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PROCEEDINGS

of the

WORKSHOP: NEW DIRECTIONS IN CRIMINAL JUSTICE

held by
the National Associations Active in Criminal Justice

May, 1987

North Gower, Ontario

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Bill McGrath
Chairman

Ben Hoffman
Secretary

PARTICIPATING ORGANIZATIONS

Association of Social Rehabilitation Agencies
Canadian Association for Adult Education
Canadian Association for Community Living
Canadian Association of Elizabeth Fry Societies
Canadian Association of Native Courtworkers
Canadian Association of Provincial Court Judges
Canadian Bar Association
Canadian Criminal Justice Association
Canadian Legal Advocacy, Information and Research
Association of the Disabled (CLAIR)
Canadian Mental Health Association
Canadian Psychiatric Association
Canadian Psychological Association
Canadian Training Institute
Church Council on Justice and Corrections
John Howard Society of Canada
National Association of Friendship Centres
National Association of Women and the Law
Native Council of Canada
St. Leonard's Society of Canada
Seventh Step Society of Canada
The Salvation Army
The National Council of YMCAs of Canada

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**SOMMAIRE DE
L'ATELIER DES ANIJC SUR LES NOUVELLES ORIENTATIONS
EN JUSTICE PÉNALE**

Mai 1987

Le document joint à la présente, rédigé par le Secrétaire des ANIJC, M. Ben Hoffman, qui bénéficie actuellement d'un congé lui permettant de poursuivre des études supérieures, résume les discussions qui ont eu lieu dans le cadre d'un atelier des ANIJC sur les nouvelles orientations en justice pénale tenu près d'Ottawa en mai 1987.

Cet atelier était le deuxième d'une série de trois, le premier ayant eu lieu en décembre 1986, sur les problèmes fondamentaux du système de justice pénale. Un troisième atelier, sur l'élaboration d'un modèle de justice pénale axé sur la responsabilité sociale, se tiendra en décembre 1987.

Ces ateliers ont pour but de préparer les membres de la coalition à d'autres mesures visant à réformer le système canadien de justice pénale. Ils constituent la première étape d'un projet qui en compte trois. À l'étape deux sera organisée une importante conférence qui vise à étudier les principes énoncés dans Le droit criminel dans la société canadienne et à examiner certaines questions soulevées lors des ateliers tenus à l'étape 1. La troisième étape nécessitera l'élaboration d'une stratégie de réforme du système de justice pénale au Canada.

EXECUTIVE SUMMARY

NAACJ WORKSHOP ON NEW DIRECTIONS IN CRIMINAL JUSTICE

May, 1987

The attached document, prepared by NAACJ Secretary Ben Hoffman (now away on a leave of absence to pursue advanced studies), summarizes the proceedings of an NAACJ Workshop on New Directions in Criminal Justice, held near Ottawa in May, 1987.

The workshop was the second of three, the first being held in December, 1986, on Foundational Problems of the Criminal Justice System. A third workshop, on A Social Responsibility Model of Criminal Justice, will be held in December, 1987.

These workshops are intended to prepare NAACJ members for further initiatives to reform Canadian criminal justice. The workshops constitute Phase One of a three-phase project. Phase Two will consist of a major conference to consider policy as stated in The Criminal Law in Canadian Society and to review issues raised in the Phase One workshops. Phase Three will require developing a strategy to implement reform to criminal justice in Canada.

BACKGROUND

In 1986 the Planning Committee of the National Associations Active in Criminal Justice committed itself to a three-phased process of fundamental review of the purposes and principles of Canadian criminal law. The commitment to this long term undertaking came primarily as a response to two major concerns. The first was that many member associations have been pressed to respond in a re-active and piece-meal fashion to a great number of government reports and proposals issued in the context of the ongoing Criminal Law Review. Some NAACJ members asked for an integrated, proactive approach which would start at "first principles" and later move to other levels and elements of criminal law and the correctional system.

The second concern arose from the recognition that the Correctional Law Review, and in fact, all Canadian criminal law reform is based on the 1982 Department of Justice philosophy statement, The Criminal Law in Canadian Society (CLICS). The CLICS document states that "whether the purpose of the criminal law is approached from a retributive or utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive".

During a 1983 consultation with the Department of Justice on the Principles of Sentencing, various NAACJ member associations questioned underlying philosophical premises of CLICS. An attempt was also made to express principles that did not reinforce the fundamentally punitive nature of criminal law sanctions.

In 1985, the Church Council on Justice and Corrections took the lead conducting a NAACJ seminar on the principles of reconciliation. "Reconciliation" appears as part of principle "g" in the section of the CLICS document dealing with principles to be applied in achieving the purpose of the criminal law. The relevant part of principle "g" states:

Wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

- (i) opportunities for the reconciliation of the victim, community, and offender.

The seminar challenged a punitively-based criminal law and initiated a more proactive approach by the voluntary sector to reform. In 1986, the Canadian Association for Adult Education proposed that the NAACJ hold a major seminar to consider the purpose of prison and the purpose of the criminal law. In part to subject the CLICS statement to the critique of scholars and eminent persons in and outside the criminal justice system, this seminar was approved by the NAACJ Planning Committee and designed as a three-phase process of fundamental review. The three phases were: preparatory workshops; conferences/seminars; and strategies for change.

Phase One, still in progress, has involved NAACJ members primarily in two preparatory workshops. One was held in December 1986 and entitled "Foundational Problems of the Criminal Justice System". The other, reported in this document, was entitled "New Directions in Criminal Justice" and held in May, 1987.

Phase Two, originally conceived as a large-scale conference, to be held at the McGill University Faculty of Law, was to consider five original papers, addressing the Criminal Law in Canadian Society and to review the developments from the preparatory workshops. The main topics proposed were The Law and Society, The Legal and the Moral, The Individual and Society, Criminal Law and the Purpose of Prisons and The Criminal Law in Canadian Society Revisited.

Phase Three has been identified as a strategy planning event, a commitment to review the findings and recommendations evolved over a two-year process with a view to appropriate reform activity.

NEW DIRECTIONS IN CRIMINAL JUSTICE **AN INTRODUCTION**

In December, 1986 at the Workshop on the Foundational Problems of the Criminal Justice System, participants resolved to hold a second workshop in Phase-One of NAACJ's process of conducting a fundamental review of criminal law. The December workshop clarified some elements of current criminal justice which are philosophically at issue. It identified other elements which might form part of a new model of criminal justice - elements which, if developed, might inspire and shape a fundamental reform of criminal justice. These included the role of the state, punishment, reconciliation, and a philosophy of restorative or reparative justice.

Four working groups developed discussion papers on these topics for the May workshop. These groups and their chairpersons were as follows:

RECONCILIATION: Lorraine Berzins (Church Council on Justice and Corrections)

PUNISHMENT: Darryl Davies (Canadian Criminal Justice Association)

ROLE OF THE STATE: Professor Ken Hatt (Canadian Criminal Justice Association and Carleton University)

RESTORATIVE JUSTICE MODEL: Bill McGrath (NAACJ Chairman)

The overall development of these discussion papers and the planning for the workshop was co-ordinated by a planning team under Ken Hatt. The Objectives for the workshop were described as:

- exploring elements of a new paradigm of justice, and
- identifying the "key issues" in those elements.

THE WORKSHOP OBJECTIVES

The Workshop was intended to help participants, many of whom were at the December 1986 preparatory workshop, to clarify their ideas and to give direction to planners of the Second Phase (the proposed conference at the Faculty of Law, McGill University).

FORMAT OF THE WORKSHOP

The Workshop was designed to ensure continuity from the December/86 workshop, by discussing on Day One the four Working Group papers and exploring on Day Two the issues arising from the papers.

PROCEEDINGS OF THE WORKSHOP

DAY ONE

PRESENTATION OF THE PAPERS, RESPONSES AND DISCUSSION

Discussion of the Working Group Paper on RECONCILIATION

Working Group Chairperson: Lorraine Berzins
Church Council on Justice and Corrections

Respondent: Vince Del Buono, Senior Counsel, Human Rights
Criminal Law Section, Department of Justice

The Reconciliation paper was given a brief introduction by **Lorraine Berzins**. She stated that the paper was a blend of thoughts shared by a very active working group which had met on several occasions, bringing together legal, theological, moral-philosophical and Native justice perspectives.

Ms. Berzins explained that the paper attempted to challenge that what exists, as the current system, based on punishment, is destructive. The current system retains a "scapegoating" function, attempting in part to "get the evil out", and by doing so mistakes the purpose of justice and ignores the potential for good and evil present in each person. While the paper offered no recipes or models, Ms. Berzins suggested that "truth-telling" was a pivotal tool for doing justice. Another element in seeing justice done was the concept of "response-ability", an enabling of people and communities to respond to the crisis of crime and the harm done. The thesis of the paper includes a conscious attempt to respond to crime in a manner which builds a stronger community in the aftermath of crime.

DISCUSSION: Some participants expressed concern with the introduction of the notion of "evil", asserting that introducing it into the discussion may divert the emphasis from more central issues such as responsibility, be it individual or collective, and from the practical need to empower people and communities to respond. One person reflected that the whole issue of scapegoating is often raised and seldom explored or even understood in terms of its origins, historical development, and current sociological function. A request was made to explore scapegoating further. Some raised the challenge that if there is a "bottom line" to everything, including crime and our reaction to it, must the "bottom line have to include punishment"?

SMALL GROUP EXERCISE: Using a case study, participants were asked to consider "who (in the case of the crime examined) is affected and what are the key actions necessary for justice to be done for each person". The principles in the reconciliation paper were to be applied in this exercise.

Ideas such as "truth-telling", the needs and tasks, and who can/should help to get done the necessary work.

The small groups identified the challenge in attempting to identify comprehensively those affected by a crime - the victim and his/her immediate family, the extended family, the offender, friends, the immediate and extended community, state agents such as police, courts, correctional officials and the government at large. The impact of the crime (in this case, the slaying of a gay male by four youths) was seen as broad and complex. Other issues raised included "gay bashing"; the suffering of those affected, the futility of the prison sentences given as punishment and the considerable implications for criminal justice procedures and personnel if another kind of justice were attempted.

RESPONSE TO THE PAPER ON RECONCILIATION: **Vince Del Buono** prefaced his remarks by noting that he had learned for himself that his work in criminal justice, including recent work on developing the first draft of the model Criminal Code and his preparation for international work in criminal justice theory had become a "vocation". Reviewing the Reconciliation paper raised this awareness of a "vocation" again. He told participants that it is at the personal/values level that the paper resonates with a challenge. Mr. Del Buono asserted that the paper was the best stated "challenge" to contemporary criminal justice that he has read to date. He applauded the Reconciliation Working Group and Lorraine Berzins for their work and vision. He pointed out, as well, that the struggle to articulate a challenge to what exists and to offer alternatives is international. This work stood among the best.

Discussion of the Working Group Paper on RESTORATIVE JUSTICE

Working Group Chairperson: Bill McGrath, NAACJ Chairman

Respondent: Dr. Tad Grygier, Canadian Criminal Justice Association

Bill McGrath introduced the paper, noting the concern that restoration is not meant to re-establish, after a crime, the conditions which existed prior to it and that may well have precipitated the crime. Instead, restoration was focussed on reducing harm, eliminating retribution and punishment, emphasizing human dignity and increasing the role of criminal justice personnel to assist in restoration. The paper outlined the implications that a restorative model of justice for victims, offenders, criminal justice personnel and the community.

Dr. Tad Grygier responded to the paper, finding little to criticize. He asserted that many models of criminal justice exist and that it is time that more balanced, non-retributive models be considered. He suggested the term "pragmatic justice", reiterating ideas in the paper such as restoration, restitution, cooperation and reconciliation. Of considerable importance, suggested Dr. Grygier, was the notion of sanctions. He asserted that sanctions will remain a feature of law but they need not necessarily be retributivist. He prompted the group to give more thought to sanctions.

Working Group Paper on PUNISHMENT

Working Group Chairperson: Darryl Davies, Criminologist
Canadian Criminal Justice Association

Darryl Davies introduced the paper developed by his Working Group, explaining that no consensus was reached on the issues, outlining the difficulties the six Working Group members had in coming to any agreement.

Some working group members, explained Mr. Davies, approached punishment from an empirical/effectiveness perspective, others from a moral-philosophical basis and others from a "practical" point-of-view, examining its role in the family, society and education. No common definition of punishment could be reached. The one receiving greatest attention by the group was that of Nigel Walker:

For a penalty to be considered a punishment, it must:

- (a) must be unpleasant
- (b) be "for" an offence against a (legal) rule
- (c) be imposed on the actual or supposed offender
- (d) be intentionally administered by human beings (other than the offender)
- (e) be ordered and administered by an authority constituted or recognized by the system of rules breached by the offender.

Mr. Davies' presentation evoked a lively discussion among workshop participants. They challenged him on the appropriateness of punishment under any circumstance - taking issue with the sense that the Working Group had not reiterated the position that rejects punishment as an element of criminal justice. Mr. Davies explained the mixed views of the Working Group and that some members felt there was a bona fide retributive aspect of criminal law.

Some participants claimed that the group must move away from punishment, displacing it as the cornerstone of criminal justice. They cautioned against falling into the trap of arguing the appropriateness of punishment on the basis of effectiveness. One participant remarked that punishment wasn't what had changed his career as a criminal, but positive human interaction and the challenge to his self-respect.

