

THE JOURNAL OF



CECM

CANADIAN COLLABORATIVE FOR
ENGAGEMENT & CONFLICT MANAGEMENT

Volume 2
(August 2021 – July 2022)

**FROM RETRIBUTION TO
RESTORATION:
EMOTIONALLY
INTELLIGENT
APPROACHES
TO THE LAW**

Vanessa Slater
Q.Med, LL.M. (C)

Shadow of the Law Publications

Copyright © 2021 by Canadian Collaborative for Engagement & Conflict Management Inc.

Volume Two

All rights reserved, including surrounding reproduction in whole or in part and in any form whatsoever.

Made in Canada

ISBN 978-0-9958842-6-7 (ebook)

Contents

ABSTRACT	22
ABOUT THE AUTHOR.....	23
INTRODUCTION.....	24
WHO IS AFFECTED BY TRAUMA WITHIN THE LEGAL SYSTEM?	25
LEGAL PROFESSIONALS: TRAUMA AND TRAINING.....	28
CONSIDERING TRAUMA AND CRIMINAL BEHAVIOUR.....	32
WHAT DOES RESTORATIVE JUSTICE (RJ) OFFER?	35
RJ RETURNS CONFLICT TO ITS RIGHTFUL OWNERS.....	37
CHALLENGES AND OBSTACLES TO CHANGE	39
CONCLUSION.....	40

ABSTRACT

The retributive focus of the colonial legal system results in much trauma, particularly with respect to criminal justice. The enlightenment that comes with becoming trauma-informed can assist lawyers, decision makers and others involved in addressing conflict to overcome deep-rooted systemic hurdles. Viewing conflict through a relational lens which embraces principles of restorative justice supports relinquishing control over the achievement of “justice” and instead focusing on restoration. This paper considers the relevancy, advantages and challenges of shifting Canada’s criminal justice system toward emotionally intelligent approaches.

ABOUT THE AUTHOR

After over two decades of providing system navigation in the non-profit sector for a diverse range of populations, Vanessa Slater became a mediator and restorative justice practitioner. As an ally and passionate advocate for access to justice issues, Vanessa continues to seek creative solutions for inclusion and conflict. She completed her certificate in Restorative Justice at Simon Fraser University and is currently completing a Masters of Laws, specializing in dispute resolution at York/Osgoode Hall PD. When she's not in her pottery studio, you can find Vanessa in the Durham Forest with her dog.

INTRODUCTION

The impacts of traumatic experiences affect individuals in a wide range of ways. There is no doubt that the universal experience of trauma comes with a profound societal cost. Understanding the effects of criminality through a trauma-informed lens offers a significant shift in understanding and enhanced ability to effectively serve those who have experienced trauma. Nowhere is the need for a trauma-informed approach greater than in our existing retributive criminal justice system. An overhaul of institutionalized thinking for lawyers, police, correctional officers, juries, and judges through institution-specific, trauma-informed practices must be widely applied for any hope of change to be realised.

The status quo is an antiquated system and has an established record of denying our most vulnerable citizens facilitated and supported opportunities for personal change. Through a comprehensive, culturally informed understanding of trauma and all its ancillary outcomes, parties will undoubtedly sustain less psychological trauma as a result of their participation in, or work-related exposure to, the criminal justice process. This fundamental paradigm shift is only possible if those supporting the existing colonial framework acknowledge that the current system requires a seismic shift from the top down. A more relational approach to the law is one which will reap significant, measurable social and economic benefits.

By adopting a relational lens (one that acknowledges the interconnectedness of us all) and employing the philosophies of restorative justice (RJ) to our legal framework, a shift towards an emotionally intelligent form of justice could transpire, thereby shifting from the systemic harm which “doing justice” inevitably causes in its current state. By returning control of the conflict to its rightful owners, and focusing on the harms and needs of both the person who has offended and the victim, these (and other) key stakeholders are afforded the right to become invested in moving beyond retribution and towards repair. In this way, a trauma-informed legal system would be one in which the effects of harm are acknowledged and even mitigated through agile, and case-specific supports. In order to demonstrate how our criminal justice system would benefit from such a refurbishment, preliminary consideration of four fundamental areas is paramount:

1. Who is affected by trauma within the legal system?
2. Why is trauma relevant when considering criminal behaviour?
3. What do restorative justice approaches offer?
4. Where do obstacles to implementation lie?

A broad overview of these areas is an inaugural exploration when contemplating a paradigm shift in one of society's most revered institutions.

WHO IS AFFECTED BY TRAUMA WITHIN THE LEGAL SYSTEM?

