Changing Punishment at the Turn of the Century: An Overview of the Issues

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On behalf of the organizing committee of myself, Judge David Cole of the Ontario Court of Justice (Provincial Division), Professor Helene Dumont of the University of Montreal, Shereen Miller of Correctional Services of Canada, Christine Robertson of the Canadian Institution for the Administration of Justice, Judge Mary Ellen Turpel-Lafond of the Saskatchewan Provincial Court and Justice William Vancise of the Saskatchewan Court of Appeal, I extend a warm welcome to Saskatoon, Wanuskewin Heritage Park and the Conference entitled: Changing Punishment at the Turn of the Century. We would like to take this opportunity to thank the Canadian Institute for the Administration of Justice for sponsoring this conference as well as the contributions of our co-sponsors, the Prairie Region, Correctional Service of Canada, Saskatchewan Justice and the University of Saskatchewan.

One aim of this conference is to recognise and reflect on two significant anniversaries. One is the 100 year anniversary of a formal system of parole instituted by the *Ticket of Leave Act* and the other is the 30 year anniversary of the Ouimet Report entitled *Towards Unity: Criminal Justice and Corrections*. Both the institution of parole and the Ouimet Report raise the fundamental issue of whether unity in our criminal justice system is desirable and whether it can be achieved. The Ouimet Report argued that: "There must be consistency in philosophy from the moment the offender has his first contact with the police to the time of his final discharge."[1] The *Charter* has helped us realize that we cannot treat people unjustly on the streets and in the station houses, but

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1 *Report of the Canadian Committee on Corrections Toward Unity: Criminal Justice and Corrections* (Ottawa: Queens Printer) at p.16

then purport to treat them justly in courts. The Arbour Report on P4W argued that the culture of legality and respect for rights needed to be extended to prisons.[2]

There are more difficult questions of unity in later stages of the criminal process. Can we punish in court, but attempt to rehabilitate and re-integrate later on? Should we attempt to achieve unity at all stages of the criminal process. Nova Scotia, for example, has embarked on a comprehensive Restorative Justice Program with separate police, crown, court and correctional entry points for diversion into restorative justice.[3] At a national level, the 1992 changes to correctional and release legislation and the 1996 enactment of sentencing reforms were designed in part to achieve greater unity. It may be easier to achieve unity on paper than in action. One purpose of this conference will be to explore whether unity has been achieved in the later stages of the criminal process.

The issue of unity can easily be obscured in our daily working lives. Judges can and are often encouraged by their appeal courts to sentence without much thought to what happens afterwards. Correctional officials and parole boards must accept sentences as a given and may focus more on what happens to the offender before sentence expiry than afterwards. There may be a place for a system of checks and balances, but there can be little justification for splendid isolation. We hope to break down some barriers in this conference by facilitating greater communication and links between judges and correctional officials, as well as others interested in their important work. At the end of the day the question of unity is one that the community, and in particular offenders and victims, cannot avoid and it is one that judges, correctional officials and policy makers ignore at their peril.

This wonderful place always makes me think of the past. Tomorrow our conference will allow reflection about the past as we examine changing understandings of punishment. Professor Nils Christie of the University of Oslo will be our keynote speaker. Professor Christie's landmark work has been characterized by a historical sensibility that not

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2 Arbour *Report of the Commission of Inquiry into Events at the Prison for Women* (Ottawa: Supply and Services, 1996).

3 Bruce Archibald "A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures to Crime" in D. Stuart et al ed. Towards a Just and Clear Criminal Law (Toronto: Carswell, 1999).

only critically examines modern trends and fundamentally questions the very idea of punishment, but remembers a time when conflict was not stolen from the community by what Professor Christie calls the crime control industry.[4]

A historical sense is vital if we are to move forward. In the words of Alexander Bickel,[5] we must remember the future. We must tie our understandings of the present and our aspirations for the future to a critical and pluralist understanding of the past. Too often the history of punishment has been written as the history of prisons. Too often the writing of history has ignored the rich and proud history of the First Peoples. I hope that all of us will be open to the wisdom and kindness of Aboriginal traditions of justice and healing that a number of our speakers have generously agreed to share with us. At the same time, our deliberations must also be guided by what the Supreme Court of Canada in an opinion written by Justices Cory and Iacobucci recognized as "a sad and pressing social problem" of Aboriginal overrepresentation in prison—a problem that they said "may fairly be termed a crisis in the Canadian criminal justice system.[6]" A number of our speakers will speak to the particularly acute overrepresentation of Aboriginal people in Saskatchewan's prisons and share with us their hopes for the future. The hope for the future may lie in a better understanding of the past as represented by traditions of both restorative and Aboriginal justice.

