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Crime prevention and control: Western beliefs vs. traditional legal practices

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Abstract

This paper raises two main questions. The first concerns the current idea that punishment – conceived as the loss of liberty – has an effect in preventing unlawful behaviour. It can in fact be shown that, in general, sanctions have a poor individual preventive effect. As to general prevention, punishment may be expected to have a deterrent effect when the unlawful behaviour is the result of a rational decision, that is, a decision based on a cost–benefit analysis. However, a wide variety of factors, from group support to situational and systemic factors, may very well counteract the threatening effect of the sanction. The second question concerns the feasibility of non-stigmatizing ways to cope with crime. The few examples borrowed from legal anthropology seem to indicate that viable alternatives exist. But the transfer of a non-Western, indigenous problem-solving process to culturally different contexts is problematic and should be carried out with extreme caution.

This article is based on two general assumptions: first of all, the conviction that any discussion on dissuasion (in which deterrence represents a special case) should take into account the socio-cultural setting in which it is meant to operate; second, and moreover, the idea that no matter what the definition of crime may be, an adequate understanding of unlawful behaviour requires paying attention not only to the offender(s) but also to the victim(s) and the bystander(s).

Now that has been said, the article is organized in the following way. I shall start with some brief notes on the two main conceptions of punishment, one

of which is based on the notion of retribution (or just deserts), and the other on its utility. Since one of the key issues is the deterrent effect of punishment, in the second part I shall discuss in some detail whether and to what extent there is empirical evidence supporting this claim.

Anthropological studies of traditional societies have revealed a large variety of ways to cope with unlawful behaviour: unlike modern Western law, customary laws[1] often have quite different views as to who is the offender, what should be done about his transgression and how to restore social relations which have been threatened or broken. This is the subject of the third part.

Finally, there is another key issue: can we learn something from these non-Western experiences, or are they so bound to a specific culture that no cultural transfer is conceivable?

Needless to say, this paper has no ambition whatsoever to cover a field of inquiry that can be compared, metaphorically, to an almost endless landscape. Rather, I will illustrate less familiar ways of coping with wrongdoings, leaving aside far better known experiences such as those of the various truth and reconciliation commissions.

Punishment as retribution

Basically, when we discuss punishment we are confronted with two points of view.

The first argues that wrongdoings should be punished, regardless of what the lawbreaker's future conduct can be.[2] People who violate the law must be punished because punishment is what they deserve (thus the ideology of retribution is also known as the "just deserts" ideology). As has been said, "central to this retributivist argument is the notion that the purpose of punishment is to place blame on the offender for the offence committed".[3] Fundamentally, it is the modern formulation of the ancient "eye for an eye" logic.

It is a view that has been heavily criticized – for one thing, because it is premised on the assumption that offence and sanction are homogeneous entities. But since we are unable to establish an equivalence between the punishment imposed and the crime which has been committed, how can the sanction that may be inflicted be considered retributive? I think hardly anyone can argue that the pain and suffering caused by theft or assault or murder are comparable to the pain and suffering produced by the loss of liberty through imprisonment. Days, months, years, a whole life spent in a cell mean miseries the degree of which can be

1 By customary laws I mean established patterns of behaviour within a particular social setting. They are also called traditional laws.

2 H. L. A. Hart, "Prolegomenon to the principles of punishment", in H. L. A. Hart, *Punishment and Responsibility*, Oxford University Press, Oxford, 1968; Norval Morris, *The Future of Imprisonment*, University of Chicago Press, Chicago, 1974.

3 George S. Yacoubian, "Sanctioning alternatives in international criminal law: Recommendations for the International Criminal Tribunals for Rwanda and former Yugoslavia", *World Affairs*, Vol. 161 (summer 1998), pp. 1–3.

measured by no one except the inmate himself (and his relatives). Nor can retributivists overcome this objection by substituting the concept of proportionality for the notion of equivalence.[4] The statement according to which the most serious punishments should be reserved for the most serious crimes – in the sense that the severity of the former should be *proportionate* to the gravity of the latter – is untenable for the very same reasons as those given above.[5] Moreover, there is plenty of evidence showing that both crime and punishment are socially and culturally constructed terms (remember, for instance, that not so long ago homosexuality was considered a crime) and therefore vary over time and space.

