Part III

RETRIBUTION AND RESTORATION IN CRITICAL PERSPECTIVE

Is punishment the appropriate response to gross human rights violations? Is a non-punitive justice system feasible?

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I INTRODUCTION

Let me start by telling a personal story. It is the story of how, more than three decades ago, I was converted to the idea and principles of restorative justice. Thirty-five years ago, in the heated struggle to get Canada to abolish capital punishment, I decided to test the popular and widely-held, though unproven, belief that the death penalty is a unique deterrent. To do so, I conducted a study of the quantitative and qualitative regional variations in criminal homicide rates across Canada.[1] The results showed that the faith placed in the deterrent effect of the death penalty lacked any scientific or empirical support. One of the lessons the study taught me is that homicide research can, in many ways, be very enlightening for the discipline of criminology, much more so than other offences against the person or against property. So when shortly afterwards I was visiting the Ivory Coast as a guest professor at the University of Abidjan, I decided to do a study of African homicide to gain a better understanding of the impact culture has on the rates, the nature and the types of criminal homicide. As a former French colony, the Ivory Coast inherited a good system of record keeping and this, I thought, would both facilitate and enhance the validity and reliability of the study. So with the usual diligence of an enthusiastic researcher I carefully examined the national police records on criminal homicide during the

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[1] E A Fattah *A Study of the Deterrent Effect of Capital Punishment with Special Reference to the Canadian Situation* (1972).

previous ten years. Very soon I noticed that there were only a few cases recorded in the rural areas and the small villages of the Ivory Coast. Could it be that the rural population in the country was much too peaceful to kill one another? Well, no. There was in fact another explanation. Once I probed further into the possible reasons for such a flagrant discrepancy, it did not take me long to realize that there were two, almost parallel, systems of justice operating in the Ivory Coast. One was the Western punitive system, inspired by the expiatory and retaliatory teachings of the Old and New Testaments, a system that was imposed on the Ivoirian population by the colonial power, France. The system used mainly a two-pronged weapon in its response to crime: death and imprisonment. The second was the indigenous, tribal system – call it patriarchal if you want- that used customary rules and traditions to solve conflicts and to settle disputes of all kinds between the members of the community.

Getting no satisfaction from the Western system of punitive, retributive justice, and unable to comprehend why the state should steal the conflicts from their rightful owners (to use Nils Christie's 1977[2] idea) while doing nothing to compensate the victim's family or to achieve reconciliation between the feuding clans, those victimized simply did not report the homicides to the police, preferring instead to have the matter dealt with according to their norms and their customs. The two elements of this indigenous justice were compensation (for the death, injury or harm done) and reconciliation aimed at restoring the peace disrupted by the offence and at ensuring a future of harmonious co-existence.

This valuable learning experience brought to memory a remarkable case that I came across when studying the history of capital punishment in Canada. The case happened in a British settlement in the Canadian North during the early years of the British Colonial Rule. It is the story of a Chief of one of Canada's First Nations tribes whose son was killed by the son of the British Garrison Commander. Intent on showing the fairness and equality of British justice, the officer insisted that his son be executed in conformity with British law. The pleas of the victim's father fell on deaf ears. He offered to adopt the killer so that he may replace his slain son. He could not, despite his personal grief, understand the rationale for the death penalty, the wisdom of doubling the loss instead of trying to minimize it. He asked himself and the commander what purpose would be achieved by taking the life of the culprit. But to no avail. The Talion Law – a life for a life, an eye for an eye, and a tooth for a tooth – had to be applied. And the so-called civilized Western justice had to prevail and did. The evident futility and destructiveness of such

[2] N Christie 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology* 1–19.

punishment was not enough to persuade a dedicated military officer to bend the rules or to listen to the wisdom of the Chief, even if it meant sparing his own son.

All this was an eye opener. It convinced me that punishment is not and can never be the answer. It convinced me that there must be a better solution, a better response to harmful, injurious acts. I have always been fascinated by the reports of cultural anthropologists who studied what Western scholars denigratingly called 'primitive societies'. Those were societies that have escaped the influence of Judaism, Christianity and Islam and thus were not inspired or affected by the religious notions of expiation and penitence.

What I found remarkable was the quasi-universality of the historical evolution of social reaction to harmful and injurious acts. The reports of social and cultural anthropologists show that in every society studied there was an evolution from private vengeance to group vengeance to a system of composition, which is the earliest form of restorative justice. Moving from vengeance to compensation was a normal, almost a natural, progression because retaliation proved detrimental to the group. As Barnes pointed out:

> 'The most serious shortcoming of the system of clan retaliation was that it provided no satisfactory method of bringing a quarrel to an end ... Therefore, an injury once perpetrated started a perpetual *vendetta* which was likely to render life extremely precarious to members of both clans.'[3]

In view of this I find it rather puzzling that despite enormous social evolution and vast intellectual progress in the last two centuries, our criminal justice system remains frozen in the era of retaliation. It continues to be fixated on the notion of retribution and the need to inflict pain and suffering on the offender by way of making him pay for the injury or harm he has done. It has always baffled me that in this day and age, in the twenty-first century, we continue to accept the punishment response as a given and fail to see its destructive and nefarious consequences whether the penalty is death or imprisonment.

