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CRIME AND REDRESS:
NATIONAL SYMPOSIUM ON
REPARATIVE SANCTIONS
May 31 - June 2, 1982
Vancouver, B.C.
SUMMARY AND OVERVIEW

TRS No. 7

S. Ab Thorvaldson
Ministry of Attorney General
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Canada

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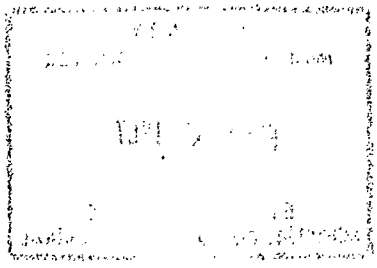

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INTRODUCTION

There is no doubt at all that the principle that criminal offenders should pay in some material way for the harm they do is highly controversial. While the proposition has been repeatedly and often passionately advocated for over a century in Europe and North America, repayment by the offender remains, in general, an afterthought in criminal sentencing.

It is not that the criminal courts do not accept the notion of redress by a wrongdoer as a universal moral principle. Nor, of course, is redress rejected as the basic remedy for civil wrongs. Further, the criminal law, in the principle of retribution, accepts the concepts of balancing the moral scale and the offender's redemption by enduring a just amount of suffering. The criminal courts also, whatever the formal rules say, seem to find it difficult completely to ignore signs of remorse and the efforts an offender might have made to make up in a material way for the harm done to the victim. And, in general, the courts are <u>expected</u> to take into account the 'character' or reputation of the offender in the sense of the good he or she may have done in the past. Finally, the courts are seriously concerned that a sentence, whatever else it is supposed to accomplish, does not go beyond what is just is relation to the offence.

It does not appear, then, that it is 'doing justice' that is the issue but rather the method of doing it, the use of material redress by the offender as a means to that end. In common practice, civil wrongs are to be paid for; criminal wrongs are to be punished. Despite considerably greater use of reparative sanctions in recent years it clearly is still not taken for granted that the first thing to be required of an offender is to make up, in money or in good works, the harm done.

The general purpose of "Crime and Redress: National Symposium on Reparative Sanctions" held in Vancouver, May 31 to June 2, 1982, was to explore why this is so; specifically to try to understand and articulate the many issues involved. It will be seen that, so to speak, it is not for nothing that the concept of criminal redress has been so controversial for so long. The concept raises issues ranging from the nature and aims of the criminal law itself through matters of legal and human rights to questions about the feasibility of administering reparative sanctions on any significant scale. And at least one reparative sanction - money payment by the offender to the individual victim - raises constitutional questions in Canada because it is regarded by some as essentially a civil remedy. And in this

country of course the administration of the civil law rests with the provinces while the power to legislate criminal law and procedure rests with the federal parliament.

The organization of this Summary and Overview departs from the program of the Symposium. The proposed program implied that the topic should be addressed deductively, beginning with a discussion of the concept of redress as an abstract principle in criminal sentencing and proceeding to separate consideration of compensation[1] and then community service. The very title of the symposium - "Crime and Redress" - was intended indeed to stand in sharp contrast to the traditional phrase "crime and punishment", implying that redress as a general response to a criminal offence

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1 Not all participants used the same terms for money payment by the offender. It was proposed in the program notes that the terms redress and reparation be used as general terms indicating any sanction which required the offender to make up in some way for the harm done, while compensation be used more specifically to denote money payment by the offender and restitution to mean restoration of property. These terms follow the British usage and, largely, those used in the Criminal Code of Canada and are employed in this paper. It should be mentioned that many participants, however, preferred to follow the American practice where restitution is used as a general term including any form of redress (money or goods or service--but usually money) by the offender and compensation denotes money payment to a victim by the state.

could stand on its own and differed from punishment in significant ways. The first session was therefore intended to consider the nature and aims of the criminal law and the question whether redress by offenders could be justified in principle in terms of that law. If so, was redress a significant new sentencing concept - implying an important shift in practice - or a relatively minor one?

Proceeding to separate sessions on compensation and community service, the program implied that whatever other aims or effects these sanctions might have, their predominant rationale was the same. Both were in accord with the definition of a reparative sanction proposed in the program notes as "any sanction which requires offenders to make up in some way for the harm entailed in their offences." Such measures as the return of goods, service directly to the victim, and forfeiture of assets were mentioned as further methods which rested at least in part on a reparative rationale; these were excluded not in principle but simply because there was insufficient time to consider them.

Many of the participants, however, did not accept several of these implicit assumptions. They did not accept the concept of redress as a broad sentencing principle which could be expressed in various ways. Some implicitly assumed that the word redress

referred only to reparation in some form by the offender to the victim and accordingly considered community service to be in a separate category. Others contended that while compensation and community service might have certain reparative aspects in common, the two sanctions are typically used for quite different purposes and in fact differed in their basic rationale. In any case, there was relatively little discussion of redress in abstract terms as a sentencing principle. Even in the first session, much of the discussion tended to focus on either compensation or community service, and on the specific legal and administrative problems each of them raised.

In organizing this paper, it therefore seemed best to proceed directly to a description and assessment of the discussion on compensation and community service. A discussion of redress as a general sentencing principle is then taken up near the end of the Overview section. What were considered to be the most significant, pervasive and controversial issues were selected for inclusion in the paper. A summary of the main contributions of the chief participants on each question is given in the first section, followed by commentary on some of the main issues in the Overview section. This organization is intended clearly to separate description from analysis, particularly considering the controversial and often intensely felt nature of much of the discussion. Even so, it must be remembered that this paper represents one person's perception of the issues.

SUMMARY

COMPENSATION

Aims

The essential question was whether compensation by offenders can be justified or legitimized as a criminal sanction. Can it be reconciled with the ends of the criminal process?

As several participants pointed out, that it is one thing to justify the notion of redress following wrongdoing as a common moral principle or norm and quite another to justify it as a criminal sentencing principle. While one panelist could observe that "we're all for it" as a general notion, another could quickly point out that, judging by the application of redress in sentencing practice, American judges are not all for it as a sentencing principle.

The question of whether compensation (or redress in general) can be justified within the criminal process implies that the notion of crime, as distinguished from a civil wrong or tort, is itself a valid and necessary concept.

Some of the participants attacked that assumption. Mohr argued that the concept of crime evolved from the common law

relatively recently for the purpose of protecting the interests first of the reigning monarch and more recently of the state, whatever the state is called. And if the common law is a law of remedies, and if the purpose of redress is to provide the opportunity in the criminal process for the victim or the community to state a claim for a remedy, then, he asserted, there is "no logical place" for it in the present criminal process. The very juxtaposition of the words crime and redress becomes problematical.

Mohr noted also that while redress and reparation were "the oldest and most basic notions of law in the face of harm", the concept of 'reparative sanction' was also problematical because the word sanction had come to be defined as a "specific penalty enacted to enforce obedience to law." "Liberal reforms", he went on to contend, "have in the end always been thwarted by the nature of criminal law, which has its eye on sanctity rather than decency, and has become sanctimonious because it conceals increasingly, if ever so thinly, that it enforces sanctity by and for purpose of power." Indeed, he suggested, the criminal law has shown its capacity to "absorb a range of justifications... to span its net even wider." The fact that redress has received only limited support in legislation and practice therefore becomes understandable. Any reform process must, he argued, be sensitive to such obstacles.