The term “trauma” has recently become colloquialized in our mainstream parlance. This is evidence of a general acceptance of, and an attempt to, understand causes of trauma and the effects of its symptoms. A traumatic event, as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM), is that which involves “actual or threatened death or serious injury, or a threat to the physical integrity of the self or others, with a response of intense fear, helplessness, or horror.”¹ This definition is all-encompassing and opens the door to subjective experiences, which can be difficult to quantify. What is traumatic for one person may not be harmful to another; the mercurial nature of people's reactions to harm is as unique as the individuals themselves. Resilience, social status, and socioeconomics undoubtedly play a role in how and if trauma manifests in people. The empirical study of trauma is here to stay. This reflects a more inclusive and humanitarian approach to those who deserve compassion as they navigate the myriad complexities associated with trauma. As one humanitarian noted, “In compassion when we feel with the other, we dethrone ourselves from the centre of our world and we put another person there.”² When considering “the slings and arrows of outrageous fortune”³ which so many have endured, offering a compassionate lens is unlikely to inflict more harm.

Though the majority of trauma research in recent decades has focused on the symptoms of Post-Traumatic Stress Disorder in war veterans and domestic violence survivor-victims, trauma predominately affects the general population. This includes not only people who have offended who find themselves navigating the criminal justice system, but also professionals who have been impacted by distressing cases and evidence such as lawyers, judges, and juries. Trauma does not discriminate between Crown counsel or criminal, juror or judiciary: it affects everyone to varying degrees. Therefore, a trauma-informed approach, rooted in compassion, is critical to mitigate the damage caused and to prevent further harm.

¹ Foreman, Hoffman, et al. (2016) *Correlates of Lifetime Exposure to One or More Potentially Traumatic Events*, CBHSQ Data Review.

² Armstrong, K. (2008) *Charter for Compassion* [Video], TED Conferences.

³ Shakespeare, W. (1600) *Hamlet* III. I, Public domain.

Regrettably, as evidenced in the criminalization of such common trauma symptoms as aggression and drug use, our retributive legal system is not well suited to recognizing trauma or addressing the needs of those affected. A large majority of people who find themselves involved in criminal activity have experienced trauma as children.⁴ So great are the numbers of children adversely affected by trauma, that the term “Developmental Trauma Disorder” has been coined. Childhood trauma such as chronic forms of abuse, neglect, or other cruel conditions contribute significantly to poorer social determinates of health, as revealed by Canadian pediatrician Nadine Burke Harris: “In high doses, childhood trauma affects brain development, the immune system, hormonal systems, and even the way our DNA is read and transcribed. Folks who are exposed in very high doses have triple the lifetime risk of heart disease and lung cancer, and a twenty-year difference in life expectancy.”⁵ American researcher and clinician Vicky Kelly puts it more bluntly, “Childhood trauma is so profoundly different. It happens in the crucible of those early critical relationships and can have devastating effect on a person’s development. It has been called the single most public health crisis in our country”.⁶ It is no great stretch to conceive that a child growing up with trauma and all its accompanying cronies of mistrust, confusion, anger, abandonment, and shame would detrimentally combine to form an adult lacking the psychological building blocks of security, interconnectedness, and a sense of self-worth in the world.

The tragic reality is that most people who cause harm have themselves been harmed. The notion of people who offend as victims is not a popular sentiment, yet “rarely, if ever, do prison programs address what other people did to the individual along the way to his or her prison sentence...you are either a victim or offender and never the twain shall meet.”⁷ Even when people who have offended have not reported as being directly traumatized, they are still likely to identify as a victim. Our retributive system does not address the original reasons or motivations for criminal behavior, but instead merely attempts to suppress the behaviour with punitive measures. By viewing criminal behaviour as an act for which responsibility lies only at the

⁴ Foreman, Hoffman, et al. (2016) *Correlates of Lifetime Exposure to One or More Potentially Traumatic Events*, CBHSQ Data Review.

⁵ Burke-Harris, N. (2015) *How Childhood Trauma Affects Health Across a Lifetime* [Video]. TED Conferences at 3:00.

⁶ Kelly, V. (2014) *The Paradox of Trauma Informed Care* [Video]. TED Conferences at 10:33.

⁷ Elliot, Elizabeth M. (2001) *Security with Care Restorative Justice and Healthy Societies*. p.78. [Elliot]

individualistic level, our current justice system falls prey to the common fundamental attribution error by placing undue prominence on internal characteristics of an individual to explain one's behavior in a given situation, rather than the situation's external factors which contributed to it. When considering the impacts of trauma on an Indigenous person who had offended and had been exposed to a lifetime of trauma, during sentencing, Madame Justice Greckol acknowledged that "few mortals could withstand such a childhood and youth without becoming seriously troubled".⁸ Plainly stated, our retributive justice system punishes people for being victims of trauma — all in the name of "doing justice". When considering changes to our legal system and sentencing for offences, we must consider the ramifications adversity has had on an individual's development.

Indeed, there are examples of institutionalized, legally holistic approaches which serve unique populations who have been impacted by trauma. A number of specialized courts have been created outside of the regular court system. The objective of these more trauma-informed courts is to provide better long-term outcomes for both people who have offended who have been exposed to specific circumstances, and for society as a whole. These specialized courts include Gladue Courts, Domestic Violence Courts, Toronto Mental Health Court, and Drug Treatment Courts⁹.