The deterrent effect of punishment

The utilitarian perspective

According to the other, and probably most influential, view on the criminal policy of the modern state, it is argued that a carefully calculated punishment can be designed for each crime so that the gain from the crime is offset by the punishment. Unlike the retributivist idea, this standpoint, which is historically linked to utilitarian thinkers such as Beccaria (1744) and Bentham (1781), justifies the pain and suffering inflicted on the perpetrator if, and only if, more pain and suffering (caused by more crime) are avoided. In reality, the infliction of pain is supposed to act not only on the perpetrator (*special* prevention), but on the "others" as well, the law-abiding citizens who might otherwise be tempted to violate the law (*general* prevention). A further question under discussion is whether the deterrent effect should be attributed to the *level of punishment* (the harsher the sanction, the higher the compliance) or to the *probability of sanction* (the risk of being arrested, tried and condemned), or to both.

Without going into the legal and philosophical debate elicited by the utilitarian position, let me just mention that even this perspective does not escape my foregoing critique of the retributivist idea, namely that punishment and crime are incommensurable entities. Equally incommensurable are the pain and suffering they cause.

Nevertheless, in spite of the theoretical and technical difficulties that it encounters, the notion that sanctions do – under certain given conditions mainly related to the efficiency of the sentencing system – have a preventive effect on crime is strongly held by common people, legal scholars and, last but not least, politicians. Indeed, the deterrent effect of punishment is usually taken for granted: "The notion of the general preventive effect of punishment is so deeply ingrained in the "common sense thinking" of society, that questions about its actual

4 Andrew von Hirsch, *Censure and Sanctions*, Oxford University Press, Oxford, 1976.
5 For a thorough review of theories centring on deserts and proportionality, see Michael Tonry, "Obsolescence and immanence in penal theory and policy", *Columbia Law Review*, Vol. 105 (4) 2005, pp. 1233–75.

existence are frequently not raised and remain unasked … In this sense, the notion of the general-preventive effect of punishment constitutes a prevailing *paradigm* in society.''[6] In other words, the burden of proof lies with those who deny this notion.

It goes without saying that the whole issue is far from being a mere theoretical controversy, for accepting the idea that punishment ''works'', in the sense that it helps to make perpetrators and others refrain from violating the law, implies that we are willing to harm some human beings through fines and/or imprisonment and, as an ultimate resort, to kill them. Without going too far into the death penalty debate, I must mention that I strongly reject on ethical grounds any form of capital punishment. And even in the light of the empirical evidence, defence of the death penalty is hardly tenable. The hitherto most comprehensive review of the new deterrent studies on the impact of the death penalty on murder points out a series of unacceptable methodological errors, such as drawing ''causal inferences from a flawed and limited set of observational data and the failure to address important competing influences on murder''.[7] Not to mention ''the most important theoretical misspecification of omitting the incapacitative effects of imprisonment and life without parole (LWOP) sentences in particular''.[8]

Let us now turn to the less dramatic question of whether the various forms of curtailing individual freedom have a deterrent effect on behaviour.

On special prevention

The available data provided by a relatively large amount of research on this subject do not prove that punishment has a significant deterrent effect. On the contrary, recent findings[9] indicate that sanctions may increase recidivism:

> ''[B]oth longer time served in prison and serving a prison sentence versus community-based sanction are associated with slightly higher recidivism rates. Similarly, shock probation, shock incarceration, and other such programs that introduce offenders to the severity of criminal justice in an attempt to deter from criminal activity do not decrease subsequent offending and, indeed, seem to exacerbate it.[10]''

6 Thomas Mathiesen, *Prison on Trial*, Sage, London, 1990.

7 Jeffrey Fagan, ''Death and deterrence redux: science, law and causal reasoning on capital punishment'', *Ohio State Journal of Criminal Law*, Vol. 255 (4) (2006), p. 261.

8 Ibid., p. 269.

9 There is quite a large amount of empirical evidence showing that incarceration tends to create and or reinforce criminal careers. Mathiesen, above note 6; Amedeo Cottino, *Vie de Clan*, L'Harmattan, Paris, 2004.

10 M. Lipsey, N. N. Landenberger and G. L. Chapman, ''Rehabilitation: an assessment of theory and research'', in C. Sumner (ed.), *The Blackwell Companion to Criminology*, Blackwell, London, 2004, p. 217.

