

Restorative Justice on the Eve of a New Century : The Need for Social Context and a New Imagination

Lorraine BERZINS*

I found it most encouraging to hear some of the thoughts and fundamental questions that were being raised by some people yesterday and I am very heartened by the growing interest in *restorative justice*. But the role that I am going to play this morning is to tell you that I also have many worries and concerns about this *in the context of our present criminal justice system and the potential pitfalls of the conditional sentencing legislation* that were also well described yesterday. Many of us realize that a lot of our sincere attempts to make changes in the past to reduce the use of prisons, and of the criminal law itself, have had an uncanny way of resulting in making both the prison population and the criminal justice system much bigger. With that kind of track record, and the knowledge we have today, it is hard to believe we can even recognize, at this point, what kinds of changes could actually bring about a *genuine* improvement to the current situation. I want to impress upon you that we must not underestimate for a moment that, *in this context*, we always risk making things worse — for frightened victims, for people in prison, for many of those groups who have always tended to find themselves at the greatest disadvantage in our communities. So I want to echo the metaphor that Judge Claude Fafard used when he said that it is neither dawn nor dusk in sentencing but somewhere in between. But I will put it more strongly by paraphrasing how Martin Luther King, Jr. characterized the social structures of our time back in 1962 : "It is midnight in our criminal justice system, and the darkness is so deep that we can hardly see which way to turn".

It could be very tempting to be cynical. But I want to urge you to dare to hope, and take innovative action, anyway — but not before stopping first to think carefully about what is profoundly wrong, at the core of this system, that keeps co-opting every other good thing we try to do. It was alluded to very clearly by Judge Fafard yesterday when he said that it has been a mistake to equate justice with punishment, with prison as the standard norm for that even though we know that it is not effective for all the things we say we want to accomplish. But Judge Bernard Grenier also referred very eloquently to the dilemma a judge faces because so often the sentence is not *only* for "efficacy", it is also to send a message about social morality. While I believe imprisonment is a highly questionable tool for modeling social morality, I think Judge Grenier touched on a very important dimension that we must not undervalue or underestimate. We cannot merely bemoan the fact that the public is clamoring for the wrong solution. We have to grasp the full complexity of what seeking and doing justice is all about, and we have to provide a

* Coordinator, The Church Council on Justice and Corrections, Ottawa, Ontario.

new set of positive tools to meet people's needs. And, quite profoundly, what we really need is a whole new imagination around that.

I think we need to be clear regarding what it is about equating "justice" with "punishment" that has become so destructive, so that we can better understand what our new alternative approaches must avoid if we are not to repeat the same cycle yet again. I am going to use my time to flag some points that I hope can begin to start us thinking about :

- why *restorative justice* cannot be merely a matter of a few new programs or new kinds of sentences added to the existing system;
- why you can expect some real resistance to *restorative justice* and *conditional sentences* if that is all you do (that is merely add a new kind of sentence within the existing system that does not attend to other needs);
- and how it is something about *our way of talking about justice* that is keeping us trapped and unable to make truly positive change;
- finally, I would like to leave you with some practical ideas of what I believe can be safely done, right now, without having to wait for the whole system to change.

First, let me stress the complexity of the task.

To begin, we must be clear regarding what calls for a more restorative approach to justice are not about, and we must make this clear to the public and any government departments who may primarily want to save money. This isn't about going soft on crime or offenders. This isn't about decriminalization or diversion or informal processes that are intended to ignore or neglect crime and do nothing about harm or injustice in the community. This isn't about models that are going to deliver us from all evil, nor deliver us from all our hatred and vengefulness when we have been wronged.

Secondly, as I said, merely adding a few new programs to the existing system is not the appropriate strategy for achieving the results we are looking for. Nor will it be sufficient to content ourselves with addressing only how we can better satisfy the interests of the *individuals*, victims and offenders, who appear before the courts, as important as they are.

For it isn't merely by what we can do to and for individuals that we're going to do something about the evils in our society and world — and this was well covered yesterday.