On our second day, we will turn to the future of punishment. John Braithwaite of the Australian National University will be our keynote speaker and will address the issue of restorative justice that employs re-integrative shaming.[7] The panels that day will explore attempts to transform the punishment environment in and out of court; in and out of prison. A central question will be whether we are in a midst of a paradigm shift from retributive to restorative justice. Change in this area had been significant and quick. The 1969 Ouimet Report only briefly recognized

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4 Nils Christie "Conflict as Property"(1977) 17 Brit.J.of Crim. 1; Nils Christie *The Crime Control Industry* (1993).

5 Alexander Bickel *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1970) c.4.

6 *R*. v. *Gladue* (1999) 133 C.C.C. (3d) 385 at 411, par. 64.

7 John Braithwaite *Crime, Shame and Reintegration* (1989).

the correctional potential of reparation,[8] and made no recommendations concerning reparation or restorative justice. Even the 1987 report of the Canadian Sentencing Commission did not put the idea of restorative justice front and centre. The 1996 sentencing reforms, however, as interpreted by the Supreme Court in *Gladue* have recognized restorative justice, with its emphasis on reparation, acknowledgement of harm, community sanctions and Aboriginal traditions, as a legitimate and valuable approach to sentencing. Even if something less than a complete paradigm shift has occurred, the implications of restorative approaches deserve and will receive our careful attention.

You may find, as I do, that restorative and Aboriginal justice are appealing and promising alternatives to the present system.[9] But there are also hard questions that must be asked. Are they viable in a mobile, busy urban environment in which you may not know or even want to know your neighbour? This is an issue that is dealt with in *Gladue* and several of our participants can speak with experience about diversion in urban environments. Should there be a dividing line between restorative and retributive approaches or are we undermining the potential of restorative justice if we say that restorative approaches are not appropriate for serious crimes such as sexual assault and spousal assault? Can restorative approaches satisfy what our *Criminal Code* recognizes as the fundamental principle of sentencing—namely that a sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility?[10] Sentencing judges cannot focus solely on the utilitarian and forward-looking features of restorative justice, but they should not assume that restorative justice cannot produce meaningful accountability and justice for offenders, victims and the community.[11] Nevertheless, much work remains to be done on how restorative justice and community sanctions achieve proportionate punishment.

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8 *Supra* note 1 at 200-1.

9 Kent Roach *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (1999); "Four Models of the Criminal Process" (1999) 89 J.of Crim.L and Crim. 671.

10 *Criminal Code* RSC 1985 c.C-34 s.718.1

11 For a recent non-utilitarian defence of restorative justice in the context of the most serious crimes see J.Llewellyn and R. Howse "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999) 49 U.T.L.J. 355.

The difficult questions relate not only to whether restorative justice is too soft for some crimes, but also whether it will be too hard when applied to less serious crimes. What are the risks when police, judges and policy-makers employ the rhetoric of restorative justice including the potentially punitive notions of accountability, responsibility and shame? Is there a risk that so called restorative sanctions will widen the net of social control, especially if the focus is on less serious offences?[12] Social control may be quite different if undertaken in a re-integrative rather than a punitive spirit. Nevertheless, restorative justice is no easy task and it can increase social control. When all is said and done, will restorative justice be an add-on that will not decrease Canada's high rates of incarceration. A conditional sentence with restorative or healing conditions could easily lead to a breach and the subsequent use of actual imprisonment. With over 28,000 conditional sentences being ordered in the first two years of their existence and some preliminary evidence that Aboriginal offenders are disproportionately being breached, the issue of net widening is real and cannot be ignored. Just as the Ouimet report recognized that treatment taken to extremes could inflict needless pain, we also have to be sensitive to the pain that restorative approaches may inflict on offenders, victims and the community.