But my favouring of restorative justice over punishment is not merely a humanitarian stance. It is based on a deep conviction that it is a better, viable, constructive and more effective response to harm than the deliberate infliction of pain and suffering. This is why any attempt to discuss restorative justice or to extol its merits must inevitably address what is fundamentally wrong with society's current response to violent and harmful acts. Instead of praising restorative justice and highlighting

[3] H E Barnes *The Story of Punishment – A Record of Man's Inhumanity to Man* 3 ed (1972) at 48 (emphasis added).

its positive aspects, the emphasis of this paper will be on the failures, the futility and the detrimental effects of the current policy, namely the use of punishment as the sole or the dominant response to undesirable and illegal behaviour.

II IF RESTORATIVE JUSTICE IS A BETTER SYSTEM, WHAT ARE THE OBSTACLES DELAYING ITS IMPLEMENTATION AND FULL INSTITUTIONALIZATION?

When discussing punishment with politicians, policy-makers, scholars, professionals, or with ordinary citizens, more often than not, they end up agreeing that punishment is bad. But then they always come up with what may be called the inevitable question, being, what is the alternative? It is this seemingly resigned and helpless attitude viewing punishment as a necessary evil (or as they say in French *un mal nécessaire*), and the mistaken belief that it is indispensable to the survival of society, that makes it difficult to convince members of the general public that there are actually better, less costly, and more effective alternatives. The discussions, whether at a scientific or scholarly level, or at a common sense, conventional wisdom level, invariably show that whatever support punishment may have is more out of despair than out of any firm belief that it does, or may have, positive or salutary effects. That punishment has to follow any wrong-doing is a notion that is inculcated in the minds of children at a tender age: 'if you commit a sin you will go to hell, if you misbehave you will be caned, if you hit your sister you will be spanked, if you break the law you will go to prison'. . . Later on it becomes really hard to break this strong association between crime and punishment. It becomes almost impossible, particularly for the average citizen, to conceive of a non-punitive society, a society without prisons, a community that does *not* respond to harmful actions by the infliction of pain and suffering. Advocating and gaining acceptance for an alternative, non-punitive, justice paradigm becomes extremely difficult because the theological notion of a punishment that must follow the fault, the wrongdoing, is too deeply anchored in the minds of most individuals.[4]

In fact, the idea of doing away with punishment altogether is not even acceptable to most criminologists, many of whom are becoming increasingly punitive, because of a mistaken belief that by so doing they will be taking the side of victims of crime. In her presentation of a feminist vision of justice, Kay Harris questions this seemingly unshakable faith in the need for punishment. She writes:

'Indeed, we need to question and rethink the entire bases of the punishment

[4] E A Fattah 'Victim Redress and Victim-Offender Reconciliation in Theory and Practice-Some Personal Reflections' (1999a) 35(1) *Hokkaigakuen Law Journal* 155 at 162.

> system. Virtually all discussion of change begins and ends with the premise that punishment must take place. All of the existing institutions and structures – the criminal law, the criminal processing system, the prisons – are assumed. We allow ourselves only to entertain debates about rearrangements and reallocations within those powerfully constraining givens. . .The sterility of the debates and the disturbing ways they are played out in practice underscore the need to explore alternative visions. We need to step back to reconsider whether or not we should punish, not just to argue about how to punish.'[5]

What is rather surprising is that this uncritical adherence to the archaic institution of punishment remains widespread despite rapid and rather fundamental social evolution. The secularization of society, the liberalization of attitudes towards human misbehaviour, the diligent pursuit of cost-effective social policies and practices, have rendered the metaphysical notion of retribution and the theological concepts of expiation and atonement anachronistic and anathematic to contemporary thinking.

And yet punishment persists and flourishes, even in the Scandinavian countries that were, together with Holland, the first to try to do away with it. With the notions of vengeance and retaliation becoming slowly, but surely, dated and obsolete and having been judged 'primitive' and 'uncivilized' by contemporary thinkers, advocates of punishment are having no choice but to cling to the utilitarian, though unproven, argument of deterrence. Study after study has shown that the blind faith in punishment as a deterrent is both unwarranted and unfounded.[6] And even if one ignores the vast volume of scientific research and try to counter the common sense argument of deterrence by appealing only to logic and reason, the same conclusion will have to be reached.

And above all let us not forget that punishment has tremendous human, social and financial costs. This is precisely why it is imperative to ask what exactly is being achieved by such a cruel, inhuman and archaic practice. If the ultimate goal of social reaction to harmful actions is the prevention of future harm and the repetition of the violence, then the preventive effects of punishment must be carefully scrutinized.

III THE FAULTY PREMISES UNDERLYING THE USE OF PUNISHMENT

One such premise is the erroneous belief that criminal behaviour is somehow unique or a distinct type of behaviour that requires a specific (and different) class of criminal sanctions. If this premise is incorrect, and it is easy to show that it is, then punishment loses any moral or rational

[5] K M Harris 'Moving Into the New Millennium. Toward a Feminist Vision of Justice' in H E Pepinsky and R Quinney (eds) *Criminology as Peacemaking* (1991) at 94.