Harland's position was in some respects similar. He also suggested that both the civil and the criminal processes tend to serve the interests of certain powerful groups in the society and do not "currently function in the interests of justice, which we have agreed to be a core issue in the concept of redress for victims." Further, he argued that the traditional distinction between the civil and criminal processes lacks a sound theoretical base and that the two differ only in emphasis. Both, he noted, have acknowledged implications for social order and have employed both reparative and punitive[2] measures to enforce decisions. There is thus "little to choose" as to which process should be reformed. He therefore suggested that we turn to the criminal system only "as a matter of convenience," because there appear to be fewer practical obstacles and not because of "some major conceptual shift in current thinking about the way we need to deal with social harms" nor "as a method of oiling the squeaky wheels of justice or bailing out its bankrupt premises."

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2 It was not always clear what some of the participants meant by the terms punishment, punitive, and penal. It is often observed that the word punishment has both a general and a specific meaning in criminal justice: a) to mean any duly imposed legal sanction for an offence, and b) to denote the extent to which a sentence is deliberately intended to cause the offender to suffer for the offence. In terms of the former definition all sentences or sanctions are 'punishments' in a legal or formal sense whatever their intended effect on an offender. According to the latter definition, however, a sentence is a punishment only if and to the extent that the sentencer intends it to cause the offender to suffer. Unless otherwise indicated the latter definition is used in this summary and overview.

Harland thus did not seem to concede that an effort to justify the concept of redress in criminal sentencing is a necessary or significant issue. Redress should, he said, "be pursued for its own merits." While he strongly supported the idea of compensation by offenders to victims, like Mohr it appears he saw this as a step toward more fundamental reform of the whole legal process. In keeping with such a position, he did not attempt to propose a rationale to reconcile compensation by offenders in criminal sentencing. Rather he focussed mainly, as he acknowledged, on a critique of American attempts to establish 'restitution' programs in that country. He pointed out that they had failed because judges often simply do not order compensation or, down the administrative line many criminal justice officials do not take the orders seriously and enforce them. The essential reason for this, he held, is that there is a "direct conflict between traditional criminal justice aims, such as rehabilitation or incapacitation... and the interests of the victim." He also pointed out the concern for the constitutional rights of the offender, and specifically, the rule against imprisonment for debt. In summary, Harland held that the main reason for the failure of otherwise well-meaning programs was the lack of a coherent and acceptable rationale for compensation within existing criminal law and procedure. Nor did he see any progress toward that end, although he felt that in Canada there is a more serious effort to define and confront these conceptual problems than there is in the United States.

Hogarth also saw compensation by the offender as consistent with a basic change in criminal justice procedures toward an emphasis on participation by both offender and victim. He noted particularly the current "resistance to change" in this process and advocated developing incentives to make change possible. "There are two people in the system who really have an interest in a reparative sanction -- the offender and the victim -- and I would like to restructure the sentencing process in a way that their role in the process is legitimized, such that they are able to energize our system toward that selfish end."

Others assumed a more traditional position about the role and potential of compensation in the criminal law. None, incidentally, rejected the concept of redress out of hand; none took the extreme view that compensation should have no place in the criminal process. All appeared to want the reform proposals carefully explored. The watchwords here, however, were caution and scepticism, and an implied acceptance of the general validity of our criminal law and of the conventional distinction between the criminal and civil processes.

Marriage, addressing the concept of redress in criminal justice in broad terms, sounded a general call for a circumspect approach, suggesting that while redress is perhaps not just another theory, it is in fact another theory! Our task, he

argued, is "to work toward some statesmanlike view of the giddy risks of further innovation." We must assess how much power a new proposal has "to confer a measure of stability and coherence upon the criminal justice system as it already exists." The greater the risks of destabilizing the system, the more circumspect we should be. "Can we afford," he asked, "to harness our fundamental institutions to techniques... or to systems of ideas in which an overturned argument can set social practice on its head?"

Marriage concluded, however, that the notion of reparative sanctions might be able to bear such scrutiny. He noted that such sanctions, unlike some of the proposals of the past, are "technologically unpretentious and do not require large investments in plant or the development of esoteric methodologies." He noted also that a number of current dispositions can be adopted to their use and that they draw upon "ancient and popular notions of moral fitness" which use "exceptionally transparent rules for matching crime and punishment." This last characteristic he considered to be of particular importance.

Burns, Roslak, Madigan, Norris, and MacKay all pointed out in various ways the legal and administrative difficulties entailed in any attempt, at least under the current law and

within the scope of present resources, to place a greater emphasis on compensation by the offender. Burns described the limited powers of the criminal court under the present Criminal Code of Canada and noted that even these powers have been interpreted narrowly. The assessment of harm tends to be restricted to the direct victim, and redress for non-pecuniary or 'general' damages has been largely rejected.3

Burns listed several reasons for the current limited provisions for compensation in the criminal law and the conservative interpretation of them. First, the prevalent view of the judiciary is that "restitution is, at root, a question of property and personal rights and thus... a matter of civil rights." Since this area of law is under the jurisdiction of the provinces, federal authorities are fearful of trespassing on provincial rights. He suggested that, "This constitutional dichotomy is an obvious well-spring of judicial reluctance to award full restitution (for personal, general damage) because to do so would shift the balance in favour of the provincial jurisdiction and render the provision ultra vires." Further, where the assessment of the harm done to the victim is complex or in the nature of general damages or where the amounts are disputed, he suggested that the criminal courts are "reluctant to turn criminal trials into complex civil fact-finding hearings."

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3 See 1(d) Victims' Role and Rights, below.

He noted also that the courts are concerned about the ability of offenders to pay and the fact that offenders would not have the same procedural protections they might have in a civil action.

Burns noted that recently, in R. v. Zelensky,[4] the Supreme Court of Canada confirmed the view that compensation could be regarded in principle as part of the criminal sentencing process but that it should be considered only in "simple cases."[5] Burns went on to describe the difficulties in assessing harm even in these so-called simple cases. While he considered the concept of compensation by offenders to be commendable in principle, he suggested that one could not expect the courts to take "an expansive view" of its role without legislation giving clear direction.

Roslak also emphasized the constitutional, legal and practical "challenges and limitations" inherent in any attempt to expand the use of compensation as a criminal sanction. He noted, in a positive spirit, that the Zelensky case and others do in fact "tie the whole idea of compensation into the criminal justice system." Still, Roslak appeared to share the cautious view saying, "The victim, for whose benefit these restitution and compensation orders are to be given, makes his claim in... not a completely hostile environment, but it is not a sympathetic

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4 (1978) 86 D.L.R. (3d) 179.
5 See 1(c) Type of Harm Compensable, below.

environment either." Further, he suggested that "the prosecutors... are reluctant because by nature and training and by experience they have grown up in the criminal law and they do not... feel comfortable in civil proceedings, to which these proceedings would be converted." He noted however that, as a matter of general approach, the law appears to reform itself in an incremental and very gradual fashion and that the effort to incorporate compensation by the offender might eventually be successful if it is persistent enough.

Norris supported Roslak's general position, arguing that while there should be some redress for victims, the concept did not seem reconcilable with the actual content of criminal procedure. And Madigan stressed the fact that only limited resources are available, particularly at the present time, to the prosecutorial function in criminal justice. He sharply criticized what he considered to be the frequent failure of criminal justice planners to consider the practical implications or feasibility of otherwise appealing proposals.

