatole France famously said, “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal loaves of bread.” The law itself overwhelmingly penalises actions that are more likely to be committed by the poor, while not penalising the far more harmful actions of the rich. As the criminologist Alex Vitale says in “The End of Policing,” “the criminal justice system excuses and ignores crimes of the rich that produce profound social harms while intensely criminalising the behaviours of the poor and non-white, including those behaviours that produce few social harms.”<sup>3</sup> To take a few examples, a homeless person begging in the street is committing a crime, but the landlord who made them homeless is not. Stealing a sandwich to feed oneself is a crime, but owning a payday loan company that has plunged many families into poverty and hunger is not. Fly-tipping is a crime, but owning an oil company that contributes disproportionately to climate change is not.

The second critique, which is closely related to the first, is that poor communities are the most heavily policed, and that the state uses policing and incarceration instead of putting the necessary resources into these communities to solve their social problems. Instead of responding to homelessness by providing housing or responding to mental illness and drug addiction by providing adequate healthcare, we respond to both by locking people up. In his book, Vitale refers to three homeless men who were killed by police in the United States. He acknowledges that these three men “posed regular threats to public order and in some cases public safety.” He argues, however, that “[t]he use of the police to manage those threats... was largely ineffective and ultimately deadly. These individuals were immune to threats of arrest and incarceration, which they had all experienced in the past. The criminal justice system, with its emphasis on punishment, could not address the underlying and intertwined problems of homelessness, mental illness, and substance abuse that drove their problematic behaviours.”<sup>4</sup> He goes on to point out that it would be cheaper to provide permanent housing and support services for homeless people than to keep arresting and jailing them. Drug abuse, too, is often linked to poverty. As Vitale highlights, “Many people involved in the drug industry don’t really have a drug problem; they have a job problem. Many others have drug problems that directly stem from the economic conditions they struggle with. There is no way to reduce the widespread use of drugs without dealing with profound economic inequality and a growing sense of hopelessness.”<sup>5</sup>

A third critique of criminal law is its disproportionate impact on marginalized communities, most obviously communities of colour. In the United States context, it is often pointed out that the history of criminal law is deeply rooted in the country’s long history of exploiting and brutalising Black people. For instance, in her book “Are Prisons Obsolete?” Angela Davis talks about how after the abolition of slavery in the American South, the convict lease system was instituted, in which criminalised Black people were subjected to forced labour in even worse conditions than they had suffered under slavery.<sup>6</sup> Similarly, the influential book “The New Jim Crow” by Michelle Alexander examines how the modern-day US penal system replicates much of the racism of the former system of racial segregation. She argues that the US imprisons a larger percentage of its Black population than South Africa did at the height of apartheid, and that ex-offenders are discriminated against legally for the rest of their lives, including through denial of the right to vote. She describes the system of mass incarceration as a “racial caste system”.<sup>7</sup>

<sup>2</sup> Angela Davis, “Are Prisons Obsolete?” Seven Stories Press, 2003

<sup>3</sup> Alex Vitale, “The End of Policing,” Verso Books, 2017

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Davis, op. cit.

<sup>7</sup> Michelle Alexander, “The New Jim Crow,” The New Press, 2012

The high point of this racial disparity is seen in the War on Drugs. Despite similar rates of drug use among different racial groups, individuals from minority communities are more likely to be arrested, charged, and sentenced to longer prison terms for drug offenses. Much has been written about the racial disparities in drug policing in the US. Vitale writes, in an American context, that “Drug policing is almost exclusively undertaken in poor mostly non-white communities. Across the country the vast majority of people in prison for drug offences are black or brown.”<sup>8</sup> President Richard Nixon’s chief domestic policy advisor, John Ehrlichman, reportedly told a journalist:

“The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the anti-war left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities. could arrest their leaders. raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”<sup>9</sup>

But this issue isn’t restricted to the United States. An analysis by the Liberal Democrats of Ministry of Justice statistics in 2021 showed that Black people were 12 times more likely to be prosecuted for cannabis possession than white people.<sup>10</sup> Yet Black people are certainly not 12 times more likely than White people to be users of cannabis. The Adult Psychiatric Morbidity Survey showed that 11.7% of Black adults, 8.9% of White British adults and 3.4% of Asian adults had used illicit drugs in the past year.<sup>11</sup> There are also disparities at the sentencing stage. Sentencing Council research covering the period from April 2012 to March 2015 showed that Black and Asian drug offenders were more likely to be sentenced to immediate imprisonment than White offenders, even after controlling for aggravating and mitigating factors. Asian offenders also received statistically significantly longer sentences than White offenders, although Black offenders did not.<sup>12</sup>