More fundamentally, we have to ask whether success and popularity will harm or co-opt restorative justice. Will restorative justice, like other reform movements, be appropriated by our existing focus on punishment? In the *Criminal Code* and in *Gladue*, restorative justice is seen as a sentencing philosophy that could be applied by judges in court. Many theorists and practitioners of restorative justice, however, see restorative justice more as an alternative to the criminal justice system. Sentencing circles draw on Aboriginal traditions, but they are not an alternative to an Aboriginal or treaty based justice system. Although judges frequently defer to a circle consensus, it is possible that sentencing circles can be influenced by a search for punishment.[13] If restorative and Aboriginal justice represents legal pluralism will their incorporation in

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12 This is one of the criticisms made in S. Levant et al "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" (1999) 45 Crime and Delinquency 3.

13 A Metis probation officer complained in one circle which recommended 18 months imprisonment (and was overturned on appeal as too lenient) that it was "a misuse of this Sentencing Circle, which is a healing process…..we're talking periods of time here." *Morin* (1995) 101 C.C.C. (3d) 124 at 142 (Sask. C.A.).

formal diversion programmes and in judge-driven sentencing distort them beyond all recognition? On the other hand, do we simply have no other choice but to run these risks in order to try to make things better and minimize the harms of the existing system?

Similar concerns are raised by attempts to transform the nature of imprisonment. There has much interest in prison reform such as that contemplated by the eventual closure of P4W and the construction of regional centres and healing lodges. Will it be possible to fundamentally change the relationship between the keepers and the kept? What is the role of restorative justice in corrections? Are attempts to reform prison an example of throwing good money after bad? Would it be better to minimize the cost and pain of prison and divert resources from prisons to community programmes? Would the public, if better informed by politicians, policy-makers and academics about the costs and alternatives, build more prisons or spend more money on community programmes? Are we fooling ourselves by attempting to minimize the pain that we inflict on people when we imprison them? On the other hand, do we not have moral and legal obligations to minimize that very pain in the hope that people will be less harmed by the experience of imprisonment?

Finally, on our third day we will return to the issue of common ground. At one level, the desire for a just, safe and peaceful society unites us. It is proclaimed in both s.718 of the *Criminal Code* and s.100 of the *Corrections and Conditional Release Act*. Nevertheless, in a world that is too often unjust, anxious and full of conflict, it is not surpassing that we as a society disagree about how such a goal can be achieved.

We will test our ability to reach common ground by examining the controversial issue of parole. Should we impose real time punishment? Will, as the Canadian Sentencing Commission hoped, this shorten the pain that prison imposes or will it given present get tough attitudes increase the length of imprisonment? Should we decide whether to grant parole solely on the basis of future looking concerns about risk, rehabilitation and re-integration or should we continue to look backward, for example, by taking into account the views of the sentencing judge and the victims. What are the implications for offenders and society in recent decreases in the number of offenders released on parole and increases in the number

released by statute and at warrant expiry?[14] Are we focussing too much on the risk of crimes that could be committed before a sentence expires as compared to the risk of crimes that may occur when a person is released without supervision and assistance after the expiry of his or her sentence? Could we do a better job of preparing offenders for re-integration into society? Are the expectations that we place on the National Parole Board, in this the 40th year of its operation, realistic and sustainable?

We have set aside time at the end of the conference to ask whether in our time together we have found common ground. It is possible that a consensus will emerge and that we will be convinced that restorative justice in its many facets is the key to our future. A failure to achieve common ground or to implement it, however, may not necessarily be a sign of failure. It may just be that we, and more importantly the community, cannot agree on a single-minded philosophy, whether it be proportionality and retribution, rehabilitation and healing or restorative or Aboriginal justice. Lack of unity may not only be inevitable, but create space for change. It may allow the survival of philosophies that the wisdom of history will reveal are only temporarily out of favour. In any event, the question of unity should be front and centre in all our deliberations.

On behalf of the organizing committee, I offer our sincere thanks for the attendance and participation of each of you in this conference. A large number of you have traveled many miles and you have all taken time from family and busy work schedules. I hope you find the conference rewarding. I look forward to our time together and hearing not only from our speakers, but from everyone in attendance at this conference. We have much to learn and much to think about.

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[14] Anthony Doob "Should Canada Maintain its System of Discretionary Release from Prison?" in Stuart *supra* note 3.