The Gladue courts are of special interest as they focus on addressing the disproportionate numbers of Indigenous people in Canadian prisons. According to Justice Barry Stuart, "Our criminal justice process has an obdurately narrow focus. Too much attention, too much blame and too much responsibility is placed upon the offender."¹⁰ Gladue Courts attempt to redress the impacts of colonialism and the intergenerational trauma associated with survivors of residential schools by applying a trauma-informed context for judges to consider. Like traditional courts, Gladue Courts include a judge, duty counsel, Crown, and the defence lawyers, but most of the professionals involved have a deep comprehension of the cultural and systemic issues pertinent to the people who have offended. Case workers prepare reports of the person's life circumstances, which may be considered by the judge during sentencing. Judges are not beholden to the Gladue reports, yet they offer a foundational basis of understanding for the marginalization which has typified an offender's path to their courtroom. The correlation between economic adversity and criminality are often intrinsically

⁸ R v Skani. [2002] AJ No 1579, 2002 ABQB 1097, 331 AR 50, 56 WCB (2d) 434 at para. 60.

⁹ Fairlie, J and Sworden, P. (2019) *Introduction to Law in Canada*. p. 349.

¹⁰ R v Moses, [1992] 3 CNLR 116.

linked, as there is little doubt that poverty is a factor in the staggering over-representation of Indigenous people in prisons. Perhaps American social justice advocate and lawyer Bryan Stevenson said it best: “The opposite of poverty is not wealth. In too many places, the opposite of poverty is justice.”¹¹

LEGAL PROFESSIONALS: TRAUMA AND TRAINING

Legal professionals such as lawyers, judges, court officers, juries, bailiffs, and court stenographers are exposed to difficult evidence through images, victim impact statements, and testimony throughout their careers. Justice Barry Stuart aptly remarked that “the justice system is as hard on the people who run it as it is on the people we run through it”.¹² There is an expectation that courtrooms are intense and, at times, adversarial environments, but when a trial is particularly emotionally difficult or gruesome, legal professionals are exposed to extra stress in the form of vicarious trauma. The term “**vicarious traumatization**” was coined to describe the profound shift in worldview that occurs in helping professionals when they work with individuals who have experienced trauma: helpers notice that their fundamental beliefs about the world are altered and possibly damaged by being repeatedly exposed to traumatic material.”¹³ This type of exposure, especially over the span of a career, can have devastating consequences on legal professionals, their families, and the clients they serve. As with first-hand experiential trauma, vicarious trauma often manifests through avoidance, self-medication, mental health issues, burn-out, and even workaholicism. The notoriously punishing hours to which (particularly new) lawyers are subjected does not help with psychological recovery and self-care. As in many highly emotionally demanding professions, lawyers can often suffer the effects of vicarious trauma without even understanding its presence or, worse, carrying the burden of it in silence. As C.S. Lewis astutely wrote, “I have learned now that while those who speak about one's miseries usually hurt, those who keep silence hurt more.”¹⁴ There is, however, evidence to suggest that many legal professionals wish to see changes in their professional culture and in how they are trained. As Métis-Cree lawyer Myrna McCallum posits in the opening preamble to her podcast *The Trauma Informed Lawyer*,

¹¹ Stevenson, Bryan (2012) We need To Talk About an Injustice [Video] at 17:00.

¹² Stuart, B. (2016) *Toward a Culture of Just Relationships* [Video] at 9:00. [Stuart]

¹³ Mathieu, Françoise (2012) *Defining Vicarious Trauma and Secondary Traumatic Stress*, material. <https://www.tendacademy.ca/resources/defining-vicarious-trauma-and-secondary-traumatic-stress/> [perma.cc/U88U-LBAL].

¹⁴ Lewis, C.S. (2004) *The Collected letters of C.S. Lewis Series, Vol. 1* p. 879. Harper Collins.

*I believe that law schools and bar courses are missing a critical competency requirement in their curriculum: trauma-informed lawyering. Becoming a trauma-informed lawyer will, among other things, challenge you to critically reflect on your personal behaviours, beliefs and biases. It will call you to positively transform the way you approach advocacy, guide your practice to avoid doing further harm to others and ask that you commit to remaining open to learn new and old knowledge you didn't know you needed before beginning your career.*¹⁵