And race isn’t the only vector of oppression in the criminal justice system. Disability is another huge factor. As I have said in previous lectures, in my career I have encountered numerous cases in which people in mental health crisis, particularly Black men, have been killed by the police. People with mental health problems and learning disabilities are also overrepresented in the prison population.<sup>13</sup>

A third critique of criminal justice is that, even taking its intended purposes at face value, the increased harshness of sentencing in recent decades does not achieve those purposes. Earlier, we looked at the core consequentialist rationales for punishment: deterrence, incapacitation and rehabilitation. This is in a context where sentencing has become substantially harsher over the past 50 years. The rate of imprisonment in the US skyrocketed between the 1970s and the 2000s, increasing by over 500%, although it has since declined somewhat.<sup>14</sup> The rate of imprisonment in England and Wales per capita is significantly lower, but has also increased over time. The prison population of England and Wales quadrupled in size between 1900 and 2018, with around half of this increase taking place since 1990.<sup>15</sup>

But does this harsher sentencing actually achieve the goals of deterrence, incapacitation or rehabilitation? Recently, Jay Gormley, Melissa Hamilton and Ian Belton carried out a review of the effectiveness of sentencing for the Sentencing Council of England and Wales. As regards general deterrence – that is, the ability of sentencing to deter others from committing offences in future – they highlight that “a range of

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<sup>8</sup> Vitale, op. cit.

<sup>9</sup> CNN, “Report: Aide says Nixon’s war on drugs targeted blacks, hippies,” 24 March 2016

<https://edition.cnn.com/2016/03/23/politics/john-ehlichman-richard-nixon-drug-war-blacks-hippie/index.html>

<sup>10</sup> The Independent, “Black people 12 times more likely to be prosecuted for cannabis, new analysis shows,” 28 May 2021 <https://www.independent.co.uk/news/uk/politics/black-people-cannabis-prosecutions-b1853669.html>

<sup>11</sup> GOV.UK, Illicit drug use, 23 November 2021 <https://www.ethnicity-facts-figures.service.gov.uk/health/alcohol-smoking-and-drug-use/illicit-drug-use-among-adults/latest>

<sup>12</sup> Sentencing Council, “Investigating the association between an offender’s sex and ethnicity and the sentence imposed at the Crown Court for drug offences,” 15 January 2020

<https://www.sentencingcouncil.org.uk/news/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/>

<sup>13</sup> See generally Centre for Mental Health, “The future of prison mental health care in England,” 2021

[https://www.centreformentalhealth.org.uk/sites/default/files/publication/download/CentreforMentalHealth\\_TheFutureofPrisonMentalHealthCare\\_0.pdf](https://www.centreformentalhealth.org.uk/sites/default/files/publication/download/CentreforMentalHealth_TheFutureofPrisonMentalHealthCare_0.pdf)

<sup>14</sup> The Sentencing Project, Prison Population Over Time <https://www.sentencingproject.org/research/>

<sup>15</sup> UK Prison Population Statistics, 25 October 2022 <https://commonslibrary.parliament.uk/research-briefings/sn04334/>

evidence on human behaviours and decision-making lends credence to the idea that certainty of punishment is likely a much stronger driver of deterrence than severity”.<sup>16</sup>

As regards the effect of sentencing on the individual offender, Gormley and colleagues find that “using more severe deterrent sentences (in particular, custodial rather than non-custodial disposals) does not reduce reoffending. On the contrary, researchers have found evidence for the criminogenic effects of incarceration. Prison is a social environment where prisoners are exposed to pro-criminal attitudes, learn from other prisoners’ behaviour, and are incentivised to adjust to prison life and criminality in general. Further, the challenging events inmates experience, such as loss of autonomy and privacy, and victimisation, may trigger psychological strain and provoke criminal coping strategies. Ex-prisoners also suffer from the negative social and economic effects of being labelled as such.” They find, in particular, that short sentences of imprisonment “may be criminogenic, hinder positive outcomes, and make reoffending more likely”.<sup>17</sup>

Of course, this is an area where an abolitionist and a reformist response might differ. A reformist might respond to this research by advocating less use of imprisonment, more non-custodial sentences, and more diversions such as restorative justice. They might point out that the research I’ve just referred to doesn’t say that punishment is useless. Rather, it merely challenges the assumption that greater harshness of punishment, as opposed to greater certainty of punishment, increases its effectiveness in reducing crime.

