The Theory and Practice of Sentencing : Are They on the Same Wavelength? (Bill C-41 and Beyond)

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In 1981, Nils Christie, a noted professor of criminology at the University of Oslo, wrote a book called *Limits to Pain*.[1] He began his book :

> *Imposing punishment within the institution of law* [...] *means inflicting pain, intended as pain. This is incompatible with esteemed virtues, like kindness and forgiveness, but this incompatibility is usually hidden by rationalizations or euphemisms. Sometimes* [...] *pain is disguised as treatment, but this attempt to manipulate the offender is unreliable and often produces new injustices. At other times, punishment is accounted just, when it is made to fit the crime. But attempts to ascribe a just measure of pain to each criminal act result in rigidity and insensitivity.*
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> *These are the two poles* [...] *between which penal theory and practice usually oscillate. My own view* [Christie continues] *is that the time is now ripe to bring these oscillatory moves to an end by describing their futility and by taking a moral stand in favour of creating severe restrictions on the use of man-made pain as a means of social control.*

It is those "oscillatory moves" that also concern me.

My concerns are so diffused that I found it hard to decide where to start a discussion concerning them. I decided to begin by looking at the sentencing legislation recently enacted. The first stop in that process is the statement of the fundamental purpose of sentencing. That purpose is now legislatively inscribed in section 718 of the *Criminal Code*.

> *718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives* :
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> *a) to denounce unlawful conduct;*

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1. N. Christie, *Limits to Pain* (Oslo : Scandinavian University Press, 1988).

b) to deter the offender and other persons from committing offences;

c) to separate offenders from society, where necessary;

d) to assist in rehabilitating offenders;

e) to provide reparations for harm done to victims or to the community; and

f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

One can say, I suppose, that that statement of purpose delineates the theory of sentencing.

The fine-sounding words in the first part of the section appear to contain a presumption which may not mesh well with reality. The purpose of sentencing is said to be one of contribution. Contribution to what? To the "maintenance" of a "just, peaceful and safe society". To "maintain" means to "preserve" what you already have. The section appears to contain a presumption that we now have a "just peaceful and safe society". The imposers of sentences, who of course are the judges and who in the view of Prof. Christie are the inflicters of pain — are in effect directed by the section to impose the sorts of sanctions that will maintain — preserve — what we already have.

In the view of many living in the mainstream, perhaps, the presumption is justified and the goal to maintain the *status quo* is laudable and proper.

In the view of many marginalized from the mainstream (and of some living in the mainstream), the presumption is unjustified and the goal sadly wanting. In their view, the purpose ought to be restructured to provide first for a contribution to the *establishment for all* of a just, peaceful and safe society and, once established, for the maintenance of that society.

Is all this a quibble? It certainly is not for the aboriginal inmate of a Saskatchewan provincial correctional institution where 72% of the inmates are aboriginal while only 15 or so percent of the population of the province is aboriginal. For them and for many in the province, aboriginal and non-aboriginal alike, the society we have is not one that ought boldly to be held out as "just, peaceful and safe". To maintain the society we have is not a goal they would support and endorse. They want the society changed — in whatever way it takes — so that the correctional institution reflects the aboriginal component of the general population. For them a society so changed would be much closer to one they would find "just" and one they would agree to "maintain" or "preserve".

There are people other than aboriginals in our society for whom the choice of the word "maintenance" without the words "establishment for all" in the statement of purpose is not a quibble. I have chosen the context of an aboriginal offender as an example to emphasize my point because that context illustrates so starkly the disharmony between the theoretical and the practical. For that same reason I will continue using the context of an aboriginal offender as an example to demonstrate other incongruities between the theoretical and the practical. But I underscore that there are many non-aboriginals in our

society who are in identical or similar positions and whose contexts could serve equally well as examples of the points I desire to make. Young offenders and many adults brought up in homes devoid of love and care, where disrespect, violence and confrontation were the dominant socializing forces, could serve as good examples. Those unfortunate persons whose chances for a normal life were cut short in the womb by their mothers' unreasonable use of alcohol — the fetal alcohol syndrome cases — would also serve as good examples. Their inability to make choices and to realize the consequences of their acts propel scores of them into our prisons. A statistic I heard the other day but have been unable to confirm (and therefore hesitate to use it) tells us that 23% of young offenders who are put in closed custody in British Columbia suffer from some degree of fetal alcohol poisoning.