[6] E A Fattah *Fear of Punishment: Deterrence* (1976).

justification. While the general public may be under the impression that crime is qualitatively distinct, criminologists have shown, with countless examples, that criminal behaviour is not qualitatively different from non-criminal behaviour. They have shown that for every behaviour defined as criminal and sanctioned by the criminal code or by criminal statutes, there are identical or similar types of behaviour that are neither illegal nor punishable.[7]

Surely, there is no qualitative difference between crime and civil torts? In many instances the same act is both a crime and a tort. And yet society's response to them is very different. It is also important to keep in mind that not all types of violent, aggressive, or assault behaviours are made criminal by the law. Many forms of violence (for example, in sport such as ice hockey) are condoned and tolerated to the extent that they become culturally legitimate. Until a few years ago, the Canadian Criminal Code (and many others) did not define forcible sexual intercourse with one's own wife as a crime. And yet the same act perpetrated on a woman who is not the man's wife did qualify as a serious crime punishable by imprisonment for life. Although the behaviour in the two cases is identical, in one case it is criminal, in the other it is not, depending on whether the two parties are bound by marriage or not. The same can be said of statutory rape and other sexual behaviours with minors, where an arbitrarily determined age, an age that changes over time and varies greatly from one society to another, is the deciding factor whether the behaviour is criminal or not, is punishable or not. Or the cynic may ask, what qualitative difference exists between the use of alcohol, tobacco or prescribed mind-altering drugs and the use of cannabis, cocaine or even heroine?

Another faulty premise underlying the use of penal sanctions is the mistaken belief that criminals are radically different from law-abiding citizens, a belief that leads to the creation of a false dichotomy between criminals and non-criminals. When we are faced with horrendous and horrible acts committed by fellow humans, it is human nature to try to distance ourselves from the perpetrators of those acts. An easy way of doing so is to think of them as abnormal, as different, as suffering from some kind of pathology. It is comforting to view them as monsters, as depraved psychopathic individuals. The well established tendency of positivist criminology to 'overpathologize' offending and offenders and to focus on their supposedly abnormal personalities, deviant characters, or irrational modes of thinking, discounts the fact that most criminal behaviour is of a mundane, opportunistic, and rational nature. The Japanese criminologist Hiroshi Tsutomi said it best when he wrote:

[7] E A Fattah *Criminology: Past, Present and Future – A Critical Overview* (1997) at 49.

'People commit crimes not because they are pathological or wicked, but because they are normal'.[8]

It is very true that the vast majority of criminals are normal people driven by the same motives that drive all of us. Whatever difference there may be lies, not in the goals being pursued but in the means to achieve those goals. The popular saying 'the end justifies the means' is an effective technique of rationalization used by criminals and non-criminals alike. It is the justification used by individual terrorists and terrorist groups to justify the mayhem and carnage they may cause, and has recently been adopted by leaders of democratic countries such as the USA and Britain to legitimize military interventions that claimed the lives of thousands of civilians. It is the same principle that led to the condoning and the practicing of torture even by countries who have signed the United Nations Convention against Torture. Positivist criminology's assertion that 'people who break the law are often psychologically atypical' or that 'offenders are. . .[a]typical in personality'[9] is contradicted by the observations that anyone placed in certain situations, under certain conditions, and subjected to certain pressures and constraints is capable of committing acts of extreme atrocity, cruelty, cupidity, dishonesty, and so forth.[10] The experiments of Milgram[11] and of Zimbardo[12] prove it. So does Nils Christie's study of Norwegian guards in German concentration camps during the Nazi occupation of Norway in the Second World War.[13] The same was shown by Christopher Browning's study,[14] by Goldhagen,[15] by Waller,[16] by the Mai Lai massacre in Vietnam, by the atrocities committed by the American soldiers in Abu Gharib prison in Iraq and in Guantanamo Bay in Cuba, to name but a few. The studies of Milgram, Zimbardo, Christie, and Browning, among others, are of extreme relevance to those who are trying to comprehend and deal with the atrocities and gross human rights violations committed by former totalitarian, dictatorial regimes. They are indispensable to the policies of

[8] H Tsutomi *Reformulating Cloward and Ohlin's differential opportunity theory into rational choice perspective: Occupational orientation of Japanese institutionalized delinquents* (1991) at 14. Paper presented at the American Society of Criminology annual meeting in San Francisco, 20–23 November.

[9] J Q Wilson and R J Herrnstein *Crime and Human Nature* (1985) at 173.

[10] Fattah (n 7) at 128–129.

[11] S Milgram *Obedience to Authority: An Experimental View* (1969).

[12] P G Zimbardo 'Pathology of punishment' (1972) 9 *Trans-Action* 4–8; P G Zimbardo 'The psychology of evil: On the perversion of human potential' in L Drames et al (eds) *Aggression, Dominance, and Individual Spacing* (1978).

[13] N Christie 'Fangevoktere i Konsentrasjonsleire' (1952) 41 *Nordisk Tidskrift for Kriminalvidenskap* 439–58.

[14] C Browning *Ordinary Men: Reserve Police Battalion 101 and the Final Solution* (1992).

[15] D J Goldhagen *Hitler's Willing Executioners* (1996).

[16] J Waller *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (2002).

transitional justice because they shed light on and help understand the behaviour of those responsible for those atrocities, particularly those who were obeying orders or were totally intoxicated by the powers they held over their helpless captives. The psychological processes of rationalization, neutralization, demonization, deindividuation and dehumanization of the victims shed much better light on their seemingly incomprehensible behaviours than any search for the abnormalities or peculiarities of their character and personality. They should be pivotal in any attempt to find the most appropriate ways of responding to, and dealing with, their crimes.