An abolitionist, by contrast, would say that this is simply putting a sticking-plaster on the brutality and injustice of policing and prisons, and that the end goal should be to abolish criminalisation entirely. Angela Davis argues that “frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison”.<sup>18</sup> At the same time, it would be wrong to caricature abolitionists as blue-sky thinkers. As the abolitionist Mariame Kaba argues, abolitionists are also involved in campaigns that win politically achievable reforms. She argues that “[a]bolitionist groups have often led fights for better conditions, connecting them to more transformative political possibilities,” and that abolitionists have been at the “forefront” of campaigns such as decriminalisation of drug use, sentencing reductions and better prison conditions.<sup>19</sup>

So what are the alternatives to criminal law? Are the abolitionists or the reformists right? In the next section of this lecture, we will explore some of the alternative models of justice that have been proposed as a way to address the critiques of criminal law and create a more just and equitable system.

## Restorative Justice

Restorative justice is an approach to justice that aims to repair the harm caused by criminal behaviour, rather than punishing the offender. Unlike criminal law, which tends to be adversarial and punitive, restorative justice is collaborative and focuses on the needs of the victim, the offender, and the community.

At its core, restorative justice seeks to heal the harm that has been done, rather than merely punishing the offender. It recognises that crime is not just a violation of the law, but also a violation of the relationships between individuals and the wider community. By bringing together the parties involved in a crime – including the victim, the offender, and the community – restorative justice seeks to repair the damage caused by the crime and to restore those relationships.

Restorative justice is based on a number of principles that differentiate it from criminal law. Firstly, it recognises that crime is a violation of people and relationships, not just of the law. This means that the focus is on repairing harm and restoring relationships, rather than on punishing the offender. Secondly, it is collaborative, with all parties involved in the process. This means that victims, offenders and the wider community are all involved in the process of repairing harm and restoring relationships. Thirdly, it is a process that is driven by the needs of those involved. This means that the process is flexible and can be adapted to meet the needs of the people involved in each case.

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<sup>16</sup> Jay Gormley, Melissa Hamilton and Ian Belton, “The Effectiveness of Sentencing Options on Reoffending,” Sentencing Council, 2022 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-PUBLISHED-FINAL.pdf> See Andrew Ashworth, “The common sense and complications of general deterrent sentencing,” *Criminal Law Review* 2019, 7, 564-578

<sup>17</sup> Gormley et al, op. cit.

<sup>18</sup> Davis, op. cit.

<sup>19</sup> Mariame Kaba, “What Abolitionists Do,” Jacobin, 24 August 2017 <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration>

Restorative justice can take many forms, but generally involves bringing together the parties involved in a crime to discuss the harm that has been caused and to find ways to repair that harm. This can involve face-to-face meetings between the victim and the offender, facilitated by a trained mediator or facilitator. It can also involve community meetings, where the wider community is invited to participate in the process of repairing harm and restoring relationships.

One of the key benefits of restorative justice is that it can help to address the root causes of criminal behaviour. Rather than simply punishing offenders for their actions, restorative justice seeks to understand the reasons behind the behaviour and to address those underlying issues. For example, if an offender has committed a crime due to addiction or mental health issues, restorative justice may involve connecting that person with the support and resources they need to overcome those issues.

Restorative justice also has the potential to reduce reoffending. By addressing the root causes of criminal behaviour and providing support to offenders, restorative justice can help to prevent them from committing further crimes. There is evidence for this: according to a 2008 evaluation by academics at the University of Sheffield commissioned by the Ministry of Justice, those offenders who participated in restorative justice committed statistically significantly fewer offences (in terms of reconvictions) than those who did not.<sup>20</sup> In addition, restorative justice can help to build stronger, more resilient communities, by fostering a greater sense of connection and understanding between individuals.