Working Group on the ROLE OF THE STATE

Working Group Chairperson: Professor Ken Hatt (Carleton University)
Canadian Criminal Justice Association

Respondent: Josh Zambrowsky, Executive Director
Canadian Criminal Justice Association

Eugene Oscapella introduced this paper, highlighting the thesis that there is no single monolithic state - it exists in several different forms. Many agencies (municipal, provincial and federal) comprise the state. "Society" was described as a network of communities with different interests - a natural aspect of a free and democratic society.

Mr. Oscapella noted that the state is necessary, that the people need protection both "by" and "from" the state. Caution against too much reliance upon the state was raised. In criminal justice, the community is partly responsible for crime and for "appropriate responses to crime". The state's role should be kept to a minimum.

Josh Zambrowsky, responding, commented that the paper was quite helpful in setting out some of the levels of the issue, in identifying community responsibility and in helping define the state. He cautioned against placing too much emphasis on the community. The community may not be as well disposed as the state to deal with crime and offender. Too much emphasis on neighbourhood "community" involvement could lead to miscarriages of justice. Mr. Zambrowsky was uncomfortable with the idea of his neighbour being his "judge and jury". He cautioned against the re-emergence of vengeance and injustice if the appropriate role of the state were ignored.

DAY TWO
REFLECTIONS ON DAY ONE

The importance of "language" was raised as one person's reflection on the first day's discussions. Examples were "scapegoating" versus "scapesheeping" - placing disproportionately all the "good" on one individual, and clarifying the difference between "punishment" and "sanction". It was remarked that the group was attempting to define the elements of a new paradigm of justice, yet was limited by "old language".

One participant suggested that one tends to punish as a response of last resort, generally when one is "exhausted".

The need to ensure that responses to crime have "human meaning" was underlined. The importance of responsibility and measures which reinforce the "connectedness of people to one another", and a system that enables the truth to be told and responsibility to be taken were emphasized.

Sanctions: At the request of the committee steering the workshop - **Dan Van Ness** and **Lucien Morin** agreed to speak briefly to the concept of sanctions.

Dr. Morin explained the history of the word sacred, tracing its Latin roots. He noted that sanction has a dual meaning at root - in "sacred", the sacred is to be revered, adored and also to be hated and feared.

Dr. Morin explained that he understood justice to be violence - a refined violence. Justice comes from or finds its origins in the religious - in the notion of the sacred. Before societies had a state, people dealt with some of their problems in a violent way. Taboos and rituals were created to avoid problems and violent reactions to them. He asserted that there is a "limit to justice - justice itself is not enough to live a happy life".

Dan Van Ness maintained that no one wants to inflict gratuitous pain on anyone, and yet no one wants to dispense with consequences. Pain may come with justice interventions but pain is not what is wanted. "What we want is peace - and if pain comes with it, so be it!"

ELEMENTS OF A NEW PARADIGM OF JUSTICE

In plenary session, each participant was asked to list the elements he/she had identified as being an appropriate part of a new paradigm of justice.

From this list, the Chairman suggested that four groups be formed, for each of the functional areas of justice. The four elements of justice developed were:

1. CRIME - violation

- crisis - something that concerns us
- social phenomenon
- continuum of social behaviour
- harm

2. OUTCOMES OF THE
RECONCILIATION
PARADIGM

- expiation
- reparation
- not able to resolve everything
- growth
- realistic thinking
- dignity
- reducing barriers
- sense of family
- responsibility for actions
- accountability
- catharsis
- joy
- protection through restraint and control
- healing
- forgiveness
- caring
- problems solved
- integrative justice
- overcoming fear
- humanistic justice
- humane protection

2. OUTCOMES OF THE
RECONCILIATION

- PARADIGM (continued)
- shared responsibility
 - non-punitive education
 - empowerment
 - trust
 - dignity of individual and community
 - reintegration in community
 - ongoing institutional reform
 - local community control of services:
community-based
 - peace
 - reconciliation

3. PROCESSES (How)
- respect for dignity and worth of individuals and community
 - conveys caring, trust and affirmation
 - inclusion (victim, offender, community, state)
 - within context (other systems etc.)
 - truth-telling - explore many facets of truth
 - expeditiously
 - with simplicity
 - in a constructive way
 - with an eye to future and to outcome
 - problem solving
 - healing and reparative
 - grass roots - connection
 - in ways that are non-threatening, reparative, forgiving, educational, innovative, caring, motivating
 - synergistically
 - ensuring protection of safety and support for all
 - with continuity
 - recognizes and liberates and deals with anger, guilt - ensure catharsis
 - reduces barriers
 - recognize and enhance growth potential
 - in a way that is accessible
 - in a way that is meaningful

4. SYSTEM/ORGANIZATION - type that meets community needs
- continuum of information flow
 - forgiving (e.g. elimination of criminal records)
 - scene for the new model
 - accessible and understandable
 - community-based
 - ongoing institutional reforms

WHERE TO GO FROM HERE?

The group suggested that more developmental work was necessary in the following areas before a large-scale seminar could be held:

1. Principles of Justice
2. **Case studies** illustrating the implications for the practice of justice when the needs of victims, offenders, communities and the state are considered together.
3. The development of **an inventory and informal network** of correctional and criminal justice practices (both national and international) that are congruent with the orientation toward justice being developed by NAACJ's review process; and
4. the development of a **comprehensive statement** which would be a credible basis for justice.

It was agreed that working groups would be formed, under the direction of Professor Hatt, to carry out this work to prepare the group for the next workshop in this preparatory phase.

MEETING WITH THE DEPUTY MINISTERS

Dan Préfontaine Q.C., Assistant Deputy Minister (Policy, Programs, Research)
Department of Justice

John Tait Q.C., Deputy Solicitor General

Frank Iacobucci, Deputy Minister of Justice, was unable to attend. Dan Préfontaine represented Mr. Iacobucci.

Dan Préfontaine explained that the Deputy had been extremely busy in the past year, undertaking a variety of initiatives as well as managing the shifting of responsibilities between the Ministry of the Solicitor General and the Department of Justice. He spoke specifically on the following:

- HUMAN RIGHTS
- CHANGES IN THE ADMINISTRATION OF JUSTICE - trial procedures
- FAMILY LAW - provision concerning recalcitrant debtors - the Family Law Enforcement Assistance Act
- BADGLEY/FRASER - Bill C-15 is through committee; third reading and debate are anticipated but implementation is uncertain.
The pornography bill had been tabled but when it will go to special committee was uncertain
- MUTUAL LEGAL ASSISTANCE OF LEGAL ORDERS - improving international liaison, enhancing drug trafficking enforcement measures and improving ways of dealing with commercial fraud.
- PROCEEDS OF CRIME - more safeguards have been built into this bill to meet the challenge that the Charter presents in respect to it. The thrust of the bill is to take the profit out of crime. A corresponding initiative is the National Drug Strategy - prevention and reduction on the demand side.
- VICTIMS - The three federal departments (Justice, Health and Welfare and Solicitor General) are working with the provinces to honour the UN Declaration on Victims. They are examining the place of the victim in the penal system, establishing a set of principles for the Canadian context, seeking official sanction of Victim Impact Statements and examining the applicability of reconciliation measures and compensation.
- SENTENCING COMMISSION - the Report suggests that one cannot accept one part of it without accepting the others. It attempts to seek an integrated, comprehensive reform. Consultation will follow.

Following discussion with those present, Mr. Préfontaine welcomed a suggestion that a briefing session be held with the NAACJ members to discuss the transfer of responsibilities between departments and the relationship of the voluntary sector with government.

John Tait, Q.C., Deputy Solicitor General, prefaced his remarks by underscoring his commitment to ensure that the voluntary sector does not suffer because of reorganization of Justice and Solicitor General responsibilities.

The Department of Justice would take the leadership role for overall justice policy development but that the Solicitor General would be active in policing, corrections, and parole. He spoke of the following specific measures:

- **CRIME PREVENTION** - While Justice will have a lead role, the police are centrally situated in this initiative and Solicitor General would thus be active in crime prevention. It is a priority area.
- **CORRECTIONAL LAW REVIEW** - Mr. Tait acknowledged that he was quite surprised the Review was so broad; in his experience moving such a broad policy development and legislative amendment package through the system was not typical. Mr. Tait invited the voluntary sector to provide him with concrete, more immediate, priority recommendations on correctional law. He asserted that correctional law reform cannot wait 20 years, recalling that the Young Offenders Act took 20 years to implement.
- **SENTENCING COMMISSION REPORT** - Mr. Tait saw weaknesses in the Report. Some aspects of what parole is all about were overlooked. He suggested the Report deserved a full review.
- **WOMEN IN CONFLICT WITH THE LAW** - Mr. Tait stated that the MSG is still concerned with women's issues as they relate to the criminal justice system. The 1987-1988 funding levels for this program area would be maintained.
- **EXCHANGE OF SERVICE AGREEMENT** - This was a particular area of concern for the Correctional Service of Canada - and Mr. Tait suggested that associations concerned with this matter speak directly with the CSC.

APPENDIX I
NAACJ WORKSHOP
New Directions in Criminal Justice
May 6, 7 & 8, 1987
Strathmere House
North Gower, Ontario

- PROGRAM -

Wednesday, May 6, 1987

- 9:00 a.m. REGISTRATION
- 9:25 a.m. INTRODUCTION TO THE WORKSHOP
- Ken Hatt, Chairman NAACJ Sub-Committee planning the Workshop
- 9:30 a.m. RECONCILIATION
Session Moderator: Ken Hatt
- Brief Introduction to paper by
Working Group member: Lorraine Berzins
- Discussion of the Zeller case: small groups
- Brief Critique: Vince Del Buono
- 11:30 a.m. BREAK
- 12:00 p.m. LUNCH
- 1:30 p.m. RESTORATIVE JUSTICE
Session Moderator: Ken Hatt
- Brief Introduction to paper by
Work Group Chairman: Bill McGrath
- Brief Critique: Dr. Tad Grygler
- Discussion
- 3:00 p.m. PUNISHMENT
Session Moderator: Bill McGrath
- Brief Introduction to paper and questions by
Working Group Chairman: Darryl Davies
- Brief Critique: Dr. Tim Hogan*
- Discussion
- 4:00 p.m. ROLE OF THE STATE
Session Moderator: Bill McGrath
- Brief Introduction to paper
by Working Group member: Ken Hatt
- Brief Critique: Role of the State
- Discussion
- 5:30 p.m. BREAK
6:00 p.m. Dinner

Thursday, May 7, 1987

- 9:00 a.m. To be decided by participants on Day 1
12:00 p.m. lunch
5:30 p.m. dinner

NOTE TO NAACJ MEMBERS ABOUT: Annual Meeting
Meeting with the Deputy Ministers

Friday, May 8, 1987

- 9:15 a.m. Introduction to the Session by
Eugene Oscapella (on behalf of NAACJ Chairman)
- 9:30 a.m. CURRENT AND UPCOMING ACTIVITIES: Department of Justice
Frank Iacobucci, Deputy Minister of Justice
- Presentation
- Discussion
- 10:15 a.m. BREAK
- 10:30 a.m. CURRENT AND UPCOMING ACTIVITIES:
Ministry of the Solicitor General
John Taft, Deputy Solicitor General
- Presentation
- Discussion
- 11:30 a.m. BREAK
- 12:00 p.m. Lunch
NAACJ Annual Meeting
- Report by the Secretary: Ben Hoffman
- Report by the Chairman: Eugene Oscapella
(on behalf of Bill McGrath)
- 1:30 p.m. Adjournment

* unable to be present at the Workshop

APPENDIX II

NAACJ WORKSHOP
NEW DIRECTIONS IN CRIMINAL JUSTICE

May 6, 7 & 8, 1987

Strathmere House
North Gower, Ontario

- LIST OF WORK GROUP MEMBERS AND RESPONDENTS -

WORK GROUP: Reconciliation

CHAIRMAN: Lorraine Berzins

RESPONDENT: Vince Del Buono

WORK GROUP MEMBERS

Jerome Berthelette
Reverend Dave McCord
Dr. Hans Mohr
Dr. Lucien Morin

WORK GROUP: Restorative Justice

CHAIRMAN: Bill McGrath

RESPONDENT: Dr. Tad Grygier

WORK GROUP MEMBERS

Bill Cosman
Gail Czukar
Carol Faulkner
Professor Ken Hatt
Reverend Dave McCord
Ben Hoffman

WORK GROUP: Punishment

CHAIRMAN: Darryl Davies

WORK GROUP MEMBERS

Réal Jubinville
Sergeant Gary Rae
Gerry Ruygrok
Ben Hoffman

WORK GROUP: Role of the State

CHAIRMAN: Professor Ken Hatt

RESPONDENT: Josh Zambrowsky

WORK GROUP MEMBER

Eugene Oscapella

APPENDIX III

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NAACJ WORKSHOP
NEW DIRECTIONS IN CRIMINAL JUSTICE

May 6, 7 & 8, 1987

Strathmere House
North Gower, Ontario

- LIST OF PARTICIPANTS -

- Resource People and Work Group Members -

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DISCUSSION PAPER: A Reflective Analysis on
Reconciliation as it Relates to Criminal Justice
(A Search for Community-Building Justice)

PREAMBLE

This document was first presented at a workshop sponsored by the National Associations Active in Criminal Justice (NAACJ), held in May 1987 in Ottawa, Ontario, Canada. The NAACJ is a coalition of 22 national voluntary organizations in Canada who share an interest in issues related to criminal justice.

This is a time of particular ferment in the work of this coalition because of the historical events that are presently unfolding on the Canadian Criminal Justice scene. The federal government is conducting a fundamental revision of the criminal law in Canadian society. Through the Canadian Sentencing Commission, the Criminal Code Review and the Correctional Law Review, provincial governments and the Canadian people are being asked to re-examine expectations that will affect, for a long time to come, the work of the police, the courts, prisons and parole. At this time as well, our country is contending with a new legislative approach to young offenders that calls for much greater involvement of communities in dealing with crime than has been asked of them in a long time.