On general prevention

As to *general* prevention, we have first to recall that deterrence theory posits a clear relationship between knowledge of enforcement actions and compliance. The law-abiding citizen is described as a subject who knows what happens to non-compliant others and therefore fears the consequences of non-compliance. But, as we all know, the reality of crime is many-sided, and there are several reasons why people comply or, on the contrary, disobey. For example, a law-abiding behaviour may be motivated much more by the fear of *informa*l sanctions, ''such as damage to a company's reputation or to an environmental manager's job or professional standing'',[11] than by the perception of the risk of being fined (or imprisoned). Furthermore, ''compliance is much improved if mild law [law backed by non-deterrent sanctions in inducing compliance; editor's note] is endogenously chosen, i.e., self-imposed''.[12]

Tyran and Feld have brilliantly illustrated the complexity of the situation by taking littering as an example.

> ''Clean streets are a classic public good … fines for littering are usually quite low, i.e., given that the anti-littering ordinances are an example of mild law it is surprising from an economic perspective that not all people litter on streets. However, in real life of course, not all the people are the same. Some people would not litter even if there were no laws against littering. A second group of people would litter if there were no anti-littering ordinances, but may obey an anti-littering ordinance out of an internalized respect for the law. Enacting the anti-littering ordinance (a ''deliberate reminder'') may activate respect in these people and therefore reducing littering. A third group of people make their behaviour dependent on how other people behave.[13]''

By and large, and going beyond the unresolved[14] methodological problems, it appears difficult to substantiate the theory of deterrence, last but not least if we consider that the same conclusion, namely that there are no strong elements supporting that theory, has been reached by investigations dealing with very diverse topics such as ''drunk driving''[15] and ''environmental crime''[16] and studies centred around the deterrent effect of harsher punishments.[17] In particular,

11 Jean-Robert Tyran and Lars P. Feld, ''Achieving compliance when legal sanctions are non-deterrent'', *Scandinavian Journal of Economics*, Vol. 108 (1) (2006), p. 139.
12 Ibid., p.135.
13 Ibid., p.139.
14 See Gary Kleck, Brion Sever, Spencer Li and Marc Gertz, ''The missing link in general deterrence research'', *Criminology*, Vol. 43 (3) (2005), pp. 623–59. They remark that there is a missing link between aggregate punishment levels and individual perception of punishment and therefore raise serious doubts about deterrence-based rationales for more punitive crime-control policies.
15 William N. Evans, Doreen Neville and John D. Graham, ''General deterrence of drunken driving: evaluation of recent American policies'', *Risk Analysis*, Vol. 11 (2) (1991), pp. 279–89.
16 D. Thornton, N. Gunnigham and R. Kagan. ''General deterrence and corporate environmental behaviour'', *Law & Policy*, Vol. 27 (2005), pp. 262–88.
17 Cheryl Marie Webster, Anthony N. Doob and Franklin E. Zimring. ''Proposition 8 and crime rates in California: the case of the disappearing deterrent'', *Criminology & Public Policy*, Vol. 5 (3) (2006), pp. 417–48.

these authors show that there is no evidence that crime decreases after the imposition of harsh sentencing policies.

Probably one basic weakness of the deterrence theory is the underlying assumption, namely that human beings are rational actors – that is, people who choose a given course of action after having calculated and weighed up the pros and cons thereof. This *a priori* assumption – for which we are sadly indebted to much liberal economic thinking – envisions the person taking action as a *homo oeconomicus*. In so doing, it encompasses only one aspect of human behaviour and rests on a fragile foundation.

Are there any conditions under which punishment may have a deterrent effect? A general model

The limits of a viewpoint premised on the idea that potential deviants are rational, calculating individuals have led the American criminologist William Chambliss[18] to develop a theoretical model which, to my knowledge, has never received the attention it deserves. What Chambliss does is to specify, in very abstract terms, some conditions under which a deterrent effect of punishment is plausible. To do so, he views the criminal scene in terms of two variables – the perpetrator's *behaviour* and his *commitment* to the criminal action.

For simplicity's sake, these variables are treated as if they were dichotomous.[19] Thus the behaviour can be either instrumental or expressive, the commitment either low or high (Figure 1).

An instrumental behaviour is a goal-oriented comportment – that is, carried out by a rational actor on the basis of a cost–benefit analysis. What the rational actor does, before he makes the decision to carry out an unlawful act, is to evaluate alternative courses of action on the basis of the subsequent consequences. And among these consequences he includes the risk of being punished.

Unlike instrumental behaviour, expressive action represents an end in itself. It is, for instance, the case of the conscientious objector, the young person who refuses, on a moral basis, to bear weapons. He is neither interested in nor affected by the consequences of his action.