We turn next to those participants who pressed for a less legalistic or ideological approach and for more flexibility and pragmatism. In some cases they expressed an impatience with 'theory building' or 'rhetoric' in favour of what might be described as an intuitive reliance on the moral values underlying

the notion of redress. Dubienski, for example, mentioned that he prefers to take a "very simplistic approach," to respond to the imperative that justice be done and to the feeling of the public that "if you guys want to change [the system] you can!" As Weisstub put it, "[I'm in favour of] putting the compensatory factor into the criminal justice system as directly and powerfully as possible and stop the nonsense. I don't believe that lawyers defending clients in the civil system is the answer. Americans always come up with that, [but then] never pay for lawyers in the end." Weisstub argued that the essential problem is not the theoretical justification of doing justice in the criminal system by means of reparation but rather the problem of determining the degree of fault in the offender so that the notion of redress can be put into practice. He noted that this is a problem not only for the criminal but also the civil law.

Similarly, Blom-Cooper argued that the proposition that offenders should repay for the harm done is "plain common sense," a "self-evident proposition" accepted from the nursery onwards. He held that "this simple, overriding penal philosophy makes it unnecessary to indulge in the hoary argument about the relationship of law to morality." He suggested that it is "the particular criminal event" which alone "can provide the clue to society's appropriate response." In connection with the split

between the civil and criminal processes he held that the "institutional divorce of civil remedies from the criminal process has further tended to remove the victim of crime from the purview of the criminal law" and that there is an urgent need for a "coalescence of penal sanctions against the offender and civil redress for the victim." Like Harland, he also minimized the differences between the civil and criminal processes. He observed that, "Just as the law of negligence is not exclusively compensatory but may award punitive damages, so the criminal law may reflect an additional penal sanction."

Blom-Cooper went on to argue that compensation was clearly superior to punishment and should be "a prime instrument of penal policy and practice," because it combined avoidance of vindictiveness towards the offender with victim satisfaction. He argued that compensation is particularly appropriate for, and should be the primary response to, offences motivated by financial gain, obviating where possible the use of punishments, specifically imprisonment. He conceded, however, that the various reparative measures might not be sufficient in all cases and might need to be "reinforced by an additional fine or some other non-monetary sanction."

Duranleau noted first the unclear status of compensation to victims in the criminal process and the current down-grading of

the victim's status while emphasis is placed on the protection of the offender's rights. He accepted the distinction between the civil and criminal processes and cited Ruby's view that compensation is a proceeding that is essentially civil in nature. He saw the difficulty as stemming "from the intermingling of two distinct resources." He argued, however, that the needs of the victim and the aim of the criminal court to protect society as a whole could be reconciled and that, in many cases, the acknowledged difficulties could be overcome. He considered the primary aim of compensation in the criminal court to be "to ensure that justice is done." He suggested the order might also "discourage the offender," lead the offender to judge his or her "own behaviour and its consequences for others," and "satisfy the need of the victim who... wants recognition of the injury done to him" or her.

Taking a historical perspective, Vogel grounded his approach on accounts of medieval legal practice, and drew attention to "the very basic relationship between the offender, the victim and society." He described the gradual exclusion of the victim and argued that the concept of redress in criminal justice has now "come full circle." He pointed out the inadequacies of the civil process and insurance as methods of assisting victims and argued that compensation was both administratively feasible in the criminal process and also "a palpable and constructive way for the courts to do justice in sentencing."

In my own submission on this topic, I argued that compensation can readily be justified as a criminal sanction within the terms of the conventional notion of the criminal law as public law, and the conventional distinction between the civil and criminal process. I supported the view that compensation, as one expression of the principle of redress, was in keeping with the concept of equitable justice as one of the social values governing the administration of the law. I also argued one could show that vindicating the concept of justice as a moral principle or norm helps to regulate social behavior. Compensation could therefore be justified as a criminal sanction, whatever other good effects it might have for the individual victim, mainly because it served the criminal court in its role as a moral educator in society.

Degree of Precision in the Assessment of Harm

The central questions were: What lengths should a criminal court go to in assessing the amount of harm? Are the standards and procedures in the civil process applicable? Must the full amount of damage be precisely assessed for the purpose of compensation as a criminal sanction?

Burns described the prevailing interpretation of the law in Canada; that is, that compensation should be considered only in "simple cases." Saying that the "Crown is now to be required to argue extensively on the value of the thing" [emphasis in the original], he stressed the many difficulties a court would have to consider in assessing damage: general policy, remoteness of harm, indirect effects, etc. Even 'simple' cases, he suggested, can be shown on examination to present serious assessment problems, and the burden placed at all stages of the criminal process on the limited resources available would be severe.

Harland pointed out how contentious the issue is in the United States. Some states as a matter of principle have rejected the task in the criminal courts and have established civil proceedings which are held alongside criminal proceedings.

Many participants, on the other hand, took a pragmatic and optimistic approach about integrating compensation into the criminal process. Duranleau pointed out that Crown and defence counsel often agree on an amount and even in disputed cases, where the amounts fall within certain limits, judges should be ready to trust themselves and at least "sound out the terrain." Dubienski argued that assessment in property cases is usually a fairly simple matter. And Blom-Cooper described the controversy in Britain on the same issue and argued that a "rough assessment" was in principle just as appropriate for compensation orders as

for fines. He suggested the current assumption that the court must apply extensive procedures to achieve a precise and proven assessment arises "because of the trap we all get into by using terminology with which we have been familiar in the past," and because "we tend to associate the actual extraction of money from the offender with its destination." For the criminal court the main aim is to take "the profit out of crime," and the allocation of the monies then becomes a separate issue.

Blom-Cooper also pointed out that while the Advisory Council on the Penal System in Britain, in the original proposal for compensation orders, had not envisaged precise or necessarily full compensation, in the Vivian[6] case the courts had overlooked that view and held that damages had to be either admitted or proved. A new bill now proposed in Britain would reverse that decision and permit partial compensation.

Shapland's research seemed to support this position. She reported that victims tended to separate the question of the amount of compensation from the source, that they recognized that in the criminal process the offender's means must be taken into account, and that accordingly victims tended not to demand full compensation. It was the "symbolic importance" of compensation that was of concern to them. They wanted compensation in the criminal process and wanted the recognition that it implied.

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6 R. v. Vivian [1979] 1 W.L.R. 48.

This theme was repeated later by Rivard who suggested that compensation in the criminal process should be "significant but symbolic."

Type of Harm Compensable

The question was whether the criminal court can consider both the pecuniary harms and the non-pecuniary or intangible harms an offence might entail. This issue is closely related to the one above concerning assessment procedure and it has been a highly contentious one in Canada. It received, however, only very limited attention in the Symposium.

Burns noted that compensation for "actual loss or damage" is permitted under Section 663 (2)(e) of Canada's Criminal Code. But while awards for pain and suffering and "injured feelings" have been made, these have generally been overturned on appeal apparently on the grounds "that the actual loss or damage must be capable of precise quantification which would exclude general damages." As indicated earlier in connection with the general restriction of compensation to "simple cases," the restriction to special damages apparently is due to the court's tendency to regard compensation as in fact a civil remedy and one which in any event would be administratively burdensome.

Rivard informed the Symposium that proposals for legislative reform currently being considered by the federal government would not extend the power of the criminal court to consider non-pecuniary or general damages.[7]

Others took a more positive approach. It was noted that compensation for non-pecuniary or general damages is permitted in the British legislation, and Shapland saw a possible expansion of its use. And while Harland noted that most states in the United States do not permit "pain and suffering awards", some presumably do. For my part, I argued that compensation as a criminal sanction would necessarily imply that the offender is in principle accountable for all of the kinds of harm a crime entails and not just for some of them.

