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Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

From the power to punish to the power to heal

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> The commonest technique of control in modern life is punishment. The pattern is familiar: if a man does not behave as you wish, knock him down; if a child misbehaves, spank him; if the people of a country misbehave, bomb them. Legal and police systems are based upon such punishments as fines, flogging, incarceration, and hard labour. Religious control is exerted through penance, threats of excommunication, and consignment to hell fire. Education has not wholly abandoned the birch rod. In everyday personal contact we control through censure, snubbing, disapproval, or banishment.
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> (B.F. Skinner (1953) *Punishment: A Questionable Technique)*

Crime as a topic remains at forefront in the media. This is true particularly recently with occurrence of tragic murders and the allegation that these are committed by young persons. There have been calls for harsher punishment, longer jail sentences and the return of capital punishment. “Law and Order” has been on the agenda in recent political elections.[1]

Canada uses imprisonment as a sanction second only to the United States of America in the western world. From its inception, imprisonment as a means of punishment for socially disapproved behavior has been a topic of concern and reform movements. Yet the huge, grey, spaceship-like fortresses remain intact with greater numbers being built to meet the demand. The use of imprisonment as a legal sanction as a very complex conceptual base that is closely tied to the function and the purpose of law. They way a society deals with offenders has varied historically with diverse motivations: punishment; deterrence (both individually and general); retribution; the protection of society; incapacitation; humanitarianism; reform; treatment and rehabilitation. There is no consensus among contemporary authors as to the aims of legal sanctions. The philosophy of punishment has been described as a controversial, almost political subject. For example, Van Den Haag defined punishment as suffering or deprivation imposed by law.[2] On the other hand, Packer argued that the aims of punishment are “the prevention of undesired conduct and retribution of perceived wrongdoing.”[3] No doubt the concepts and methods used in dealing with offenders are interrelated and linked to the underlying view of crime and the criminal (free will vs. determination) which is bound up with the view of humans in the nature of society, culture, values and economics which are reflected in the law and other mechanisms of social control.

The use of imprisonment as the most prevalent mode of punishment is a historically complex issue. Why do we still use imprisonment in light of its obvious failure? What function do prisons perform: In the past two decades various writers have attempted to grapple with the above questions, e.g. Foucault, Ignatieff, Hay, Rotham, Hall. These authors offered a significantly different explanation from traditional explanations. Despite almost immediate denunciations as a failure, prisons exist without obvious abatement. Foucault viewed this ‘failure’ from a different perspective. He saw the carceral system as deeply rooted and carrying out precise functions.[4] He argued that punishment in general is not intended to eliminate offences but rather to distinguish then, to distribute them, to use them. That is, it is not so much that they render docile those who are able to transgress the law, but they tend to assimilate the transgressor of the laws in general tactic of subjection, in short, penalty does not ‘simply check irregularities; it differentiates them’. It provides then with general economy.[5] Foucault argued that the penal system in its entirety and ultimately the entire moral system both are the results of a power relationship established by

the bourgeois and constitutes an instrument for exercising and maintaining that power. In short, prisons are an integral part of the control apparatus of industrial capitalism.

Whatever theory one subscribes to, traditional or modern, there are two facts that have to be dealt with. Firstly, it costs approximately $10 billion dollars to operate the "justice" system and secondly, it does not work.[6] We have a justice system that is seriously flawed and is seen as unjust and ineffective. We need people with courage to challenge and develop and alternative vision at a time when pessimism is rampant and many given up in despair. Community based "restorative" justice modes give hope.

In 1992 Judge Barry Stuart, Territorial Court of the Yukon, utilized circle sentencing. On the basis of the *Moses* case,[7] Provincial Court Judges in Northern Saskatchewan initiated sentencing circles approximately 3 years ago. Since then over 100 individuals in many communities have benefited from the process, primarily in the north.

One consequence of the use of sentencing circles has been a drop in the crime rate;[8] as well as reducing the numbers of individuals imprisoned.

The community is engaged in a direct way thereby shifting the focus from retribution to that of restitution, reintegration, restoration, reparation and rehabilitation. Reclamation is also critical. That is the return to the community what is rightfully theirs – the ownership and responsibility for its members. Specific criteria were developed in order to ensure consistency in application. They are as follows: The accused must agree to be referred to the sentencing circle. The accused must have deep roots in the community in which the circle is held and from which the participants are drawn. There are elders or respected non political community leaders willing to participate. The victim is willing to participate and has been subjected to no coercion or pressure in so agreeing. The court should try to determine beforehand, as best it can, if the victim is subject to battered women's syndrome. If she is, then she should have counseling and be accompanied by a support team in the circle. Disputed facts have been resolved in advance. The case is one which a court would be willing to take a calculated risk and depart from the usual range of sentencing.