Yet another faulty premise underlying the punishment response is the erroneous belief that incarceration with the degradation, humiliation and dehumanization that it entails is bound to transform the offender into a better and more honest or docile person upon release. That some continue to believe that the prison experience can be a positive experience is truly startling. The deprivation of freedom and the detention in crowded inhumane conditions can only breed hate, hostility and anger. It creates resentful, vindictive and vengeful individuals who cannot wait to get out so as to take revenge upon society.

The faulty premises underlying the punishment response are numerous. Yet, probably the most erroneous of all is the idea that courts of justice can mete out penal sanctions that are proportionate to the injury or the harm done; that they can make the punishment fit the crime. To think that imprisonment can be a fair, just, and personal punishment that is commensurate with the wrong being punished is ludicrous. The plain truth is that the punishments daily dispensed by the criminal justice system are blatantly arbitrary and unjust and thus cannot be ethically condoned or morally defended. And while the requirements of efficacy, profitability and necessity do not withstand any empirical test, it is the condition of proportionality that can never be met by punitive sanctions, particularly imprisonment. More than two decades ago I went to great lengths to explain how impossible it is to make a prison sentence proportional to the offence being punished.[17] And yet, imprisonment continues to be used as the primary means of retribution. This despite the fact that it is totally impossible to rationally or equitably determine what prison term is a fair expiation for an attack on property, or to create an equitable balance between physical and sexual assaults and a given number of days, months or years in prison. Despite well-meaning attempts such as the 'justice model', 'the principle of commensurate deserts', or the 'the presumptive sentence', the arbitrariness of such equation is both evident and inevitable. Yes, it is possible to grade various

[17] E A Fattah 'Making the Punishment fit the Crime: Problems Inherent in the use of Imprisonment as a Retributive Sanction' (1982) 24(1) *Canadian Journal of Criminology* 1–12.

offences according to their objective and /or perceived seriousness. However, to determine a prison term equivalent to theft or robbery, to assault or rape, is inevitably arbitrary, capricious and despotic. As the inherent problem of equating the amount of deprivation of liberty with the degree of moral guilt of the offender, or with the extent of the harm done, has never been solved, the capricious determination of the length of imprisonment is left either to the arbitrariness of legislators or the discretion of sentencing judges, with all the disparities and inequities that ensue. That we continue to accept and to apply a punishment that poses such insoluble ethical, fairness and equity problem is, sad to say, a clear indication that we are more committed to the justice principles of the eighteenth century than we are to the egalitarian and human rights principles of the twenty-first century.[18]

Suppose it is argued that punishment will be proportionate, not to the seriousness of the offence, but to the moral responsibility of the offender. Could this proposition serve as a basis for a more equitable system of punishment? The answer, needless to say, is a categorical *no*. This is because the degree of moral responsibility of the offender, which is unique for every accused, can never be quantified or measured. It is therefore, a serious scientific error to advocate a sentencing system that supposedly will dispense varying dosages of punishment on the basis of an abstract notion (moral responsibility), which is neither susceptible to quantification nor measurement.[19]

Nor is fairness and equity achieved when the determination of punishment is made solely on the basis of the nature and the seriousness of the offence being punished. It is neither fair nor equitable to give those found guilty of identical or similar crimes identical prison sentences. The same prison term does not entail the same amount of pain and suffering, does not involve identical deprivations, and does not carry with it the same consequences to different offenders. As long as it remains impossible to measure the pains of imprisonment[20] and to weigh the sufferings and deprivations resulting from it for each individual offender, the use of incarceration as a retributive sanction will never be justified in a democratic and just society.

[18] E A Fattah 'From Philosophical Abstraction to Restorative Action – from Senseless Retribution to Meaningful Restitution. Just Desert and Restorative Justice Revisited' in H J Kerner and E Weitekamp (eds) *Restorative Justice, Theoretical Foundations* (2002) 308 at 315–6.

[19] E A Fattah 'Beyond Metaphysics: The Need for a New Paradigm – On Actual and Potential Contributions of Criminology and the Social Sciences to the Reform of the Criminal Law' in R Lahti and K Nuotio (eds) *Criminal Law Theory in Transition* (1992) at 78.

[20] G M Sykes 'The Pains of Imprisonment' in L Radzinowicz and M E Wolfgang (eds) *Crime and Justice* vol III *The Criminal in Confinement* (1971).

IV IS PUNISHMENT THE RIGHT ANSWER TO TORTURE AND GROSS HUMAN RIGHTS VIOLATIONS?

Is punishment the right answer to torture? In my opinion not, because it never reaches those who are responsible; those 'untouchables' at the top. Contrary to the popular rhetoric about 'bad apples', torture, in most cases, is not the initiative of individuals. More often than not it is a government policy. How just and how fair is it to punish those who were obeying orders or following policies when those who are really responsible are left unpunished? This is to say that punishment is *never* an appropriate response. Although the futility of punishment has been a proven fact for centuries, the horrific acts of recent years have exposed one of the fundamental shortcomings of the punishment response. Obviously punishment is not, and cannot be a deterrent for so-called terrorists or for suicide bombers. Their actions prove that when the motives are strong, people will sacrifice anything, even their lives.