The commitment is low when the decision to break the law is due to occasional factors rather than to specific, stable motivations. Conversely, a highly committed person is one who has chosen to centre his life on a criminal activity. Individuals who have chosen a criminal career are, compared with law-abiding subjects, presumably less sensible to the threat of the sanction and/or will take the risk of being punished as a professional cost. In other words, the higher the

18 William J. Chambliss, *Crime and the Legal Process,* McGraw-Hill Book Company, New York, 1969.

19 It should be noted that general, abstract models – in particular taxonomies – display advantages but also disadvantages. On the one hand, we appreciate their simplicity: basic trends, correlations and the like are immediately shown. On the other hand – particularly when, as in our case, we work with dichotomies – the borderline between simplification and oversimplification can easily be blurred, and the risk of distorting the reality sought is high. Moreover, the concepts used may be manifold: clearly, the outcome will differ, depending on the meaning we attribute to them.

		Level of commitment to criminal action	
		Low	High
Type of behaviour	Instrumental	A	B
	Expressive	C	D

Figure 1. A typology of actions and motivations

commitment, the lower the probability that punishment will have a deterrent effect.

The fact that the level of commitment makes a difference in terms of deterrence was shown quite long ago in a study by Cameron[20] on shoplifting. She identified two types of shoplifters: the *booster* and the *snitch*. The former is the professional thief for whom stealing is a way of life. The latter, the snitch, is very much the middle-class housewife or the ordinary citizen who ''contributes'' to the family budget through more or less occasional stealing. The interesting point is that scrutiny of the supermarkets' records revealed that the snitch, unlike the booster, rarely if ever appeared more than once in the registers. Apparently, he or she was not willing to take the risk of being caught again. Presumably, here, deterrence worked.

If this reasoning is plausible, we will expect in general a maximum of deterrence in (A), where low commitment is combined with instrumentality and, conversely, a minimum in (D), because expressiveness is combined with high commitment (this is the case of the ''crime of passion''). In the other cases the preventive effect is probably very low, at least as far as (B) is concerned. Here the risk of punishment is, as it were, included in the ''costs'' of the criminal profession.

Chambliss has unquestionably developed a fruitful starting point for more specific analyses, but I believe that we cannot ignore group support, for we know[21] that it makes quite a difference, in terms of commitment, whether the individual initiative to break the law can count or not on some sort of approval among other people – friends, relatives, comrades, affiliates and so forth (not to forget the bystanders). Good, though indirect, evidence of this is provided by the persistent strength of criminal organizations such as the Mafia, Camorra and the like, despite the extremely severe penal legislation enacted by the Italian government during the last thirty years.

So far we have been looking at commitment in terms of personal vs. collective involvement in deviant behaviour. But we could also look on the bright side, so to speak, by viewing commitment as a prerequisite for respect for the law.[22] Needless to say, this topic goes far beyond the scope of the present article.

20 Mary Owen Cameron, *The Booster and The Snitch*, Free Press of Glencoe, Glencoe, Ill., 1964.
21 Edwin Sutherland, *White Collar Crime*, Yale University Press, New Haven, 1983. Amedeo Cottino, *''Disonesto ma non criminale''. La giustizia e i privilegi dei potenti*, Carocci, Rome, 2005.
22 I owe this suggestion to Anne-Marie La Rosa.

What can be said here, in a very sketchy and general way, is that law-abiding behaviour is usually considered to be the result of several convergent forces coming from within the individual (his conscience, his value system, etc.) and from his surroundings, and among the latter I would name two: control from above (the so-called formal control) and control from the peer group.

From a slightly different perspective, Zimbardo[23] stresses the poor explanatory power of the traditional model centred on the law-breaker and his disposition, convincingly arguing that it is context and structure that play a paramount role. True, the author deals with situations of extreme violence in combat zones, but "understanding how good people turn evil" is just another more suggestive and more dramatic way of asking why (ordinary) people become lawbreakers. According to this author, in contexts where the very basis of the military tends to be homophobia, misogyny and dominance over all enemies, the physical and psychological violence – even in its most horrendous forms – systematically inflicted upon civilians and prisoners (from the Rape of Nanking and the My Lai massacre to the Abu Ghraib abuses and torture) can be largely explained by situational and systemic factors. But if these factors do indeed have a much greater explanatory power than the individual perpetrators' dispositions, then – argues Zimbardo – the legitimate punishment per se of individual perpetrators risks missing the point.

