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POLICY REPORT for Parliamentarians

Courtesy of the Association for Reformed Political Action (ARPA) Canada

One night in 1974 in Elmira, Ontario, two 18-year-olds got drunk and went on a vandalism spree. They punctured 24 car tires, slashed car seats, threw rocks through house windows, and much more. In just two hours, 22 properties were damaged. The two teens were soon arrested. The outrage in the community is easy to imagine. This event made legal history not because of the crime, but because of the sentence. The probation officer suggested to the judge that the offenders be told to meet their victims and repair the damage. The judge agreed, so two police officers took the young men door-to-door in Elmira. They had to identify themselves, apologize, listen to what their victims had to say, determine the amount of restitution, and ask for forgiveness. The two offenders had to save money to pay for the repairs not covered by insurance, and go door-to-door again with certified cheques. They also had to repair the things that money could not replace, such as the cross they damaged in front of the local church. In addition, they had to pay a fine and were put on probation for 18 months.

This is the first documented case of restorative justice in Canadian law. A philosophy with roots in Old Testament legal principles and in indigenous communities around the world, restorative justice has inspired criminal justice and sentencing reforms, in our view for the better. Restorative justice principles have the potential to continue to guide reform of the Canadian justice system.

But we cannot talk about criminal justice reform unless we first define the term “justice”. It is a powerful and yet ambiguous concept. The law must present a clear vision of the purpose and intended result of bringing law-breakers to justice. Charles Colson, a restorative justice advocate who served time in prison for his role in Watergate,¹ offers a compelling definition of justice (see quote on right).²

A system of true justice...holds individuals responsible for their actions...under an objective rule of law, but always in the context of community and always with the chance of transformation of the individual and healing of fractured relationships and of the moral order.

- Charles Colson

Accepting personal responsibility is not the end of the story. It is a necessary step on the road to forgiveness, restoration, and peace. The Hebrew word *shalom*, used often in the Old Testament and translated as “peace”, paints a beautiful picture of what justice should bring. *Shalom* means more than the absence of conflict; it denotes wholeness and harmony, integrity and balance.³ *Shalom* is everything as it ought to be. *Shalom* makes justice and peace inseparable.⁴ Justice must seek to build *shalom*, or it will be rudderless. So, justice is not only about retribution or financial recompense. It is about people in a community, governed by the rule of law, seeking to build *shalom* in human relationships.

How do our current criminal justice practices measure up?

Restorative Justice

Fall 2016

Current Practices

The central focus of Canada's criminal justice system is not on the relationship between offender and victim, but between offender and state. This focus is rooted in early English common-law tradition. After the Norman invasion of Britain, reparation for victims of crime was abandoned in favor of fines payable to the Crown. Eventually, restitution for victims was stopped altogether.⁵ Today, we tend to view crimes as wrongs *against the state*. The actual victim is only marginally considered, if at all.⁶ Consequently, an essential element of justice is lost: the actual nature of the wrong and its impact on victims.⁷

Restitution orders, where offenders are required to compensate their victims, are rare in Canada. Restitution is ordered in 2.4% of sentences on average⁸ - in less than 1% of cases in Quebec, Manitoba, and Nunavut on the low end, and 5.8% in both Prince Edward Island and Nova Scotia on the high end.⁹

The default punishment in today's system is incarceration, a method so commonplace and so engrained in western culture that it can be difficult to imagine alternatives. However, prison is not a "traditional" practice, considered in the light of world history, nor is it necessarily a just one. Up until the 19th century, jails were mainly used to hold prisoners until trial, until their punishment, or until they paid a debt. They were not primarily used as a form of punishment.¹⁰ The advent of incarceration as a sentence stemmed from two somewhat differing theories. Some believed prison was a good alternative to public execution, torture, and shaming methods, as it is more humane but would still deter crime, or so it was thought. Others envisioned prisons as institutions of rehabilitation and moral instruction.¹¹ The objectives of deterrence and rehabilitation are admirable in theory, but incarceration has not advanced them in practice.