We know only too well now that the problems the criminal justice system confronts daily are related to some root causes in the community. What we are able to do about that, through existing or emerging justice models, affects many more people than the individuals directly involved — at heart-wrenching levels, and in the very moral fibre of their being. While some might be tempted to say justice is sufficiently

served by a satisfying settlement between two disputants, we know there is often more than that at stake; there is the symbolic level, to which Judge Grenier referred, of that "message" that is sent out to the wider community about how seriously we take this problem, and how seriously we intend to do something to prevent it from continuing in our community. Today, however, in our criminal justice system, we have only a negative tool for sending out this message — the severity of punishment, the length of a prison term as punishment. It is a symbol that has become costly, destructive, often meaningless, and useless. But it is still in the public's mind set the only justice symbol we've got. And, as I said, we must not underestimate the power of this symbolic level in doing justice and the importance of meeting this need in more positive ways.

For I believe that what we do in criminal justice, and how we refer to it daily in the media and in our lives together, is intertwined with the awesome backdrop of the deepest layers of our collective psyche. It touches on the many complex issues we are wrestling with in our families and communities, as we struggle to come to terms with experiences of good and evil in our lives together, to regain some faith that we may be capable of rising above our individual flaws, limitations and vested interests to reach out for a vision of some common good that we can accomplish collectively. The inability to heal from having or hearing of an experience of injustice affects us viscerally and can have far reaching implications for our future lives together. Do not underestimate this grave responsibility.

What we do in the community when crime happens, and what we do in the criminal justice system, can either help us build confidence that we can have a future together, or it can tear us further apart. And being torn apart, as we well know, can leave us with more misunderstanding, bitterness, rage and injustice between us and between the different segments of our very diversified country.

This is why, despite the many pitfalls I know are there, after twenty-five years I still bring my heart and soul to wanting to find a *good* way to do justice. I believe that much is at stake for our future lives, individually and collectively. There *is* something that is well worth attempting to achieve, despite all the risks, because too many real lives are being broken by our current failures. Last month, I was at a national symposium in Vancouver that brought together people from every province and territory of Canada to begin to plan how to implement better ways of *Achieving Satisfying Justice* in our country. I struggled there with a very similar dilemma. I groped at that time for an *image* to hold up to people that could evoke the complexity, the richness, the multiple layers of our being, individually and collectively, that these issues represent in the lives of real people, and that this moment in the history of our criminal justice system represents. And what came to me is how strikingly the public has been captured recently by the imagery of the widely acclaimed film *The English Patient* based on the book by Canadian author, Michael Ondaatje. That is the image I would like to hold before you here, as well, today, as you think about *restorative justice* :

People, devastated by war, brought together against the backdrop of beautiful surroundings, finding their way around their daily lives trying to come to terms with the past, with the war, with each other, with the harm they have done, with the harm that has been done to them. They are daring to make their way around the dusty rooms and the decaying beauty of a monastery from another era, to

explore possibilities, despite the hidden presence of land mines, a threat that could erupt at any moment. They continue to inch their way through the surrounding possibilities carrying the pain of their longing for what could be better.

It would seem that this rich imagery has struck a chord deep within the psyche of Canadian men and women of our time, perhaps echoing the poignancy of the yearning within us to be drawn into the mystery of building human community, despite all that has gone on between us. For in the final devastation of war, there comes a time when we realize that no matter how justified is our rage and our desire for vindication and vengeance, it can only continue to hurt us when life must move on.

I hold these images up to you because what we are about in trying to make good changes in how we do justice is as difficult and as important as recovering from war; I hold them up because we are in desperate need of stirring up a new imagination in the field of criminal justice; and finally I hold them up because the film also shows us that it is in hearing out each other's stories that we are slowly enabled to move on to finding what is needed to live with each other in peace. Interestingly, hearing out each other's stories is an important feature of the process in many of the innovative justice models being profiled at this conference.

It is no mere coincidence that it is the imagery of recovery after war that was brought to my mind for the task before us related to the criminal justice system. We have been through a kind of "doing justice" by "doing war with each other" in the criminal justice system. And now we must see that it is time to recover from this and find a different way to approach our problems in living together, because of the devastation our war tactics have wrought and for which we can no longer avoid the consequences.