Let me turn to the "objectives" listed in section 718 that are prescribed for the "just sanctions". Take this scenario. A sentencing judge has before him a nineteen-year-old aboriginal convicted of breaking and entering a commercial establishment and committing therein the indictable offence of theft. His record shows three previous breaking and entering convictions as well as convictions for assault, impaired driving and breach of probation. It is clear to the judge from the pre-sentence report that the young man has no material assets and never has had any. His parents whom he hardly sees have no material assets to speak of and have never had any. He has little or no self-worth. The terms "honour" and "dignity" somehow seem out of place when applied to him as a possessor of those qualities. His life has been rudderless and totally lacking in motivation. Violence, confrontation and alcohol predominated in his early and later life. He is unemployed and uneducated. His chances of obtaining employment are, frankly speaking, nil or approaching nil. His previous sentences consisted of probation orders and terms of imprisonment. I think I have given sufficient details for you to draw in your own minds a profile of this offender. The Crown's position is that he has been dealt with quite leniently in the past and has not responded. He is a repeat offender and must be sent to jail if he is to learn his lesson and the public is to be adequately protected.

The sentencing judge — a just man — looks at the first objective outlined in section 718 and says to himself : "I must denounce this offender's unlawful conduct. One of the values of our society is that those who have worked hard and own material goods have the right to enjoy their proprietorship without interference. They must not be deprived of that pleasure by someone like this offender who took those goods without the owner's consent. Society, through me, must send a message to him, the offender, about our values and how we feel when someone stomps on those values".

The judge has a problem. He knows what message to send and arguably has an effective tool to send the message. But the critical question is : will the message be received? This young offender has no idea what it means to work for and acquire material goods. He has never had that pleasure. Nor have his parents. Nor have his friends. The feeling is quite alien. It is not a value in his society. He has never experienced the negative feeling of having been deprived of that pleasure. If the judge sends the denunciatory message, how comprehending will his receiver be? The chances are very good that the message will simply not get through. The judge may be a good sender, but the intended recipient, by reason of a web of circumstances largely not ascribable to him and given the nature of the message, is not a very good receiver.

The nature of the message is not the only problem. If the judge's choice of medium for sending the message is imprisonment, the imperviousness of the intended recipient will not be diminished. Indeed, it may even be enhanced. Someone who has lived most of his life in pain, violence and confrontation — a very negative experience — is not likely to receive what is supposed to be an affirmative message by the infliction of further pain.

In the end, the judge may well be entitled to ask himself : "Is there anything practical about sending this person to jail in order to denounce his unlawful conduct? It may make me and other property owners in our society feel good, but is that what denunciation as contemplated in that first objective is all about"?

The judge then moves to the second objective and looks at the first part : "to deter the offender". The judge's eye skips to the fourth objective : "to assist in rehabilitating offenders". The judge says to himself : "These two objectives share the same ultimate goal, namely to persuade this offender from ever committing this kind or any other kind of offence. Persuasion here is the key. The offender must be persuaded he has something to lose if he ever again commits another offence".

This offender has no material goods to lose, no job to lose and no hope of ever having one, no self-worth to lose, no dignity to lose, no honour to lose. He has nothing to lose. How am I supposed to persuade him that he *has* something to lose by committing another criminal offence? Will sending him to jail by some magical process persuade him he *has* something to lose when in fact he has *nothing* to lose? Will sending him to jail give him material goods, a job, self-worth, dignity, honour — so that in the end he has something to lose"?

Furthermore we presume that this offender, like most offenders, acted freely when he chose to do what he did. But is that a fair presumption? Or is it more fair to presume that he did, more or less, what he was socialized to do? Does one deter that sort of an offender by throwing him into jail? Does he respond to jail in much the same way as someone raised and living in the mainstream of society? A businessman, for example? Or should one think more in terms of resocializing him? And jail does not quickly come to mind as the learning institution for that process.

The judge can hardly be blamed for asking : "Is there anything practical about sending this offender to jail in order that he may be deterred from committing this and other offences and in order that he may be rehabilitated and persuaded to live a crime-free life"?

