Justice as Healing
A Newsletter on Aboriginal Concepts of Justice

The Theory and Practice of Sentencing: Are They on the Same Wavelength?

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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:

> [I]mposing punishment within the institution of law means the inflicting of pain, intended as pain. This is … [incompatible with] esteemed virtues such as kindness and forgiveness. To reconcile these incompatibilities, attempts are sometimes made to hide the basic character of punishment. In cases where hiding is not possible, all sorts of reasons for intentional infliction of pain are given. … Attempts to change the law-breaker create problems of justice. Attempts to inflict only a just measure of pain [to each criminal act] create rigid systems insensitive to individual needs. It is as if societies in their struggle with penal theories and practices oscillate between attempts to solve some unsolvable dilemmas.
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> My own view 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.[2]

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 s.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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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.[3]

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 that 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 Professor Christie are the inflicters of pain, are in effect directed by the section to impose the sorts of sanctions that will maintain, or preserve, what we already have.

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

In the view of many who are 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. First, to contribute to the *establishment for all* of a just, peaceful, and safe society. And, second, once that is established, to maintain 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 these inmates, and for many in the province, aboriginal and non-aboriginal alike, the society we have is not one that ought to be boldly held out as "just, peaceful and safe". To maintain the society we have is not a goal they would support and endorse. They want society changed by whatever way necessaryso 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 my 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), 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 s.718 that are prescribed for the "just sanctions". Take this scenario. A sentencing judge has before him a 19-year-old aboriginal male convicted of breaking and entering a commercial establishment and committing therein the indictable offence of theft. The offender's record shows three previous B & E 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 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 s. 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 who 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 it. 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 thatfirst 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. My goodness, 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, and honourso 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? 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 by far the majority of the population are not the real intended targets of this general deterrence message. Their moral values, philosophies, and lifestyles have little or no room for the commission by them 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 the judge 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 on 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 Allan Manson, 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 s. 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 circumstance'.
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> 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 efScacy of general deterrence as a rationale for determining custodial issues.[4]

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

He decides in the end against putting the offender in jail as it 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 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. He then 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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> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

> (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.[5]

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 as 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 "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", or 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 becoming 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. [The judge] 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 quite 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 an 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 *Criminal 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 Norval Morris and Michael Tonry 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."[6]

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.

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 impAsonment 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 conspired to put him into a dilemma.

But that is only the first complexity. The judge knows bus sentence will be reported in the news media. If he resorts to a community based sanction, with its 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 steamship, 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 an iesthetic.

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

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1 N. Christie, *Limits to Pain* (Oslo: Scandinavian University Press, 1981).

2 *Ibid*. at 5.

3 R.S.C. 1985. c. C 46. as am. by S.C. 1995. c. 22. s. 718.

4 A. Manson, "Finding a Place for Conditional Sentences" (1997) 3 C.R. I ith) 283 at 291 [footnotes omitted].

5 *Supra* note 3, s. 718.2.

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