Ideas akin to restorative justice have been practised in many cultures, and are often deeply rooted in non-Western traditions of justice. For instance, as I mentioned in the last lecture, the Navajo tradition of “peace making” has a lot in common with restorative justice. The Peacemaker Program in the Navajo Nation coexists with the formal tribal court system, and its purpose is to bring parties together to talk out disputes and to reach an agreement, with the peacemaker acting as a facilitator.<sup>21</sup>

Despite its potential benefits, restorative justice is not without its challenges. The first is that restorative justice is not designed to settle factual disputes. It isn’t an adjudicative process and there is no “fact-finding” mechanism. So if the accused denies that they behaved wrongly, restorative justice may not be appropriate.<sup>22</sup>

The second is that the restorative justice process may not account for power imbalances in the relationship between the victim and the offender. For instance, in the context of sexual and gender-based violence, Sarah Deer and Abigail Barefoot write, “the lack of a formalized structure may actually allow the offender to re-victimize and re-traumatize a survivor through threats (direct or implied) and intimidation... [and] even where direct safety and well-being are well protected, [restorative justice] models can still marginalize the psychological needs of victim/survivors.”<sup>23</sup> This can of course be mitigated through the use of skilled facilitators who are able to keep victims safe. But there will be times when restorative justice is not an appropriate or safe option.

The third significant critique is that restorative justice is not always enough. There are times when a person genuinely poses a danger to public safety and when some kind of measures need to be taken to protect others from them, which a purely consensual process cannot necessarily achieve. For example, Deer criticises an anecdotal account of a case handled by a Navajo Peacemaker, in which it was known that a child was being sexually abused by one of two possible suspects, neither of whom admitted it. The Peacemaker’s solution was to isolate the child from both people and make sure the child was never alone with either. Deer is highly critical of this response, stating “There is no evidence that the Peace-making system acknowledged the psychological harm suffered by the child, and simply isolating suspected sex offenders from a child does not directly address the underlying criminal behaviour... There is no enforcement

<sup>20</sup> Joanna Shapland, Anne Atkinson, Helen Atkinson, James Dignan, Lucy Edwards, Jeremy Hibbert, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, “Does restorative justice affect reconviction?” Ministry of Justice, June 2008

<https://restorativejustice.org.uk/sites/default/files/resources/files/Does%20restorative%20justice%20affect%20reconviction%20-%20The%20fourth%20report%20from%20the%20evaluation.pdf>

<sup>21</sup> A Guide to the Peacemaking Program of the Navajo Nation, Judicial Branch of the Navajo Nation, September 2004 <https://www.pokagonband-nsn.gov/sites/default/files/assets/group/tribal-court/2014/peacemaking-program-navajo-1345.pdf>

<sup>22</sup> See Sarah Deer and Abigail Barefoot, “The limits of the state: Feminist perspectives on carceral logic, restorative justice and sexual violence,” (2018) *Kansas Journal of Law and Public Policy* 28, 505 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/kjpp28&div=25&id=&page=>

<sup>23</sup> Deer and Barefoot, op. cit.; Sarah Deer, “Decolonizing rape law: A native feminist synthesis of safety and sovereignty,” (2009) *Wicazo Sa Review*, 24(2), 149-167 <https://www.jstor.org/stable/40587785>

mechanism in place to prevent future harm. Furthermore, because the offender is not held criminally accountable by the system, [they are] apparently free to commit offences on other children... Some of the problems with applying a 'peace making' model of justice to rape include safety, coercion, the excusing of criminal behaviour, and recidivism."<sup>24</sup>

A fourth, and closely related, limitation of restorative justice is that although it has been widely adopted worldwide, it has usually been adopted as an adjunct to the traditional, punitive criminal justice system, rather than a complete replacement for it. Restorative justice is often used either as a diversionary alternative to prosecution, or as part of the sentencing process. But in both cases, if the parties do not agree to restorative justice, or the process breaks down, the spectre of criminal punishment continues to hang over the offender's head.