The judge then turns to the second part of the second objective : To deter ?other persons from committing offences". "Who are those other persons"? the judge asks. The law-abiding citizens who constitute the majority of the population are not the intended targets of this general deterrence message. Their moral values, philosophies and lifestyles have little or no room for the commission of criminal offences. For them the message is superfluous. The message is obviously intended for those in our population who may be inclined to commit offences — for those who fall into a category much like that of the offender now standing before me waiting to be sentenced. The judge wonders : "If I am right in concluding that a term of imprisonment is not a practical way to persuade this

particular offender before me from committing further offences, am I not right in also concluding that sending him to jail is not going to have much practical effect in persuading *others*, who are like him, not to commit criminal offences? And of course it would be highly unethical and entirely wrong in law to make an example of him by sending him to jail for no other reason than to deter others from committing offences. The law does not permit stringing him out on a line to dry, so to speak".

The judge also considers the level of esteem in which general deterrence as a sentencing objective is now held in many learned quarters. This level of esteem is aptly summarized by Professor Alan Manson[2] in a recent article, where he says :

> *What about general deterrence, the often-used rationalization for increased confinement? Certainly, some judges continue to have faith in it and it remains as one of the 'functional considerations' listed when discussing sentencing in general terms. As well, it is now listed as a legitimate objective in section 718(b). Current empirical research and academic opinion suggest that its real utility as a justificatory objective is suspect or limited at best. The Sentencing Commission, citing its own literature review and the work of the U.S. Panel on Research and Incapacitative Effects concluded that deterrence research either produced no evidence of a deterrent effect or at best offered caution 'against any dogmatic belief in the ability of legal sanctions to deter'. The Commission, like others who have considered this issue, accepted that there is probably a general deterrent effect but that it flows from the overall process of apprehension, conviction and punishment rather than a particular sanction intended to produce a particular result for a category of offences. It concluded that deterrence 'is not a goal that can be attained with precision to accommodate particular circumstances'. Another important view, now widely held, is that whatever general deterrent effect may exist, one does not achieve proportionately greater deterrence from incremental increases in sentences. More recently, a number of experienced judges have questioned the efficacy of general deterrence as a rationale for determining custodial issues.*

The judge concludes : "It looks as if I should rule out general deterrence as a practical reason for sending the offender to jail".

He goes to the third objective : to separate offenders from society, where necessary. The intent here is to incapacitate the offender. If he is in jail, then he is separated from society and while he is separated society will be protected. "But", the judge says to himself, "putting him in jail may be a short-term solution but am I thereby creating a long-term problem?

For example, I know that he is not a member of a street gang today. Will he be one when he leaves jail? Jails, I am told, are some of the best recruiting grounds for street gangs. He is a vulnerable nineteen-year-old. If I expose him to an older group of not-so-vulnerable inmates is he not apt to come out a better criminal? Will I really be protecting

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2. A. Manson, *Finding a Place for Conditional Sentences*, 3 C.R. (5th) 283 at 291.

society by producing a better criminal even though I did protect society for that short while"?

He decides in the end that putting the offender in jail is not very practical to protect society by separating the offender from society for that short while. Moreover, the words "where necessary" should not be overlooked.

So far the judge has considered four of the six objectives. They are what may be called the traditional objectives of sentencing and have been a close part of our present retributive form of justice for many years. They have almost always been invoked by judges when sending offenders to jail. In the case of each objective it is fair to say that the theoretical and practical do not mesh too well when applied to this aboriginal offender.

The judge next considers the fifth objective : To provide reparations for harm done to the victims and the community. Then he looks at the sixth : To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community, and says : "I may be able to do something with these objectives. The first four objectives have been around for some time and, frankly, are partly responsible for that unacceptable disparity in the aboriginal jail population. These two new objectives provide me with some scope I did not have before. They reflect a restorative model of justice as opposed to the retributive model".

His sense of elation is heightened when he reads sections 718.2(d) and (e) of the *Criminal Code*.

> *718.2 A court that imposes a sentence shall also take into consideration the following principles :*
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> [...]
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> *d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
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> *e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

Two related ideas quickly pop into his mind : "I should seriously consider a community-based sanction of some sort and I should investigate the feasibility of a healing circle even at this late stage of the process to arrive at that sanction".