There is heightened awareness that adversarial approaches have failed to meet the human need, and that the social sciences alone have failed to deliver on their promises of rehabilitation and crime reduction. There is also a new willingness to move away from incarceration for economic reasons: jails are a luxury the country can no longer afford. At the same time, among the general public, fear and frustrations have been mounting and the question of the death penalty was recently once again brought forward for political discussion.

Member agencies of the NAACJ coalition have been faced for some years now with continuous pressures to respond to government-initiated proposals for reform that are extremely time-consuming, but fragmented, and ineffective. The NAACJ has decided that the time has come for the community to take a proactive stand on the more fundamental issues and to prepare itself to deal with crime in a different way. This discussion paper was one of four prepared to assist the associations in their joint exploration of fundamental problems and new directions for criminal justice in Canada.

The document is the outcome of the reflection of a small working group struck for this purpose: Jerome Berthelette of the National Association of Friendship Centres (a group representing the interests of Canada's aboriginal peoples); Dr. Lucien Morin of the Canadian Association for Adult Education; and Lorraine Berzins, David McCord, Dr. J.W. Mohr, Vern Redekop and Jamie Scott, all of the Church Council on Justice and Corrections, of which Dr. Mohr is past-president.

The group's reflection was supplemented with material from other sources and articulated in its present form by Lorraine Berzins. Participants were asked to prepare for discussion by highlighting those items which resonated as being true to their experience and important to the exercise. They were also asked to apply the principles and ideals to a recent Canadian criminal case. There was unanimous support from the participants for clarifying the ideas, exploring their implications and pursuing a new paradigm of justice.

At the request of the Department of Justice, the paper was made available for distribution to delegates preparing to attend the international "Reform of the Criminal Law Conference", in London, England (July, 1987).

APPENDIX IV

DISCUSSION PAPER

A Reflective Analysis on Reconciliation
as it Relates to Criminal Justice

(A SEARCH FOR COMMUNITY-BUILDING JUSTICE)

Prepared by a

Working Group of the

NATIONAL ASSOCIATIONS ACTIVE IN CRIMINAL JUSTICE (NAACJ)

for a

WORKSHOP on "New Directions in Criminal Justice"

May 6 & 7, 1987

OTTAWA, ONTARIO

DISCUSSION PAPER: A Reflective Analysis on
Reconciliation as it Relates to Criminal Justice
(A Search for Community-Building Justice)

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APPENDIX: Some Reconciliation Guidelines

A Reflective Analysis on Reconciliation as it Relates to Criminal Justice
(A Search for Community-Building Justice)

I. INTROOUCTION

This paper is an invitation to search with us for an alternative approach to justice-making in the aftermath of crime.

The desire to search for a new approach emerged loud and clear at the December 1986 NAACJ Workshop "Foundational Problems of the Criminal Justice System". As we found ourselves on the brink of a Correctional Law Review that was about to give us more of the same old thing, a strong consensus broke through in a powerful new way: this system is destructive, and it is destructive because it is based on punishment.

It also became clear that attempts to reform it that tried to fit themselves neatly into the basic workings of this present system were doomed to becoming part of the destruction: we kept falling back into the same old thinking traps. The desire emerged to remove our thinking from this framework and take the time to brainstorm in far-reaching ways: what are the values we want to uphold and what must we do to uphold them? In the aftermath of crime, what are our most deeply-felt needs? Who needs what, and when? What must be done, and who should do it?

This paper is about an alternative approach to justice-making that has been tentatively referred to as "reconciliation". What the paper is able to say most clearly is what reconciliation does not mean to those who invoke it as a desirable principle or objective. It does not mean a return to the previous status quo, and if that is what is being conveyed by "reconciling", "reparative" and "restorative", then we need another term.

What the paper is able to say less clearly is what reconciliation - or an alternative approach to justice-making - could mean in today's context. It is in this respect that it is an invitation to journey, to participate in the process of identifying what we need to do to meet our real needs. And it is for this reason that the presentation of the paper is not tightly structured in the conventional way. We are groping to name our experience and aspirations, to confront our values and ideals, to face the demands of what it would mean if we were to take responsibility for putting these ideals into practice, of acting on our capacity to overcome pain and resist evil - a capacity we know that we have.

We are looking for an approach to justice that uses the crisis of crime to build a stronger community in its aftermath, to attend to the problems that the crime has made visible, to challenge all those who need to take responsibility for what they know and what they do, to call the community to accountability for all of its members - and, through this, emerge from this crisis hopefully ever so slightly wiser, closer to each other, more aware of each other's needs and how to meet them, from having learned from what went wrong and who was being left out. Hence the title of this paper: a search for justice that builds community.

II. WHY WE ARE DOING THIS PAPER

1. We're in the midst of a major shift in our understanding of crime and society, in our understanding of the social psychological, economic and symbolic processes that affect how we use our system of punishment. There's a danger that major decisions will be made without reflecting these new understandings.

For example:

- 1.1 more and more of us realize that we can't get rid of fear by locking people up;
- 1.2 that we may have been putting our resources in the wrong place, just trying to change offenders, instead of concentrating as well on the needs of victims and communities before and after crime;
- 1.3 that all the human work that needs to be done when a crime is committed - by offenders, victims and communities - hasn't been getting done and that in fact our adversarial legal procedures don't encourage this and make it much more difficult to do;
- 1.4 that the way we label and separate people produces disastrous results;
- 1.5 that we can't afford to keep building prisons, yet our prisons are overcrowded;
- 1.6 that we've been using our system of punishment to avoid looking at many social problems and problem people that we don't know what else to do with: the mentally ill, the homeless, the weak ones in our educational and economic systems;
- 1.7 that decisions about criminal justice and within criminal justice are being made on the basis of abstract stereotypes about offenders, victims and communities and are no longer grounded in what's really happening to people and what needs they are really experiencing;
- 1.8 that the realities of justice and the law we think we have configured often turn out to be but the reification of our perceptions of justice and the law. It is our perceptions that create reality rather than reality which determines our perceptions.

"Criminal justice is inextricably interwoven with, and largely derivative from, a broader social justice. The construction of a just system of criminal justice in our unjust society is a contradiction in terms... (We must admit) the impossibility of achieving more than a superficial reformation of our criminal justice system without a radical change in our values and a drastic restructuring of our social and economic institutions.

Struggle for Justice, A Report on Crime and Punishment in America, Prepared for the American Friends Service Committee, N.Y., Hill and Wang, 1971, pp 16, 23-24.

2. We are in a state of transition in our understanding:

- 2.1 our cultural mind has become conscious of the great dissonance between the reality of justice and our beliefs about justice;
- 2.1 our ideas about truth, right, nature, human nature, God, consciousness, purpose, good, causality, understanding, justice and law, etc. - have all undergone Copernician revolutions in recent years. And we cannot ignore these changes because they have had a profound effect on our theories and practices of justice. Accordingly, our basic assumptions regarding justice and law today have to be re-examined in the light of what biology, cybernetics, communications theory, critical theory, logic, epistemology etc. have discovered about such things as truth, human nature, causality, understanding etc;
- 2.3 it is becoming more and more obvious that there is something basically negative about the idea of rehabilitation: it is estranged, by definition, from the idea of person, from the positive notion of human promotion and development. We are discovering that rehabilitation really amounts to an updated process of scapegoating. Rehabilitation is not really effective, cannot be effective in fact. And the reason for the ineffectiveness has nothing to do with insufficient research in causality or etiology, or with irrelevant taxonomies of measurable objectives. The problem is with a misconstrued philosophy of human conduct.

"Most, if not all, theories of rehabilitation still cling to a philosophy of human behaviour as the product of a solitary will and reason, the result of an autonomous, atomic, self. As if an individual human being was only a self and a self caused by itself, rather than the complex construct of relations through and by others. Human beings have an insatiable desire of behaving and becoming which is more dependent upon the mirror gaze of other individuals than upon the rational rules of ideal selves. And human relations do not halt before the rational calculations of supposedly independent selves. Because modern theories of rehabilitation do not see how powerless they are to address the fundamental question of human relations, they also do not realize that the reason of rehabilitation or the rehabilitation of reason is being paid for in the hard coinage of scapegoating. For example, when rehabilitation spends itself in "why" truths, or "how-come" truths or "what for" truths, supposedly discoverable within the personality traits of the individual self, it transforms itself into a tremendous categorizing technique of scapegoating. Rehabilitation does not work... And refinements to maintain the nostalgia for a utopian system of rehabilitation can only add frustration to the present paralysis."

Canadian Association for Adult Education (1986);

- 2.4 we are discovering that we have been fooling ourselves by making medical problems out of social relations.
- "We have no enemy whom we can fight, exorcise or dispel by 'cure'. What we do have are problems in living - whether they be biologic, economic, political or social-psychological... Mental illness is a myth whose function it is to disguise and thus render more palatable the bitter pill of moral conflicts in human relations."

T.S. Szasz, "The Myth of Mental Illness"
American Psychologist 15, Feb. 1960

"We should be resisting any proposal which locates its phenomena in the heads of individuals when the problems are better studied with attention to group processes."

Joel Powell, unpublished paper presented at the American Society of Criminology meetings in Denver, November, 1983)

- 2.5 When you get to the point of being able to accurately predict the number of rapes and muggings in a given community - as the police are now able to do - you have done away with the notion of individual responsibility.

Tad Grygier

- 2.6 These emerging new understandings have made many of us realize that the criminal justice system is now like a coat that doesn't fit any more.

The force of the needs that we now see that we have, and that are not being met, are like a baby who has outgrown the womb: it has become vital to emerge from that womb, to have our approach to justice find a new "espace vital" (vital space or organic environment) to live in, to take root in, to be born into something new.

The problem is that the current proposals for the Criminal Law and Correctional Law Review are being made as if none of this had happened.

They reflect the reality of the "system" as perceived by the operators of the "system". They concentrate so much energy on trying to account for "what is" that they fail to see that "what is" is no longer. In fact a new vision of justice and human interaction is already very present in our cultural paradigms but our paralysis within the existing model of justice, as if it were the only one possible, is such that we do not realize it yet. The government position papers do not seem to be aware of these new realities which constitute what we would call a "new paradigm of justice".

No approach is more impractical than one which takes the present practices as more or less given.

The best practices may not be good enough and may even be totally useless if the assumptions they serve are those of an outdated or outmoded perception of reality. A "new" paradigm of justice is with us which calls for other practices.

III THE CRUX OF THE PROBLEM

1. "Old heroes die hard"

On the basis of the above, the authors of this paper - and many other people with a long experience in the field - have concluded that we need a new vision of justice as a basis for planning and this cannot happen without a new vision of human interaction based on our updated knowledge and understanding. Our analysis is that it is the punishment model that clearly has to go: any approach that maintains the punishment principle is bound to give us more of the same system that we know has been nothing but destructive of the human work that needs to be done. We need to extricate ourselves from this way of thinking, ground ourselves in the values we want to uphold, and, with that as our basis, examine the human work that needs to be done when a crime alerts us to the fact that all is not well among us.

The trouble is that it is very difficult for all of us to extricate ourselves from the prevailing punishment model for it is very deeply entrenched in each of our lives and in the way we've been brought up to think. Let us first

remind ourselves of why this is likely to prove such an obstacle to our task and how vigilant we must be about the likelihood of falling back into the same way of thinking half-way through the process.

2. The concept of "social sin" or "structural evil": how we all might be contributing to the injustice of a system that seeks justice.

"What is proper to Social Sin is that it is not produced by deliberation and free choice. It produces evil consequences but not guilt in the ordinary sense. According to the biblical description, social sin is committed out of blindness. People are involved in destructive action without being aware of it.

....The first level of social sin is made up of injustices and dehumanizing trends built into the various institutions - social, political, economic, religious, and others - which embody people's collective life. As people go about doing their daily work, and fulfilling their duties, the destructive trends built into their institutions will damage a growing number of persons and eventually destroy their humanity. This evil may go on without anyone being fully aware of it. For the contradictions implicit in institutions remain hidden at first; only after a long time do the negative effects appear, and when they do, they are not immediately recognized as effects of the system. It takes a long time before the discrepancies implicit in institutional life translate themselves into dehumanizing trends and are acknowledged as such.

...A second level of social sin is made up of the cultural and religious symbols, operative in the imagination and fostered by society, that legitimate and reinforce the harm done to a growing number of people. Here again we have that ignorance. We have called such symbolic systems 'ideologies'. Such an ideology would be the privatized notion of sin, for by persuading people that the source of evil is only in the human heart we make them blind to the destructive trends built into their institutional life.

On a third level, social sin refers to the false consciousness created by these institutions and ideologies through which people involve themselves collectively in destructive action as if they were doing the right thing. This false consciousness persuades us that the evil we do is in fact a good thing in keeping with the aims and purpose of our collective well-being. Examples drawn from our own society would be the achievement-orientation of the dominant culture, its individualistic and competitive spirit, and our arrogant collective self-understanding with its implicit racism. This false consciousness exists, of course, in varying degrees of intensity, from a total identification with the dominant trends of society, including all of its social effects, to a greater and greater distancing from these trends accompanied by growing awareness of the injustices implicit in them. It is on this level that the wrestling against social sin begins! For here people, open to the Spirit, are able to become aware of, and turn away from, the taken for granted injustices built into their society. This is the level where conversion takes place.

