

# Rethinking Retribution: a critique of *Simple Justice*

**Rob Allen** refutes Charles Murray's thesis that the current British approach to crime and punishment is overly liberal and intellectually complex, and thus ineffective.

*In the introduction to Simple Justice, his latest essay on British society published by Civitas and the Sunday Times, the author Charles Murray is described as a 'celebrated American sociologist'. In his own country, Murray is regarded by many as highly controversial, most particularly for his most famous book, The Bell Curve: Intelligence and Class Structure in American Life (with Richard Herrnstein, 1994), which had an explosive reception due to its argument that the heritability of intelligence was a cause of persistent differences in poverty and educational attainment between different racial groups, notably black and white Americans. Nevertheless Murray remains influential – he is currently a fellow at the conservative think-tank, the American Enterprise Institute for Public Policy Research, an affiliation he shares with other prominent past and present members of the Bush administration.*

*In Simple Justice, Murray draws a portrait of the*

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*criminal justice system in British society gathered from reading British newspapers and interviewing prominent people in this sphere of British life. His thesis is that the official response to crime in Britain is ineffective because the liberal 'elite' who run the criminal justice system believe in an approach that recognises disadvantage, causes of crime and social complexities. Murray calls this 'progressive justice', which he says is far too complex and ambiguous an approach to deliver real justice in the real world. He recommends a return to what he sees as realism: 'retributive justice' meted out to the persistent offenders, or 'outlaws', who disrupt the lives of the law-abiding 'citizens'. Seven essays written in response to Murray are included in Simple Justice. Here is an extract from the critique by Rob Allen.*

## **Specific problems with retributive justice**

In addition to the general problem of gross oversimplification, there are three particular problems with Murray's no nonsense espousal of retributive justice.

## **Outlaws and Citizens**

The first concerns the idea that people should be divided between Citizens and Outlaws – a dichotomous worldview that seems as simplistic as it is disturbing. Murray boldly asserts that the Citizens produce everything good in English life and that priority must be given to protecting them. Those who commit serious crimes – murder, rape, robbery and burglary, “the elemental predatory acts” – should be treated as Outlaws, forfeiting many of the rights enjoyed by the law abiding.

The language of the Wild West and Old Testament may appeal to American sensibilities but ironically it is in this country where the Christian church is established and we are all subjects rather than citizens that the values of mercy, forgiveness and tolerance seem to play a greater role. Research on the kinds of people who become serious and persistent offenders has been remarkably consistent in many countries of the world. They are drawn from the poor, the ill-

educated, the drug-addicted, the abused and neglected, people who have little stake in conformity. Many have serious mental health problems. This does not always excuse their crimes. But it is a context, which cannot be wished away by those who make a socially responsible criminal justice policy. It points to precisely the kind of measures which are needed if crime is to be reduced. Of course those who commit crimes need to be held to account for what they have done, and it is argued below, given every opportunity and encouragement to put things right by their victim and the wider community. Organising a response to their offending on the basis that they are as people, outside the law, is both morally questionable and practically unhelpful. The moral problem arises from defining human beings solely in terms of their behaviour. Are people who do bad things automatically bad people who need to be defined and labelled as such? Police officers, whose no nonsense approach is much approved of by Murray, often talk about villains and bad guys as if people cannot change and cannot redeem themselves. What would Murray make of Jimmy Boyle, once Scotland's most

notorious criminal, now a successful artist? Or the long-term prisoners who work in a Citizens Advice Bureau in Oxford; or the man who heroically saved dozens in the Far East Tsunami before being arrested for burglary on his return to Australia?

The practical problem arises from the fact that treating people as Outlaws makes it more difficult for them to change their ways. Work undertaken for Rethinking Crime and Punishment (RCP) on the economic costs of crime has highlighted the heavy reputational costs of a criminal record. Discharged prisoners find it difficult to rent a house, get a job or a credit card – the kind of market exclusion effects that may be more debilitating than a term of imprisonment itself.

Sentenced prisoners cannot vote in elections. And those with a criminal record are unable to claim from the Criminal Injuries Compensation board. A sensible crime policy would aim to reduce the disparities between Citizens and Outlaws, not enshrine them.

### Progressive justice

The second issue relates to the dimensions of justice. For Murray the primal function of a system of justice is to depersonalise revenge, and society has the duty to punish culpable offenders. Murray's Hobbesian view may be of historical interest, but how relevant is it to modern societies? While for Murray, punishment is the be all and end all, progressive justice aims to achieve other objectives. The punishment of offenders is only one of the five purposes of sentencing to which the courts in England

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and Wales must have regard. Murray would presumably approve of two of the other purposes – the reduction of crime (including its reduction by deterrence) and the protection of the public. But it is the other two – the reform and rehabilitation of offenders, and the making of reparation by offenders to persons affected by their offences – that distinguish justice from revenge. Restorative Justice (RJ) in particular provides a much more comprehensive and constructive approach to crime than that propounded by Murray. Borrowing heavily from mediation routinely used in civil disputes, RJ provides an opportunity for offenders to take responsibility for the loss, damage or harm they have caused and do something to make amends. RJ allows victims to let the offender know how the crime affected them and put a bad experience behind them. Pilot schemes are showing that victims who participate in RJ are much more satisfied than they are with conventional criminal justice.