Actually, both the famous Stanford mock prison experiment[24] and the real Abu Ghraib prison have proved that situations matter. "Social situations can have more profound effects on the behaviour and mental functioning of the individuals, groups, and national leaders than we might believe possible."[25] In particular, "situational power is more salient in novel settings, those in which people cannot call on previous guidelines for their new behavioural options. In such situations the usual reward structures are different and the expectations are violated."[26] But systems matter as well, because they provide "the institutional support, authority, and resources that allow situations to operate as they do".[27] Therefore, dehumanization – "a condition where others are thought not to possess the same feelings, thoughts, values, and purposes in life that we do"[28] – this basic, fearsome prerequisite for perpetrating any unimaginably cruel form of violence – is no longer a problem of "bad apples" but of "bad barrels". To sum up, "bad systems create bad situations create bad apples create bad behaviors …".[29]

Finally, as for determining responsibility, I am in favour of a perspective that goes beyond the concrete responsibility of the individual perpetrator and puts the blame on the structure, on the organization. And in my view – for I purposely

23 Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil*, Random House, New York, 2007.
24 The 1974 Stanford experiment is described in detail in Zimbardo, above note 23.
25 Ibid., p. 211.
26 Ibid., p. 211.
27 Ibid., p. 236.
28 Ibid., p. 222.
29 Ibid., p. 445.

ignore situations in which the violation of humanitarian rights seems to be an autonomous choice of a single mind – the burden of proof lies with those who deny this perspective. Findings in other fields of research, such as studies on economic crime,[30] do in fact show the feasibility of an approach viewing corporations that commit criminal actions as fully responsible. ''A corporation does not, in a physical sense, have a brain with which to form intent or ability to act required for traditional criminal liability. However it does have a nerve centre composed of decision-making processes that govern corporate conduct and make legally binding decisions.''[31]

Let us now take a look at some other ways which human beings have invented to tackle the issue of deviant behaviour. A confrontation with other notions of offence, offender and punishment may be suggestive of new ideas and hypotheses.

Crime and customary law

There are societies or communities in which the dominant way to respond to crime is peaceful. It is peaceful in the sense that the main aim of the social response is first and foremost not to punish the offender but to help him. And this is made possible because sight is never lost of the victims or of the surrounding social context. As Rouland has aptly observed, ''en matière délictuelle c'est moins la faute qui est sanctionnée que l'absence de réciprocité et d'équilibre des comportements entre les droits et les obligations'' – it is less the offence that is punished than the absence of reciprocity and balance in terms of rights and obligations.[32] Also, it is not infrequent that crime is viewed as a wound that must be healed, rather than as an offence in the Western penal sense of the word. This in turn greatly affects the judicial role in sentencing. Since the final result sought is a solution acceptable to all concerned, constant attention is paid to both restoration (a process that renews damaged personal relations and community ties) and reparation (the process of making things right for the victim).

Needless to say, the language used in these legal practices is everyday language. Similarly, important legal notions of Western law have no equivalent in traditional law, and traditional legal thinking likewise follows paths other than those we are used to taking in the West.

The Navajos: the criminal process as a peacemaking process

According to the Navajos, the response to crime is fundamentally inspired by the idea that the trial's goal is to make peace. As Robert Yazzie, chief justice of the

30 Michael Gilbert and Steve Russell, ''Globalization of criminal justice in the corporate context'', *Crime, Law and Social Change*, Vol. 38 (3) (2002), pp. 211–38.
31 Ibid. p. 220.
32 Norbert Rouland, *Anthropologie juridique*, Presses Universitaires de France, Paris, 2nd edn, 1990.

Navajo nation, puts it, ''Our sentencing policy provides for peacemaking *before* a charge is filed, *after* one is filed, *before* sentencing and *after* sentencing''.[33] The centrality of peacemaking and the priority given to the restoration of social relations reflect a very specific way of looking at the offender. To the question ''who is he?'' the answer is: ''he is someone who shows little regard for right relationships. That person has little respect for others. Navajos say of such a person, ''*He acts as if he has no relatives*''''.[34] But in the Navajo way of thinking, Chief Yazzie explains, when someone acts this way, ''his relatives have a certain responsibility: It is shameful to have a relative who acts out against others. That hurts *your* relationship with others. So, you assume responsibility for your relative's actions. The same holds true of victims. If my relative is hurt, I have a responsibility to step in and help''.[35] When this happens, the relatives are brought in and a peacemaker is appointed.