Victim's Role and Rights

Some of the participants suggested that the question of victim's rights in the criminal process should not be taken seriously or, alternatively, stressed the practical difficulties to be expected if the victim was given greater status in the process. Harland, for example, suggested that "victim's rights"

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7 In fact the new Young Offenders Act, S.C. 1980-1983, c. 110, specifically states that the courts shall not have the power to consider such damages.

was the most recent single "catch phrase" in the United States, sometimes cynically used by groups who wanted less to assist victims than to punish offenders more severely. Weisstub noted that many victims might in fact want no part of the criminal action nor further contact with the criminal. And Snowden pointed out that the criminal process has in any case very little power to affect the plight of victims in general. Only about 50% of offences are reported, and of these only about 15% of the offenders in some categories are apprehended. Still fewer are charged and convicted, and many of these either lack resources or are recidivists requiring sentences not particularly compatible with compensation. Norris observed that the imperatives of the criminal process might cause extensive delay and that greater attention to the proposed rights of victims might well demand considerable resources. Compensation by the offender thus was not seen by a number of the participants as a practical method of meeting the material needs of victims.

The comments of others, however, added complexity to this matter. First, what does the victim really want? As indicated earlier, Duranleau mentioned the victim's desire for "recognition" and Shapland's research, in particular, showed that the victim did not seem to see the process as simply a convenient way of obtaining material redress. There were evidently principles and larger issues involved. Second, what is the victim's status? As indicated earlier, some participants

proposed that the victim should be a relatively independent and active participant in a fundamentally revamped process. The essential focus would be the settlement of the conflict or the wrong which occurred between citizens. Some of the actual complexity would come out in more human and more flexible negotiations and victims would be "given back" some of their former power.

My own submission supported the notion of the victim as "Everyman" in the modern criminal process; that is, the victim's role is that of representative or surrogate for the harmed community. This position is an attempt to justify a legitimate and even essential role for the victim within the conventional criminal process, consistent with the notion of crime as a harm to all citizens. The position accepts the conventional distinction between the civil and criminal processes and rests on the drawing of a clear distinction between the private and the public roles a victim can play.

Others took a less theoretical and more pragmatic approach. Blom-Cooper suggested the introduction of rights for victims necessarily required a less "one-dimensional" system or, as mentioned earlier, a "coalescence" of civil and criminal procedures. Duranleau acknowledged at the outset that the victim was "the unknown factor," but argued that a proper use of

compensation would result in more justice for the victim within the criminal process. And Roslak remarked that it was the victim "for whose benefit these... compensation orders are to be given" and he looked for at least gradual reform to incorporate those interests within the criminal justice process.

COMMUNITY SERVICE

Aims

As indicated earlier, Mohr argued that compensation had no "logical place" in the present criminal process, and that it implied a different concept of the criminal law. Consistent with and in support of that view he suggested, however, that community service orders, in contrast to compensation, "seem to have flourished in court... exactly because they can be interpreted as sanctions since their quantum can be based not on harm but on the severity of the disobedience to law." He thus implied that, whatever the rhetoric might be, community service is used in a traditional punitive and repressive way rather than as a method of assisting offenders or expressing notions of justice through redress to the community.

The views of Harland and Chappell were consistent with Mohr's conclusions. While Harland accepted compensation as a means of doing justice, he regarded community service as "a penal sanction" designed to extend - or at least which has the effect of extending - social control over offenders. He rejected the arguments that community service is an effective alternative to prison, that it is rehabilitative or that it does "symbolic" justice through reparation to the community. He suggested that

such aims are sometimes used hypocritically to conceal the punitive motives of many who support community service programs.

Chappell, addressing the aims of community service without reference to compensation, drew the parallel between the use of convict labour in the early development of the British colony in Australia and the current conception of community service. While at first the sentence of transportation to the colony followed by public service was seen mainly as an alternative to the death penalty (though still punitive in intent), it was soon noticed that the procedure had "substantial economic merits." It also came to be justified in terms of the "moral reform" and social rehabilitation of offenders through hard work. While some doubted the effects of such labour on moral attitudes, it seemed to have a striking effect on social behaviour and the integration of the offender in the community.

Chappell went on to describe the results of the investigation by the Australian Law Reform Commission on this topic. Community service schemes in Australia were seen to have "a smattering of denunciation and rehabilitation... an element of punishment... [but also] some far reaching social effects." Frequently the principal justification heard was that community service would function as an alternative to imprisonment, and it "appeared to attract broad support from sentencers." The value

of community service was controversial among the members of the Commission, however, and it was only endorsed conditionally. The Commission eventually recommended that the sanction "be clearly labelled as a form of punishment" and "cautioned... that community service orders could very rapidly become a political placebo used to justify political inaction on other more controversial and substantial sentencing reforms," a result which Chappell feared has in fact taken place in Australia.

Other participants took a more optimistic position, drawing attention to the many effects of community service which appeared consistent with the aims of the criminal sentencing process.[8] Daniels, for example, emphasized the use of community service as a means of avoiding imprisonment, as a technique for involving citizens in the justice process, as a rehabilitative measure in the sense that it might encourage a sense of responsibility or moral accountability in the offender and affect recidivism rates, and even as a means of deterrence in some cases.

Heath also rejected the notion that community service was frequently punitive in its intent and suggested that it represented "higher aims" such as reconciliation of the offender

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8 This was the approach of the Advisory Council on the Penal System in Britain when community service was first proposed in that country.

with the community and "mild censure." Dubienski saw community service as a particularly useful alternative to prison and intended as "punishment and deterrence."

Carver stressed the value of community service as a means of avoiding imprisonment but he would, over time, expand it to other offenders. He stressed that it also tends to involve the public in the administration of criminal justice, brings the offender into contact with constructive citizens, permits the offender a method of paying back for the offence, and helps rehabilitate the offender through involvement in sentencing.

My own submission here was that while community service could be put to a number of uses, the predominant theme both in its administration and in the literature was that offenders were making up for the harm done, and that offenders might comprehend the moral principles implied. I argued that the main justifying aim of service, like other reparative sanctions, was that it supported and might help to maintain the notion of justice or reciprocity as a moral principle.

Finally, Rivard outlined proposals that were currently being considered by the federal government which suggest that community service is seen mainly as a means of "reconciliation" of the offender and a "positive form of censure." The proposals,

however, would restrict it to offenders who would otherwise be sentenced to prison, which he acknowledged implies that it is to be used only as an alternative to imprisonment. He pointed out, however, that another proposal was that community service be used as an alternative to the fine and noted that this would tend to expand its use.

Administrative Feasibility

The overwhelming opinion of the Symposium participants was that public or charitable service by offenders presents no serious administrative problems. Harland, Heath, Carver, and Daniels all described the success of community service programs respectively in the United States, Saskatchewan, Nova Scotia, and Ontario. Harland pointed out that in the United States there appears to be little problem in marshalling support for community service, securing its use by courts, obtaining the ready cooperation of community agencies in supplying the service tasks, and getting the cooperation of offenders. Such programs have therefore developed very rapidly and, in sharp contrast to compensation programs, seem to be running well. There have been concerns about liability for accidental injury to offenders in the course of the work and about the risk of further wrongdoing by offenders in some situations (e.g., hospitals), but actual problems have been rare.

Daniels, describing the rapid development of the community service programs in Ontario, stressed the extent to which these programs draw upon volunteer citizens. Some 200 community agencies and 7,000 volunteers were involved in 1981. He argued that the program had a significant impact on the imprisonment rate. The vast majority (90%) of offenders completed their orders, and attitude studies suggested a much more positive attitude to community service than to prison, fines and even probation.