1. We have actually called it a war on crime.
2. Our approach to doing justice has been reduced to a battle of legal technicalities between two lawyers in court.
3. This adversarial legal battle has done untold additional harm to victims seeking safety and justice in the courts, and to offenders whose deepest problems are seldom addressed in the deals struck between the two warring sides in a courtroom.
4. Over the last decade, we have reached an all-time high in the number of people we put in prison. It is now well documented that we have used imprisonment against the most disadvantaged groups in each of our communities. And, by the way, we are now discovering that people from those same disadvantaged groups are also getting the longest sentences despite new alternatives, and are getting the least access to these alternatives. It is also well documented that bad things happen to people in prison (suicide, murder, degradation). Something about the nature of prisons brings out the worst in people on both sides, as does war.

5. Yet to what kinds of people are we doing this? The latest Statistics Canada report tells us that the prototype of the person in provincial jails is a 31-year-old man doing 31 days for a property crime such as theft. And for what kinds of offences are we using the heavy instrument of our criminal courts? Recently, *The [Toronto] Globe and Mail* ran a front-page story about a case involving the theft of a 50-cent newspaper that used up thousands and thousands of dollars in court costs and resources. Of course, this is not what anybody would have intended, but as the Crown Attorney involved candidly acknowledged, the process moved somewhat on automatic, everybody — as in war — did their small, separate part of the job and one thing led to another. No one raised fundamental questions along the way.

But we now know that more people from a variety of sectors are questioning more loudly the kind of justice approach we have let go on for years. I quote some who wrote to us, in order to illustrate what we must make sure our new alternatives avoid.

- a) A judge wrote to us :

Over the years the thrust, fueled by public opinion, has been to put all people convicted of any crime in jail and to throw away the keys so long as it did not affect a family member or a friend.

We, the judiciary, have quietly adopted that philosophy until all the jails are double-booked, overcrowded to where we are at the revolving door concept whereby to let someone in we must let someone out with little thought to rehabilitation or the protection of the public. It has come to be the place that to jail someone for non-payment of a fine has been a joke, as when they are arrested and taken to jail, they are sent home. Worst of all worlds is that this news travels fast and you have people showing up and wanting to turn themselves in as they know there is no possibility they will be asked to serve out the time or at least all of it.

The time has long passed, said this judge, when we should have been looking at alternatives. We are now in a crisis situation. We are moving not because it is a proper move, but because we must move.

- b) Some victims have said :

I was prepared to be open to understanding what led to this, what went wrong in this person's life, to accept an apology, to see what he might be willing to do to make amends, until I saw him, through his defense lawyer, refuse to take any responsibility for what he had done, use every technicality he could to get off the hook.

- c) Yet a defense lawyer told us :

No, this is not a good way to do justice, to bring about the social responsibility that is in the best interests of all members of our community, including my client. But the alternative right now is a system

of punishment and imprisonment that is harmful to my client, who often is already discriminated against in our society. So I will continue to do battle in court through every means that I can until there is a process in place that truly addresses the problems and needs of my client.

This, to me, hits on the most important reason we must move alternatives away from punishment as much as possible : as long as sentencing is focused on negative "solutions", we will have a *legal battle* that prevents us from meeting all the emotional needs Terry O'Connell was describing as so important for people to experience satisfying justice (when he was speaking of family group conferencing experiences in Australia).

- d) A community truly concerned about curbing the incidence of sexual abuse in its midst and helping victims heal and offenders take responsibility for their actions and needs has written this :

The courtroom process is not a safe place for victims to address their victimization, nor is it a safe place for the victimizer to come forward and take responsibility. It can make it much harder to get at the real work that needs to be done.

- e) Finally, a victim of a very violent gangland crime who was left permanently paralyzed said this :

Eventually you have to accept what is — you have to stop being a victim. I've got a family. If I hang on to the anger, I'll aim it at them.

This man discovered for himself the painful reality we must face : our existing criminal justice system does not give the care, support and calling to account that people need when dealing with crime, the harm they have done, or the harm that has been done to them. It is not good enough to humbly admit the failure that our criminal justice industry does not give us justice, and then just give up and let it be :

We need justice!

So what is needed is a whole new approach, and not only for minor cases but for serious cases as well. And fundamental to that new approach is an overall positive, healing purpose, for victims and communities as well as for offenders and their families, instead of the punitive, adversarial philosophy that we now have. I am sure there are a million and one variations on how to go about introducing this different approach as long as we keep in mind the overall, positive purpose we are aiming for.