And here begins what is central to the whole procedure: the ''talking things out''. This is a process in which not only the relatives on both sides participate, but also friends, neighbours and anyone else involved. After a prayer, usually conducted by an elder, the participants are invited to tell what happened and how they feel about it. When everybody has spoken, the peacemaker applies the lore (''forms of precedents which everyone respects'') to the problem. It is important to note that this is not a case of mediation: the peacemaker has a very clear opinion about what he has heard during the ''talking things out''. Finally, when the prayer has been said and all feelings have been expressed, people usually reach a consensual decision about what to do, sign a document and plan what has to be done in practical terms.

Meanwhile, something very important occurs between the victim and the traditional ''probation officer'' (most often one of the victim's relatives): the problem of restitution is addressed. The Navajo term for it is *nalyeeh*, which can be translated as ''restitution'' or ''reparation''. The aim is not correction of the offender but correction of his action. In the negotiation that follows,[36] agreement is reached on an amount which can often be merely symbolic. In conclusion, to cite Yazzie's words once again, ''Peacemaking … makes offenders look at themselves and at the consequences of their actions. Many victim assistance programs forget that victims have families, and they are one of the best resources to help. That's the Navajo response to crime in a nutshell.''[37]

33 Robert Yazzie, ''The Navajo response to crime'', *Justice as Healing*, Vol. 3 (2) (1998), p. 3 (emphasis added).
34 Ibid., p.1 (emphasis added).
35 Ibid., p.2 (emphasis added).
36 Sometimes the negotiations can be interrupted by the intervention of a non-Indian court, as in the following example: ''[F]amilies of three young men who raped a young Navajo woman were about to transfer twenty-one heads of cows to the victim's family. A state court had jurisdiction, and it refused to enforce the agreement. The woman was shamed for not having a public symbol of her innocence delivered to her home and she got nothing'' (ibid., p. 3).
37 Ibid., p.4.

Native Hawaiians "setting to right" (*ho'oponopono*)

The basic feature of Hawaiian culture is "the continuous preference by Hawaiians of employing a social interaction style that stresses interpersonal harmony and avoidance of overt conflict".[38] *Ho'oponopono* is precisely a method to cope with any event that might threaten or undermine this harmony. It therefore has, in principle, a broad applicability, ranging from conflicts within a family via the domain of social problems and maladjustment to actual deviance and crime. The key phases of this practice are as follows: an *opening*, with assessment and preparation of the participants and formal statement of the problem; a *discussion*, leading to identification of the problem; a *resolution* through confession, forgiveness and, when necessary, restitution; and a *closing*. Of all these phases no single one is more important than another; rather, they follow each other in a logical sequence of built-in controls over the "degree to which the group holds the values of co-operation, trust, and interconnectedness, which are implicit in *ho'oponopono*".[39] And to ensure this interconnectedness is one of the main tasks of the leader, traditionally a senior family member or a respected outsider.

What makes this method particularly interesting for our purposes is that it has been used both in a variety of settings where people are not part of the Hawaiian community and among socially unrelated subjects. How this has been successful is difficult to explain in detail. Certainly it has to do with cultural processes which help to transcend cultural boundaries. What can be said here is something quite obvious, namely that the transfer of an indigenous problem-solving process into another cultural context is doomed to failure unless one has some knowledge of "local knowledge". This means starting with a reconstruction of the socio-economic and cultural scene in which the event we intend to cope with (whatever the problem may be) has occurred. Also, we need to map out the situation to ascertain, for example, whether other legal systems exist alongside the dominant one and what sort of justice is at work. Perhaps basic notions such as "offence", "offenders" and "victim" do not have the meaning we Westerners usually attribute to them. Needless to say, this issue can become crucial when focusing on closed groups such as military units, crews, teams and so on, since these are groups which tend to elaborate their own normative codes, sometimes in opposition to the official legal system. The consequence thereof can be that criminal acts by group members are no longer treated as such. Principles of solidarity and loyalty may exert such strong pressure on a group of weapon-bearers that violations of humanitarian law by some of its members are no longer perceived as such, or become justified by upholding these values. Here we have a clash between certain military ethics[40] on the one hand and the law on the other.