Furthermore, no punishment yet invented could be an appropriate or a proportionate response to the horrendous acts of genocide that seem to have become commonplace in recent years: in Bosnia, in Rwanda, in Sudan, etc. How can the punishment of a handful of carefully selected offenders be an adequate retribution for the extermination of hundreds of thousands of victims? And what exactly is being achieved by incarcerating those individuals for varying terms of imprisonment? Surely, in those cases punishment is no more than a symbolic gesture and a hollow one at that.

This is one thing the wise black leaders of South Africa, like Nelson Mandela and Desmond Tutu, realized once the apartheid rule came to an end. They could have arrested hundreds or even thousands of those who were responsible for the atrocities against black people, and subjected them to all kinds of punishment. But what purpose would this have achieved? A temporary and short-lasting satisfaction of the vindictive instincts of an oppressed population? Instead, they wisely chose the moral high ground. They were fully aware that what has been done could not be undone, and rather than retaliating against some of those responsible (they obviously could not punish everyone who was) they decided to show forgiveness and opted for reconciliation through the establishment of the Truth and Reconciliation Commission. The healing effects of this conciliatory approach were truly remarkable and will remain in the annals of history as a bold and highly successful experiment. Just imagine what would have happened to the country if the thousands and thousands of those responsible for the atrocities of the apartheid regime were executed or sent to prison.

V IS PUNISHMENT THE RIGHT ANSWER TO TERRORIST ACTS?

As many acts of violence, and acts labelled as terrorism, are rooted in injustices that are unacknowledged or denied, punishing the perpetrators is simply to double the injustice. It can only enhance the chances of further and more serious violence. On 7 August 2004, psychiatrist Jerrold Post, who interviewed many potential and unsuccessful suicide bombers, was quoted in the *Globe and Mail* as maintaining that suicide bombing is gaining new converts. Asked why this is happening he responded with a single word: 'despair'.[21] He said that suicide bombers are people who see no other solution for the forces they see arrayed against them, and no other way of avenging their family's losses

> 'I think one has to look to the despair that they are experiencing. . . . . These are not deviant, psychologically disturbed individuals. Every one of them I have talked to has made perfect sense.'[22]

If violence, if terrorism are the acts of people who are driven to it by hopelessness and despair, by their unheeded cries for justice, is it conceivable that punishment will deter such hopeless and desperate individuals? It is precisely in those cases – as in most others – that restorative justice, with its emphasis on mediation, reconciliation and reparation, proves to be a much more appropriate and much more effective response.

When examining the viability of restorative justice for cases of violence, one has to keep in mind that gratuitous violence is extremely rare; it is the exception, not the rule, and so are unmotivated and unprovoked violent acts. Moreover, violence that is sexually or financially motivated constitutes only a small fraction of all acts of violence.[23] The vast majority of acts of violence are retaliatory in nature. Study after study has shown that retaliation is a key ingredient in violence.[24] In fact, there are reasons to believe that revenge is the most prevalent motive for the use of force.[25] Researchers affirm that violence, in most instances, is an expression of a grievance, a response to an attack, injury, or provocation.

[21] J Post *The Globe and Mail* 7 August 2004 at A6.

[22] Ibid.

[23] E A Fattah *The Interchangeable Roles of Victim and Victimizer* (1994).

[24] H J Felson and H J Steadman 'Situational Factors in Disputes Leading to Criminal Violence' (1983) 21(1) *Criminology* 59–74.

[25] D Black 'Crime as Social Control' (1983) 48 *American Sociological Review* 34–45; P Marongiu and G Newman *Vengeance: The Fight Against Injustice* (1987).

VI ARE VICTIMS BETTER OFF IN A RESTORATIVE SYSTEM OF JUSTICE?

Most people either forget or are unaware that victims are the primary losers in punitive justice systems. From the time personal conflicts were converted into public crimes, and the institution of composition (known as *wehrgeld*) was replaced by a punitive punishment, victims' interests were sacrificed, and they were assigned a peripheral role in the criminal justice process. The new system completely ignored their plight and usurped their rights. The composition, or the *wehrgeld*, that was designed as a means of redress, as a way of compensating them for the injury, the harm, or the loss they have suffered, was replaced with a so-called penal fine that went to the king's coffers or to the public treasury. And for centuries the plight of victims went unnoticed, unrecognized and without remedy. Voices calling to address and redress victims' disenfranchisement were not heard until the second half of the twentieth century. Modest state compensation programs were set up in some countries but offered only symbolic recognition and continue to suffer from a chronic lack of funding and resources. Studies showed that only a very tiny minority of those victimized end up receiving any state compensation. And for those who do, it is too little, too late.[26] Even worse, the studies found that those who go through the state compensation process were less satisfied than those who did not apply for compensation. And as if to add insult to injury, the victim movement that was supposed to defend the interests of victims, to claim their rights and to speak on their behalf, was moving in the wrong direction. Its main concern was to increase the severity of punishment and to raise the level of penal sanctions. Somehow victim advocates failed to realize that since funds and resources are limited, increasing the costs of the expensive system of punishment leaves less and less for victim compensation.

VII WOULD RESTORATIVE JUSTICE BE ACCEPTABLE TO THE VICTIM AND THE VICTIM'S FAMILY?