Heath described the successful use of community service as an alternative to payment of a fine (the "fine option") in Saskatchewan. In 1981 about 7,000 offenders settled their fines in this way. She saw community service as particularly suitable when the offender is unable to pay compensation or a fine. It is administered, as in Ontario, by a variety of community agencies. There have been no incidents of further wrongdoing by offenders while doing the community service work and workers' compensation has covered the few claims for injuries to the offender.

Carver described the procedures he employs to select offenders for a program in Nova Scotia. Offenders are generally remanded in custody while a probation officer investigates their suitability for the program. If accepted, offenders -- and this appears to be a unique feature of the program -- are required to

procure their own service task and also to arrange for appropriate supervisors. Successful completion of the work might result in an absolute discharge while, Carver said, failure will result in "a month in jail or some other suitable penalty." The program has enjoyed good public support.

Hutton stressed the need for proper investigation of an offender's suitability. Madigan argued that the success and credibility of community service programs depend heavily on proper supervision, and in general emphasized that "good ideas" must be backed by adequate administrative resources. Slaven felt that community service was particularly suitable in small communities where the offender did "work visible to all others in the community."

Eligibility

In general, most participants saw community service as applicable to a wide range of offences. Selection was deemed to depend more heavily on the characteristics of the offender than on the type of offence. Harland remarked that community service is used in the United States for "traffic offences on up." Daniels argued that while community service is usually applied to the poor or unemployed it can have "a special significance" for middle class offenders; for example, for the professional who can

pay even a large fine all too easily. Dubienski stated he considered virtually any offence to be suitable "as long as the sentence is acceptable by society." He "wouldn't rule out serious or violent crime at all if the facts and circumstances were such that [the choice of sentence] would be acceptable to society."

As mentioned earlier, Rivard informed the Symposium that proposals that were currently being considered by the federal government would limit the use of community service to those who would otherwise be sentenced to prison. Harland pointed out, however, that American studies show that community service is not in fact used predominantly as an alternative to prison despite claims to the contrary.

Severity and Disparity

The question of the rights of offenders arose earlier, mostly as a procedural issue in connection with compensation. Would the offenders have the same opportunity to protect their interests in the criminal system as they would if compensation could be ordered only in the civil process? Regarding community service, however, the issue arose mostly in connection with a) judging the appropriate severity -- the appropriate "place on the tariff" -- of community service, and b) sentencing disparity and the control of discretion.

Taking the tariff question first, several participants questioned how the courts could presume in principle to judge the number of hours an offence warranted and how, in practice, hours of service were currently related to probation and particularly to imprisonment. In the United States, community service orders have ranged up to 24,000 hours (Harland) and in Canada up to 1,000 hours (Dubienski) and perhaps more. Harland criticized the current trade-off between prison time and hours of service, and Dubienski questioned the assumption, implicit in the British legislation, that 240 hours of service is somehow commensurate with two years' imprisonment. Generally, community service is considered "in the middle between incarceration and probation" in the United States (Harland) and somewhere between probation and the fine in Canada (Dubienski). MacKay pointed out further that one had to consider not merely the number of hours' work but the type of work, "Twenty hours digging post holes... might be considered more difficult work than twenty hours playing cards with old people."

The closely related problem of disparity or 'unequal justice' was also contentious. Harland referred to it as "a major villain," particularly considering the number of agencies involved in administering orders. Heath, while strongly favouring the use of community service, expressed a similar concern. MacKay asked how one applies community service equally

to offenders of different backgrounds and in cases where the availability of appropriate work might be largely a matter of chance. Further, he asked, "Does one take into account [an offender's]... record?" And Chappell suggested that there is a great risk that agencies, particularly in rural areas where legal services are scarce and where there might be prejudice against minority groups, will use community service for purposes not intended by the planners, or in a punitive and excessive way.

There was no easy answer to concerns about whether community service could be administered in a just, equal and humane way. The main response was probably that of some of the judges present (particularly Hutton and Dubienski) who doubted there could be any clear standards for 'doing justice' and who noted that the issue was a venerable, pervasive and familiar one in criminal sentencing. How, Hutton asked rhetorically, have the courts decided upon equitable sentences in the case of imprisonment or other severe sentences in the past?

Some (for example, Nuttall and Harland) called for guidelines or for central leadership and clear legislation. Blom-Cooper argued that it, "is Parliament that has to draw up the lines of penal policy.... We want to leave discretion to the courts but to be quite clear about the boundary lines of that discretion". As mentioned earlier, however, Madigan had

complained that legislation often failed to consider the resources required or the complexities in the actual administration of the law. Nuttall endorsed the need for legislative leadership but also drew attention to the particular problems of a federated state such as Canada -- not only the general problem of achieving a balance between law and executive discretion but also the problem of constitutional separation of legislative and executive power in criminal law.

Mohr, having the last word on the topic and making specific reference to Carver's practice of equating a blood donation with five hours of community service, observed that one had to look at the community context and the perceptions or feelings of offenders and the observing community. The present tariffs applied to the use of community service, at least judging by the absence of appeals, appeared to be perceived as just.

OVERVIEW

COMPENSATION

Easily the most controversial and difficult question discussed in the Symposium was whether compensation was in principle acceptable or justifiable as a criminal sanction or was best regarded only as a civil remedy. There were perhaps four positions expressed on this issue which, at least in retrospect, are fairly easy to identify. These might be labelled the radical, traditional, reparative, and pragmatic. Each one is briefly described below.

The 'radical' position began, appropriately enough, with a statement of assumptions about the nature and purposes of our criminal law. As expressed in the Symposium by Mohr, the criminal law was originally and is still intended to serve the interests of the state as opposed to the citizens. The state is held to be distinct from the community of citizens notwithstanding our present democratic procedures, and its interests of course do not necessarily represent those of the citizens. The aims of the state are repression and control and its methods are punitive and controlling regardless of the label which might be attached to such methods. In short, the concept of crime is regarded here as a tool in the sole possession of a

central authority seeking primarily to protect itself by repressive methods. Both the state, and the criminal law which serves it, lack moral legitimacy.

It follows from this position that redress by the offender would not be compatible with the criminal law for several reasons: a) it rests on common moral precepts and the notion of community as distinct from the state, b) it involves citizens directly with each other, and c) it implies that order can be achieved by vindicating a rational principle rather than by intimidating punishment or other controlling sanctions. Thus, while compensation by offenders can be justified morally, it can find no legitimate place as a sanction within the existing criminal law. Any place it might be given would be at best illogical and at worst dishonest and hypocritical.

The radical position therefore favours compensation not because it might help to achieve the aims of the criminal law but precisely because it cannot, because it might help to turn criminal law on its head and take it back to its roots in common law. At the very least, the position challenges current fundamental assumptions about our law. Compensation would help to promote a kind of participatory justice which emphasizes the mediation of conflict between citizens rather than coercive power. In the process it would tend to integrate citizens with

each other in a constructive sense and to integrate law and social values. In such a revamped system, redress would not simply have high priority but would be the basic response to crime.

There is no space here to comment usefully on this position, assuming it is described reasonably accurately above. Its strength rests on its grounding in a clearly stated position about the nature and aims of the state and hence of the criminal law. But by the same token its validity rests on the validity of its fundamental political position. That position was not directly challenged or discussed in the Symposium. All that can be said is that the great majority of the participants, by their silence, seemed to imply that they accepted the current criminal law, generally, as valid, that is, as resting on some reasonable and democratically determined consensus about its ends and means.