...Finally, if my analysis is correct, we have a fourth level of social sin which is made up of the collective decisions, generated by the distorted consciousness, which increase the injustices in society and intensify the power of the dehumanizing trends. These collective decisions, made by councils or bands of various kinds, appear as if they are based on free choice and deliberation while in fact they may simply be the rational consequences of the distortions built into the institution and duplicated in consciousness. At the same time, this is the level where personal sin clearly enters into the creation and expansion of social sin. For here, out of conscious evil intention and greed, a person or a group of persons can magnify the evil done by institutional life and give a twist for the worse to human organization."

Gregory Baum, Religion and Alienation

The dynamic, then, is that we have an original injustice, we attempt to justify that oppression theologically, economically, psychologically, criminologically, and as a result promote a "false consciousness" from which many other "right" decisions flow logically and justly, but based on a "wrong", "unjust" starting point.

From where comes the original injustice? Perhaps from the phenomenon of scapegoating, among others.

"Those who dominate and have power have to fit everything to their own image."

Jerome Berthelette, National Association of Friendship Centres.

3. The Phenomenon of Scapegoating: Why do we do it?

- 3.1 "A force which plays heavily on human behaviour is the fear of being caught, which is why many people approve the harsh treatment of criminals. From the dark caves of the mind where powerful mischief is hatched comes the message that if thieves and cheaters do not suffer, everyone - beginning with the self - will steal and play false. The call for the death penalty comes loudest from people who carry a high level of rage; they imagine that the restraints which keep them from killing need reinforcement.

Mistrust of self comes from an immature conscience, the consequence of embittering experience and emotional hunger"

June Callwood, Globe & Mail, September 24, 1986.

- 3.2 Social scientists say that human beings in conflict always look for a scapegoat, someone to take all the blame so that the rest of us can continue to feel that we are good and that the conflict is not our fault. This happens especially when some person gives us good reason to criticize (a difficult family member, an unlikeable colleague, etc.) and the rest of us have the power to attribute all of the problem to him or her.

Social scientists also say that labelling people in this way has devastating effects on them. It makes it very hard for them to feel good about themselves and to behave differently from what our negative expectations are.

- 3.3 We all have a tendency to want to establish an order that is "our" order, that does not disturb what is convenient to "me", what keeps things running in a way that meets my needs - and we're always tempted to call this THE order, the one that should be submitted to by others even if it doesn't meet their needs as much as mine - the "right" order, "God's order", "the order that's good for the family, this country, this organization, this Church". Conflict with this order is no longer seen as the natural conflict of desires between equals, but the crime or sin or flaw of the other who dares to question whose will shall prevail.

- 3.4 It is because we are trying to be righteous that we do greater violence to each other. We need someone to blame so we can feel we're good and we do it whenever we can get away with it: to those who are weak, to those we don't need, to those we don't understand because they're different from us, to those with whom we have no relationship, bond or shared meaning that can be called upon to absorb the conflict that has been experienced. Look carefully at the history of those we imprison for the most serious violence and you are likely to find people who have been repeatedly labelled and excluded by those who have had the power to assert that their perception of what is right is "reality" for today, "sanity" for today, the criminal law for today.

- 3.5 "I am afraid of you" BECOMES "You are dangerous"

"I find it hard that you are different from me" BECOMES "There's something wrong with you: you must change or leave"

"I don't understand why you are not trying to be the way I think you should be" BECOMES "You are unremorseful, unrepentant uncooperative"

- 3.6 This preoccupation with individual guilt and its repression allows us as a community not to look at ourselves, not to take counsel again, not to see what it is that produces crime among us. It allows us to avoid becoming aware of our common participation in evil. It allows us to avoid feeling that "there but for the grace of God go I", not only in relation to offenders but also in relation to victims. Victims, in fact, are no more listened to than offenders. It is not easy to listen to anguish and hate. As victims are reminded by offender and offence of the feelings and deeds they are capable of, so they remind us. And we don't want to know.

"When there are only individuals on trial and not the communities which produced them, Christianity and liberal humanism can avoid the issue of evil and sweep the dark side of our existence under the carpet, avoid it or even excuse it rather than facing it. And thus there can be no forgiveness because we are not made to recognize our common participation in evil. Forgiveness depends on that."

Hans Mohr (1987).

IV. WHY PUNISHMENT "SUCKS"

1. The infliction of pain

"Experiments have conclusively proven that no one learns anything by punishment. What you learn (as a child) is how to avoid punishment by lies and how to punish a child 20 to 30 years later. People continue to believe, however, that punishment can be effective.

...how can I transmit what I have learned about child abuse to professionals, parents and people responsible for law? It's not easy because most people learned from the beginning of their lives that the child has to be spanked in order to become as good, human, honest, tolerant as the teachers, parents and ministers and others around them believe that they are. Interviewers would say that even though they were often spanked as children, they didn't become an Adolph Hitler. I see it as my task to repeat that each kind of beating, caning and spanking of a child is a humiliation and is a serious damage for his whole life.

...People treated this way (with spanking, striking, verbal humiliation) pretend that this kind of treatment was necessary. They reserve the right to do the same...they see cruelty as a normal way"

Alice Miller, Swiss psychoanalyst, Omni, 1987.

- 1.1 Punishment was meant to meet the minimal condition of tangibly acknowledging the harm done. What has grown up around it is the infliction of pain and the satisfaction of revenge. A civil society has no business in furthering the infliction of pain and the execution of revenge.
- 1.2 "To escape from violence, it is evidently necessary to renounce the idea of retribution; it is therefore necessary to renounce those forms of conduct which have always appeared natural and legitimate. It seems just, for example, to respond to good with good and to evil with evil, but the results are obvious..."
René Girard, Des choses cachées depuis la fondation du monde
- 1.3 Punishment is the infliction of suffering, by definition. While penal sanctions may sometimes happen to be painful, should they necessarily be so? We have a

"strange belief in criminal law as a kind of penal magic, as if violence could produce non-violence, as if reconciliation could be the aim and the effect of punishment. Hence our criminal law as the impotence, the fury and the folly of the will in the face of what is but should not have been, in the face of what it can no longer change but which it nevertheless tries to annul through punishment - no matter how diluted or

jelled our interpretations of the concept have become. Hence, also, our criminal law as a sign of exasperation, indignation and despair when faced with Beccaria's blunt question: 'What is this right which men assume to slaughter their fellow man?' "Of Crimes and Punishment

Canadian Association for Adult Education (1986)

- 1.4 The Canadian Government's recent documents proposing reform take the position that retribution is an acceptable underlying aim of the criminal law, "as a requirement of justice, a fitting response to wrongdoing...which is appropriate and adequate" (page 27, Correctional Philosophy published by the Ministry of the Solicitor General, also in Criminal Law in Canada Society published by the Department of Justice). This position reveals the violence of justice or justice as violence, that is, as an inevitable response or reply to an earlier violence, and on and on.

"It confirms, without being able to acknowledge, that in our present paradigm of justice there is no difference between the violent act which the violence of justice is intended to prevent or punish and the violence itself. As a response to and reprisal against violence, justice as violence or retribution is symmetrical with vengeance, however legal and 'due processed' this retribution may be. And it is precisely because it is losing ground to its own inherent violence that our criminal justice system is forced to accept retribution."

Canadian Association for Adult Education (1986)

- 1.5 Punishment is justified evil and as it stands now, the state has a monopoly on violence. Prison is the only satisfaction people can get.
 - 1.6 A man has a problem with his wife, so he hits her. Now the Attorney General has a problem with the man. So he hits him. It's the same process; we have learned nothing new. For what reason is such evil justified for the state, but not for any one else?
- ##### 2. The Ambiguities
- 2.1 **Retribution or violence clings to our criminal law with the appetite and patience of a cancer.** Assuredly it would be a great benefit to leave the beaten path, to realize that the malaise of our criminal law rests in its profound inability to escape from the cycle of violence. At best, retribution is prophylaxis: at worst, it is a crime like the rest.
 - 2.2 **Contradictory objectives make no sense, and as such command no action.** You cannot aim to punish and reconcile at the same time, just as you cannot at the same time answer the contradictory imperatives to walk and stand still, to speak and remain silent. Contradictory objectives can only lead to stalemate or total paralysis. And this is not a problem of consensus, or opinion, or ideology: it is a question of logic.

2.3 We have allowed criminal law and the "criminal justice system" to replace justice. By allowing it to organize that which comes under our conscious inspection, what we get is a "bag of tricks" - some of them very valuable and very useful tricks. But we still do not know two pennies worth about the wisdom or the value of justice. So that criminal law becomes a short-cut device to enable one to get quickly at what one wants, not to act with maximum wisdom in order to live as human beings, but to follow the shortest, logical, practical or causal path to get what one next wants, which may be law and order; it may be safety; it may be incarceration; it may be punishment. Above all, it may be vengeance.

2.4 Punishment is not something human beings can take upon themselves. We have to extricate ourselves from that very deep way of thinking that makes us believe in cause and effect, in evil and good in external conditions that we can affect in the future. We have to extricate ourselves from the Roman Law Paradigm way of dealing with human behaviour by applying rules and norms, and help people to, instead, look in the mirror at what we are really like and take responsibility for moral choices.

2.5 "Je ne suis ni ton bourreau ni ton juge". Jean-Jacques Gérard is a man whose 9 year-old son was strangled to death by a stranger, in a detail of horror that the parents found intolerable. 'I had but one idea, to get back at whoever did this.' But the climate of community hatred and vengeance that developed was more than Gérard could take. 'I had to see things more humanly, to put a stop to the passions that were overruling us. I had to hang on to some common sense by finding a way to understand what happened, what kind of person the murderer could be.' Gérard's search led him to a 19 year-old youth from a disturbed family that the police characterized as both weak and violent. He was not a homosexual. So why murder in this way? 'I sensed intuitively that this was not the act of a sadist but of a miserable wretch...After all I have heard, I believe today that the rapport he struck up with my son evoked in him a tenderness that he had never experienced before and was unable to tolerate. I wrote to him in prison: 'I am neither your judge nor your executioner. You killed my son François but that does not mean you do not have a form of dignity. I want to meet you, so I can understand'. Is this forgiveness? Says Gérard: 'If there is a God somewhere, forgiveness is His job, not mine. It's not up to me to get back at the murderer, nor to forgive him...' All Gérard is trying to do is to make some sense out of the drama. 'For me, it's a way of honoring life.' Beyond horror. (*Actualités*, France, 1985).

2.6 Because of our reluctance to look at reality in the mirror, the system has become substitute reality.

2.7 The truth is that good and evil are what we are in, and harmony is never a stable state. There is a constant organic flow from harmony to disharmony, to harmony. We can't change that, we can't find a recipe for constant harmony in the future if only we follow certain rules and procedures. We can only remind ourselves of how we want to be living together and out of those values, guided by those values, within a framework of good and evil, make a decision for the good.

2.8 The realistic goal is not to prevent crime but to learn how to cope with conflicts when they occur. This is done by building connections between people so that the "little ones" are not marginalized and scapegoated, so that there is tolerance of differences and sensitivity to others' rights. It would seem that, before we launch into great strategies for punishing violence, or preventing it, there is a need for a massive consciousness - raising educational effort about our great fascination with violence: what are we neutralizing out of our daily relationships that leads us to relegate violence to certain marginal experiences on which we thrive "in safety"? What extra burden of "badness" are our scapegoats carrying for us because we won't carry our own? Perhaps more of our efforts must be concentrated on trying to understand this dynamic of ours before we can expect a major breakthrough in the prevention of crime, or at least of criminalization.

We scapegoat all the time, and most of the time we don't care because the people we do it to are too unimportant to cause us to go through the painful process of realizing that what we're doing is unjust, and is preventing us from looking at what human work really needs to be done to reduce violence. It takes someone like Gerry Ruygrok (the father of Celia Ruygrok, an Ottawa half-way house worker who was murdered while on duty) to remind us incessantly of how serious this is because his daughter died as a result of our failure to do anything effective. (Mr. Ruygrok is a Canadian immigrant from Holland who is pressing the Canadian public and its criminal justice system to deal with the problems that he uncovered as he looked into the conditions that led to his daughter's death: 21 year-old Celia was on midnight duty alone in a half-way house and was sexually tortured and murdered by a 29 year-old man released on parole after serving ten years of a life sentence for a murder of an almost identical description).

"Morality's compulsion to impose whiteness and blackness on a field which is a hundred shades of gray ends up a kind of obtuse madness. In most ethical choices, there are degrees of rightness in each possibility. The dilemma that lies beyond the influence of rule books is to decide which option is less wrong...

...John Dewey, the 19th century U.S. philosopher and educator, used as a paradigm for ethical development the reasons that parents give children to explain why they should not lie...'God will not love you'...'It's a sin'...'You'll be found out and you won't have any friends...' Top prize, according to John Dewey, goes to parents who explain that children shouldn't lie because the bedrock of a family is trust, and members can't function at their best without it. Since people in a family, in a society, make critical decisions on the basis that what they are told can be believed, the fabric is weakened by untruth.

... An ethic based on responsibility for the connectedness of the human tribe..."

June Callwood, *Globe & Mail*

- 2.9 To be human is, by definition, to have a choice. If we are to uphold the human in our response to crime, we are to bring a presence, uphold a value, not impose a standard, as the imposition even of good would still be wrong.

"There is no list of 'right' policies - there is only what we can do given our moral values and the political consensus we achieve."