There is no empirical evidence to support the claim that victims are overwhelmed by a desire for revenge and that nothing other than the punishment of the offender would bring them closure or satisfy their thirst for justice. If anything, whatever evidence we currently have does show that victims are not as vindictive or as bloodthirsty as some victim groups would want us to believe.[27] Healing, recovery, redress and

[26] E A Fattah 'From a Handful of Dollars to tea and Sympathy: The Sad History of Victim Assistance' in J J M van Dijk et al (eds) *Caring for Crime Victims: Selected Proceedings of the 9th International Symposium on Victimology* (1999b) at 189.

[27] K Boers and K Sessar 'Do people really want punishment? On the relationship between acceptance of restitution, needs for punishment, and fear of crime' in K Sessar and H J Kerner

prevention of future victimization are the foremost objectives of crime victims.[28]

Even victims of the most serious and most heinous crimes of violence are not as vengeful as they are usually portrayed in the media or in the manifestos of right-wing political parties. The powerful television documentary *From Fury to Forgiveness*, the experiences of Mark Umbreit in the United States and Ivo Aertsen in Belgium, demonstrate in a vivid and deeply moving fashion that even victims who lose their young children or close relatives to homicidal killers can show genuine forgiveness and can plead with the justice system for the lives of their victimizers.[29]

VIII HOW ACCEPTABLE IS RESTORATIVE JUSTICE TO THE GENERAL PUBLIC?

It goes without saying that a system of restorative justice cannot succeed unless it is accepted by, and has the backing of the general public. Public demands for punishment and the loud cries for vengeance reflect a woeful lack of understanding of the realities of crime and justice. People have no idea of what would happen to society if every law violator, if every act of violence, if every sexual peccadillo and every property crime were to be punished by a prison sentence. Who would be left out? The general public is largely unaware that only a very small percentage of those who commit crime, even serious crime, end up being punished. Little do they know that the ones who end up in prison are but scapegoats sacrificed at the altar of general deterrence. Educating the public seems appropriate. What most members of the general public do not realize, or fail to recognize, is that criminal behaviour, as mentioned earlier, is not unique behaviour, and if it is not, then there is no valid reason to respond to it in a unique manner.

Once this point is driven home, once the public is made aware that too many conflicts, too many serious law violations, too many acts of violence, are currently being dealt with outside of the criminal justice system and are not subjected to penal sanctions, whatever objections or reservations they may have about a general system of restorative justice will gradually but surely disappear. There will still be the odd revolting case that will precipitate a cry for vengeance and will prompt calls for

(eds) *Developments in crime and crime control research* (1991)126–49; C Pfeiffer *Opferperspektiven: Wiedergutmachung und Strafe aus der Sicht der Bevolkerung* (1993). See also K Sessar 'Punitive Attitudes of the Public: Reality and Myth' in L Walgrave and G Bazemore (eds) *Restorative Juvenile Justice* (1998).

[28] E A Fattah 'Some Reflections on the Paradigm of Restorative Justice and its Viability for Juvenile Justice' in L Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research* (1997b) at 270.

[29] Fattah (n 4) at 160.

traditional punishments. But in the same way that the abolition of the death penalty has become accepted, and the calls for the execution of murderers have subsided in Canada and the other countries that have lived with abolition for many years, restorative practices will end up being accepted. And once their positive effects and their superiority over punishment have been amply demonstrated, public resistance to the new paradigm will eventually die down and the new system of justice will become widely accepted and supported. This support will be aided by the fact that restorative justice practices not only involve the community, but they also require the active participation of the members of that community.

IX RESTORATIVE JUSTICE AS A TOOL FOR CLOSURE AND HEALING

It is often argued that punitive justice provides emotional satisfaction to the victim who has been injured or harmed by the offence. But it is not true that victims are satisfied *only* when the offender is punished and made to suffer. This is so because real justice involves much more than just quenching the thirst for vengeance. Victims who are absorbed by their hate and obsessed by their desire for vengeance struggle to regain their equilibrium because they can never regain the peace of mind necessary for a happy existence. Victims who learn how to forgive cope better and heal quicker than other victims. Moreover, forgiveness elevates the victims to new moral heights, whereas retribution lowers the victim and the state to the same level to which the offender has sunk by his crime. This is yet another argument for restorative justice.

Restorative justice promotes closure and facilitates healing and is thus beneficial to the coping process, to the psychological well-being and the regeneration of the victim: precisely the goals that victim organizations and victim services want to achieve. Punitive justice, as Nils Christie pointed out, steals the conflicts from their rightful owners: the victim and the offender.[30] It takes over and reduces the main protagonists to mere spectators in a process that is more theatre than reality. A process where criminal justice officials wear strange robes and speak a language that is almost incomprehensible to those whose conflicts are being judged.

It is not difficult to contrast the humanizing spirit of restorative justice with the brutalizing and demeaning nature of retributive justice, or to compare the healing effects of restorative justice with the agonizing and antagonizing outcomes of punitive justice. Restorative justice aims at healing and redress, rather than violence and duress. It favours the victim's gain over the infliction of pain. Retributive justice is past-based

[30] Christie (n 2).

whereas restorative action is present and future oriented. In retributive justice systems there are no winners, only losers. The primary losers are the two major protagonists: the offender gets the punishment and the victim gets nothing. But they are by no means the only ones, because in punitive systems there are many other losers as well. And the ultimate loser is society itself.[31]