Using recidivism (offender reconviction after release from prison) as a measurement for criminal justice system success, Canada does poorly. Between 40-45% of federal offenders are reconvicted within two years of release.¹² Harsher prison sentences correlate with higher recidivism rates.¹³ In fact, some studies suggest prison is often a training ground for crime, where inexperienced criminals learn the "tricks of the trade" from older offenders.¹⁴ As tough-on-crime legislation has gained popularity over the past decade, Canada's prisons have become overcrowded, mostly with non-violent offenders.¹⁵ As a result of the decline in mental health services, more individuals with mental health problems end up in prison—an environment very poorly suited for dealing with such problems.¹⁶ Most inmates are not rehabilitated¹⁷ and many are less able to succeed as law-abiding and productive citizens upon their release than before their sentence began.

Mass incarceration is simply not working. There are better alternatives.

Restorative Justice in the Bible

The Old Testament legal code is an early example of restorative principles in action.¹⁸ God taught his people to show concern for their neighbours' wellbeing. For example, in Deuteronomy 22 we read, "If you see your brother's ox or sheep straying, do not ignore it but be sure to take it back to him...Do the same if you find your brother's donkey or his cloak or anything he loses. Do not ignore it."

Exodus 21 says, "If one man's bull injures another man's bull so that it dies, the owners are to sell the live bull, split the proceeds, and also split the dead animal between them." Accidental loss is shared. The passage continues, "If it was known that the bull had the habit of goring, yet the owner did not keep it penned up, the owner must pay, animal for animal, and the dead animal will be his." The loss caused by negligence is borne by the negligent party. Our common law tradition follows these principles.

If, however, someone stole an animal and the animal was found alive in his possession, the thief had to pay back double. If the thief further profited from the crime by selling or slaughtering the animal and therefore could not restore it, he would have to pay back five head of cattle for an ox, or four sheep for a sheep (Exodus 22). If the thief merely had to return what he had stolen, it would cost him nothing and there would be no disincentive to stealing. By requiring the thief to pay back double or more, however, the law simultaneously achieved restitution, retribution, and deterrence.

Restoration is a prominent theme in the Bible. Willingness to offer restitution was a sign of godly character. When Zacchaeus, a fraudulent tax collector, repented, he repaid the victims four times what he had stolen.¹⁹ When the prophet Samuel retired from public office, he said to the people, “Here I stand. Testify against me... Whose ox have I taken? Whose donkey have I taken? Whom have I cheated? Whom have I oppressed? From whose hand have I accepted a bribe to make me shut my eyes? If I have done any of these, I will make it right” (1 Samuel 12).

While we are calling on the state to reform the criminal justice system on restorative justice principles, in practice restorative justice will necessarily involve other parties and institutions. The state is but one institution. Civil authorities alone are endowed with the right and responsibility to enforce the law and punish lawbreakers. “[The ruler] is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain” (Romans 13:4). But the state cannot achieve *shalom* on its own. In its dealings with offenders, the state should leave room in the justice system for civil society actors to get involved in counselling, mediating, and otherwise helping both offenders and victims.

Restorative Justice in Indigenous Communities

Restorative justice also has roots in the traditional practices of indigenous peoples, such as the Australian Māori people and many Native American communities. In some North American indigenous communities, when an act of injustice or violence occurred, the entire community was involved in the response. The elders acted as mediators and guides.²⁰ The Māori indigenous people of Australia also hold restorative justice traditions. The Māori approach justice through a holistic lens, viewing crime in the context of relationships. The community owns the process of dealing with offenders and repairing harms.²¹ These principles are reflected in present day indigenous practices like sentencing circles and victim offender mediation.

Restorative & Retributive: Working Together

Restoration and retribution are not antithetical. Retribution is a proper aim of criminal sentencing and is not mere “institutionalized revenge”. Rather, it is just punishment or ‘desert’—what the offender deserves.

If deterrence or rehabilitation were the only aims of the criminal justice system, however, then the only relevant questions for criminal justice policy would be: what deters and what cures?²² Public shaming might deter better than incarceration. Theoretically, forced re-education, psychotherapy, medication, and so on might do a better job of curing a person of whatever it is state officials believe caused the offender to offend. If these are the sole or primary aims of the system, we might expect the state to conduct a plethora of experiments with convicted offenders to figure out what works better for deterring and rehabilitating. But we do not (or ought not to) treat people as objects for experimentation. People are moral beings with inherent dignity.