Dian Cohen, MacLean's Magazine (1987)

3. The imperative of truthtelling

- 3.1 **The punishment model focuses on finding someone to blame, so the rest of us can be let off the hook.** It focuses on labelling, blaming and punishing (the concept that there will be a penalty is built into the present definition of criminal law). Blaming is personalizing evil, it doesn't allow us to examine the total picture of what happened here that brought such pain and destruction, it leaves many questions unanswered, not even asked. Revenge comes out of the impotence we then experience in the face of all the evil we have experienced.
- 3.2 **A context for the only kind of truthtelling that can answer some of our questions must be the least threatening possible, and punishment is threatening.** We need truthtelling to see what good can be chosen that can give us a more substantial basis for feeling safe again. Publicly telling the truth is the only force that can begin to liberate us from the entrenchment in evil. Truth is an essential dimension of our liberation. Each party has within his or her own experience a piece of that truth and each party must be empowered to speak it, and listen to the others, so that the total picture can come out.
- 3.3 **This truthtelling process can enable us not to have to remain adversaries.** It will not change our assessment that what happened was evil, but it can mean that evil does not have to remain an obstacle between us. We can have an encounter that can be human despite what has gone on.
- 3.4 **But the punishment model has actually systematized our being adversaries.**

"We have enough problems being adversaries without systematizing it!" Vern Redekop (1987)

V. THE ANATOMY OF RECONCILIATION

1. **The opposite to punishment is sharing the suffering.** It demands very courageous action. It is not nicey-nicey, saying "it didn't really matter", it's being willing to share the pain of all that happened and face everyone's response-ability in it. We can't get to the other side of it unless we go through it. That's why we avoid it. That's what the punishment model allows us to avoid and that's why we cling to the punishment model so much.

2. **Reconciliation is tough. We can't let ourselves off the hook. But we can't let others off the hook either.** It demands a response from all to account for how they are contributing to the problem by the choices they have been making in their lives: you owe us a response about your life. It demands of others that they live in truth, that they not continue to make choices that do us harm and keep us apart.
3. Consider how the adversary system prevents all this from happening.
- a policeman responding to "a domestic" goes through a red light and kills a woman. He is told to make no comment, express no grief. Does he attend the funeral?
 - a child drowns in the Boys & Girls Club pool. The Director hands the matter over to a lawyer, and, in the media, expresses no sympathy or concern and refuses to provide facts on numbers of children at the pool that day.
 - In a sensational Canadian case, a prominent man stands trial for having his wife murdered. He was a highly respected man in his "community". How many people knew something of his life and were never called to account? This murder did not come out of the blue...
4. **"India met the violence, and did not back down"**

"Gandhi took on the suffering of India, not to reproach and confound others with the spectacle of his own penitence for their sin. He wanted them to recognize that they could learn to bear and overcome the evil that was in them if they were willing to do as he did. He wanted to liberate the untouchables not only from political and economic oppression but from the incubus of their own self-hate and their despair. And finally he wished to liberate the oppressors themselves from their blind and hopeless dependence on the system which kept things as they were, and which consequently enslaved everybody both spiritually and materially."

"...The evils we suffer cannot be eliminated by a violent attack in which one sector of humanity flies at another in destructive fury. Our evils are common and the solution of them can only be common. But we are not ready to undertake this common task because we are not ourselves. Consequently the first duty for every person is to return to his or her own 'right mind' in order that society itself may be sane."

"...Repentance is 'a great understanding' (Hermas) - and by no means an emotional crisis. It is the ability to cast off the intolerable burden of the past act, no longer seen as irreversible. But obviously no person enclosed in his or herself can utter an omnipotent word of command and abolish his or her own sin. The 'knowledge' and 'understanding' which is truly the 'great (and repentant, liberated) understanding' is therefore 'understanding-with' or 'con-scientia' (conscience). A kind of synthesis of agreement by which our internal conflict is resolved and 'all the knots of the heart are loosed'"

"...In this context, truth and forgiveness go together and there must be one truth and one forgiveness both for myself and my brothers [and sisters]. Both truth and mercy are falsified when I judge by a double standard."

"...The capacity for forgiveness and for understanding in this highest sense makes human beings able to transcend the limitations of that self which is the subject of evil. But this is not a merely mental operation, a manipulation of 'pure intentions' and the excitation of subjective benevolence towards offenders. It means an immolation of one's empirical self, by mercy and sacrifice, in order to save and liberate oneself and the other. To forgive others and to forget their offense is to enter with them into the healing mystery of death and resurrection."

Thomas Merton, Ghandi on Non-Violence (1964)

...and the phoenix rises from the ashes...

"...The truth may turn out in terms of the current moods and trends of a blind society to be supremely unprofitable. In that case, when truth becomes absolutely the worst policy, one follows it anyway, even when it leads to death."

"...Ghandi's 'vow of truth' (and other vows) - the necessary preamble to the awakening of a mature political consciousness, must be seen for what it is: not simply an ascetic or devotional indulgence that may possibly suit the fancy of a few religious pacifists and confused poets, but (a) precept(s) fundamentally necessary if man [and woman] is to recover his [and her] right mind".

"....Peace cannot be built on exclusivism, absolutism, and intolerance. But neither can it be built on vague liberal slogans, and pious programs, gestated in the smoke of confabulation. There can be no peace on earth without the kind of inner change that brings man (and woman) back to his (or her) 'right mind'".

Thomas Merton, Ghandi on Non-Violence (1964)

5. "The aboriginal tradition calls the person to accept responsibility for self, family, community, nation, and for nations to accept responsibility for each other. Today's crisis is that no one is accepting responsibility for anything they do: parents leave children to TV and day care, kids see no model of responsibility, the education system bell-curves you. Accepting responsibility is very demanding, upon the individual, the community, the nation".

Jerome Berthelette (Oral Tradition)

6. "My neighbor is not initially my enemy. We are not born enemies, we are born wanting to reach out to the other. In friendship, we accept the other as other. In violence, we reduce the 'other' to 'the same'. Justice is to correct that, to return to being other. It is therefore not reconciliation that is part of justice, but justice that is part of reconciliation."

Lucien Morin

7. "The aboriginal tradition calls the person to do something, like build a canoe, not only out of selfish desire, but to be used by other people. Not only for my own survival, but for the survival of the nation. It is no good to survive if the nation doesn't survive."

Jerome Berthelette

8. "When you enter the sweat lodge, you divest yourself of 'stuff', of attachment to material stuff."

(Native Oral Tradition)

9. "I use my canoe for pleasure, and to hunt and fish for food. If my neighbour has a sick child, my neighbor's need for my canoe comes first".

(Native Oral Tradition)

10. "You have to lose your life to gain it" - (biblical tradition). This message is not one of oppression, but of the only real liberation. You are on a self-destructive course if you don't put your friend before yourself.

11. Evil is necessary. It is what forces us to re-orient ourselves to good. The good is strong at the very beginning. The Native oral tradition speaks of the two twins. The good always comes first, then comes evil. The good is always stronger, you can always go back to the good.

12. Re-conciliation. Re-paration. Re-sponse-ability: the ability to hope again. The good you can get from people in a crisis is enormous.

13. Social scientists tell us that deviance has an educative function. It is what we use to articulate and promote our norms and values.

14. Every society has to have crime. It's how we deal with it that counts.

15. We're dealing badly with both evil and good because we're dealing with them separately. We have to deal with them together.

"...where I was born, the trees were always in the sun. And I left that place because it was intolerant of rain. Now, we are here in a place where there are no trees and there is only rain. And I intend to leave this place - because it is intolerant of light. Somewhere - there must be somewhere where darkness and light are reconciled. So I am starting a rumour, here and now, of yet another world. I don't know when it will present itself - I don't know where it will be. But - as with all those other worlds now past - when it is ready, I intend to go there."

Timothy Findley, Not Wanted on the Voyage (1984).

16. The garden has to be tended incessantly. Peace-keeping is a constant call to responsibility. We keep falling into the trap of thinking a model will do it for us. Any model will do us in.

17. "What I mean by reconciliation is breaking the circle of evil, which consists of vengeance and returning evil for evil. Reconciliation lies in ending this apparent logic. It's nothing but the capacity to be human and forgive your enemy. It does not mean denying justice and forgetting about everything, it just goes further than that."

"Reconciliation reaches the profundity of human nature where one finds the dimension of magnanimity necessary for forgiveness. If we are to reach tomorrow with possibilities and live together in peace we must overcome the spirit of rancour and vengeance. Reconciliation is more than just egalitarian justice, giving both parties what they deserve. It is the capacity to overcome pain and demonstrate the ability of human beings to resist evil, and the dignity of which a human being is capable."

"...I remember something that happened in Nicaragua right after the Sandinistas came to power that illustrates what I am saying. Tomas Borge, a member of the governing junta, was visiting the prison where he had been imprisoned only a few months earlier and he met a high official of the Somozista guard, a person responsible for the torture he had endured. Borge spoke both to the guard and the people present. 'My first vengeance will be this - that your children and your wife will live in peace and freedom. You see these hands? They were not made to kill, but to care for life.' He embraced the man and said, 'You are free.' This simple event demonstrates very clearly the dignity of which a human being is capable; this is what I mean when I talk about reconciliation."

Luis Perez Aguirre, (Uruguay)

18. "INJUSTICE MUST BE MADE VISIBLE" (Gandhi)

"It is extremely important to see the issue of how to deal with the aftermath of violence in the context of reconciliation and forgiveness because it is the only way to treat crimes against humanity. There are steps that must be taken to make it work and to make it more than just one group giving in to the demands of another. First, trust must be restored in the democratic values of participation, public responsibility, social and political responsibility, participation in production, and especially freedom. We need to exercise all these preconditions of democracy and eliminate the fear of freedom. Fear is typical of military regimes and wherever the state's security, [or institutional good order] takes priority over all other human values. We have to train ourselves to be able to practice the rights which are now partially or totally suspended. And secondly, the exercise of truth is fundamental as a liberating element. The truth liberates us. We cannot wait for freedom to come raining down from above. We have to build it ourselves through our search for truth. Verification, (from Latin 'verificare' to practice truth) is to construct the truth based on the facts and reality, in all senses. This may seem theoretical if it is not implemented in one's daily life."

Luis Perez Aguirre

To create a climate in which reconciliation can take place, the truth must be revealed. All sectors of the country [the criminal justice system, parties to the conflict, etc.] - must begin speaking the truth as the only way to open the space in which we can practice the preconditions of democracy. No one has the monopoly on the truth, but the small portion of truth that each has, each must say. If others think that one has made a mistake, they must demonstrate that. Publicly telling the truth is a liberating force.

19. Encounters with the other inevitably cause conflict, and to seek to be reconciled by avoiding that conflict is to allow the forces of violence to prevail. The Word of God is GOOD News: no one is called to be dominated by any other, not even by God, the Holy Other. Yet we are also saved from being imprisoned forever within ourselves. Of what good is it to survive, and feel perfectly right and justified, but all alone?
20. The Good News about violence is that it is the sign of an encounter with the "other", and we are called to encounter - to liberate ourselves from the domination of our own desires. It is an opportunity to transcend the forces of violence that threaten to dominate the self and the other, if only we take the time to create the space in which SALVATIONAL ENCOUNTER can take place, encounter that fully respects both the self and the other. But the path is not easy: it never ceases to challenge my order, every new order that I cling to as my own.
21. Reconciliation is tough because we experience the conflict of having feelings we think we shouldn't have and letting these feelings prevent us from seeing the other's point-of-view in the situation. Victims and aggressors can feel overwhelmed by hurt, guilt and rage, the desire for vengeance, the fear that they may be hurt again. If we don't let ourselves experience and express these feelings, we can't own our own violence and let it go: we are not being reconciled fully as we are. But if we express them in a way that attacks the other, we are feeding the cycle of violence and vengeance. What can we do?

Some say that unless we find liturgized, ritualized ways to express our violence and vengeance, we will continue to act it out.

"The lament psalm is a very shrewd understanding of human personality. The way we move to maturity is to bring all the negativities to full speech. I can see the priest standing by and saying: have you got it all out yet, is there anymore? And I discover that if I get it out in structured ways wherein it can be received, I really do walk away new and free. But if we do not practice lament, if we do not practice speech that brings it to the throne of God, I have to sit on it and carry it around within me for the rest of my life. We live in a world of people who are waiting for a chance to speak it into God's Holy Ear. The mystery is that if you say it honestly to God, God is not frightened off, offended or alienated, but rather God draws nearer. The lament says I'm treating you, God, with utmost seriousness. VERY MANY PEOPLE IN OUR REPRESSED CULTURE NEED CONSTANT PERMISSION TO SPEAK THEIR RAGE, HATREDS, HURTS, FEARS.

People are not likely to sing hymns of praise with the same freedom, power and energy if they have not been through the full statement of their loss and hurt and grief before they get there. The pastoral task is to authorize people to do the kinds of speech that will make joy possible."

"...THE CHURCH'S BUSINESS IS NOT TO SAY SOMETHING GOOD BUT TO SAY THE TRUTH. SOMETIMES THE ONLY TRUTH IS THAT IT HURTS. Psalm 88 is a psalm for those times. The only truth that this psalm can muster tonight is that it hurts and you better give the wound air. The next day it may be time for some ointment but not until you've given the wound some air. Psalm 88 does not flinch before the painful truth that there are pieces of life that are unutterable. It remembers to whom it must be said when you can't say it and you've even forgotten that".

Walter Brueggemann (1980)

Having a place to express our vengeance means we don't have to retaliate. We are freed so we can go about the business of feeding the hungry and healing the sick.

22. It has been said that conflict is a basic condition of our existence in time and space. As we give our undivided attention to one idea, one language, one person, someone is likely to experience that as a violence to others. But we can create the bonds with others that allow us to process and absorb the conflicts of our encounters, that allow us to admit that we all err and need to give and receive forgiveness, that we need to mediate and negotiate with each other, as equals, that we need to work on our problems together so that we can find solutions that make room for everyone.