X RESTORATIVE JUSTICE AND THE PREVENTION OF FUTURE VICTIMIZATION

Restorative justice acknowledges that what victims desperately want, even before redress, is freedom from fear, from the threat of future victimization. This is why, when victims ask for or seek imprisonment for the offender, it is not, as is erroneously believed, or as retributivists claim, to satisfy their thirst for revenge, but to seek some assurances about the threat of future victimization; a threat that disappears when reconciliation is achieved.[32]

My sincere belief is that conflict resolution and dispute settlement are probably the surest way to ensure that violence will not flare up again, that the emotions that fuel the aggression are held in check. If this is true, then the best way to prevent future victimization is restorative justice practices. Unless and until reconciliation is achieved, the seeds of violence will always be there. The motives for violence will continue to simmer until they get an opportunity to express themselves in renewed acts of hostility and violence. Restorative justice aims at restoring the peace and harmony disrupted by the offence, at revitalizing the bonds and the ties that were ruptured by the criminal act. And contrary to the punitive/retributive justice system that feeds on vindictiveness, and the thirst for revenge, restorative justice promotes forgiveness, understanding, reconciliation and restitution. It gives the victim and offender a chance to meet face to face, to reach a mutual understanding of one another, to put the past behind them and to reach a fair and just agreement about the future.

Contrary to the punitive justice system that keeps victims and victimizers apart and stops or hinders any meaningful communication between them, restorative justice brings them face to face and promotes meaningful communication between them, thus allowing the victim to find the answer to their most pressing question: why me? Victims who, by themselves or with the help of others, are able to find the answer to

[31] E A Fattah 'Gearing Justice Action to Victim Satisfaction. Contrasting Two Justice Philosophies: Retribution and Redress' in H Kaptein and M Malsch (eds) *Crime, Victims and Justice – Essays on Principles and Practice* (2004) at 28.

[32] E A Fattah 'Preventing Repeat Victimization as the Ultimate Goal of Victim Services' (2001) 38 *International Annals of Criminology* 113–133.

this haunting question seem to suffer less and to cope better than those who believe, or are led to believe, that their victimization was an unjust blow in an unlucky destiny or that it was a freak act of a deranged, sick or abnormal individual.

Restorative justice gives victims the opportunity to identify predisposing, vulnerability and other victimogenic factors that might have invited, initiated, triggered, promoted or facilitated their victimization. This enhanced awareness and this new understanding of why they were victimized, of why they were selected as victims help them regain control of their lives. It enables them to shed the denigrating label of victim, the debilitating 'mark of Abel' and allows them to put an end to the state of victimhood, in which they inevitably found themselves as a result of the victimization.[33]

XI IS A NON–PUNITIVE JUSTICE SYSTEM POSSIBLE? A SCANDINAVIAN EXAMPLE

Half a century ago – in 1954, a new criminal code, specifically drafted by Prof. Verner Goldschmid for the former Danish colony, the large Arctic island of Greenland, was promulgated. Inspired by the old traditions of the people of Greenland, this unique criminal code is solely offender-treatment oriented, which sets it apart from other Western criminal codes, including that of Denmark itself. Here is how this unique code is described by one commentator:

> '. . .the unique Greenland Criminal Code attempts to graft traditional Inuit concepts of rehabilitation onto a Western, and specifically Danish, system of laws and procedures. The philosophy behind even the enlightened Danish penal system is punishment – a repressive means of social control whose object is forced conformity with society's norms. In contrast to this "conformity model", the object of Inuit customary law is neither punishment nor justice, but the elimination of conflict and the restoration of harmony – a philosophy dubbed "The Arctic Peace Model".'[34]

One has to ask, why is it that the example of the Greenland Criminal Code was not followed by others? Why is it that the philosophy that inspired it did not tempt those reformers who in the past 50 years were busy modernizing the criminal codes of their countries? Why is it that the restorative/treatment practices incorporated in the Greenland Criminal Code were never adopted by other countries around the world? Is it the traditional obsession with punishment? Is it Western arrogance that does not allow us to admit that there are certain traditions and certain customs

[33] Fattah (n 26) at 195.

[34] E Schechter 'The Greenland Criminal Code and the Limits of Legal Pluralism' (1983) 7(2) *Etudes Inuit Studies* 79 at 70.

of so-called 'less civilized' people that are superior to ours and may be beneficial to our societies? And yet, any objective comparison of the responses to harmful actions and the means of conflict resolution is bound to show that those people who were labelled by the missionaries as 'primitive, godless and uncivilized' were superior to us in more than one respect. It is certainly to their credit that they used peaceful, non-violent and non-destructive modes of settling disputes and of solving interpersonal and community conflicts. It is to their credit that they were able to realize the futility of punishment, and the fact that it does not serve any useful purpose. They were more than cognizant of the detrimental effects of responding to violence with violence, of taking a life for a life, or an eye for an eye, and this long before Gandhi uttered his now famous adage: 'an eye for an eye would make the whole world blind'. Those labelled by the missionaries as 'savages' realized early on how illogical and unproductive it was to respond to harm by inflicting more harm or to try to alleviate the pain and suffering of the victim by making the offender suffer.

Fortunately, in Canada we are trying to get rid of our superiority complex and are coming to the realization that when it comes to justice there is a lot to be learned from Canada's First Nations. As a result, Canada is gradually taking steps that are putting the country in the forefront of restorative justice. One initiative has been the development of three Canadian courts for use by the First Nations people only.[35] The purpose of those courts is to bring healing and restoration to the community.