The judge is attracted to the notion of community involvement. For him justice is the responsibility of all citizens, not just the judges, the police, the probation officers, the correctional officers and all those other people in the justice system. After all it is the community as a part of the general society that produces the offenders in the first place. The judge is keenly aware of the American tendency to put their "offender" problems out of mind and out of sight by warehousing people in jails — mostly people marginalized from the mainstream. This is done in the guise of having "professionals", the experts, look after the situation. The judge is aware that there are now more than a million Americans in prison, four times as many as there were twenty years ago. The judge is deeply

concerned about the American tendency creeping into Canadian society. This could result in large concentrations of Canadian prisoners coming to be acceptable and seen as perfectly normal. He muses whether this has not already happened in the case of aboriginal people who are sentenced to jail in such vast numbers. He has always been uncomfortable with the ethical issues involved in inflicting upon another human being the pain of imprisonment. He sees through the rationales, the euphemisms and the cant-like rhetoric a judge often uses in sentencing people to jail. He finds most appealing the idea of restitution, restoration, reparation, the idea of healing the breach that a criminal offence creates between an offender and his victim and between the offender and his community. Eliminating the sense of alienation that an offender must feel and restoring a sense of belonging to the community seems to the judge as such a positive route, when compared to the pain-inflicting route.

All in all a community-based sanction arrived at through the process of the healing circle seems to be the answer.

But the judge's problems have not yet begun. To put his answer into effective practice is a formidable, if not impossible task. Complexities — some call them impediments — are or will be thrown in his way from all sides.

The first of these is a confluence of the public concept of an acceptable sentencing system, the public's mood, and the jurisprudential principle that a sentencing judge ought not to impose a sanction that will tend to undermine the public's confidence in the administration of justice.

A large segment of the public seems to want a binary system of sentencing where the following two premises prevail :

1. Punishment is essential to justice. The offender took an unfair advantage of those who obey the law. To restore the balance, it is necessary to punish. (Interestingly, before it was amended in September 1996, Part XXIII of the *Code* was headed "Punishment");

2. Only imprisonment is punishment. Everything else is an alternative, a leniency, or a letting off.

Another substantial segment of the public has a closely related concept described by Morris and Tonry[3] as a "pernicious tendency to think of criminal sanctions as either punishment or treatment, either pain or beneficent assistance, either the prison [...] or the social worker".

There is very little room in a binary system for treating sanctions as on a continuum with imprisonment at one end and a fine or probation at the other end, and a large variety of intermediate sanctions in between. In a "continuum" system there are no alternatives, no letting off, but simply a sanction appropriate to the circumstances.

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3. N. Morris & M. Tonry, *Between Prison and Probation : Intermediate Punishments in a Rational Sentencing System* (New York : Oxford University Press, 1990) at 176.

The public's mood seems to stem from the notion that criminal offenders, particularly repeat offenders, are the dregs of our society and, in the view of some, not members of our society at all. The offenders need to be "dealt with" by a form of strict control. The infliction of pain is the automatic response. Imprisonment is the only salvation for a safe society, a magic bullet as it were. The corollary of course is this : If only those judges — I heard them referred to the other day by a member of the public who telephoned a radio talk show as "senile old buggers" — would "get with it" and sentence offenders to long stiff terms of imprisonment we would end up with the safe and *peaceful* society we all so desperately want.

The public's mood may well be fed in part by yet another force : the notion that crime-control is a part of our normal economic landscape (as distinguished from the landscape pertaining to justice). Crime-control is becoming or has become an industry. (We are now talking about privatizing jails!) It produces jobs and investment in addition to control. This is something not to be ignored in a society highly motivated by economic forces.

Our conscientious sentencing judge who is not about to undermine the public's confidence in the administration of justice and who wants to fashion the right sentence for the aboriginal offender in front of him, finds himself in a state of perplexity. The public's mood, the public's concept of a good sentencing system and the judge's own ideas about retributive justice and restorative justice have put him into a dilemma.

But that is only the first complexity. The judge knows his sentence will be reported in the news media. If he resorts to a community-based sanction, with emphasis on restitution and restoration instead of punishment and pain, he can see the headline now : "No imprisonment for X Y". The subliminal message, of course, is that the judge did the wrong thing. The "thing" is wrong because it is something different from what the headline writer *cum* editor had in mind. An editorial will follow. The editorial writer, more often than not a member of the public, partakes of the same mood as the public and has the same concept of what a sentencing system should be like. He or she is likely to write an article re-enforcing the public's mercurial and sometimes ugly disposition and in effect putting the judge down.

There are of course the political complexities. On the one hand, politicians get re-elected by pandering to public fears and stereotypes. On the other hand, they are quick to employ noble rhetoric and to even reduce it to legislative enactment, but slow to release funds necessary for the machinery to put into practice what the rhetoric seems to imply.