23. Fully "me" and fully "we": that is the ministry of reconciliation. But something of the self must die so that something deeper and fuller can live. (In the sweat lodge, all your stuff must be left behind...In the soil, the seed must die...).

It has been suggested that what must die is the righteousness of my perceptions, my standpoint in the situation as the center for all interaction, judgement and decision-making. Each self must move out of center-stage domination so that a wholeness greater than the sum of its parts can be set free. There comes a point when it no longer matters who is right and who is wrong: someone is suffering, a human like me, and that is what we must attend to together, whether he or she "deserves" it or not, so that we can be together again in something that is better for both of us.

24. What we should be trying to do is not to prevent conflict, but prevent the criminalization of conflict when it occurs. We can do this by building the bonds that allow us to do the truth-telling needed to absorb it, overcome it, build a stronger more integrating community out of it.

25. Forgiveness frees not only the forgiven but also the forgiver. The experience of many victims is that they go through different phases. While vengeance is a necessary means of survival when first attacked, they ultimately need to let it go for their own sake - no matter how justified it seems - so that they too can be freed from the hold of violence and evil upon their lives. Following is a personal story that dramatically illustrates this dynamic. It is told by the chaplain of a Canadian federal penitentiary.

"A man was killed by two unknown young men. He and his wife had several children and they had gone out for a family treat of ice cream that evening.

The widow remained traumatized by the event for several years. She went through a lengthy process and finally came to the conclusion, five years later, that she needed to forgive the young men and to express that forgiveness to them in order to finally put the whole incident behind her. She sought help from her minister who put her in touch with the penitentiary chaplain.

Coincidentally, one of the offenders in question had just approached the same chaplain because he was experiencing a need to express his remorse for the killing to the family of the victim. They were allowed to have contact with each other.

Shortly after, one of the children remarked to the woman: 'Mummy, you're eating ice cream again!'

Her gesture of forgiveness had indeed released her from the trauma and this was being dramatically illustrated by her subconscious through the sudden recovery of her taste for ice cream which, she now recalled, she had been eating on the night her husband was murdered and had been unable to touch ever since."

26. "But people need to be forgiven. It can really make a person crazy if he thinks people can't forgive him."

An Ontario Correctional Institute inmate, published in Bridge newsletter, June 1985.

"I know a way out of hell. Find a boy, make sure he is Muslim and bring him up that way".

Gandhi

VI. THE QUESTION OF JUSTICE

1. People expect the law to give them justice. The law doesn't even give them the law.
2. The purpose of law is to facilitate the interaction of people in society to achieve certain ends, including social ends and even spiritual ends, not just to protect our survival but to allow us to flourish and protect the value of human beings.

3. What is justice?

A noun referring to a system.

A word that can be ascribed to ways of doing things; or to the underlying reality about which things are being done.

What is the set of conditions that people experience as just?

Part of it is the perception that you're getting your piece of the pie. Does that mean only what you deserve? Or does it mean what you need?

Will there come an end to the time when we can continue to protect the wealthy from the legitimate claims of the poor?

4. We know the law does not give us justice. But we must be vigilant as we search for it, we have a responsibility to foster the emergence of order from disorder. We have a responsibility to say exactly what we know and not mix what we know with what we don't know, even through analogy.
5. Justice always pertains to three elements: two people related to one another through another object. Reconciliation pertains only to the two people, in direct contact. We're getting away from the justice domain when we talk about reconciliation, but reconciliation will yield better justice.
6. With justice, you are dealing in terms of the pretension of one person over the "prestation" of another. You are defining people by what is between them instead of what they are.
7. There is a concern that with mediation models, the two parties may settle but the community still suffers. Mediation results could be worse than the alienated justice we get from the justice system. On the other hand, what may be "wrong" in the eyes of the justice system may be "right" in the community where we differentiate.
8. Justice is an attribute of God in which we share, not something that we just deal out. Justice has to be "mediated" i.e. experienced.
9. "GOD'S GIFTS WILL BE GIVEN FREELY, WHERE GOD CHOOSES, WITHOUT THE MORAL JUDGEMENTS OF THE MANAGERS OF THIS WORLD".
Walter Brueggeman, 1980.
10. Justice is to be made. Martin Buber says you can make justice only if you see the total person, otherwise you're only seeing parts of the person. Our sense of justice depends on what we see, and we learn to see from other people.
11. RECONCILIATION MEANS MAKING JUSTICE WHILE SEEING THE HUMAN FACE.
12. "Human laws, most of the time, only deal with evil superficially; they cannot touch the broken reality of the human heart. But the law of God seeks to restore the human person in the depth of his and her being. This is why, despite its apparent intransigence which at times seems inhuman, God's law is ultimately more liberating and constructive than mere 'human' laws".

Georgette Blaqui re, The Grace to be a Woman (1981)

13. "NEITHER DO I CONDEMN YOU" (John 7:53) (8:1-11)

"I have not come to judge the world but to save the world" (John 12:47)... "I do not take pleasure in the death of the sinner, but that he be converted and live" (Ezekiel 18:32). This is the nature of the judgement of God: mercy is not contrary to justice but fulfills and perfects it. It is the quality which makes justice life-giving and not death-dealing. "Neither do I condemn you": through this word man is invited to stop building up his own justification by crushing somebody else, even though that person is guilty.

This word leads us into freedom by situating both man and woman in the truth about ourselves, that is to say by placing us all in the 'communion of sinners' called to repent; such is the actual situation here and now, and the proclamation of the 'communion of saints'".

Georgette Blaqui re, The Grace to be a Woman (1981)

VII WHAT DO WE NEED/WANT TO DO

1. Planning the future: the concept of "ethical anticipation"

- 1.1 Let's not mortgage the future. "Futures" prediction minimizes our present power to change what will affect the future. Our mind can't imagine how different we can make it, the process that takes us beyond the present. Speculation invariably transposes the present onto the future, it takes for granted that there are some things we won't be able to change, it gives them power over us.
- 1.2 What we need is a really strong vision to counteract the pull back into the punishment paradigm, and the power of persons, from within persons, to work on problems together and start to live out the vision now, instead of speculating what future structures should look like. To speculate abstractly takes us away from that inner power and is bound to lead us back into the old fall-back positions.
- 1.3 We need to vision the future as "advent", not limited by what our present thinking can create but coming to us from beyond ourselves and rolling towards us as vast possibility. (Moltmann)
- 1.4 We can adopt a stand of "ethical anticipation" remaining faithful to our values in the actual complexity and ambiguity of the evil. Avoiding frustration, depression, immobilization of not being able to function in the face of complexity.

We have to:

- (a) observe and see (theory), but what victims, offenders and communities are really experiencing, not the reification of our mental constructs;
- (b) take action (praxis);
- (c) but we also have to create (poesis), the justice that is to be made. To try to predict what kind of procedures and models and system we should have in the future is to subvert this process, it is to not allow a new future to emerge but to instead parachute the limits of our present thinking into the future and make the present happen again.

2. Some needs identified

- 2.1 Crime is the crisis that tells us that something has gone wrong between us. We need to bring all the pieces into the open that will allow us to examine them, more than just to judge whether they are bad or good. We also need to ensure the safety of the people who are victimized.
- 2.2 We need to clarify what we mean by denunciation. We know we cannot live without shared values and the crisis of a crime allows us to articulate those values.
- 2.3 We need a new kind of forum that allows us to do this new kind of truth-telling, where everyone is allowed to come and ask a question. Example of the prominent man who had his wife killed: many more people knew much more and were silent; they were let off the hook by the system.
- 2.4 A victim needs safety; needs to know what kind of a person did this; needs compassion for what she/he has been through; needs to feel the person has seen his/her hurt and is sorry - or that someone is sorry. Needs to forgive and move on for own sake because hatred is self-destructive. Needs to be able to tell it like it really feels and still get support. Needs to be able to own up to response-ability and still get support. Needs to reintegrate this marginalizing experience into the mainstream of the community's experience, the common experience of being human; needs to not be left alone with it.
- 2.5 An offender needs truth-telling; to be called to account, but not alone; to see the victim as a person; to not be left alone with guilt. To be challenged to respond and repair.
- 2.6 The community needs to share in responsibility. Needs to feel safe and whole again. People need to be empowered to respond in an appropriate manner, response-ability, response-capability. The police and the crown prosecutors should be treated as the community's representatives and agents, empowered by the community.

- 2.7 All need to learn to accept forgiveness from others; to be able to see the needs and suffering of others; to take action; to accept responsibility for the action they take. At what point does society step in and provide a more formal forum for mediating a conflict, using force in the sense of stepping in to intervene regardless of preference of particular victim and offender?
- 2.8 Guilt, accountability, blame, response-ability: much more depends on process that is faithful than on any particular new bag of tricks.

3. Possible directions

- 3.1 **A new forum for truth-telling.** The current system is not geared to establishing the truth, therefore justice cannot be complete. We need another forum. A coroner's inquest is one model of a kind of forum for truth-telling that is more likely to liberate what needs to be done and said. It is not supposed to be adversarial, and it tends to find, not one sole factor or person to blame, but a series of events and circumstances that together produced a negative result. Everyone is called to account.
- 3.2 **An amendment to the criminal justice mandate.** For example, the following proposal:

"The central mandate of Canada's criminal justice system has traditionally been to protect society and punish offenders. Efforts have focussed on applying the law and on dealing with offenders in isolation from communities or victims, whose needs - it is increasingly recognized - have long been neglected. No one in Canada has been satisfied with the results brought about by such a system. It has not taken care of those who have been hurt and it has not been realistic in its efforts to return rehabilitated offenders to the community.

When a crime is committed, those who have been hurt have a right to be taken care of. They may feel vengeful and this feeling is their right, a normal emotional response necessary to survival in the early stages of crisis. The government has a responsibility to protect society from this vengefulness, but it also has a responsibility to help the victim deal with this legitimate feeling in such a way that it does not become harmful to him or her and to society itself; it must do what it can to ensure that the victim does not remain a wounded person.

To date, this responsibility has not been recognized as a central part of criminal justice work and no one has been mandated to deal with victims of crime for the victims' own sake. But from our standpoint, crime is harm done to people and more efforts should be focussed on repairing that harm.

We therefore recommend a major shift in the central mandate given to the criminal justice system as follows:

At any stage of the criminal justice process, from police to courts to any correctional agency, the mandate of the criminal justice system should be to attend to:

1. victims, by providing the care and context for healing,
2. offenders, by providing opportunities for them to take responsibility for their actions, repair the harm done (as much as possible), and be restored as full members of the community, and
3. communities, by providing protection and support for constructive problem-solving in order to achieve harmony and peace.

The thinking, resources and efforts of the criminal justice system must be redirected to ensure that any official dealing with crime is mindful of the fact that at each stage, the victim and the offender have needs, and that it is the responsibility of the agency to ensure that those needs are addressed, and to consider their implications for the particular task performed by that agency.

Such a systemic change has particular implications for the mandate given to correctional agencies and would ensure that they can no longer deal with offenders in ways that ignore the needs of victims and communities.

In our estimation, this simple but fundamental shift would do much to redirect the efforts of correctional agencies to issues that are far more realistic and constructive for society."

from a proposal by the
Church Council on Justice and Corrections (Ottawa)

3.3 Identification of tasks appropriate for the criminal justice system.

3.4 Identification of tasks etc. that we cannot expect the criminal justice system to do because our needs go beyond its architecture (the logos of justice vs. the logos of unity, love, friendship, life itself).

Tasks for the Community

- TO - prevent
 - denounce
 - break the silence
 - empower victims
 - empower victims and offenders to be able to communicate with each other without violence
 - break the cycle of violence and vengeance
 - promote emotional and spiritual healing
 - protect other potential victims from the violence of the offender
 - restore feeling of safety in the victim
 - restore feeling of safety in the community
 - restore trust in the community
 - impact the values that lie behind the violence by restoring the feeling of meaningful relationship

But we are impoverished in that the only tools we think of to accomplish these tasks are the tools of a destructive system.

The crisis is that we have abdicated any sense of personal power to do any of the above tasks. We feel that tools of social services counselling, treatment, are limp and ineffectual.

We feel that we're left with very little human caring relationship with which to denounce and control. It appears that we don't trust that we have anything else to fall back on but the adversary system.

Do we really have no other choice but to abdicate all personal responsibility for these functions and hand them entirely over to the state?

What would be required for there to be some alternatives?

Some Reconciliation Guidelines

- We need to present ourselves in a way that respects the other's separate existence.
- We need to feel that what we present will be respected by the other.
- We need to listen to other(s) so as to be open to what he or she wants to tell us.
- We need to exchange feelings, perceptions, points of view, hearing the contradictions without giving up one's own truth and integrity.
- We need to let ourselves always see in the other a human face, not an object for the satisfaction of our own desires.
- We need to do a lot of truth-telling without attacking the other.
- We need to let go of our truth once we have told it so that we can listen openly to the other.
- We need to be empowered by expressing our feelings and letting them go in a way that doesn't attack the other.
- We need to experience our own fragility without taking advantage of the other's fragility by seeking to dominate him/her in the situation.
- We each need some reality testing of where I must stop because the other begins; what I want and need has to be balanced out by the other's equally legitimate consideration of want and need.
- We each need to feel that what the other wants and needs is not arbitrarily more important than what I want and need.
- We need to feel that the other will not take advantage of our fragility to dominate us.
- We need to use power as an inner resource to deal with the conflict in positive ways.
- We need to ask ourselves what each person needs for the solution to the conflict to be positive for everyone.
- We need to remind ourselves that each person's self-esteem and sense of belonging is the basis for their ability to use non-violent means to solve the conflict.
- We need a forum to legitimate our feelings even though we think they are feelings we "shouldn't" have.