XII COULD RESTORATIVE JUSTICE AND PUNITIVE JUSTICE CO–EXIST?

Fearing that replacing the current punitive system entirely with a new restorative one may be an utopian dream, many proponents of restorative justice have resigned themselves to the idea that it is possible to have two parallel systems, operating side by side, or at minimum having a restorative justice component operating within and under the aegis of a dominantly punitive system. In my humble opinion, such a vision of a dual system is faulty and misguided. I believe that since punishment and healing are mutually exclusive, such a double philosophy and dual objective system can never work in practice. I am utterly convinced that nothing less than a fundamental paradigm change can remedy the deep-seated problems of our current justice system. As a longstanding criminologist, I have keenly observed over four decades every attempt

[35] L Parker 'Tsuu T'ina Peacemaking Justice in Canada' (2004) August Edition *Restorative Justice Online*; Fattah (n 19).

made to reform the criminal justice system, to correct its shortcomings, to remedy its failings, to lower its costs, to reduce its clientele. To my utter disappointment *nothing* has worked. The punitive philosophy that permeates the system defeats any and every attempt at reform. How many alternatives to incarceration were introduced over the years and hailed as the answer to the overuse of imprisonment and the overcrowding of prisons? And yet all they did was to widen the net of social control. And many so-called alternatives, such as community service orders, even probation, are being widely used as additives to incarceration instead of being alternatives to prison. Unless there is a radical change in philosophy, unless there is a paradigm shift, all the talk about restorative justice will be in vain. Any attempt to introduce the concepts, the principles, and the practices of restorative justice within a primarily punitive system is bound to fail.

XIII THE NEED FOR A NEW PARADIGM: FROM A GUILT ORIENTATION TO A CONSEQUENCE ORIENTATION

It is amazing that criminal justice policies and practices fail to take notice of a very important fact. The vast majority of cases dealt with by the criminal courts are offences of strict liability, of negligence, of omission and the like. How did this come about? Why was it necessary to abandon at such a large scale, the traditional and deeply anchored notions of criminal intent, moral guilt, and moral responsibility? The answer is simple. It is evident that the harmful consequences of those behaviours were deemed to be more important than the moral considerations, which required that wickedness, malice, evil intent be a prerequisite for criminal punishment. The need to regulate those behaviours, because of their actual or potential social harm, overrode the requirement of moral guilt. The growing complexity of society inevitably led to a declining emphasis on the classical notion of *mens rea* and to a growing emphasis being placed on the consequences of the act.[36] Naturally, this tendency was more pronounced in certain sectors than in others. That harm is slowly becoming the primary criterion for criminalization can be seen in recent criminal code reforms in many countries. For example, in the report of the Finnish Criminal Law Committee, quoted by Lahti,[37] the Committee's first task was to locate those forms of behaviour that appeared to be the most harmful when judged in the light of specific goals of each sphere

[36] E A Fattah 'From a Guilt Orientation to a Consequence Orientation: A Proposed New Paradigm for the Criminal Law in the 21st Century' in J Welp and W Kuper (eds) *Beiträge zur Rechtswissenschaft* (1993).

[37] R Lahti 'Recodifying the Finnish Criminal Code of 1889. A Scandinavian Way to Make the Criminal Law More Efficient, Just and Humane' in R Lahti and K Nuotio (eds) *Towards a Total Reform of Finnish Criminal Law* (1990).

of life. To do so, the Committee used a test question: Does certain behaviour harm or endanger the interest of an individual or of society, and if so, to what extent? In other words, the notion of harm was the yardstick the Committee used to judge whether a given behaviour should or should not be criminalized.

As the criterion for criminalization, the notion of harm is in perfect harmony with the generally accepted goals of modern criminal law. If we accept that the primary goal of the criminal law in modern society is to prevent the occurrence of socially harmful, socially damaging and socially injurious actions, then it is only logical that the eligibility of any given behaviour for inclusion in the criminal code (as well as the seriousness assigned to various actions) be judged according to their actual and potential harm, and not according to the wickedness or degree of malice of the perpetrator. This, however, is not the way present criminal codes deal with various categories of criminalized behaviours. Homicide is a good case in point because it illustrates well the difference between a guilt orientation and a consequence orientation. In Canada, in the USA, and in many other countries, ten times as many lives are lost to negligent manslaughter as to wilful homicide. And yet the less 'harmful' intentional homicide is punished far more severely than the negligent homicide. Why? Because the punishment is based on the notion of moral guilt and not on social harm.

The result is anomalous! A person who intentionally kills a single individual is punished much more harshly than a contractor who is responsible for the death of hundreds because he used faulty material in the construction of a multi-story building or a bridge that later collapses.

Elsewhere I have outlined the details of the proposed paradigm.[38] Suffice here then to just mention the headings of the principal elements of the paradigm:

(a) a move from moral responsibility to social responsibility;
(b) a move from legal fiction to social reality;
(c) a move from repression to regulation;
(d) a shift of emphasis from deterrence to social prevention;
(e) a switch from intimidation to mediation and from segregation to reconciliation; and
(f) abandoning the notion of retribution in favour of restitution.

Acceptance of the new paradigm is bound to lead to the removal of the arbitrary boundaries erected over the years between criminal law and civil law. And it will hasten and pave the way to the implementation and full institutionalization of restorative justice.

[38] Fattah (n 19); Fattah (n 36).