My last point before getting to some things we can do without having to wait for a revolution is to stress how much the way we talk to each other about what is needed will be crucial. Up to now, we have been squeezing everything we have more recently learned about what is important for "justice" into the same old categories and terms of the outdated system we have. These categories and terms don't fit our real life experiences of what we need and they keep us boxed into all the negative features that come along with the present system. Often, this really isn't necessary. These features just get in the way of achieving what we want and need. So we must stop using the present system as the

only starting point of all our discussions of what we want and need because otherwise we are in danger of perpetuating what we no longer believe in, and fighting against what we do believe in.

We must make every attempt possible to understand each person's language, to hear beneath it to the essence of what each is saying they need and want. If we are not very clear and specific about what we truly want, if we keep tying what we say to the limitations and meanings of today's version of justice in our system, if we take for granted that the root of the destructiveness of the system must be with us forever, then we will be forced, and will be forcing others, to fight with each other for their piece of the puzzle, and their piece of the pie, in a system whose limitations we will be continuing to perpetuate. This is the true tragedy of turf wars.

Some groups in our country, many aboriginal communities for example, already know they don't like a system that takes justice out of the hands of communities, but other groups — some women, for example, don't trust the unfettered forces in communities either — there are power imbalances and socio-economic inequities in communities, and communities when left on their own have a history of scapegoating the vulnerable, abusing the rights of the disadvantaged. We could be caught in a tug of war between those who want more power given to communities, and those who don't trust communities with that power — unless we see clearly that it does not have to be a "one-size-fits-all" solution.

Let us not generalize and prevent *anything* better from happening *anywhere* just because some situations may indeed require more vigilance and more protections from the state.

Otherwise, we risk grinding to a complete halt, unable to make any change whatsoever. Yet are we really content to maintain, without change, a system we know does not work and does so much harm?

So what can we do?

First of all, the main question for restorative justice is not whether to put someone in prison or not. The main question is what justice process and what sentence can best deliver safety and healing for real people who must ultimately continue to live with each other, by and large, in our various communities across the country: *positive* goals for which we need to provide *positive* tools, an assortment of social, economic and health services for victims, for offenders, for the ripple effect in their communities — as needed, as appropriate for varying situations — again, not "one-size-fits-all".

We are learning that as people begin to experience a more satisfying process, the clamor for *imprisonment as punishment or denunciation* also tends to decline — its use can be geared more strictly to real safety.

There are some practical things we can each start doing differently in our daily work even without formal programs — through the people we start to include in our consultations we do before sentencing, as Judge Lloyd Deshayé said, through the issues we start to consider for our decisions, through the more fundamental questions we begin to raise for the community in our judgements and other public reports, through the care

and support we more intentionally bring to the *people* we are dealing with and affecting throughout all of this; through the *good* things we can try to advocate for our clients' underlying needs instead of merely trying to win a legal argument. There are the many options documented in *Achieving Satisfying Justice*. And it would be *smart* to refer as many interventions as possible away from the punishment process, so that the opportunities provided *feel* constructive and *helpful*, and these good things are not just seen as "too much punishment proportionate to the crime".

I stress again the importance of language, trying to break away from thinking of the new services and policies needed only in terms of old categories, for example : exclusively for victims, or for offenders, or in terms of criminal code categories, of offence types. Our real concerns so often do not fit those categories. For example : many groups advocate that we should be attending to "the most marginalized people" with much greater awareness and care. However, depending on our life experiences, and our work, some of us, when we hear the phrase "the most marginalized", will think of a "victim" while others will think of an "offender". For some, who comes to mind may depend on whether that victim or offender was a woman or a man, or from a disadvantaged economic or ethnic group.

While not abandoning each our constituencies or our struggles, we need to start responding to problems outside those boxes, in the real social context, in a way that will not create more problems for others who are in a different social context. On a different but related note, we need to recognize that our categories for funding resources don't fit our present needs any more either. Some criminal justice money needs to be put into social services if we are to truly address the problems that come before the courts. We need to broaden our definitions of restorative justice to include this social context.

In conclusion, as I am sure you have been able to see, my own hope is that we may be witnessing the dusk of sentencing as we have known it, and the dawn of a completely different approach to justice based on positive tools for safety and healing.