And then there are the bureaucratic complexities. The monolithic bureaucratic behemoth is like a huge ship, very difficult to turn around. Change is not second nature to a bureaucracy.

Although it is not officially a branch of government in the same sense that the legislative, executive and judicial branches are, the bureaucracy in an administrative state such as ours, has and exercises power that makes it the real, albeit unofficial, fourth branch of government — often the most powerful branch.

One must not forget the legal complexities. There is jurisprudence emanating from the Court of Appeal and the Supreme Court of Canada that a sentencing judge can hardly afford to overlook. For reasons not necessary to elaborate, the sentencing paradigm in that jurisprudence is naturally the retributive paradigm.

Our sentencing judge's height of perplexity is making him think that right now he would rather be undergoing a root canal without anaesthetic.

Let us leave our judge in his quandary, his state of acute anxiety, for a while and digress.

Is our sentencing judge savouring pie in the sky when he thinks of restorative justice as a viable component of our criminal law and more particularly, of our sentencing system? Is he just shooting in the dark or does he have something?

Let me first define restorative justice. It is perhaps best to do so by comparing and contrasting it with the model we now essentially have : retributive justice. My research has meant reading any number of books and articles by judges, lawyers, academics, some in the law, some not. One of the best comparisons I have encountered appears in Howard Zehr's book entitled *Changing Lenses : A New Focus for Crime and Justice* :[4]

> *According to retributive justice, (1) crime violates the state and its laws; (2) justice focuses on establishing guilt (3) so that doses of pain can be measured out; (4) justice is sought through a conflict between adversaries (5) in which offender is pitted against state : (6) rules and intentions outweigh outcomes. One side wins and the other loses.*
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> *According to restorative justice, (1) crime violates people and relationships; (2) justice aims to identify needs and obligations (3) so that things can be made right; (4) justice encourages dialogue and mutual agreement, (5) gives victims and offenders central roles, and (6) is judged by the extent to which responsibilities are assumed, needs are met, and healing (of individuals and relationships) is encouraged.*
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> *Justice which seeks first to meet needs and to make right looks quite different from justice which has blame and pain at its core.*

He compiled a chart which contrasts some characteristics and implications of the two concepts of justice. It is a long chart but most revealing and worth reproducing :[5]

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4. H. Zehr, *Changing Lenses : A New Focus for Crime and Justice* (Waterloo, Ontario : Herald Press, 1990) at 211.

5. *Ibid.* at 211-214.

Understandings of Justice

Retributive Lens	Restorative Lens
Blame-fixing central	Problem-solving central
Focus on past	Focus on future
Needs secondary	Needs primary
Battle model; adversarial	Dialogue normative
Emphasizes differences	Searches for commonalities
Imposition of pain considered normative	Restoration and reparation considered normative
One social injury added to another	Emphasis on repair of social injuries
Harm by offender balanced by harm to offender	Harm by offender balanced by making right
Focus on offender; victim ignored	Victims' needs central
State and offender are key elements	Victim and offender are key elements
Victims lack information	Information provided to victims
Restitution rare	Restitution normal
Victims' "truth" secondary	Victims given chance to "tell their truth"
Victims' suffering ignored	Victims' suffering lamented and acknowledged
Action from state to offender; offender passive	Offender given role in solution
State monopoly on response to to wrongdoing	Victim, offender, and community roles recognized
Offender has no responsibility for resolution	Offender has responsibility in resolution

Outcomes encourage offender irresponsibility	Responsible behaviour encouraged
Rituals of personal denunciation and exclusion	Rituals of lament and reordering
Offender denounced	Harmful act denounced
Offender's ties to community weakened	Offender's integration into community increased
Offender seen in fragments, offense being definitional	Offender viewed holistically
Sense of balance through retribution	Sense of balance through restitution
Balance righted by lowering offender	Balance righted by raising both victim and offender
Justice tested by intent and process	Justice tested by its "fruits"
Justice as right rules	Justice as right relationships
Victim-offender relationships ignored	Victim-offender relationships central
Process alienates	Process aims at reconciliation
Response based on offender's past behaviour	Response based on consequences of offender's behaviour
Repentance and forgiveness discouraged	Repentance and forgiveness encouraged
Proxy professions are the key actors	Victim and offender central; professional help available
Competitive, individualistic values encouraged	Mutuality and cooperation encouraged
Ignores social, economic, and moral context of behaviour	Total context relevant
Assumes win-lose outcomes	Makes possible win-win outcomes

The clear winner on paper, according to this chart, is the restorative justice concept. But how will it fare in the real world? We know retributive justice "works", at least in the sense that we know how to use it. Will restorative justice work in both the sense of knowing how to use it and in the sense of producing favourable outcomes and effective results?