Lawyers require a more robust, well-rounded education, including thoughtfully executed curriculum focused on the psychological needs of their clients and themselves. Emerging lawyers spend years in law school focused on their technical studies but, as Macfarlane notes, “clients are rarely, if ever, mentioned in law school classrooms”.¹⁶ It is no wonder that lawyers often miss the mark when dealing with the emotional needs of their clients. Perhaps there is entrenched resistance to changing the culture as she contends, “the widespread resistance to the interventions of emotional issues into the management of a file is epitomized by the quip, “The only thing I don’t like about the legal practice is the clients.” Like most enduring jokes, this comment is not without truth.”¹⁷ Indeed, the majority of clients who have found themselves requiring a legal professional, especially within the realm of criminal law, have likely experienced some degree of trauma. This makes things overly complicated for lawyers who simply want to provide the legal service they were trained to provide. According to psychologists Haskell and Randall, “although the law is deeply involved with regulating and responding to human behaviour, legal professionals are virtually never exposed to formal or informed psychological literature, research, or professional knowledge about human behaviour in their legal education or ongoing professional development”.¹⁸

¹⁵ McCallum, M. (2021) *Trauma and Transformation in the Judiciary* (No.21) [Audio podcast episode] at.0.49. [McCallum]

¹⁶ Macfarlane, J (2008) *The New Lawyer*. Vancouver BC, UBC Press. p.62. [Macfarlane]

¹⁷ *Ibid* p.62.

¹⁸ Haskell and Randall (2013) "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping". *Dalhousie Law Journal*. p.501. [Haskell and Randall]

Lawyers are trained in law; is it reasonable to also expect them to also possess the “relational skills” of supporting the emotional needs of their clients? I contend that this is a reasonable expectation, and that becoming trained in a trauma-informed manner will not only benefit their clients but themselves as well. Macfarlane suggests that a shift in thinking is required: “In the hierarchy of effective communication skills, the pinnacle has traditionally been courtroom eloquence – the persuasive making of substantive legal arguments. For the new lawyer a different type of eloquence is necessary...the new lawyer offers a participatory model of compassionate, client centered professional service instead of the traditional “trust me” detachment of the old lawyer.”¹⁹ This “new lawyer” model is unquestionably a move in the right direction, both for lawyer and client. By learning to provide trauma-informed service, lawyers can mitigate their own exposure to the risks associated with vicarious trauma inherent in this demanding profession. Educating lawyers to address vicarious trauma firsthand would create more compassionate, and therefore less damaging, experiences for everyone exposed to the legal process. These effects of unchecked trauma manifest in both clients and legal professionals with serious costs. As McCallum states,

*Many of us are just kind of going through the motions, holding up the status quo without questioning: is there a better way? It's time to plant some seeds to get people to think about how their work is impacting them mentally, spiritually, emotionally etc. I think being trauma-informed and actually applying trauma-informed principals are one of the better ways we could do this. I see when folks are traumatized, whether it's directly or vicariously through their work. I see how that shows up on the bench, I've seen how it shows up in opposing counsel and I've definitely seen how it shows up in myself. I can't help wonder how many really good people are driven out of this profession because of the mental health risks. There needs to be a better way.*²⁰

Law schools train students in the techniques of interviewing clients, gathering sensitive information, generating timelines, preparing clients for cross-examination, and so forth. All of these techniques could be taught through a trauma-informed lens without a disruptive overhaul of the existing legal curriculum. It would simply require that legal scholars and professors become

¹⁹ Macfarlane, *Supra* note 16, p. 36.

²⁰ McCallum, *Supra* note 15, at 11:00.

trauma-informed themselves, so that they may begin to start weaving trauma-informed examples and language into their courses. This top-down approach is what is required to start training law professionals who will eventually possess greater legal and interpersonal skills. Acknowledging trauma in clients will deepen the communication between client and lawyer, creating new opportunities for understanding, context, and professional advocacy.

Trauma affects everyone, including those on the bench. For judges who have been exposed to trauma either personally or vicariously, its impact may serve them professionally. Reflecting on trauma may even offer an advantage, as Manitoba Provincial Court Judge Kael McKenzie noted in a recent interview:

*If we're experiencing trauma, does that make us less capable? I think no. I think in fact, recognizing that makes us more capable more able to do our job and to understand the people coming into our court room. People come into the courtroom with trauma...and big trauma. With big things that have happened in their lives, systemic things. ...and that's why we have to be trauma-informed. We have to be.*²¹

Because we are all impacted by trauma, we are all paying the cost, both personally and as a society. We help people heal when we promote collaboration with each other, thereby creating connection back to community. The constraints of our existing legal system make it extremely difficult to cultivate creative, inclusive solutions to improve conflict even for the most collaboratively-minded lawyers; as Ippolito notes:

*Despite our best efforts to get away from traditional top-down organizational structures and right-based legal culture, our systems are still set up to default to those hierarchies in times of crisis and problems. Learning to operate in a non-hierarchical collaboration is essential to breaking those default frames and excelling in achieving goals that rely on the ability to leverage the talents of others reciprocally and to creatively and effectively engage with them.*²²

²¹ McCallum, *Supra* note 15, at 23:00.

²² Ippolito, L. (2019) *Music, Leadership and Conflict: The art of ensemble negotiation and problem-solving*. p. 193.