And finally, a fifth limitation is that restorative justice does not address all the harms done to victims or meet all of the victim's needs. As Susan Herman of the National Center for Victims of Crime said in 2000, "Repairing the harm is often far more complicated than apologies and restitution and relationship-building. It can require long-term sophisticated counselling, assistance with safety planning, relocation and any number of services required to rebuild a life... Many of victims' needs cannot be met by individual offenders or small communities because there is only so much they can do."<sup>25</sup>

Despite these challenges, restorative justice has the potential to offer a more compassionate, collaborative, and effective approach to justice than traditional criminal law. By focusing on repairing harm and restoring relationships, restorative justice has the potential to address the root causes of criminal behaviour and to build stronger, more resilient communities.

## Community Based Justice

Community-Based Justice is an alternative approach to criminal law that emphasizes community involvement in justice processes. This approach seeks to address the underlying causes of crime by addressing social issues that contribute to criminal behaviour. In this section, we will explore the principles of community-based justice and its potential as an alternative to criminal law, highlighting examples from the UK and the Commonwealth.

Community-based justice aims to shift the focus from punitive measures to preventative measures by engaging communities in addressing the root causes of crime. This approach recognizes that crime is often a symptom of broader social issues, such as poverty, lack of education, and social exclusion. Community-based justice is based on the principle that communities are best placed to identify and address these underlying social issues.

One example of community-based justice in action is the Koori Court in Victoria and New South Wales, Australia. In Victoria, the Koori Court is a specialist court that operates within the Victorian court system and is designed to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. The court is based on principles of restorative justice and community involvement and is staffed by a combination of legal professionals and Elders from the local Aboriginal community. A similar Youth Koori Court has been implemented in New South Wales for eligible young people. There is evidence that the Victorian Koori Court improves experiences within the justice system for the accused through the provision of a culturally appropriate court setting and process, the involvement of Elders and community members in the Court, and the adoption of an inclusive approach by Judges and legal representatives.<sup>26</sup> There is also some evidence that it may reduce recidivism rates.<sup>27</sup> An empirical study of the New South Wales Youth Koori Court showed that indigenous young people referred to the court were less likely to be sentenced to detention. They were also less likely to be re-convicted and less likely to be sentenced to

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<sup>24</sup> Deer, op. cit.

<sup>25</sup> Remarks by Susan Herman, Executive Director, National Center for Victims of Crime, Before the International Symposium on Victimology, Montreal Canada, 10 August 2000, <https://web.archive.org/web/20140327002614/https://victimsofcrime.org/media/newsroom/speeches-and-testimony/restorative-justice>

<sup>26</sup> Clear Horizon Consulting, "County Koori Court: Final Evaluation Report," 27 September 2011 <https://www.countycourt.vic.gov.au/files/documents/2018-08/ckc-evaluation-reportfinal27sep110.pdf>

<sup>27</sup> See the discussion by Allan Borowski, "Indigenous participation in sentencing young offenders: Findings from an evaluation of the Children's Koori Court of Victoria." *Australian & New Zealand Journal of Criminology* 43.3 (2010): 465-484.

detention at re-conviction, although the difference in re-conviction rates was not statistically significant.<sup>28</sup>

Community-based justice has the potential to be a more effective and inclusive approach to justice than traditional criminal law. By involving communities in the justice process, community-based justice can address the root causes of crime and provide support to those who have been affected by it. Community-based justice initiatives can also help to build trust between communities and the justice system, which can lead to better outcomes for everyone involved.

However, like restorative justice, community-based justice mechanisms such as the Koori Courts operate as an adjunct to the mainstream criminal justice system, rather than as a replacement to it. Indeed the Koori Court is an integral part of the state-run criminal justice system, and although community elders are involved in sentencing decisions, it is the judicial officer who makes the final decision. So this is unequivocally a reformist, rather than abolitionist, approach to criminal justice. The state and its courts still have the final say.

## Transformative Justice

Transformative justice is a relatively new concept that seeks to address the root causes of harm, violence, and crime through a transformative process that empowers individuals and communities to build relationships and address systemic inequalities. Unlike criminal law, which focuses on punishing offenders and maintaining the status quo, transformative justice seeks to create a new system of justice that prioritizes healing, accountability, and community building.