Those taking the 'traditional' approach by definition regarded the criminal law as legitimate. This group did not, however, proceed to state clearly their specific assumptions about the nature and aims of the law and then to consider whether compensation as a criminal sanction would or would not help to achieve the stated aims. Rather they seemed to begin with the implicit assumption that, in keeping with present legal and administrative practice, compensation was necessarily

"essentially civil in nature" or at least that it would inevitably be "converted" to a civil proceeding within the criminal process. That position in turn seemed to rest on an unstated assumption that the main purpose of compensation was to serve the interest of the victim as a private individual and not to serve the victim in any public role or public capacity.

The traditional position, expressed in varying degrees by a number of the participants, thus did not seem in fact to address the theoretical question whether compensation could be justified as a criminal sanction, but tended rather to beg that question and to discuss the issue only in terms of traditional legal and administrative practices. The many administrative (and in Canada also constitutional) problems which could be foreseen in any attempt to offer what was deemed to be a civil remedy in a criminal court were pointed out. It was stated, for example, that the criminal court cannot constitutionally be permitted to trespass into civil law, that criminal prosecutors do not feel comfortable in civil proceedings, and that the resources are in any event limited and cannot be allocated to procedures which are not considered the "main business of the criminal court" except perhaps in "simple cases". Such arguments are clearly valid given the assumptions on which they rest, but it was those very assumptions which were at issue.

The next position is labelled "reparative" for want of a better term. It is easiest to describe by contrasting it with some of the other positions. Like the radical view, it accepts the theoretical problem, the need to state assumptions about the aims of the criminal law and to reconcile the use of compensation with those aims. But unlike the radical position it accepts the criminal law in Canada as legitimate and also accepts, along with the traditional position, the conventional distinction between the civil and criminal processes. It thus seeks to provide a strong justification for the greater use of all reparative sanctions within the conventional aims of our criminal law. Specifically, the position assumes that compensation as a criminal sanction, unlike its role as a civil remedy, must serve the interests of society as a whole and not merely the private interests of the victim as an individual. It thus stresses a clear distinction between the public and private capacities the victim may occupy.

The challenge to this position, therefore is to demostrate how making offenders compensate their victims helps to maintain the criminal law. The position argues here that moral attitudes do have a significant effect on social behaviour, that requiring offenders to compensate their victim is a particularly palpable and telling method of vindicating the principle of justice or moral accountability on which the criminal law is in part based,

and that at least in the long run this will help to maintain the law.

This position, however, for all its attention to theory, makes rather sweeping assumptions about the actual workings of the law, the role of moral attitudes in behaviour, and the potential for criminal sentences to influence moral attitudes. It also assumes that the average citizen will be able to distinguish the difference between compensation as a criminal sanction from compensation as a civil judgement and will not simply be confused. The research on this point is encouraging but limited.

Those who took what was called a 'pragmatic' position pressed for less attention to theoretical niceties and argued, for example, a) that redress by wrongdoers was a self-evident moral principle requiring no theoretical justification in criminal sentencing; b) that the postulated distinctions between civil remedies and criminal sanctions were not as real as commonly claimed; or that, c) at least in a substantial proportion of cases there was in fact no appreciable conflict between the needs of victims for a remedy and the interests of the public in proper enforcement of the criminal law, and that some way of coalescing the civil and criminal processes could be found.

Such arguments, however, met a number of objections. Several of the participants had pointed out very early in the discussions that, judging by the current actual use of compensation as a sanction, the notion of redress was clearly not self-evident to the courts as a kind of moral absolute in sentencing. Further, it did not seem to be made clear what was meant by a 'coalescence' of the civil and criminal process. Were they to be combined merely on an administrative level, as practiced to some degree in many countries? That is, were they to be kept separate conceptually by giving the victim the right to sue civilly during the course of criminal proceedings? Or was it implied that the conventional distinction between the criminal and civil processes was wrong in principle, that the interests of society and those of the individual citizens were in fact the same and could be merged in one proceeding? While the former position would present administrative problems, the latter would require that one come to grips with a fundamental distinction in the law. It was mentioned in this connection that both the civil and criminal processes have acknowledged (and intended) significance for society and that they share both punitive and compensatory techniques to achieve their ends. But would such observations be sufficient to destroy or at least out-manouvre the conventional distinction between public and private law? The point here is that the issue was not clearly articulated and discussed in this Symposium.

Based on this Symposium, then, perhaps the chief complaint about a purely intuitive and pragmatic approach was that in the end it would not be sufficient. It was observed that the same proposals for greater use of compensation by offenders have been made for over a century, presumably generated by the same sort of moral fervour we see today, but with little practical result. This would seem largely due to the formidable obstacles presented by traditional assumptions and conventional legal theories about the propriety of considering compensation in the criminal process. At the same time, as mentioned earlier, the Symposium was sharply warned by one participant about the serious danger to social stability that can result from becoming 'theory struck'. Marriage observed in this connection that one of the advantages of the concept of redress is that is seems to transcend ideological debates and might "succeed in tapping springs of common feeling." Some sort of balance among theoretical, intuitive and pragmatic approaches seems needed.

Turning to the discussion of the selected administrative issues concerning compensation, the differences between the traditional legal opinion in Canada and the reform proposals was particularly easy to see in connection with the first topic, standards concerning the assessment of harm. The traditional position was that the quantum would need to be fairly accurately determined, while the reformers seemed to make no such assumption

and some argued flatly that compensation orders which achieved only 'rough justice' or even 'token justice' were sufficient, within certain limits, for the purposes of the criminal process. The traditional position, reflected in Zelensky and many other cases in Canada, would seem to rest, as discussed generally a moment ago, on certain prior assumptions about the purposes of compensation in the criminal process, specifically that its purpose was the same as it would be in the civil court -- to restore the victim's loss as an end in itself. If so, it would follow that (a) the procedures developed in the civil court would apply, (b) any losses not admitted would require proper investigation, and (c) of course from a purely administrative standpoint the court would have to restrict applications for compensation to simple cases to avoid being overburdened.

Several of the reform positions on this issue, however, at least implied that compensation was in itself neither civil nor criminal in principle and that if used as a criminal sanction there was nothing in penal theory which would require, again within certain limits, a precise assessment of harm. The use of compensation orders would necessarily be limited by the means of the offender, by other sentencing aims -- for example, the incapacitation of dangerous offenders -- and of course by the limited administrative resources available to the court. This

position was consistent with Blom-Cooper's emphasis on "taking the profit out of crime" as a primary aim of criminal compensation regardless of the eventual allocation of the proceeds. It was also consistent with the insistence of Shapland's victims that compensation be ordered in the criminal rather than a civil process so long as the amount of compensation was not "derisory" and did not add insult to injury.

In short, the reform positions on this point seemed to be that the amount of compensation ordered had to be determined according to the social purposes of the criminal process and not necessarily according to the needs or rights of the victim as an individual. The court might order no compensation, compensation in part or full compensation. While a benefit to the victim might well be intended by the court and welcomed as an <u>effect</u> of the compensation order, it was not seen here as a justifying <u>aim</u> or purpose determining procedures and standards.

The debate on this point, however, left a number of questions unexplored. If the court did relax its standards, how could it be sure that a "roughly assessed" amount was not in excess of the harm done and thus did not violate the right to justice of the offender or the very notion of justice on which the sanction presumably rests? Further, while Shapland's victims seemed to have been able to make a distinction between what it

was appropriate to expect from a criminal as opposed to a civil court, would this be true of the general public? Might the citizens not begin to assume that they had a right to compensation in the criminal process? And as for the victims, would they not feel 'used' here, as elsewhere in the criminal justice process, as a means to an end?