An exploration of the elements contributing to the failures of our current system is required if there is any hope of changing the ways law is taught and administered.

CONSIDERING TRAUMA AND CRIMINAL BEHAVIOUR

Michael Ignatieff was staring right at the Prime Minister. "I worked in a prison when I was a younger graduate student. I worked with lifers. I'm utterly unsentimental about criminals, but I know one thing about prison: It's that prison makes almost everybody worse who's in there...it's high time for an 'adult solution'".²³

These words were said by Ignatieff over a decade ago during a televised leader's debate in an attempt to raise awareness and challenge the way Correction Services Canada operated prisons. Seemingly, nothing came of it, and Canada's prison system is more deeply flawed today than ever before.

The sad intersections between violence, poverty, abuse, criminal behaviour, and trauma are widely accepted as contributors to anti-social behaviour. This does not mean that people who have broken the law can simply blame their actions by saying "I had a bad childhood so it's not my fault", yet it bears attempting to contextualize the underlying causes which precipitated the criminal behaviour through a trauma-informed lens. As one researcher observed, "child abuse, and neglect, poverty, sexual molestation, and witnessing violence are, among others, the most common risk factors for post traumatic reactions, aggression and antisocial behaviour."²⁴ It is unavoidable that some inmates must be incarcerated to protect public safety; that is what prisons were originally intended to do. Approximately eight hundred Canadian inmates are currently designated as "dangerous offenders," meaning they cannot be released. Fortunately, these cases are the exception, not the rule. According to Ling, "more than thirty per cent of the population is incarcerated on non-violent offences, mostly drug and property crimes. Critics have wondered for years: Why do they need to be in the violent confines of federal prison, counting down days at the expense of the Canadian government?"²⁵

²³ Ling, Justin (2021) *Houses of Hate: How Canada's Prison System is Broken*. Macleans [online] <https://www.macleans.ca/news/canada/houses-of-hate-how-canadas-prison-system-is-broken/> [perma.cc/K5VA-AYQG].

²⁴ Vittoria, A. (2012) *Offending Behaviour: the role of trauma and PTSD*, European Journal of Psychotraumatology, 3:1. [Vittoria]

²⁵ Ling, Justin (2021) *Houses of Hate: how Canada's prison system is broken*. Macleans.

Most people in our carceral settings are eventually paroled and return to a community. Understandably, these people are even more traumatized than they were before their incarceration. Exposure to the constant threat of violence and stress wreaks havoc on an individual's overall well-being. It remains unlikely that any mental health and/or addiction issues were treated inside; in fact, it is more likely that individuals emerge (usually unsupported) from prison with increased mental health, trauma, and addiction issues. Public protection is diminished when we return people who have offended to the street unrehabilitated, unreformed, and unsupervised. Simply put, the prison system is failing everyone; as Ling laments:

Canada's prisons are antiquated, inhumane, violent, and expensive. They don't even work. Two decades ago, researchers from the University of New Brunswick did a meta-analysis of 50 studies on incarceration, spanning a half-century. They could not find "any evidence that prison sentences reduce recidivism" and that "prisons should not be used with the expectation of reducing criminal behaviour." They revisited the study two years later, looking at 100,000 inmates. They found the same result: prisons do not reduce crime, they increase it.²⁶

Even if trauma-informed sentencing judges and lawyers wanted to invoke or suggest an alternative to incarceration, they are thwarted by the constraints of the justice system available to them. The frustration imbued in the following comments by Justice Barry Stuart reveal the degree to which our prison system is failing everyone:

Judges and prison officials elude responsibility for the abysmal failures of incarceration by shifting blame to the "system". This is partly true. The absence of reasonable alternatives creates a difficult choice. Faced with the prospect of leaving an offender in the community without any programs offering a reasonable prospect of rehabilitation, or sending the offender to jail, where at least any question of control is resolved, begrudgingly, often in frustration, jail is chosen. The tenaciously held belief against overwhelming evidence to the contrary that jail can rehabilitate provides an illusory solace for the court, and enables communities and courts to avoid confronting reality. The destructive impact on offenders and ultimately future victims, and

²⁶ *Ibid.*

*the squandering of scarce public resources is reason enough to exercise restraint in relying upon punishment and especially upon jail to protect the public.*²⁷