The concept of ‘desert’ affirms human dignity by affirming our moral agency. Where a person intentionally commits a crime, he chooses wrong. We recognize a choice to do wrong as deserving of punishment.

Punishment or part of the punishment, however, may take a restorative form: mend a fence; pay back defrauded funds; publicly acknowledge a statement as libelous. Of course, if an offender merely pays back what he stole, it costs him nothing. Paying back what was stolen and more, either to the victim or to the state by way of fine, restores what the victim lost, punishes the offender for the wilful wrong, and deters further wrongdoing.

The concept of ‘desert’ affirms human dignity by affirming our moral agency.

Restorative justice will look different for different offences and in different circumstances. There is a place for prisons, to protect the public from violent and dangerous offenders. Prisons do not, as a rule, rehabilitate criminals or deter crime, but they do incapacitate dangerous persons and protect the public from them. Prisons are necessary, and restorative justice principles should inform *how* we incarcerate people. As much as possible, meaningful work should be offered. Work not only gives a sense of purpose, but can provide offenders with an opportunity to make restitution and to support their families while incarcerated.²³ Prisons should be safe and prisoners should be treated with respect, busily occupied, encouraged to strengthen links with their family and community, and expected to improve themselves and given resources to do so.²⁴

Restorative Justice in Canada

Our criminal justice system has changed since the two teenagers in Elmira knocked on doors with cheques and apologies. In 1996, the sentencing principles in the *Criminal Code of Canada* were amended to include community sentencing, to provide reparations to victims and affected communities, and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and communities.²⁵ And section 718.2(e) was added to the *Criminal Code*, establishing that “*all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*”²⁶ **These changes follow restorative justice principles and are a significant step forward.**²⁷

Restorative justice programs are now used to some degree in every province and territory. Examples include Peacemaking Circles, rooted in aboriginal tradition; Sentencing Circles, where the victim, offender, family, judge, lawyers, and others meet to discuss sentencing options; Victim Offender Mediation programs, where the victim and offender talk about the crime with the assistance of a trained mediator; and Family Group conferencing, among other initiatives.²⁸ While there is much room for growth in the use of restorative justice practices, current practices are producing real benefits.

Practical Benefits: Reduced Recidivism

One of the key benefits of restorative justice programming is that it reduces recidivism in comparison with the more prevalent policy of incarceration. Although evaluative research has drawn mixed conclusions, there are many programs that have been shown to reduce recidivism and prevent crime. For example, Circles of Support and Accountability (COSA) is a program that works with high-risk sex offenders who have served their full sentence and been released. COSA groups have been in existence since 1994 and are active across Canada. COSA offers the offender a group to help him or her transition back into society, to provide monitoring and accountability, and to help neighbouring communities overcome fear and hostility.

The results have been positive: COSA participants had a 70% reduction in sexual recidivism and an overall reduction of 35% in all types of recidivism compared to a control group, and the re-offenses that did occur were less severe.²⁹ In Florida, a community corrections program has seen a recidivism rate of only 27%, half the rate of the state prisons.³⁰ The Detroit Transition of Prisoners program, which sees offenders at high risk of reoffending enter a mentorship program and receive Christian discipleship, has a 1% recidivism rate (the national rate is approximately 75%).³¹ Reducing recidivism is an important part of restoring relationships and protecting communities.

Practical Benefits: Victims

Crime is a violation of the victim’s integrity and the peace of the community.³² Victim-Offender Mediation programs (VOMs) are an example of restorative justice in practice, and have proven to be particularly beneficial to victims of crime. After participating in a VOM, victims report feeling less afraid of being victimized again and more satisfied with the way the crime was handled than similarly situated victims who had been through the normal court processes.³³ Victims of certain types of crimes are especially willing to participate in mediation. For example, a study of the largest victim-offender mediation program in North America revealed that 75 percent of victims of minor property and personal offenses were interested in participating in the mediation process.³⁴ In cases where juvenile offenders are involved, victims expressed a desire to meet with them even when mediation was not presented as an option.³⁵ Sherman and Strang (2007), in their review of evaluative studies, conclude that victim-participants were generally satisfied with restorative justice practices, considerably more so than with punitive practices.³⁶