The next administrative question concerning compensation was what type of harm should be deemed compensable. Should the court be permitted to award compensation for general as well as special damages? Unfortunately, this topic received only limited attention and most of that was in the context of a discussion about the general administrative problems surrounding the assessment of harm. It was, for one thing, rather difficult to determine what specifically the reasons were for the effective exclusion of general damages from Canada's Criminal Code. That is, it was not clear whether compensation for pain and suffering or other intangible forms of harm was excluded because it was considered: a) unacceptable in principle (i.e. always and undoubtedly in the nature of the civil remedy), or b) administratively too complicated to consider in a criminal court (i.e. never in the category of "simple cases"). Was the exclusion a matter of theory or administration?

If it was meant that while compensation for special damages is acceptable in principle (even if perhaps limited to cases

which are considered simple to assess and administer) but that compensation for general damages is not acceptable in principle, then the theoretical basis for such a distinction would need to be shown. It is frequently pointed out that pain and suffering or other injury to the victim's sense of justice, order, security, self-esteem, and dignity are often the only substantial harm involved in a crime, and in general that harm to a citizen's rights is the very foundation of the decision to declare a given behaviour a crime.

If, alternatively, it was assumed that the concept of general damages was acceptable in theory but always more difficult to assess than pecuniary or special damages, it would have to be shown why that is necessarily so. On this point, some have suggested that with the assistance of guidelines it would be much easier to assess general damages than it would be to assess special damages. An award for general damages might also, in many cases, obviate the need to consider the careful tabulation of monetary losses in view of the limited capacity of many offenders, in any case, to pay full compensation. As Blom-Cooper argued in connection with assessment of criminal harm generally: whether it is called a fine, compensation, restitution, or confiscation, the important thing is that the offender pay to some extent for the harm caused.

The question of the type of harm which should be deemed criminally compensable raised, in short, the familiar list of difficult issues surrounding the general notion of redress by offenders. It is, moreover, a particularly contentious issue in the current sentencing reform procedures in this country. The Symposium succeeded in making only a very limited contribution to the debates on the topic.

On the question of the role and rights of the victim in the criminal process, the main observation to be made is probably that the views of the participants, in keeping with the focus of this Symposium on sentencing, tended to be closely related to their views about, or approach to, the place of compensation as a criminal sanction. First, assuming that compensation was intended simply as a method of assisting victims, there were those who pointed out that on purely practical grounds this was not very sensible since such a small proportion of the actual number of victims would be served. Others, taking a position from the standpoint of the current law and its administration and therefore assuming that compensation was really a civil remedy, found it difficult to take the victim seriously in the context of criminal law as public law. The victim might well be brought in 'through the back door' on grounds of compassion and practicality, but not 'through the front door' on grounds of principle.

Conversely, for those who saw compensation, in a radically redesigned process, as the work-horse of conflict settlement procedures, the victim's loss would be the substance of the hearing and the victim's status that of one among equals. And for those who perceived compensation, within the scope of conventional criminal theory and practice, as a method of vindicating popular notions of justice and thus a means of maintaining the criminal law, the victim would also play a crucial role and enjoy commensurate status.

It was of course appropriate for this Symposium to consider the victim's role mainly in conjunction with the question of compensation as a criminal sanction. It showed that proposals to require offenders to compensate their victims cannot proceed in a legal vacuum and raise a number of theoretical and administrative issues. It could well have been observed in the discussion, however, that greater status for victims in the total criminal process is not determined simply by whether compensation by offenders can be considered in the criminal court. Higher status and greater assistance for victims clearly can proceed quite independently of the question of the actual sentence imposed. The Law Reform Commission of Canada, for example, stressed that justice should be done for victims within the criminal process even where offenders cannot pay. However, the discussion of the topic at the Symposium was necessarily a limited one.

COMMUNITY SERVICE

There were two main points of view in the Symposium debate on the aims or rationale of community service. Some participants regarded community service as a versatile and, most often, non-punitive sentence which could serve a number of positive sentencing aims such as reparation, moral reconciliation, moral growth in the offender, and rehabilitation. On the other hand, there were those who did not regard it as a significant or novel reform and tended to see it in negative terms as really another punitive, repressive or controlling sanction, or one which might readily be used for such traditional purposes.

A couple of general observations can be made: first, it seemed apparent that offenders can be required to perform public service or charitable work for one or more reasons. The question is one of emphasis, not of mutually exclusive uses of the sanction. Second, it was amply demonstrated that the aims of public service as a criminal sanction tend to shift over time and change from place to place. Chappell's description of the evolution of the aims of public service by offenders in the British colony in Australia and Harland's observations about the current use of 'community service' in some places in the United

States can both be seen as excellent examples. Fluctuation in the main justifying rationale of a sanction is, of course, commonly observed in penal history. It follows that to show that a sanction such as public service was applied for certain reasons at specific times in the past, or in specific places today, does not necessarily imply that those are the only purposes it can be put to in this country at this time.

The questions for the Symposium, then, were: What are the most prevalent aims for what we are now calling community service - the modern version of public service by offenders? And, ideally, what should the main aim or aims of this sanction be? As some of the speakers made clear, a) a punitive intent for community service is always present to some degree; and b) the amount of pain would in fact be increased if we imposed severe punishment to enforce compliance with the orders. The remarks of many of the other speakers seemed to support the view, however, that community service today, conspicuously unlike the penal servitude of the past, does not seem mainly intended or administered to humiliate, stigmatize, deprive, intimidate, or otherwise cause offenders to suffer. Nor does community service seriously attempt to control an offender's freedom. Rather, the emphasis at the conference was on the social values community

service, as a reparative sanction, seemed to rest upon and on the moral messages it hoped to convey, particularly to offenders but also to the general public.

The Symposium did not, however, reach a consensus on this topic. As Harland pointed out there was a conspicuous absence of data presented at the Symposium which would support any particular position about the way community service is in fact administered. The Symposium did seem to succeed, however, in defining the controversy about the aims of community service and in demonstrating the implications of the different views for the future significance and potential of the sanction. If community service is to continue to develop and yet avoid the fears of some that it might be used in a punitive, repressive and even corrupt way, it seems clear that both sufficiently permissive legislation and proper administrative and enforcement standards are required.

Turning briefly to the administrative issues selected, there seemed to be no significant controversy in the Symposium about the general administrative feasibility of community service programs. Reports on American and Canadian programs were generally very positive. There was only a limited discussion, unfortunately, of the administrative difficulties sometimes encountered. Programs need, for example, consistent and adequate enforcement, clear performance assessment standards, adequate

supervision, consistency in the priority attached to the sanction in correctional and sentencing policy guidelines, and appropriate work which is readily available. Some participants did stress the need for proper selection and good supervision of offenders. What the discussion lacked was sufficient data describing not simply the number of offenders who have been given the sanction and successfully completed it, but data showing the extent of variations in policy, the proportion of current staff allocated to administer the sanction, and the extent to which community service has in fact been used as an effective alternative to imprisonment, probation and (apart, perhaps, from Saskatchewan) the fine.

The discussion of what types of offenders or offences should be considered eligible for community service, in both legislation and policy, revealed sharp differences of opinion. Most of the participants seemed to favour applying community service from traffic offences to some cases of violent crime. The rationale of the more cautious proposals that were currently being considered by the federal government to apply community service only to offenders who would otherwise go to prison was not explored.