The need for alternatives to prison is glaringly evident. The outcomes associated with incarceration are truly bleak. Berzins asks, “Knowing how much damage it does and the lack of evidence for its usefulness, can we really continue to found the entire justice policy of a civilized society on the mere assumption that legal punishment is right?”²⁸ Our retributive system simply does not address the underlying issues of poverty, abuse, and systemic barriers which lead individuals to commit offences in the first place. When we are not connected with intimate, safe relationships with each other and our communities, we are forced into a dangerous state of mind. When people experience a lack of agency in their lives, as well as the sense that they do not matter, anti-social behaviour and all its accompanying issues can trample in like an uninvited guest. Moving from retribution to rehabilitation and repair through restorative approaches is well worth expanding to a broader audience within our current framework. What we have been engaged in for so very long is suspiciously ineffective, as a Cree Elder remarked to a settler during a workshop on restorative justice, “You have a *legal* system, we’re just not sure it’s a *justice* system”.²⁹ Western civilization’s age-old societal “eye for an eye” thinking is outdated and desperately in need of revision. As one mother (of a sexual assault survivor) who supported her daughter through an eight-hour restorative circle process said, “We cannot break cycles of dehumanization by responding to violence with dehumanization. We must strive to make justice and healing synonymous”.³⁰ One solution to work towards the intersection of justice and healing is restorative justice (RJ). RJ is an agile, trauma-informed, and inclusive approach to redressing harm. It focuses on the needs of the survivor-victim, but also on the underlying needs of the person who has offended. RJ attempts to right the wrongs, to the extent possible, by addressing the obligations the person who has offended has created as a result of their actions. Perhaps in part, RJ is the “adult solution” Ignatieff was envisioning a decade ago.

²⁷ *R v Moses*, [1992] 3 CNLR 116 p.24 note B. [Moses]

²⁸ *Ibid* at note 11.

²⁹ Elliot, *Supra* note 7 at p.40.

³⁰ Essler, K (2020) *Cross Examination Is Brutal: Is it time to consider restorative justice in sexual assault cases?*

WHAT DOES RESTORATIVE JUSTICE (RJ) OFFER?

The restorative model of justice should not be understood as a new gimmicky, untried, 'new agey' idea. It is a very old idea that has been with us since the beginning of human community life, since our first thoughts about criminal justice. The return to elements of restorative justice is a return to the roots of justice. It's not a new and untried solution, it's a badly needed recalibration of our criminal justice system.³¹

RJ is a multi-party process which necessitates authenticity, remorse, and the desire for change in order to ensure a transformative, durable, and long-term outcome. Emotional restoration is the cornerstone of restorative justice practices. It must be noted here that not all criminal acts are appropriate for RJ for a variety of reasons, including public interest and the psychological safety of those who have experienced harm. With certain harm inflicted, "many crime victims will find such intimate contact with their offenders utterly traumatic".³² RJ is only to be considered carefully on a case-by-case basis for those victims and people who have offended who are ready to authentically engage in the process and have realistic expectations about what they might gain from the experience.

In common dispute resolution jargon, RJ attempts to "fit the forum to the fuss" with agility, in a way that retributive justice simply cannot. Retributive justice seeks to isolate those who have caused harm from the community where as RJ strives to discover ways to restore the community and heal connections as much as is possible. In a retributive justice system, judges and lawyers do all the talking while victims and people who have offended have only a chance to speak in an extremely limited and controlled context, as opposed to RJ where the voices of the victim and people who have offended are central to the process. In RJ practices, such as sentencing circles, displaying emotions is encouraged, whereas in a court, the sterile and foreboding setting discourages emotional expression. There is, however, a key area where these two paradigms merge, as noted by RJ pioneer Howard Zehr: "Both the philosophy of retribution and the philosophy of restoration have a lot in common. They both say that the victim is owed something, they both say that the offender owes something, they both say there ought to be proportionality

³¹ McLaughlin, B. (2015) *Evolution of Restorative Justice within Canadian Justice System* at 45 min. [Video].

³² Radzik, L. (2003) *Do Wrongdoers Have a Right to Make Amends?* p.327.

between the two. What they differ on is the currency that will right that balance.”³³

At the risk of being perceived as possessing a Pollyanna-like view on this nuanced subject, I contend that empathy has never caused more harm. Empathy is extended freely to survivors of violence and rarely afforded to those who have caused the harm. If we can find it in ourselves to extend empathy to people who have offended and are involved in an RJ process, this maybe be an important pathway towards unlocking the possibility of reparation.

*...it is often empathy that leads to the emotions of remorse, guilt, and shame. As a consequence, it is crucial to activate the potential for compassion in the offender. This can only happen in a situation wherein the offender him - or herself experiences respect and empathy. This is one of the major strengths of good conferencing, in comparison with traditional court proceedings.*³⁴

In an RJ conference or sentencing circle, communication between people who have offended and victims often follows a structured script and is facilitated carefully with a trauma-informed approach at the fore. This effective methodology affords individuals the opportunity to regain control and agency through the expression of their needs, and it offers the person who has offended the opportunity to fulfill obligations they have created. Justice Barry Stuart succinctly outlines the typical objectives of a sentencing circle:

*The effect of the circle was to: challenge the monopoly of professionals, encourage lay participation, enhance information, create a search for new options, promote the sharing of responsibility, encourage the offender's participation, involve victims in sentencing, create a constructive environment, provide a greater understanding of the justice system's limits, extend the focus of the criminal justice system, mobilize community resources, and merge First Nation's and Western government's values.*³⁵

Most victims of crime do not have the opportunity to meet with the person(s) who caused them harm in order ask the persistent, lingering questions (such

³³ Zehr, H. (2012) *Restorative Justice is the Law*, [Video].