Transformative justice is based on the principles of accountability, empowerment, and transformation. It recognizes that harm is caused not only by individual actions but also by systemic inequalities and power imbalances. It seeks to address these underlying issues by creating a space for open dialogue, community engagement, and personal growth. An important facet of transformative justice is that, in general, it's explicitly anti-carceral and abolitionist. Unlike restorative justice, which often functions as an adjunct to the mainstream criminal justice system, transformative justice advocates reject the mainstream criminal justice system and explicitly want to create an alternative to it, which doesn't rely on the use of coercive state power.

Anthony Nocella explains the differences between restorative and transformative justice as follows:

“Restorative justice stresses that the system is flawed, overworked, and retributive, but does not address why it exists, how it is racist, sexist, ableist, and classist, whom it benefits, and how it was developed. Transformative justice, on the other hand, is explicitly opposed to helping someone get arrested, imprisoned, fired from their job, repressed, or oppressed. It is about looking for the good within others, while also being aware of complex systems of domination. If the world is to transform, we need everyone to transform and everyone to be voluntarily involved in critical dialogue together.”<sup>29</sup>

One example of transformative justice in action is the Creative Interventions Toolkit, a practical guide to stop interpersonal violence developed by Creative Interventions. This toolkit provides a community-based, transformative justice approach to dealing with situations of interpersonal violence, including domestic violence, sexual harassment, sexual and assault, child abuse and elder abuse.<sup>30</sup>

Transformative justice has the potential to create a more just and equitable society by addressing the root causes of harm and violence. It challenges us to rethink our understanding of justice and move beyond the limitations of the criminal justice system. It is absolutely something we should welcome. However, it is not without its challenges and criticisms.

As we have already heard, not everyone is satisfied with restorative justice approaches when it comes to serious violent and sexual harm. The same criticism arguably applies to transformative justice. Many victims of serious violent and sexual harm, and many members of the wider public, expect to see the perpetrator punished, and are simply not going to be satisfied with a process that doesn't involve the infliction of some form of punishment on the perpetrator. Scott Berkowitz of the Rape, Abuse and Incest National Network articulated the view of many people when he told BuzzFeed News in 2013 that given the seriousness of rape,

<sup>28</sup> Evann J Ooi and Sara Rahman, “The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes” (2022) *Crime and Justice Bulletin* <https://www.bocsar.nsw.gov.au/Publications/CJB/CJB248-2022-Report-Impact-NSW%20Youth-Koori-Court-on-sentencing-and-reoffending-outcomes-V8.pdf>

<sup>29</sup> Anthony Nocella, “An overview of the theory and history of transformative justice,” *Peace & conflict review* 6.1 (2011): 1-10 <http://www.review.upeace.org/pdf.cfm?articulo=124&ejemplar=23>

<sup>30</sup> Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence, 2012 <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf>

“a long jail sentence is always appropriate,” and that “Victims are looking for justice. For a crime this serious justice includes punishment.”<sup>31</sup>

This isn’t a view that we can simply write off as knee-jerk retributivism. It can be argued that any process in which coercive state power is completely absent, and there is no prospect of the perpetrator being incarcerated, runs the risk of a violent abuser being free to offend again. Of course, abolitionists are not without answers to this point. Mariame Kaba said in an interview with The Next System Project, shortly after the election of President Trump in 2017, “Has the current approach ended rape and murder? The vast majority of rapists never see the inside of a courtroom, let alone get convicted and end up in prison. In fact, they end up becoming President.”<sup>32</sup> She has a point. The current criminal justice system was created by and for those with power. It isn’t particularly apt for addressing sexual and violent harm, especially when it is perpetrated by the powerful against the powerless.

Nonetheless, in discussing this issue, we clearly can’t simply ignore public sentiment. Not least because if the state simply abandoned the business of punishing people, and left communities to solve their own problems, some people would take justice into their own hands and mete out violence to rapists and abusers. In fact, there are some abolitionists who openly acknowledge this. In the anarchist zine “What About The Rapists?”, an anonymous author describes how they and their friends assaulted a rapist with a baseball bat in order to punish him. The author writes:

“we are tired of accountability processes that force the survivor to relive, over and over, the trauma of assault; that force the survivor to put their reputation on the line as “proof” of their credibility; that end up being an ineffective recreation of the judicial process that leaves the perpetrator scot free, while the survivor has to live through this for the rest of their life... we are not sorry, and we will not stop: from now on, we will respond to sexual violence with violence.”<sup>33</sup>

Pausing there, I imagine most of us would be uncomfortable living in a world with no judicial process, no trials and no appeals, where justice was delivered by vigilantes with baseball bats. I certainly would.