Finally, there was a fairly extensive discussion on the question of equality and justice in the imposition of community

service orders in sentencing. The numerous problems were outlined. The need for clear legislation and careful policy guidelines was pointed out. Clearly, there is a great deal of work to do if this new sentencing is to be applied consistently across Canada and equitably in relation to conventional alternative sanctions.

REDRESS AS A GENERAL SENTENCING PRINCIPLE

It will be recalled from the Introduction that we avoided dealing with the central general 'hypothesis' on which the Symposium rested: that redress is valid as a sentencing principle or aim quite different from punishment and from other traditional sentencing principles, and that both compensation and community service, more than anything else, express that principle. It will be apparent by now, however, why some of the participants disagreed. Many clearly regarded compensation as essentially a civil remedy awarded to serve the private interest of the victims or at best an 'add-on' in criminal sentencing. Community service, on the other hand, was seen as 'a punishment' integral to the criminal process, indeed, a sanction which could only too readily be put to traditional sentencing aims. For these participants, a discussion of both of these sanctions did not belong in the same Symposium. While it was acknowledged that

the sanctions might have a reparative 'element' in common, this similarity was considered relatively unimportant.

It is in any case clear that compensation and community service present different legal and administrative issues, tend to involve different administrators, and have largely been dealt with in the literature in separate compartments. The Symposium challenged that state of affairs and suggested not only that they should be seen as expressions of a common principle but that it was important to see them in that way.

In view of the importance of the issue and its function as the basic concept of the Symposium, it was considered useful to include here a few paragraphs arguing that compensation and community service can and should be interpreted mainly in terms of the concept of criminal redress and that they give support to that concept.

Beginning with community service, the task is to show that while to some extent it can and does serve as a method of punishing, rehabilitating or controlling offenders, it rests predominantly on the notion of redress. First, it can hardly be viewed as mainly intended to punish offenders. If one examines the early statements concerning the rationale of this new sentence and observes the way, for the most part, it is currently

administered, it becomes apparent that it is not primarily intended to cause offenders to suffer some form of pain for purposes either of deterrence or retribution. The literature rather shows definite attempts to reduce whatever suffering the sentence might cause. While offenders of course do suffer to some extent as an effect of this sentence, as they would of any other, and while that suffering is often to some extent intended, this does not necessarily indicate that inflicting pain is the justifying rationale of the sentence. Nor is community service seriously intended to incapacitate or physically control offenders, or to rehabilitate them in the traditional meaning of that word in sentencing theory or practice.

While community service might be justified on several grounds, by far the loudest refrain is that offenders are giving something back to society and redressing, if only symbolically, the harm done. The enthusiasm with which this sentence has been widely accepted can be seen as for the most part due to its appeal to an ideal, the ideal of justice or reciprocity in society. It appears to be intended to represent a basic response to wrongdoing -- the moral response -- in a form which is constructive, rather than inhumane and punitive. Offenders are intended to atone for their wrongs but are to do it by good works and not by suffering, as the retributivists of the past would require. While many an offender might well respond only to the

inconvenience of discomfiture the sentence entails, ideally they (and the observing public) are to understand the connection between the wrong they did and the good works they are required to perform. The notions of redemption and reconciliation with the harmed community are ubiquitous in the community service literature. Ideally, the offence is to be perceived not simply as disobedience to a superior power which brings on intimidating punishment but as a wrong, an injustice which must be put right. The moral symbolism the sentence represents is not only apparent to all but primary. It was thus not public service as a penal method which was at all new but the shift in the motive for its use that gave community service its significance.

For the present purpose the main point to be drawn from this interpretation of community service is that is implies that the concept of redress is acceptable as a sentencing principle in its own right. Redress is freed not only from conventional assumption that it belongs strictly in the civil process; it is freed also from the more liberal view that it must remain in the tributaries of criminal justice and never serve as a mainstream concept in sentencing, that it can only be an ancillary consideration, a mitigating factor, or an 'element' of a sentence. Community service succeeds in expressing the principle in a relatively pure form, at least pure enough to force us to take it seriously independent of conventional sentencing aims.

Such an interpretation of the aims of community service then permits one to approach the difficult problem of compensation by offenders by a different road. If redress in the form of public service is acceptable in principle then so is redress in other forms provided they serve the ends of criminal justice and can be administered accordingly. Compensation is thus viewed, like any reparative measure, as neither civil nor criminal in principle; it depends on why it is ordered. If compensation is ordered in a criminal court primarily as a method of achieving redress in order to vindicate the moral principles on which that notion rests and if such a vindication is considered in keeping with the ends of criminal law, then compensation is logically justifiable, in principle, as a criminal sanction. Any remaining problems, serious as they may be, are essentially matters of administration and not theory.

The implicit argument underlying the organization of the Symposium was, then, that the concept of redress, implying the principle of equitable justice, is a concept uniting not only compensation and community service but also forfeiture of assets gained through crime, service directly to the victim, and restitution of goods as criminal sanctions. Its significance as a sentencing principle for theory, and ultimately for sentencing policy and practice, should be apparent. Equitable justice, as the fundamental 'moral norm' in society is obviously of enormous

importance. The aim of 'doing justice' in sentencing is nothing less than to appeal to, and to influence, the social conscience of all citizens. Reparative justice expresses the moral response in a positive way and helps to resolve the central conflict in sentencing - the need on the one hand for compassion and understanding and on the other the imperative that as human beings we must be held morally accountable. In the process it implies that the enforcement of the criminal law can be based less on the simple use of power to intimidate and control and more on the concern for each other that is implicit, ideally, in the concept of crime as public law.

Reparative sanctions thus speak to the most fundamental and intractable issues in criminal sentencing, and represent far more than merely methods of helping a few victims of crime in a material way, of deterring some offenders, or keeping certain limited groups of offenders out of prison. The real danger is that the full significance of the concept of criminal redress will not be appreciated and that we therefore fail to design appropriate legislation and procedures to express it.

CONCLUDING REMARKS

It might be complained that, in the selection and discussion of issues, there is a bias in this Summary and Overview on the side of the call for conceptual clarity. On the one hand such a complaint is valid. First, there are many real administrative difficulties presented by compensation and community service as criminal sanctions, particularly if they were to be developed on a larger scale. Further, presumably all are in sympathy to some degree with what was called an intuitive and pragmatic approach to reform particularly when, as some suggest, we are dealing with what many regard as a simple and self-evident moral principle. Many are impatient for action.

On the other hand it is quite obvious that the problems are not simple and that some of the theoretical disagreements are profound. For example, some accepted the political legitimacy of our criminal law while others did not. Some saw the similarities of community service and compensation as being of fundamental importance while others felt just as strongly that what these sentences had in common was not critical. Some felt the conventional distinction between the civil and criminal processes was necessary and valid while others thought it was merely arbitrary or a matter of historical expediency. Some appeared to

make no distinction between the public and private roles a victim might play while for others the distinction was of crucial importance. Finally, some saw community service as essentially punitive while others favoured it, in part, precisely because they regarded it as non-punitive.

Even such major disagreements would be of little significance for policy and program planning if they had no practical effects. But clearly they do. As indicated throughout the Symposium, the discussion of many of the ostensibly purely administrative issues showed how one's approach to them or conclusions about them was often largely determined by prior assumptions about the purposes and role or significance of the sanction. One hears repeatedly the comment that repayment by offenders and greater consideration for victims are "great ideas in theory but not very practical." The Symposium will have succeeded substantially if it showed that one must look to the basic assumptions being made and showed the connections between those assumptions and our assessments of practical problems. It will have succeeded fully if it articulated the main issues clearly and brought those with different perspectives to a better understanding of the topic.

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