³⁴ Harris, N. et al. (2004) *Emotional Dynamics in Restorative Conferences*. p.202.

³⁵ Moses, *Supra* note 27 at note 27. #4.

as “Why me?”) which are often an impediment to their healing. In an RJ context, these emotionally charged questions can be addressed, which often affords both parties greater ease. As Zehr explains, “They want answers that are as multi-layered as real life, not the simplistic, binary answers that emerge from the legal process.”³⁶ The relational focus of restorative justice leads to such practices being particularly suited for the task of healing trauma — particularly that which is experienced through the violence of other human beings. Crucial to restorative justice is the belief that responses to crime must be focused upon the reparation of broken relationships, and these relationships are best repaired not through punishment and fear, delivered by an impersonal state-based system, but through human dialogue occurring within a safe, secure, and trusting environment.

In order for RJ to truly affect the person who caused the harm, this respectful setting must be created if any hope of a return to right relations can occur. Our emotionally restrained court system does not support this kind of emotionally safe environment for people who have offended and, consequently, they may not be fully aware of the effects of their crimes. Canadian lawyer Rupert Ross suggests “an offender cannot even *know* what he did until he begins to learn, first hand and in a feeling way, how people were affected by it”.³⁷ Healing the trauma of harm inflicted by other human beings requires the reparation of trust in others that the harm originally done to them will not be repeated — a goal which RJ, with its focus on accountability, respect, inclusion, and fulfilling obligations, is particularly well positioned to deliver.

RJ RETURNS CONFLICT TO ITS RIGHTFUL OWNERS

*Conflict is an incredible opportunity and we ought not to let the professionals steal it from us. Process is product; the process we choose is going to determine what the outcomes are.*³⁸

RJ relies on the person who has offended and their ability to authentically participate, thereby reducing the obvious inequities in the retributive legal system, which virtually eliminates participation of the very person who is the primary focus of the process. RJ challenges the monopoly of lawyers and returns ownership to those affected by the harm, to its rightful stakeholders.

³⁶ Zehr, H. (2001) *Transcending – Reflection of Crime Victims*. Intercourse, PA: Good Books.

³⁷ Karp, D. (2015) *The Little Book of Restorative Justice for Colleges and Universities*. p 39.

³⁸ Stuart, *Supra* note 12 at 4:00 [Video].

Within restorative approaches such as victim-offender mediation and community sentencing circles lies the knowledge that the individuals affected by the conflict or crime inherently know what they need and how to fulfill those needs. “For far too long the expensive, formal, slow, and blunt instruments of the justice system have been employed for too many conflicts within communities. In effect, conflicts are stolen from the community by the justice system”.³⁹ According to criminologist Nil Christie, “Lawyers are particularly good at stealing conflicts, they are trained for it”.⁴⁰ This may be a dim view of lawyers, yet it remains relevant for consideration in the exploration of restorative approaches to conflict. “Properly processed, conflict is an essential element in building the foundation of community spirit and pride, and most importantly in building the ability to co-operatively develop community-based solutions to social problems.”⁴¹ These community-specific solutions to social problems are also significant contributors to determining how to best protect the community in the future.

Our current legal system would benefit from some hybrid model which includes RJ for certain cases. Exploring an expanded complement of options for crime would be a benefit to society overall. Ancient Indigenous practices from all over the world, such as sentencing circles, have proven instrumental as a form of reconciliation, re-integration, and prevention. When appropriate, restorative practices should be considered first (before courts) to determine if the harm caused could be better addressed directly by those impacted. As Justice Barry Stuart expressed, “We have to think about circles not as an alternative process, but the first order process to turn to. The courts ought to be the very, very last process that we do when the communities can’t handle it, then we to turn to the courts as the alternative process”.⁴²

The retention of ownership of conflict through RJ practices ensures participants possess autonomy and control in the difficult process of addressing harm. The circle process can inject a valuable awareness of larger, systemic community issues which may have contributed to the original offence. RJ offers a wider view of our innate interconnections through its trauma-informed approach, as noted by psychologists Haskell and Randall: “The philosophical orientation embodied in a trauma-informed approach can apply to work with victims, offenders, and all those affected by traumatic events, including the broader communities in which victims and offenders

³⁹ Moses, *Supra* note 27 at note 35.

⁴⁰ Christie, N. (1977) *Conflicts as Property*. p. 4.

⁴¹ *Vittoria*, *Supra* note 24. Similar to the advantageous outcome possibilities of mediation.

⁴² Stuart, B. (2016) *Toward A Culture of Just Relationships* [Video] at 10:00.

live”.⁴³ By returning the conflict and its resolution to the rightful owners, victims, people who have offended, and the community can address needs and obligations through consensus, something which can rarely be actualized in a legal context.