38 Victoria Shook, *Ho'ponopono*, University of Hawai'i Press, Honolulu, 1985, p. 4.
39 Ibid., p. 90.
40 See, e.g., Richard A. Gabriel, *To Serve with Honor: A Treatise on Military Ethics and the Way of the Soldier*, Praeger, New York, 1982.

To conclude this section I should like to point out that the idea of helping the offender to ''make things rights'' is not totally alien either to Western criminological and legal thinking or to the practice of the courts. In the last twenty years, restorative and reintegrative programmes have been implemented which draw support from aetiological theories emphasizing the pivotal role played by community and family bonds. This is for example the case of the concept of reintegrative shame introduced by Braithwaite.[41] In brief, the author's argument goes as follows: crime rates vary, depending on the different processes of shaming wrongdoing. In Japan, where shaming exercises an extraordinary power on citizens, crime rates are low. In his opinion, this preventive power is due to the presence in that society of characteristics such as communitarianism and interdependency, which reduce exposure to white-collar crime as well as common crime. He holds that shaming, however, becomes counterproductive when it stigmatizes the deviant – that is, fails to include a reintegrative element.

It is difficult to say how effective this approach is. In a recent investigation carried out in Russia,[42] the authors conclude that ''the results are mixed. Disintegrative shaming is associated with future misconduct, but being reintegratively shamed is also positively predictive of projected crime/deviance''. These ''mixed results'' may be due, as these two scholars suggest, to a theory which needs further refinement – but perhaps also to the fact that shaming presumably has different connotations in Japan and in Russia.

Final considerations

Let me summarize in a few points what I have tried to say in this article. To begin with, it seems clear that neither theory nor empirical data support general statements about the deterrent effect of punishment (fines and/or imprisonment). Instead, they warn against an uncritical, generalized use of negative sanctions. That said, and following Chambliss's line of thinking, it may be conceded that the (threat of) punishment may have an individual preventive effect in cases where subjects (individuals or groups) without particular commitment act rationally after calculating the pros and cons (category A). Whether and to what extent this ideal type of perpetrator can be identified with specific types of criminal behaviour – for example, human rights violations – is an open question which must be tested empirically. On a common-sense basis, however, I am willing to hypothesize that cases where weapon-bearers plan criminal actions, individually or in groups, directly or indirectly (a typical case of instrumental behaviour), their commitment does not have to be high. War narratives provide many examples of repeated violations of human rights committed by the same perpetrators, and I am inclined to believe that, in an unknown number of cases, the violations are experienced by

41 John Braithwaite, *Crime, Shame and Reintegration*, Cambridge University Press, Cambridge, 1989.
42 Ekatarina V. Botchkovar and Charles C. Tittle, ''Crime, shame and reintegration in Russia'', *Theoretical Criminology*, Vol. 9 (4) (2005), pp. 401–42.

the perpetrators as routine. We know that even torture may be turned into an ordinary job.[43]

Second – and coming to the two anthropological examples of traditional law – it is evident that the Navajos' peacekeeping process, unlike what has happened in the Western judicial process since the creation of the modern state, is firmly centred on the victims and the social relations surrounding them. For the Navajos, all the conflicting parties are owners of the conflict. To use Christie's terms, the conflict is their property[44]. Consequently, the potentially disruptive effects of a confrontation limited to only offender and victim are on the one hand strongly curtailed. On the other hand, the very fact that a conflict is ''common property'', in the sense that it belongs to all subjects engaged in the judicial process, tends to encourage a conflict resolution no longer restricted to the offender–victim relationship, but open and involving the broader fabric of society. If this can reasonably be considered as an overarching goal of any judicial system, then the Navajos have something to teach us.

What I have just said is true, too, of the Hawaiian *ho'oponopono* method, but it calls for a further comment. A striking result of this traditional way of coping with conflicts is that it seems to work even when the parties involved belong to different cultures and/or are not related to each other by kinship or other social ties. Without denying how problematic the transfer of a non-Western, indigenous problem-solving process to a culturally different context can be, this seems to me a case in which it may, with all due caution, be worth leaving the door open for further exploration and experimentation.

43 There is nowadays a considerable amount of evidence on what has been called the ''banality of evil'' – Hannah Arendt, *Eichmann in Jerusalem*, Praeger, New York, 1963 – or the ''normality of evil'' – Cottino, above notes 10 and 22.

44 Nils Christie, Conflicts as Property, *The British Journal of Criminology*, 17, pp. 1–15, 1977.