There are any number of models one can look at. The Japanese model is particularly interesting. Professor Zehr draws upon the work of John O. Haley, a specialist in Japanese law, and describes Japan's unique two-track judicial system in these words :[6]

> *Separate formal and informal tracks operate parallel to one another, but with considerable dependence upon and interaction between them. A common pattern is for serious cases to begin in one but be transferred to the other.*
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> *One track is a Western-style, formal criminal system with many familiar characteristics. The process focuses on guilt and punishment. It is governed by formal rules and is operated by professionals such as public prosecutors. This track is used for many crimes. Yet few cases proceed all the way through the system, ending in long imprisonment or other serious legal penalties. Cases are constantly shunted aside. To an outsider, the overall system seems remarkably lenient.*
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> *This apparent leniency and the lack of long-term involvement by the formal legal system is the result of a second, less formal, track for which there is no Western parallel. Haley summarizes it like this :*
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> > *A pattern of confession, repentance, and absolution dominates each stage of law enforcement in Japan. The players in the process include not only the authorities in new roles but also the offender and the victim. From the initial police interrogation through the final judicial hearing on sentencing, the vast majority of those accused of criminal offenses confess, display repentance, negotiate for their victims' pardon and submit to the mercy of the authorities. In return, they are treated with extraordinary leniency; they gain at least the prospect of institution[al] absolution by being dropped from the formal process altogether.*
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> *Cases are moved out of the formal legal system at each stage of the process. Only a fraction enter prosecution and an even smaller fraction are fully prosecuted. A smaller minority are incarcerated and few serve more than one year. This does not mean, however, that Japanese offenders are not convicted. In fact, conviction rates in Japan stand at about 99.5 percent!*

The Japanese model may or may not work for us. How should we go about putting restorative justice to work for us?

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6. *Ibid.* at 217-218.

The first step is to recognize that retributive justice is firmly embedded not only in our statutory laws and our jurisprudence but in our history, culture and our psyche.

If restorative justice is to take root we will need to change our statutory laws, our jurisprudence and our psyche. We cannot change our history but we can delve further into it for some valuable ideas to spur our culture to further evolve.

We have a fairly good start in changing our statutory laws. *Bill C-41*, now law, contains some sizeable openings for permitting and resorting to restorative justice in the matter of sentencing. Section 718, despite the deficiencies I have pointed out, does contain paragraphs (e) and (f) and section 718.2 does contain paragraphs (d) and (e). Section 742 introduces a conditional sentence of imprisonment and the notion that a sentence of imprisonment, in certain cases, need not be served in a prison, but may be served in the community. The legislative enactments have by no means substituted restorative justice for retributive justice in the matter of sentencing but they are a foothold, a decent foothold. More legislation will be needed as restorative justice slowly and incrementally begins to supplant retributive justice in matters of sentencing of certain kinds of crimes. I emphasize here "in certain kinds of crimes". I am not talking here about the category of violent crimes of which serial murder cases are one example. Public servants — politicians and bureaucrats — who work in the justice area, and academics should not only be monitoring the progress but in many respects should be adopting an activist stance, all with a view to urging Parliament to pass the appropriate legislation as the need arises.

The next area that requires change is the jurisprudential area. Four lines of attack are in order. First, judges should be educated in restorative justice in much the same way as efforts are now being made to educate judges in gender equality and social context. Not only should they know what restorative justice is about, its historical roots, its values, its disadvantages, but also how to put it into practice. Judges need to come to the realization that old answers to old questions and old reasons for doing new work will not form the foundation for a new approach to sentencing. Second, prosecutors and defence counsel should similarly be educated through seminars, articles, books and the like. Unless counsel are thinking about innovative ways of putting restorative justice into practice, judges who are there to adjudicate, not legislate, will continue to be hampered in their efforts to dispense justice. Third, law students should be taught all about restorative justice in law school, the needs for it, its values and how to put it into practice. I realize that until now retributive justice has ruled the roost and perhaps classes in sentencing were not a pressing necessity. I understand only three Canadian law schools (Saskatchewan is one of them) have a class in sentencing, a half class I believe. But if it is time to look at a new model, then law schools should be at the forefront. There should be extensive classes in restorative justice and in sentencing. Thousands of law students across the country thinking and talking about innovative ways to involve the community in the healing of the breaches in relationships caused by an offender’s offense, is a rather exciting thought.