CHALLENGES AND OBSTACLES TO CHANGE

The prime obstacle to changing the legal system are those who work within it. The rigorous training required to become a lawyer is extraordinarily demanding and requires a degree of assimilation into the culture of law. Expecting existing lawyers to adopt RJ options into their practices might be a tall order because “to many, the existing criminal system is sacrosanct. Tampering with its rituals is tantamount to heresy”.⁴⁴ Social justice-based lawyers and judges are the exception when it comes to exploring alternatives or hybrid solutions to address harm. Many are simply unaware of trauma-informed approaches and RJ practices. Lawyers need relevant education which reflects the diversity of clients’ needs and experiences. Only then will RJ be viewed as an option in the legal toolkit to redress harm and restore relationships.

The general public’s perception of what justice looks like is another barrier to implementing a more trauma-informed approach to the law. Considering changes to one of the most hallowed institutions in our society is something most people simply do not have any interest in contemplating. The notion of restorative approaches for criminals is often viewed as being “soft on crime”. There is also a perception that people who have offended may use RJ to their own advantage in hopes of securing a lighter sentence, thereby participating in the process without genuine integrity and accountability. Critics of Gladue Courts certainly have raised this as a possibility, yet one must consider if those critics’ agendas are permeated by dated colonialist thinking about Indigenous people. Some victims and advocates react negatively to RJ because they are under the misapprehension that the goal of RJ is to achieve forgiveness and reconciliation. While it is true that RJ can provide a context in which one or both of these may occur, this is an experience that varies from participant to participant. There is no pressure in an RJ process for either forgiveness or reconciliation to be a prerequisite for a successful outcome. RJ focuses on moving towards healthier relationships and gaining a new sense of identity.

⁴³ Haskell and Randall, *Supra* note 18.

⁴⁴ Stuart. *Supra* note 27 part 4.

Yet another significant challenge is time. RJ practices take much longer to facilitate than a typical sentencing hearing. The preparation to ensure that an RJ process is ready to proceed can take months alone. Having various parties come together with a trauma-informed RJ facilitator over many hours or weeks is expensive and can pose technical issues such as travel costs, space availability, and scheduling challenges. Critics will undoubtedly ask, “Who is going to pay for all this?” Sadly, the number of legal influencers and advocates capable of projecting the long-term fiscal benefits of investing in rehabilitation and a return to community is infinitesimal. A restorative practice costs much less (and has better outcomes) than incarcerating someone for even a short period of time. The long-term benefits of reintegration into community with accountability and support will be better for families because the devastating ancillary effects of incarceration exist long after the person who has offended is released. Asking people to consider a hybrid version of our criminal justice system to include RJ cases will be an uphill battle, to say the least. In order for RJ to be accepted more widely into our retributive model, legal professionals (including police) need to be trained in restorative practices from the beginning of their educational paths. Change is slow; however, we have a collective duty to continue to strive towards a less expensive, more productive, more trauma-informed response to crime.

CONCLUSION

This is a critical time as the effects of COVID-19 have brought racial, gender, and socio-economic disparities into sharp focus. We know that we must do more to respond to these inequities. Trauma-informed RJ practices allow us to reimagine systems and communities in a way that focuses on participation, repair, and inclusion. Canada’s constitution provides a framework which grounds all legislation and criminal justice policy in human rights. In many cases, restorative justice initiatives could meet human rights obligations and satisfy the objectives of sentencing through collaborative non-retributive processes. Even if a small minority of police and lawyers became advocates for RJ practices, it could make a significant impact by actually supporting the existing rule of law, as asserted by Sherman and Strang: “By providing more opportunities for questions and answers, face-to-face or otherwise, it may actually make the law far more accessible to the people. The evidence of satisfaction with RJ suggests that it may reinforce the rule of law. There is no evidence that the wider use of RJ would undermine the rule of law”.⁴⁵ The

⁴⁵ Elliot, *Supra* note 7 at p. 90.

current system has a long road ahead as former Chief Justice Beverley McLaughlin noted during an impassioned speech in which she extolled the virtues of RJ:

We have not done enough. We have some restorative justice; we have some mechanisms that allow us to introduce elements of it into our process. Occasionally we see it applied in its full force to even serious offences. But the task of reconciling RJ goals with the retributive justice system that dominates our society that is deeply rooted in our culture is a difficult one. It will be a long work of progress but we must not give up. I believe that we must work whenever we can as judges, as lawyers, as community workers to introduce the attitudes of responsibility, conversation, discussion and healing into criminal law and into criminal sentencing and incarceration.

Finally, a trauma-informed approach such as RJ strives to provide interventions and unique sentencing options in a way that reduces further harm and victimization. Given the criminal justice system's dismal record of addressing harm with state-sanctioned harm, there exists a desire for change in this broken system. A trauma-informed justice system will be a step in the right direction to offer more transformative interventions for those affected by trauma and crime.