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APPENDIX V

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THINK PAPER

Prepared by the

WORK-GROUP ON RESTORATIVE JUSTICE

for the

WORKSHOP: New Directions in Criminal Justice
(May 6, 7 & 8)

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Ben Hoffman

April 7, 1987

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Restorative Justice
April 7, 1987
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THINK-PAPER ON RESTORATIVE JUSTICE.
FOR DISCUSSION ONLY

A. INTRODUCTION

The title "restorative justice" is used in this document in the absence of a better term. The work-group is not satisfied with the term for these reasons:

1. It seems to imply the re-creation of the situation that brought about the crime and thus might lead to a repetition of the crime
2. It is used in criminal justice literature with varying meanings. Its use here may lead to confusion

The work-group bases this document on the Principles of Correctional Law, Principles of Offender Rights and Offender Programs, and Principles of Community Corrections drafted by NAACJ in 1983. Those Principles are attached to this document as an appendix. However, the work-group's position differs from the Principles on two matters:

1. In the Principles the term "culpable conduct" is used in referring to crime. The work-group believes that term is overly judgemental, particularly while the question of responsibility on the part of the offender remains in debate
2. The Principles provide for "sanctions". There is some uncertainty as to the meaning of that term but if it is interchangeable with the term "punishment" the work-group would suggest its elimination for reasons appearing later in this document

In fulfilling these Principles, criminal justice should serve three positive functions:

1. Protecting members of society from those forms of harmful behaviour that are defined as crime
2. Protecting the individual member of society from arbitrary interference from those in a position of power
3. Protecting the individual member of society from conviction for a crime he or she did not commit

The second and third of these functions fall outside the scope of this exercise. It is in relation to the first function that new approaches are necessary. One new approach is suggested in this document under the title "restorative justice". Its philosophical base is stated thus:

The aims of restorative justice are:

1. with consent, to further the personal and social well-being of all persons or groups involved in a crime situation in an effort to prevent further offenses
2. to reduce to the minimum the harm caused by the commission of a crime to any person or group, consistent with the protection of members of society

Among other positive results, we see these six accruing from the adoption of the restorative justice approach:

1. Humanizing and personalizing the criminal justice system
2. Reducing the tensions and conflicts that arise during the period immediately following the commission of a crime
3. Seeking a long-term solution to the tensions and conflicts that arise from the commission of a crime through developing the positive aspects of the situation
4. Giving the community the duty and the facilities needed to play a reconciliation role between the parties to the conflict
5. Limiting the intervention of criminal justice in the lives of individuals
6. Taking violence out of the criminal justice system

The introduction of restorative justice philosophy would make redefinition of the term "criminal law" necessary. The current definition is that criminal law is any legislation that forbids specific acts or demands the performance of specific tasks and provides penalties for non-compliance. If punishment has no further role in criminal justice, as we suggest, the above definition will no longer suffice. The concept of crime without sanction will be in force.

The concept of responsibility is crucial to the restorative approach. Is the individual human merely the passive product of the interplay between his or her inborn characteristics and his or her life experiences? If so, how can he or she be held responsible for his or her actions? If not, what degree of responsibility does he or she carry and in what circumstances? Without having an answer to these questions, the work-group assumes that it is important for the offender to recognize at least some responsibility for his or her act.

Individuals suffering from a developmental or mental disability present special problems related to responsibility. In Great Britain a category of diminished responsibility is recognized as a partial solution to these issues.

We should keep in mind that the goal is to reduce harmful behaviour, not to reduce crime as such. What constitutes crime is defined in relation to the interests and concepts of particular societies and is subject to change as those interests and concepts develop.

It is recognized that if the restorative approach is adopted criminal justice will need further cooperation from such fields as health, mental health, developmental disability, education and social service both in developing policies and in providing services. Criminal justice, however, would maintain its identity.

The role of the state and the effectiveness of punishment are matters pertinent to this discussion. Each is subject to study by a separate work-group.

Throughout this exercise we have concentrated on the theoretical approach rather than on the difficulties that might arise in implementation.

In the following pages we look at the implications of applying restorative justice to four groups: victims, offenders, criminal justice services and personnel, and members of the community

B. VICTIMS

We believe there would be little opposition to applying restorative justice philosophy to victims of crime, although there might be disagreement on how far the state should go to assist victims and who would meet the cost. Also, there is a large literature dealing with the needs of victims and how those needs should be met. We are, therefore, presenting only a limited discussion of the application of restorative justice philosophy to victims in this document.

There are several potential victims of crime:

1. The direct victim, the person or group who has suffered physical harm or property loss resulting from a crime
2. A person who has been found guilty of a crime he or she did not commit
3. A person charged with a crime and found not guilty
4. A person who suffers injury or loss while assisting the police, preventing a crime, or reducing injury or loss to others resulting from crime
5. The direct victim's family
6. The offender's family
7. Witnesses
8. Special interest groups
9. The community

Some crimes, such as treason and most traffic offenses, have no direct victim except the community as a whole. The community may be seen as a victim in every instance of crime since the community pays for the services. There may be several communities involved, local, provincial, national and international, and their interests may be in conflict.

The victim's "needs" arising from the commission of a crime can be separated under two headings, physical and mental. Not all would apply to all types of victim:

The physical needs would include:

1. Compensation and restitution
2. Medical care
3. Employment retraining if permanent disability results from the crime
4. Legal costs
5. Protection against attack or molestation by the offender or any other person

The mental needs would include:

1. Help in overcoming the trauma arising from being the victim of a crime
2. Help in facing permanent disability if that arises from the crime
3. Dealing with a desire for revenge

There may be some debate whether the term "needs" or the term "rights" should be used in the above list. Needs is the broader term and would suggest broader help for the victim. However, rights are more binding. Also, the victim should be reimbursed for all losses, not just those that meet "needs" in the welfare sense. Compensation is a cross between insurance and welfare.

To meet these needs, three programs are required:

- a) Restitution and compensation: These should constitute the first line of defence in reducing the harm done to victims of crime. To be fully effective, they should display the following characteristics:
 1. All people in Canada should be covered
 2. All pertinent expenses should be eligible, including property loss, physical injury, pain and suffering, loss of income, and legal fees and similar expenses
 3. Claims should be settled without undue delay

There may be a conflict between the need of the victim for quick processing of a claim and the need of the offender who may find reimbursing the victim a useful learning experience.
- b) Reconciliation. This topic is being studied by a separate work-group.
- c) Consultation services. The victim needs referral advice so he or she can locate the source of whatever kind of assistance is needed. A variety of services will be required to meet the range of needs demonstrated by victims.

C. OFFENDERS

The offender may be an individual or a corporation. The following is written with the individual offender in mind. Is there anything special to be said about the offending corporation?

The offender must not be seen as an outlaw but as one of the members of society the criminal law is intended to protect. This view of the offender is partly recognized in our criminal law by the limitations on punishments that can be imposed by the court. Further, helping the offender to meet his or her problems has been recognized as a legitimate function of probation, parole, prisons and after-care.

The offender may also be seen as the victim of circumstances over which he has no control. Included in these circumstances are:

1. Unjust social conditions
2. Laws that create unnecessary categories of crime
3. Scapegoating

Restorative justice is based in part on the above positive view of the offender.

Restorative justice philosophy, in establishing that the proper aim is reducing to the minimum the harm any person suffers from a crime, makes the retention of any kind of violence as part of our criminal justice system impossible. Specifically, the following four expressed or unexpressed functions would be removed from our criminal law:

1. Retribution
2. Punishment
3. Deterrence
4. Scapegoating

This does not mean that the offender would not suffer if, for instance, it were deemed necessary to send him or her to prison, or that there would be no deterrence arising from the criminal justice system. It means only that these effects would be incidental to rather than a planned part of criminal justice.

The removal of these functions from our criminal law would free the criminal justice agencies to concentrate on the aims of restorative justice set out earlier in this document.

The offender's "needs" arising from the commission of a crime can be separated under two headings, physical and mental. Not all would apply to all offenders:

The physical needs would include:

1. Legal costs
2. Assistance in job-finding
3. Education or training to meet job requirements
4. Social assistance to meet living expenses while unemployed

The mental needs would include:

1. Help in facing up to responsibility for his or her part in the crime
2. An opportunity to make restitution
3. Help in dealing with feelings of guilt and embarrassment at being labelled a criminal
4. Help manage personal relations with family, friends and the community.

To meet these needs the following are required:

- a) Restitution and compensation. Paying compensation to the victim may have a salutary effect on the offender. At the time of the crime the offender may have thought of the victim as nothing more than a faceless nonentity. Through paying compensation the offender may come to see the victim as a person to whom the offender has brought suffering.

On the other hand, demanding compensation beyond the offender's ability to pay may hinder rehabilitation and may promote negative feelings of resentment towards the victim. The work-group on reconciliation will no doubt deal with these issues.

- b) Reconciliation. Being studied by another work-group.

- c) Consultation services. The offender needs referral advice so he or she can locate the source of whatever kind of assistance is needed. A variety of services will be required to meet the range of needs demonstrated by the offenders.

D. CRIMINAL JUSTICE SERVICES AND PERSONNEL

Adoption of the restorative justice approach would have profound implications for present and anticipated criminal justice services. New attitudes towards their job would be required. Administrative responsibility would be more widely shared. Staff training requirements would be adjusted accordingly.

Criminal law would need revision. To what extent and in what way will require careful study.

Some of the implications for some of the services are these:

1. The police. The police should have broadened discretion not to lay charges but to make greater use of such devices as admonition and referral. The guiding principle should be that the police lay charges only in cases where special circumstances exist that make the laying of a charge desirable. The police will need an internal structure to carry out the referral function and will need a wide range of supporting services to which referral may be made.
2. The Crown. The guiding principles of not laying a charge except where the special circumstances of the case require such action should hold with the Crown as well as the police.
3. The courts. The main effect on the courts would be in disposition. There should also be a radical reduction in case-load.
4. The correctional services. At present, offenders coming into the correctional services do so at least in part for reasons of punishment or deterrence. This would not be so under restorative justice and correctional services would be free to deal with each offender in the way best calculated to return the offender to the normal community as a contributing citizen

DRAFT PRINCIPLES OF CORRECTIONAL LAW

(from NAACJ Seminar on the Correctional Law Review, March/84)

E. MEMBERS OF THE COMMUNITY

The work-group anticipates that members of the community would derive the following benefits, among others, if the restorative approach were adopted:

1. Protection against further criminal behaviour, by restraint or incarceration of the offender if necessary
2. A sense of security arising from the knowledge that each offender would be subject to an individualized program designed to prevent recurrence of the crime
3. An opportunity to participate directly in the criminal justice system through reconciliation and similar programs
4. Knowledge that a common and effective philosophy would apply to all pertinent segments of the criminal justice system
5. Knowledge that violence-begetting violence would no longer be part of criminal justice
6. Moral satisfaction in the knowledge that the victim's needs were being met
7. Moral satisfaction in the knowledge that the offender would be dealt with in a humane and forgiving way, consistent with the protection of the members of the community

April 7, 1987

1. The state exists to contribute to the welfare and development of the individual person in all his human dimensions.
2. Every person has an intrinsic dignity and value in himself, regardless of his condition and circumstances, and entirely apart from any institutional or social objectives he may serve.
3. In order to carry out its primary responsibility towards the welfare and development of the individual human person, the state has an obligation to contribute to the maintenance of a peaceful and a safe society. In the discharge of that obligation, the state establishes a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.
4. The state's system of prohibitions, sanctions and procedures is subject to the Canadian Charter of Rights and Freedoms.
5. The purpose of the state's system of sanctions is neither punitive nor retaliatory.
6. The state's system of sanctions is aimed at:
 - (a) the reconciliation of the victim, society and the offender
 - (b) restitution for the harm done to the victim,
 - (c) the personal development of the offender as a human person and as a citizen, and
 - (d) in cases where there is the threat of serious harm to individuals or society, the physical constraint of the offender.
7. The offender, even when confined, remains a member of society and retains all the rights and privileges of an ordinary citizen except those that must be withheld as an unavoidable consequence of the sanctions imposed by the state.
8. The state's sanctions and the way in which they are carried out do not interfere any more than necessary with the freedom of individuals.
9. No one is ever beyond the hope of renewal as a human being.

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DRAFT PRINCIPLES - COMMUNITY CORRECTIONS

(from NAACJ Seminar on the Correctional Law Review, March/87)

1. The locus for the restoration process for offenders is the community.
2. In light of the heterogenous nature of Canadian society, the unique nature and resources of the community out of which a conflict emerges must be respected.
3. The correctional system practices mediation, conciliation and problem resolution.
4. Community corrections promote and provide for:
 - i) reconciliation of the victim, community and offender
 - ii) redress or recompense for harm done to the victim of the offence
 - iii) programs aimed at the personal growth of the offender and his/her reintegration into the community.

NATIONAL ASSOCIATIONS ACTIVE IN CRIMINAL JUSTICE

DRAFT PRINCIPLES - OFFENDER RIGHTS AND OFFENDER PROGRAMS

(from the NAACJ Seminar on the Correctional Law Review, March/84)

1. A prisoner remains a member of society and retains all the rights and privileges of an ordinary citizen except those that must be withheld as an unavoidable consequence of the sanction imposed by the court.
2. Management of the prisoner in custody is governed by the primary objective of fostering the welfare and development of the human person towards his earliest possible return to the community.
3. The loss of liberty constitutes the punishment. Any action which affects the length of sentence or by imposition of which further restricts a prisoner or which may be construed as further punishment is to be taken only within the legal safeguards of due process.
4. All International covenants and standards to which Canada is a signatory are contained in Canadian law.
5. Prisoners and their families have a right to be fully informed about all rights and privileges and are made fully aware of legal appeal in the case of rights and of grievance procedures in the case of privileges.