Holland is an interesting study in this respect. The incarceration rates in that country since World War II have been very low. Students of this phenomenon have ascribed it to two things : the experience of imprisonment at the hands of the Nazis and a law school curriculum that questioned imprisonment. The latter resulted in the moulding of a whole generation of lawyers and judges who hold in very low esteem imprisonment

as an essential component of justice. I remind you Holland is not reputed as a crime-ridden country.

The fourth line of attack in the jurisprudential area features the public servants. The politicians need to come to the realization that playing to the crowd and clinging to old states of mind show neither a sense of vision or direction, nor a philosophy concerning what is good for an ever-changing society. Moreover, politicians and bureaucrats are responsible for providing the resources, monetary and human, to ensure the success of a restorative justice model. Providing the monetary resources may simply mean re-channelling money from the operation of jails to communities and community workers who are engaged in the implementation of community-based sanctions. Judges cannot be expected to impose community-based sanctions in a vacuum so to speak. They must have assurances that facilities, programmes, and people are in place for the implementation of those sanctions.

Let me give you one example : The need for and the dearth of forensic psychologists. This need will become particularly poignant when resort to section 742 comes into its own.

The last important change that needs to take place is the change in our society's psyche with the accompanying cultural evolutionary development. This is probably the most difficult change to accomplish. To understand the psyche it is useful to delve into a little history. After all, knowing how we got into the state we are in now may help to undo whatever it is that needs undoing.

Without wishing to start at any particular point in the history of redresses for wrongs done to the human person, may I say that until well into the modern era what we today call a crime was viewed primarily in an interpersonal context. It was regarded in much the same way as we today regard a "tort". Professor Zehr very aptly encapsulates this era :[7]

> *As in "civil" conflicts, what mattered in the majority of offenses was the actual harm done, not the violation of laws or an abstract social or moral order. Such wrongs created obligations and liabilities which had to be made right in some way. The feud was one way of resolving such situations, but so was negotiation, restitution, and reconciliation. Victim and offender as well as kin and community played vital roles in this process.*
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> *Since crime created obligations, a typical outcome of the justice process was some sort of settlement. Restitution and compensation agreements were commonplace, even for offenses to the person. Laws and customs frequently specified a range of appropriate compensations for both property and personal offenses. These included formulas for converting personal injury to material compensation. Our concepts of guilt and punishment may represent a transformation (and a perversion, perhaps) of this principle of exchange. The Greek* pune *refers to an exchange of money for harm done and may be the*

7. *Ibid.* at 99-100.

> *origin of the word for* punishment. *Similarly,* guilt *may derive from the Anglo-Saxon* geldan *which, like the German word* geld, *refers to payment. Offenses created liabilities. Justice demanded some steps to make losses right.*
>
> *The offender and the victim (or a representative of the victim in the case of murder) settled most disputes and wrongs — including those we call criminal — outside of courts. They did this within the context of their kin and community. Church and community leaders often played central roles in negotiating or arbitrating settlements, registering agreements once they were made. The administration of justice was primarily a mediating and negotiating process rather than a process of applying rules and imposing decisions.*

In medieval Europe no system of criminal law as we know it today existed. It was in the eleventh and twelfth centuries that a series of changes began and continued for the next several centuries. Justinian's Code was discovered by the West in the late eleventh century. Roman law then created the basis for Canon law which in turn greatly influenced the law adopted by secular powers throughout Europe. Roman law was formal, rational, and codified. It gave an important role to central authorities. The law could be systematized, studied and taught by professionals. All this fitted in very well with the Church's needs at the time. The papacy was involved in the struggle for supremacy within the church itself as well as with secular powers. Heretics and clerical abuse needed to be dealt with. The shift from community justice to church and later state justice is very nicely described by Zehr :[8]