Murray is right that in these forms of more progressive justice, deciding on a just sentence for a convicted offender is a far from simple matter. It requires careful and intelligent assessment of the factors relating to the offence and the offender and a balanced judgement about the best measures to impose. For Murray these may be noble aspirations but are impossible to achieve in practice, because we lack effective mechanisms for diagnosing and treating underlying problems. It is true that the 1,700 residential drug rehabilitation places in England represent a major shortfall. The answer is surely to expand these and other services using the considerable resources Murray would have us tie up in prisons.

Murray asks us to consider that it is for parents to decide how best to deal with a misbehaving child whom they know well, let alone for a judge to assess and treat an offender about whom they have virtually no information. The analogy is instructive. Good parents know that bringing up children is as much about praise as punishment. When their children steal something or harm someone the priority is to apologise and to put the harm right. When choosing between the options for correction, parents would not consider doing anything which would inflict damage or harm on their child. Murray does not explain what he means by "a lesson that won't soon be forgotten" but it is sobering that in the country which invented the juvenile court to act as "a kind and just parent", 2,000 juveniles are today detained for life without the possibility of parole.

### Public attitudes

The third issue relates to public attitudes. Lord Bingham recently summed up the position when he said "Everybody thinks our system is becoming soft and wimpish. In point of fact it's one of the most punitive systems in the world." For Murray the criminal justice elites are out of touch with public opinion, which favours the simple justice approach; they live in different worlds. But work carried out for the RCP has found that although public attitudes are complex, sometimes contradictory, and often highly dependent on the wording of poll questions, they are in general much less punitive than is often thought to be the case.

First, it is clear that there is a good deal of support for

prevention. Asked to choose from a list of options two or three measures which would do most to reduce crime in Britain, 60 per cent of people say better parenting, 55 per cent more police, 45 per cent better school discipline and 41 per cent more constructive activities for young people. When we asked in 2001 how the public would spend a notional £10 million on dealing with crime, the most popular option was to set up teams in 30 cities to work with children at risk. Nearly three-quarters of people think schools and colleges have an important role in preventing young people from offending and reoffending, with teachers seen as more important in this regard than police, courts or custody. This confirms the findings of an EU-wide survey in 2002, which found more support for targeted prevention programmes than for tougher sentencing.

Second, there is a great deal of scepticism about prison. About half of the members of the public surveyed think that offenders come out of prison worse than they go in and a third don't know. Only two per cent choose to spend the notional £10 million on prison places. When asked how to deal with prison overcrowding, building more prisons is the least popular option with the support of only a quarter of people. This reflects the finding that only one in ten people think putting more offenders in prison would do most to reduce crime in Britain.

Third, there is a desire for better alternatives. To deal with prison overcrowding, more than half of the public would prefer tougher community punishments to be developed. Nine out of

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intervene more actively and intrusively in controlling people's lives in the interests of public safety and comfort, in ways which go far beyond punishment as it is ordinarily understood. In the current debate about 'respect', Alan Steer and Richard Sennett have both argued against the use of punishment as a means of controlling young people (*Times*, 21 May, *Sunday Times*, 22 May, 2005). If people are to be punished for who they are and not for what they have done, there is a danger that punishment will lose its legitimacy, those who administer it will lose their moral authority, and those who experience it will no longer need to have any sense of shame.

However the debate unfolds, the indications are that both the courts and the penal system will be required to carry out a more diverse and complicated range of functions than any which have been expected from them in the past. The old rules may no longer apply, but the new rules have not yet been written.

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ten of those surveyed agree that there should be more use of intensive community punishments to keep track of young offenders. Focus group research by Strathclyde University found that people want non-custodial sentences that make offenders pay back and learn their lesson. Research on the reputation of alternatives to prison found a need to benefit victims, communities and offenders.

Fourth, there is support for treating rather than punishing underlying problems. More than half of the public think that the best way of dealing with prison overcrowding is to build more residential centres so that drug addicted offenders can receive treatment. In focus group research, "almost all respondents, including tabloid readers, adopted liberal positions on the issue of drug crime and felt strongly that drug users should be treated rather than punished." For young offenders, education is seen as playing an important role. Two-thirds of people agree (a third strongly) that under-18s who have offended and cannot read and write should receive compulsory education rather than custody.

These four findings might seem to be somewhat at odds with the prevailing wisdom, including Murray's, about public attitudes. Evidence from some opinion polls suggests that people in Britain have harsher attitudes towards offenders than RCP's work suggests. It is true that when asked if they want stiffer sentences, seven out of ten people will say 'yes', and between a quarter and a third will 'strongly agree' that the courts are 'too lenient'. Moreover, three-quarters of people think that the police and the courts are 'too lenient' when dealing with young offenders. However it is well established that people simply do not know how severe the system actually is, in terms of the use of, and the length of, custodial sentences. The Home Office has found that over half of people make large under-estimates of the proportion of adults convicted of rape, burglary and mugging who go to prison for example, and recent research conducted for the Sentencing Advisory Panel confirmed this picture. Nearly three-quarters of people believed that sentences for domestic burglary were 'too lenient', and nearly half that they were 'much too lenient'. However, people consistently under-estimated the degree to which courts actually imposed prison sentences. Close analysis would suggest that there is

something of a 'comedy of errors' in which policy and practice is not based on a proper understanding of public opinion, and public opinion is not based on a proper understanding of policy and practice. As the Home Office put it, "tough talk does not necessarily mean a more punitive attitude to sentencing".

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