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APPENDIX VI

DISCUSSION PAPER

Prepared by the
WORKING GROUP ON PUNISHMENT

for the
NAACJ WORKSHOP: New Directions in Criminal Justice

May 6, 7 & 8, 1987

WORKING GROUP

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INTRODUCTION

In beginning a fundamental review of Canadian criminal justice, punishment was identified as one of the central elements which must be addressed. The Government of Canada's statement of philosophy underlining the criminal law, Criminal Law in Canadian Society, states that "whether the purpose of the criminal law is approached from a retributive or utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive." The criminal law sanctions are left to the correctional system to mete out: be they "justified in the name of treatment, rehabilitation, denunciation, deterrence, incapacitation, or whatever - (they) are and always have been perceived as punitive by almost all of those to whom they have been applied".

Participants at NAACJ's December/86 workshop knew that their review of Canadian criminal justice, and any aspiration to "new directions in criminal justice" would not be complete, indeed even possible, without considering punishment. A working group, one of four, was assigned the task of developing a discussion paper on punishment.

Recognizing that the topic is vast, in the field of criminal justice alone, the working group sought to accomplish several things:

- to achieve a retrospect, situating punishment in its current context by considering it from an historical perspective;
- to consider whether punishment is endemic to all known societies and imagined ones;
- to determine why it persists as a response to crime; and
- to consider whether it is morally justified, regardless of its effect.

The classical and positive schools of criminology were reviewed vis-à-vis punishment, and are summarized in this paper. Definitions of punishment were reviewed. Coercive measures, even the least intrusive, were considered to determine if they are inevitable or necessary in some cases and whether they remain, for the offender (or the detainee), punitive.

BACKGROUND

In the time frame imposed on the Sub-Committee planning the Workshop for producing a discussion paper on Punishment, it was clearly impossible to provide an in-depth analysis and comprehensive overview of punishment and its role in either the present or an idealistic criminal justice system. The difficulty in dealing with the subject of punishment was compounded by factors such as:

- (a) the complexity of the subject. Punishment is an abstract and ambiguous term which means different things to different people.
- (b) members of the Working Group did not have an opportunity to examine, let alone digest, the myriad volumes written on the moral aspects of punishment. It was not possible therefore to discuss the historical dimensions of punishment or to methodically compare its use in different societies and justice systems. For example, no attempt was made to compare the role of punishment between an Anglo-American or Continental European inquisitorial systems of justice.

- (c) the time-frame imposed also prevented any possibility of a thorough empirical investigation of the effectiveness of punishment(s). A background paper prepared by Ezzat Fattah for the Law Reform Commission of Canada entitled "The Fear of Punishment" was distributed to the Working Group but was not discussed at future meetings.

DEFINITION OF PUNISHMENT

The Working Group was provided with a definition of punishment written by H.L. Hart (Oxford University) and subsequently by Nigel Walker (Cambridge University) to include the following elements:

For a penalty to be considered punishment, it must:

- (a) involve unpleasant consequences for a person punished;
- (b) be "for" an offence against (legal) rule
- (c) be imposed on the actual or supposed offender
- (d) be intentionally administered by human beings (other than the offender)
- (e) be ordered and administered by an authority constituted or recognized by the system of rules breached by the offender.

The Working Group did not reach a consensus on the above definition. No further discussion took place on finding a precise meaning of the term. Some members of the Working Group felt punishment would be best approached by examining it at different levels - philosophical, empirical, etc. The discussion took three levels of epistemological discourse among Working Group members: moral argument, pragmatism and empiricism. Each approach has its own debates within it, let alone the struggle for primacy in addressing the issue of punishment. Is a moral position to guide all activities despite pragmatic issues, such as effectiveness and a public's demand for penalties? Or should the issue be guided ultimately by empirical evidence? This level of debate - this epistemological matter - constrained the group in making progress towards consensus on the definition of punishment. In view of the timelines, in order to ascertain the responses of various individuals to punishment, the attached questionnaire was distributed to members of the Working Group.

ROLE OF PUNISHMENT

Members of the Working Group discussed the various purposes of punishment and acknowledged it serves moral, educative and punitive functions. No consensus was reached by the Working Group in terms of ranking the various purposes of punishment in the criminal justice system. It was recognized however that punishment "may" be perceived differently depending on who administers the punishment. For example, limiting the notion of punishment to a non-retributive coercive act of the many imposed on the one, for whatever reason (say behaviour dangerous to oneself and/or others), still may be perceived by the restrained individual as a punitive measure.

The members of the Work Group also considered the role/purpose of punishment outside the criminal justice system to see whether it had general application in other areas of human behaviour such as the family, church or employment. It was generally agreed that rules are developed to keep society functioning. A number of ways to ensure that rules do not get broken include: early socialization; education, rewards and punishment. The Working Group could not identify any society or imagine any society with rules where rule breaking would never be responded to with punishment/penalties.

HISTORICAL BACKGROUND

In order to situate punishment in criminal jurisprudence, the elements of two major schools of thought in criminology were discussed and are set out as follows.

CLASSICAL SCHOOL

- developed in 18th century in response to harsh, punitive measures of State against individuals
- aim: to protect individual against harsh and arbitrary measures of state
- concept of humans:
 - seek pleasure/avoid pain
 - had free will
- importance of crime and criminal:
 - the legal definition of the crime itself is more important than the person who committed it

POSITIVE SCHOOL

- developed in 19th century in response to:
 - work in the sciences on the biological and psychological forces influencing human behaviour
- aim: to discover, through scientific research, the biological and psychological forces that are factors in why people commit crimes
- concept of humans:
 - human action determined by the play between environment and heredity in each individual
 - "free will" does not exist
- importance of crime and criminal:
 - the psycho-social makeup of the criminal more important than the legal definition of the act

CLASSICAL SCHOOL

- concept of crime:
 - crime defined as violation of law, not of morality
 - punish to deter only, not to express society's moral disapproval
 - purpose of punishment: that pain of punishment exceeds the pleasure of committing the criminal act
 - precise definition of each kind of crime would yield a precise measure of punishment
 - level of punishment could be determined with mathematical precision

POSITIVE SCHOOL

- concept of crime and criminal law
 - rejected a narrow legal definition of crime
 - "natural" law
- view of punishment
 - criminals are treated on the basis of scientifically sound treatments
 - treatment is not punishment, its larger social purpose is to protect society by helping the criminal

The Working Group recognized that the tenets of neither school had been consistently observed in respect to offenders over a sufficient length of time to measure or evaluate them. The rehabilitation mandate, the positivist mandate to "treat", while apparently dominant in correctional practice in the last 20 years had never engaged the full underpinning of the criminal law's approach to crime and offenders.

CONCLUSIONS

1. No consensus was reached by the Work Group regarding the definition of punishment in the criminal justice system.
2. It was acknowledged by all members that Punishment plays different roles at different times which can have both positive and negative effects for society.
3. The Work Group did not agree on whether Punishment is effective or ineffective, too severe or too lenient, too arbitrary or too structured, overused or not used enough, etc., to conclude whether it should or should not be abolished or replaced in any future criminal justice system.

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APPENDIX VII

DISCUSSION PAPER

Prepared by the

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THE ROLE OF THE STATE IN CRIMINAL JUSTICE AND CORRECTIONS

Introduction

This paper examines ideas and concepts, and intends to provoke discussion. It does not pretend to be a philosophical analysis.

This paper addresses the role of the state, and by extension, the role of criminal justice in relation to society.

There is no single, monolithic, "state". It exists in several different forms. Many agencies - municipal, provincial and federal - comprise the state.

We describe "society" as a network of communities.

suggesting that a variety of heterogeneous communities - sometimes composed of residential clusters, sometimes composed of occupational or lifestyle clusters - with different interests is a natural aspect of a free and democratic society.

The network of communities has an authentic existence which transcends the jurisdiction of the state. That is, what the state does can at best only partially reflect the network of communities and cannot subsume or displace it. The notion that the state is derived from some form of "social contract" involves misplaced emphasis. While the state is a necessary feature in contemporary life, it is not sufficient for community life. It is clear that the state must increasingly become accountable to the network of communities. Further, the inflationary spiral of growth in the administrative apparatus of government is a dynamic which causes serious concern.

The Present Function of the State

In all techno-industrial societies, citizens have a need for protection in relation to employment and sustenance, illness and their old age. In addition to these more general types of protection, people need peace and safety - the protection associated with criminal justice policies. The distinction

between these different aspects of protection is not always simple. Sometimes protection (or the lack of it) in the more general areas impinges directly on the extent of peace and safety in communities.

It is ironic that with the growth of techno-industrial societies and the state there has come to be a need for protection from the state as well. Impersonal organizations and procedures, extensive information systems that threaten privacy and affect one's opportunities, and the growth of discretion in the different sectors of criminal justice are all indicators of this trend.

In our society, therefore, people need protection both by and from the state.

In criminal justice, the state traditionally plays a multi-faceted role. It provides the means to detect criminal behaviour (the police); it provides the means to process the person accused of the behaviour (the courts); it provides the means to dispose of the person found guilty of the behaviour (prisons and other dispositions); and it articulates the norms of criminal justice (through legislation, regulations and policy).

The state is therefore active in the criminal process at several different times. And, as mentioned above, it takes

many forms - provincial, municipal and federal agencies.

Advantages and Disadvantages of State Involvement in Criminal Justice

State involvement in the criminal justice system, like state involvement in defence, economic policy and social welfare, is justified in some circumstances. In criminal justice, the state provides several benefits:

- greater potential for equality of treatment
- shared cost burden
- greater potential for consistency in setting out the objectives of criminal justice
- ability to fill in gaps left by lack of social control within the community
- (protective) function to shield society from those who are truly dangerous

Yet there are serious disadvantages associated with state involvement in criminal justice:

- historically high incarceration rates
- possibility of using criminal justice as part of government's economic policy (e.g., prison construction), rather than for the appropriate objectives of criminal justice
- tendency to be inflexible, difficult to change
- tendency to be bureaucratic and detached, removed from humanitarian influences; isolates offender from the community; offender sees less how his conduct harms the community, and has less opportunity to be exposed to the community (the exposure would arguably tend to make him less anti-social by making him realize that he is part of the community)
- arguably ineffective as a mechanism for promoting law abiding behaviour among those who have undergone punishment
- tends to promote the view in the community that the state is responsible for crime and also that it is solely responsible for the solution to crime; as a result, too many people assume that the best response to crime is more

resources (police acting for the state), more law (enacted by the state) and more punishment (administered by the state). This is not true: the community is at least partly, and perhaps largely, responsible for crime and for the appropriate responses to crime. In short, responding to anti-social behaviour requires hard work by the community; yet, there is a tendency to avoid that hard work if responsibility for all elements of criminal justice is left to the state.

The Appropriate Role of the State in Criminal Justice

Increasingly, anti-social conduct is confronted by the state rather than by the community. This may be for several reasons. Among them is the supposed inability of the community to exert control over unacceptable conduct without the resources of the state. Also, the state "creates" forms of anti-social conduct by criminalizing conduct that traditionally have not been subject to correction by the community. As it creates new anti-social behaviour, it appears compelled to introduce ways to deal with it. Hence, the state becomes more and more involved in controlling behaviour. The state arguably also sees its criminal justice role growing because it fails to take other measures to enhance the social well-being of the community (e.g., devoting insufficient resources to social welfare).

This compounds social problems that may then lead to criminal behaviour.

We argue that the state role in criminal justice should be kept to a minimum. The state should withdraw from certain aspects of criminal justice, and the smaller community should replace it. This can be accomplished in several ways. Criminal law can be revised to attack only that conduct which can truly be considered criminal (seriously anti-social), not merely conduct that has historically been considered criminal, or conduct that is now being labelled as criminal for lack of a more thoughtful way of attacking a social problem.

In corrections, the state should encourage alternatives (not simply measures that are added on to existing punishments) to the present system of state controlled punishments - incarceration in particular. The community should be encouraged to fill the gap. Equally important, the state should concentrate more on the roots of criminal behaviour through more attention to social welfare programs that can reduce crime by removing the conditions that breed crime.

The state plays a legitimate role in articulating the principles of criminal justice - what conduct should be considered criminal, for example, and what an appropriate correctional philosophy should be. It, or perhaps the

para-public sector, also should bear the responsibility for keeping dangerous individuals away from the community. Its participation beyond that should be minimized. In particular, the presumption of policy makers that every aspect of criminal justice should fall within the jurisdiction of the state must be challenged.

Suggested basic principles of state involvement in criminal justice:

#1: The state should interfere with the activities of its citizens as little as is possible.

#2: The state should generally encourage reliance on dispute settlement mechanisms (for example, mediation) that exist wholly apart from the state. The state may nonetheless establish the tools for resolving disputes (e.g., the civil court system) where other dispute settlement mechanisms are not adequate.

#3: The community cannot resolve all the problems it faces - unemployment, defence, crime, etc. Here, the state can play a legitimate role, providing resolution mechanisms that the community cannot.

#4 The state has a role in articulating uniform standards of criminal justice, but it should wherever possible refrain from acting as the instrument by which those standards are implemented. In other words, the state should act as a facilitator and reflect the national conscience.

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