The circles are held in informal settings where everyone is given the opportunity to speak. Participants include the offender, the victim, their families, elders and other community members, also the Judge and counsel. The goal is to reach a consensus as to the most appropriate way of dealing with the offender in the context of the community and the victim. Through the process and the group dynamics, healing starts.

The process is one that is often painful and emotional to the participant. The offender must face the victim, her/his own family and community. This is why it is more effective.[9] The involvement of the community validates aboriginal community values within the current system.[10] This is a first and important step in achieving the aspirations of self-determination and autonomy. The sentencing circle replaces the only Anglo-European based adversarial, punitive system with one where the objective is to restore harmony to the community. The focus is primarily on rehabilitation as opposed to punishment. In this way it provides the best hope for the protection of the public.

There is no "right" model for restorative justice as each community must find its own way and develop a model that reflects its community values. Justice reform cannot be removed from the demands for self determination of aboriginal people.[11]

The extension of the sentencing circle to precharge diversion program in some northern communities is significant in that the accused may be sent directly to the community for resolution as approved to being diverted from the court. The control over the process is within the community. This hold the most potential for the development of the community based restorative justice models. Whether this is "tinkering" with the justice system is subject to much debate. What is clear is that it is preferable to the "status quo". Fundamental change is necessary in the justice system which has failed aboriginal people[12] and is failing the non aboriginal as well. In the non aboriginal community diversion program based on restorative models operate successfully.[13] These models can easily be used in urban centres for aboriginal and non aboriginal offenders.[14]

In Saskatchewan the use of the sentencing circle has expanded to urban centres. We can also expect the northern precharge diversion community model to be utilized in the future.

These models are not a panacea. They do not deal with the complex causes of crime but they do provide a greater emphasis on prevention and on alternatives to prison. A redistribution of functions to the community, both aboriginal and non aboriginal, is a start in altering the hierarchy and paternalistic structure of our justice system.[15]

We have everything to gain by being creative in terms of economics and, more importantly, the lives of individuals. We need to embrace change with an open mind and be willing to confront the hard political questions and rethink punishment and the role of penal institutions in order to move forward.

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1 *Globe and Mail*, July 1995. See also "Ottawa wants new regulations for dealing with violent offender" *Star Phoenix*, July, 1995.

2 Ernest Van Den Haag, *Punishing Criminals* (N.Y.: Basic Books, 1975) at 8.

3 Herbert L. Packer. *The limits of the criminal sanction* (Stanford: Stanford University Press, 1968) at 26

4 Michael Foucault, *Discipline and Punish - the Birth of a Prison* (N.Y.: Pantheon Books, 1977).

5 *Ibid*.

6 Anthony Doob, "Harsher Youth Laws Too Costly: Study" Toronto (C.P.) *Star Phoenix*, July 21, 1995

7 *R. v. Moses*, [1992] 3 Canadian Native Law Reporter 116 (Yukon Territory Court)

8 Yukon Statistics, see Justice Report, "Creative Justice" (Spring 1992) Vol. 8 No. 4 Canadian Criminal Justice Association

9 John Braithwaite and Stephen Mugford, "Conditions of Successful Reintegration Ceremonies," (1994) Volume 34 No. 2 *British Journal of Criminology*

10 Note: out of deference I will not use the word "accommodate".

11 Luke McNamara, *Aboriginal Peoples, the Administration of Justice and the Autonomy Agenda* (Winnipeg: legal Research Institute of the University of Manitoba, 1993) and also P. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 *University of British Columbia Law Review* 366

12 Saskatchewan, *Report of the Saskatchewan Indian Justice Review* and *Report of the Saskatchewan Métis Justice Review* (Regina: Government of Saskatchewan, 1992) Chair: Judge P. Linn).

13 See "Restorative Resolutions Mediation Service: Winnipeg, Saskatoon, Calgary (CP) *Star Phoenix*, July 20, 1995

14 See the New Zealand Group Family Conference Models as per Judge F.W.M. McElrea, "Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?" (1994) 4 *Journal for Judicial Administration* at 33

15 See Christie Jefferson, *Conquest by Law* (Ottawa: Solicitor General Canada, 1994) and see also Joan Ryan, *Doing Things The Right Way* (Calgary: University of Calgary Press, 1995).