> [C]*anon law did not only represent the introduction of systematic, formal law and an enlarged role for central authorities. It implied a wholly different concept of crime and justice. Justice became a matter of applying rules, establishing guilt, and fixing penalties. Early Christian practice had focused on acceptance and forgiveness of wrongdoing, emphasizing the necessity of reconciliation and redemption. Canon law and the parallel theology which developed began to identify crime as a collective wrong against a moral or metaphysical order. Crime was a sin, not just against a person but against God, and it was the church's business to purge the world of this transgression. From this it was a short step to the assumption that the social order is willed by God, that crime is also a sin against this social order. The church (and later the state) must therefore enforce that order. Not surprisingly, focus shifted from settlements between participants to punishment by established authorities.*
>
> *Canon law and its accompanying theology formalized concepts of free will and personal responsibility. This helped to lay a basis for a rationale of punishment. Imprisonment became a means of punishing wayward monastics, which led to the widespread use of imprisonment as punishment beginning in the eighteenth and nineteenth centuries.*

By the sixteenth century, state justice — public justice — as distinguished from community justice — private justice — had begun to establish itself in Europe with some

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8. *Ibid.* at 112-113.

degree of permanence. It was encouraged by the Protestant Reformation and its inclination toward punitive sanctions administered by the state.

Then followed the Enlightenment and the French Revolution. The thinkers of this age did not question the notion of wrongs and redresses consisting of pain. They offered new justifications and introduced new mechanisms for applying punishment.

The primary instrument for applying pain came to be the prison. Why were prisons introduced? Zehr explains :[9]

> *The reasons for the introduction of imprisonment as a criminal sanction during this era are many. However, part of the attraction of prison was that one could grade terms according to the offense. Prisons made it possible to calibrate punishments in units of time, providing an appearance of rationality and even science in the application of pain.*
>
> *Prisons also matched well with evolving sensibilities and needs. Publicity and physical suffering had characterized punishments during the Old Regime. Absolutist regimes had used brutal, public punishments as a way of making visible their power. New, more popularly based governments had less need for public displays of power as a basis for legitimacy. Moreover, people were becoming less comfortable with pain and death. Ways of handling death and illness changed, reflecting a need to hide or even deny these hard aspects of life. In that context, prisons provided a way to administer pain in private.*

The victory of state justice was complete.

Pause a moment and reflect upon this assertion : the infliction of punishment — the use of punishment as a tool — tells you more about the punisher than about the recipient of the punishment. Hierarchical societies and dominant individuals punish (the need for control here is the key). Arrogant societies and self-righteous individuals punish. Insecure societies and fearful individuals punish. Uncaring societies and selfish individuals punish. The opposites of those societies and those individuals do not.

Today to purge the psyche of the need for punishment and of the concomitant principles of retributive justice, moulded as the psyche has been by church theology and Enlightenment philosophy, is a task of horrendous proportions. But one should not capitulate too quickly. Think of the institution of slavery. It too had deep theological and philosophical roots. It is gone.

Think of gender inequality and the status of women in our society. This distortion has persisted for millennia. It too has theological and philosophical roots. While it may not be gone it is well on its way.

On a different level, think of what has happened to the cultural habit of smoking, and also the once not-frowned-upon act of driving while drunk.

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9. *Ibid.* at 119-120.

The public's thinking, the public's mood can be changed. It takes time. It takes education. Public servants, academics, news journalists, lawyers, judges, all have a distinct role to play.

Indeed one can now perceive cracks in the public's psyche. Some police forces are actively examining and experimenting with diversion and community sanctions. Mediation clinics are starting to crop up to deal with certain kinds of crimes by young offenders. Some members of the public are openly commenting : "Jail does not work, we must try something else". Such comments are still not too common, but unlike several years ago, one is now beginning to hear them. For a substantial segment of the public sentencing circles have become an accepted process for determining a fit sentence, assuming, of course, the presence of the right criteria.

Things indeed are happening. We may well be on our way to creating the new in the midst of the old. And while it may look like new philosophy, it is really old philosophy, so old that it looks like new.

It is too early to make the statement : imprisonment is not a mark of justice but a mark of failure. Perhaps one day we will be able to make that statement with confidence, in respect of all offences excluding only some of the most violent ones.

The measure of any civilized society is how it manages its criminal justice and how it deals with crime and punishment.

In the meantime, let's get back to our sentencing judge whom we left stranded in a dire state of anxiety. What did he end up doing? He adjourned the matter for further consideration.