

Restorative Justice¹

- by Wayne Northey

In 1974 two youths who had been drinking and had been “talked to” by the police already, took out their frustrations on the small community of Elmira, Ontario, by doing damage to twenty-two different vehicles and homes. Several months later the youths pleaded guilty to the charges, and Judge Gordon McConnell in Kitchener ordered a Pre-Sentence Report. Mark Yantzi, the Mennonite Probation Officer writing up the report, discussed the case with the local Mennonite Central Committee court volunteer, Dave Worth. Both had been reading recent publications by the Law Reform Commission of Canada in which it had been stated that reconciliation played an important role in criminal justice. They also knew that reconciliation was the central concept of their Christian faith.

Yantzi proposed in his Pre-Sentence Report that the youths would benefit from meeting face-to-face with their victims and making amends. Judge McConnell was intrigued by the idea, and discussed it with the probation officer. The Judge indicated that the notion had lots of merit, but it was simply not done in Western jurisprudence. He made a fateful choice nonetheless when he decided “Why not?,” and put the sentencing over until Yantzi and Worth could take the youths to meet each of the victims. They did and out of that experience arose the first ever “victim offender reconciliation project”.

The above story, known in the Restorative Justice movement as “The Elmira Case”² became a kind of proverbial shot that echoed around the world. Over 200 mediation programs in North America alone trace their origins to the program that came into existence as a joint venture between Ontario Correctional Services and the Mennonite Central Committee. Several hundred similar programs now exist in Europe and elsewhere.

A Little Bit of History and Anthropology³

To set a context for the programmatic emergence of Restorative Justice late in the twentieth century some historical and anthropological comments would be helpful.

Almost a millennium ago, in the late 11th century, European history underwent a significant upheaval some call “The Papal Revolution”. During this time, the Church moved to consolidate its power over all souls and kings of Europe, the great universities

¹ A massive body of literature has grown up in the past few years. The best study to date specifically on the topic is *Restoring Justice* (Strong and Van Ness, 1997). The best overview of the wider context is *The Expanding Prison* (Cayley, 1998). The first major study was *Changing Lenses* (Zehr, 1990) - considered a classic. An excellent annotated bibliography has also recently been produced (McCold, 1997).

² See a fuller account in Dean Peachey’s “The Kitchener Experiment” (1989).

³ I am drawing on the work of Berman (1983/1997), Strong and Van Ness (1997), and Girard, in particular: (1977); (1986); and (1987).

began to emerge, and the Western legal tradition started to take shape, as new law codes were formulated for study and promulgation throughout the Western world.

In a fateful interplay between Church and Society far too complex to describe in a short article, secular states began to follow the lead of how the Church dealt with its religious heretics. These “social heretics” began to emerge under new state law codes as “criminals” whose victims were no longer the actual victims, but “Rex” or “Regina”, or later “we the people” under the United States Constitution.

So the evolution of the criminal justice system in the West was away from *community and victim centred justice* towards *state and offender centred justice*. The former had been a dominant approach in the ancient Hebrew culture, in Roman society when applied to its own citizens, and in many pre-colonial African and North American and worldwide indigenous cultures. In the Reconstruction of Japan following the Second World War, the Japanese became the first industrialized country nationally to embrace this more restoratively oriented way of justice.⁴

A shift away from this approach for common law Western jurisdictions began with the Norman Conquest of Britain in 1066. The state began, as a criminologist said provocatively this century, to *steal the criminal conflict from the community*.⁵ It is still a shock for some victims to discover that they are not even named on the court docket, having a millennium ago been displaced by *Rex, Regina* or “we the people”. One victim of rape describes a fantasy of phoning the Queen in Buckingham Palace on each anniversary of the assault to ask her how she is doing!

The purpose of the law shifted dramatically as well. Earlier, the emphasis had been upon making the victim whole again, what in the ancient Hebrew culture was called “restoring *shalom*”. With the rise of the king's power, the purpose became to uphold the authority of the state.

There was dominant Western religious undergirding of this approach which led to a marriage of law and religion that placed, on the one hand, primary emphasis upon the offender's violation of the law while dropping any concern for rehabilitation of the victim. On the other hand, it drew on Roman slave law as a model for meting out the worst of punishments imaginable upon the offender.⁶ This form of response to crime is known as “retributive justice”, and has dominated Western jurisprudence for a millennium.

Where did such violent notions of punishment originate?

⁴ John Haley is the expert on this. Of his many publications, see for instance Haley (1989).

⁵ Nils Christie writes: “The victim in a criminal case is a sort of double loser in our society... He is excluded from any participation in his own conflict. His conflict is stolen by the state, a theft which in particular is carried out by professionals (1981, p. 93).” He draws upon an earlier classic essay he wrote entitled “Conflicts as property” (1977). Christie's book and article are rewarding reading!

⁶ Herman Bianchi explicates this in *Justice as Sanctuary* (1994).

That is an *anthropological* question. Anthropology is the science or study of cultures which presupposes taking at least one step back from culture to look at it somewhat as an outsider. When we ask that question generically of all cultures, René Girard argues that the founding moment of culture is in fact violence, which then scapegoats in order to bring social cohesion.

A “scapegoat mechanism” as described earlier arises to siphon the violence away from the community, thereby creating peace for a time within the society. In religious cultures, this kind of violence invariably took the form of myths, rituals, and prohibitions legitimizing the violence against the victim or victims. In the secular West, the ultimate non-religious instance of the same dynamic is the Holocaust.

It was precisely over against the excesses of various forms of scapegoating violence that some well-meaning Christian philanthropists tried in 1790, in Philadelphia, Pennsylvania, to move away from physical punishments towards an emphasis upon reformation of the criminal. If only they could lock each individual into a jail cell with a Bible and a rule of silence, surely the violence would cease, and the criminal would become “penitent”! The new name for this form of response to crime was the *penitentiary*. The new motive was rehabilitation, not retribution. The idea caught on like wildfire, and continues to spread like no other around the globe to this day. But, it soon became evident that, whereas former means of scapegoating administered physical wounds that eventually healed, the penitentiary began to inflict psychic harms that rarely ever healed. Though not the intent, a new scapegoat mechanism arose in the form of the penitentiary that destroyed the very *psyche* of the convicted criminal. Then where did that lost soul fit into society?⁷

In this context of scapegoating, Restorative Justice poses perhaps the most troubling question: “*Why harm people who harm people to teach people that harming people is wrong?*” The Restorative Justice vision moves away from a “stigmatizing shaming” scapegoat mechanism to a “reintegrative shaming” way of nonviolence in a bid to break definitively with the endless cycles of violence in our culture.⁸

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⁷ Michel Foucault’s *Discipline and Punish: The Birth of the Modern Prison* (1978) demonstrates this well.

⁸ The classic book on this idea is Braithwaite (1989).

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