In 2015, the government of Canada took a step in the right direction by passing Bill C-32, the Canadian Victims Bill of Rights.³⁷ This legislation grants victims the right to information about the investigation, offender, and proceedings; the right to protection; the right to participate in the proceedings through conveying their views and delivering a victim impact statement, and the right to ask the court to consider ordering restitution.³⁸ The law gives victims the right to be informed, upon request, of services and programs available to them as a victim, including restorative justice programs. The Victims Bill of Rights, though limited, is an important step towards developing a more restorative approach to criminal justice.

Practical Benefits: Cost

Our current correctional system costs taxpayers approximately \$4.8 billion per year, not including policing or court costs.³⁹ The cost of housing a federal inmate has reached \$316 per day.⁴⁰ It would cost much less to have an offender participate in restorative justice programming rather than incarcerating them. The cost of restorative justice programming will be more than compensated for by the long-term savings from reduced prison costs. Additionally, as we've seen, restorative practices have been shown to lower recidivism, further reducing the strain on prison facilities.

Instead of the old ideas about rehabilitation and deterrence, ideas now largely discredited, we need to think in radically different terms about a system that restores the peace of the community shattered by crime.

- Charles Colson

Recommendations

Restorative justice should find supporters on both the right and the left. To quote Charles Colson, "Instead of the old ideas about rehabilitation and deterrence, ideas now largely discredited, we need to think in radically different terms about a system that restores the peace of the community shattered by crime."⁴¹

1. The Canadian government should work with other institutions of society to help prevent crime and reduce recidivism, to help young offenders through mentorship programs, and to help adult offenders reintegrate into society. Faith-based organizations, churches, and community organizations should play a vital role. ARPA Canada recommends that the Department of Justice conduct a review of the efficacy and measured outcomes of faith-based and other moral rehabilitation programs, with a view to adopting successful models.
2. Section 718.2(e) of the *Criminal Code* should be amended to read "*all available sanctions that are reasonable in the circumstances should be ~~considered~~ prioritized above imprisonment for all offenders.*"⁴²
3. Conditional sentences (i.e. house arrest) should be used more frequently, but with more resources for proper oversight and surveillance, which is a net cost-saver.⁴³ Conditional sentences allow the offender to maintain work, support family members, pay restitution and remain active in society making reintegration more likely.⁴⁴
 1. Section 742.1(b) should be removed from the *Criminal Code*, making conditional sentences available for offences with a mandatory minimum sentence of under two years.
 2. Sections 743.1(f)(vii), (viii), (ix), & (x) should be removed from the *Criminal Code*, making conditional sentences available for non-violent crime such as motor vehicle theft, theft over \$5000, breaking and entering a place other than a dwelling house, being unlawfully in a dwelling house, and arson for fraudulent purposes.
4. The Department of Justice should conduct a thorough review of mandatory minimum sentencing provisions in the *Criminal Code*. Mandatory minimum sentences should be reserved for violent crimes and for offenders who pose an unmistakable danger to the community. Mandatory prison sentences for certain crimes should be removed, allowing judges to use restorative sanctions such as house arrest, probation, and community service.
5. The Law Reform Commission of Canada, the Federal Provincial Task Force for Victims, the Canadian Sentencing Commission, the Standing Committee on Justice, and Solicitor General have all endorsed restitution as an important sentencing option, but it is only used in 3% of sentences.⁴⁵ We recommend that the *Criminal Code* be amended to require that judges:
 1. Consider restitution in all appropriate cases and require reasons when not imposing a restitution order;
 2. Make victims aware that restitution is a sentencing option and allow them to request restitution;
 3. Empower the court to impose alternative sentences, such as conditional sentencing or garnishment of wages, when the offender willingly defaults on payment.⁴⁶

If implemented, these changes will significantly improve the experiences of victims, offenders, and their communities with the criminal justice system. ARPA Canada is grateful for the work that the Government of Canada does to serve and protect its citizens on a daily basis.

Citations, Resource and Research

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