Despite these valid criticisms, transformative justice provides a valuable alternative to criminal law that focuses on healing, accountability, and community building. It challenges us to think creatively about how we can address harm and violence and create a more just and equitable society.

## Conclusion

We now need to confront squarely the question posed by this lecture: do we need criminal law? This requires us to choose between abolitionism and reformism. We’ve seen that there are major problems with every aspect of the criminal justice system as it currently exists. It’s classist, ableist and racist, and it fails to address the root causes of harm and conflict in society. But that doesn’t answer the question: can it be reformed, or should it be abolished?

In itself, it’s not controversial to say that restorative justice is a good thing, or that it should be more widely used. Restorative justice is used in many countries around the world, including the UK. It has produced good results and received widespread approval from academics, judges and policymakers. But it generally functions as an adjunct to the formal criminal justice system, not a replacement for it. And as we have heard, restorative justice has limitations. It doesn’t have any kind of fact-finding process, and so is unsuitable for adjudicating guilt or innocence. Not all victims want to engage in it or feel safe doing so. It doesn’t necessarily tackle the structural causes of harm and violence. And as it functions as an add-on to traditional criminal justice rather than a replacement for it, offenders still have the spectre of conviction and punishment hanging over their heads. Similarly, community-based approaches to justice normally function as add-ons to the formal courts, not as a replacement for them.

Transformative justice, on the other hand, is more ambitious. In general, it’s an explicitly anti-carceral and

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<sup>31</sup> BuzzFeed News, “Can Transformative Justice Stop Rape?” 24 May 2013

<https://www.buzzfeednews.com/article/bridgettodd/temp-title-1364849685380-9zss>

<sup>32</sup> The Next System Project, “Towards the horizon of abolition: A conversation with Mariame Kaba,” 9 November 2017

<https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba>

<sup>33</sup> Anonymous, “What About The Rapists? Anarchist approaches to crime and justice”

[https://syllabus.pirate.care/library/Anonymous/What%20about%20the%20rapists\\_%20Anarchist%20approaches%20to%20crime%20&%20justice%20\(352\)/What%20about%20the%20rapists\\_%20Anarchist%20approac%20-%20Anonymous.pdf](https://syllabus.pirate.care/library/Anonymous/What%20about%20the%20rapists_%20Anarchist%20approaches%20to%20crime%20&%20justice%20(352)/What%20about%20the%20rapists_%20Anarchist%20approac%20-%20Anonymous.pdf)



abolitionist alternative to the formal justice system, that rejects integration into the formal justice system. It is also a much more radical form of justice, that is rooted in anti-racist and anti-capitalist politics. It seeks to address the root causes of criminal behaviour and to transform the conditions that lead to crime. This approach recognizes that crime is often a result of structural inequality, oppression, and violence, and seeks to address these underlying issues through social and political change. Transformative justice emphasizes the importance of community-based solutions and a focus on healing and transformation. And it is ambitious. As we have heard, transformative justice schemes such as the Creative Alternatives toolkit are squarely designed to tackle the very types of harm to which restorative justice is often viewed as ill-suited, such as domestic and sexual violence.

However, we also have to engage with criticisms of abolitionist approaches to justice. It has to be acknowledged that in the real world, many victims and many members of the public demand to see the perpetrators of serious violent and sexual harm punished. That isn't necessarily an intractable desire, but it's also not one that we can ignore when making decisions about public policy. As we've seen, in a world with no criminal justice system, we could expect to see not just transformative justice, but also vigilante violence. To that end, I'm not convinced that the immediate abolition of criminal courts, police and prisons is a feasible or desirable goal.

However, the exploration of these alternatives offers a valuable perspective on the limitations of our current system and the possibilities for change. We should acknowledge that criminal punishment can't solve the underlying social problems that cause harm and conflict, and often makes them worse. We should challenge the gross inequality and injustice of our capitalist economy and the structural racism that often accompanies it, and push for all communities to have high-quality education, housing, jobs and health care accessible to all. And we should expand the space for restorative, transformative and community-based approaches to conflict resolution. If we can take these steps, the role of criminal punishment in our society will steadily diminish.

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