

# BOOK REVIEW

## Bad Law: Rethinking Justice for a Postcolonial Canada

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JUSTICE GERALD JEWERS\*

The “bad law” referred to in this book by John Reilly, a retired Alberta provincial court judge, is the Canadian criminal justice system, in particular the sentencing provisions in the *Criminal Code* of Canada.

He pronounces the system to be a “mess,” plagued by inconsistent sentences, backlogs and overcrowded prisons; he says the basic approach is punitive, which is wrong, and proposes instead a system based on traditional aboriginal principles of restorative justice, which are not concerned with punishment and seek to solve a problem in a peaceful and non-adversarial way.<sup>1</sup>

Judge Reilly is certainly qualified to comment on this subject. He was a judge in the Criminal Division of the Alberta Provincial Court for 40 years, first in Calgary, where he dealt with many aboriginal offenders, and then as the resident judge in Canmore where he was responsible for dealing with

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<sup>1</sup> John Reilly, *Bad Law: Rethinking Justice for a Postcolonial Canada* (Victoria, BC: Rocky Mountain Books Ltd, 2019) at 2–3 [*Bad Law*].

residents of the Stoney Nakota Reserve.<sup>2</sup> He has written two previous books related to aboriginal justice, namely “Bad Medicine” and “Bad Judgment.”<sup>3</sup>

He takes note of s. 718 of the *Criminal Code*, which became law in 1996, and sets out the purpose and principles of sentencing as follows:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community, and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community<sup>4</sup>

Subsequently s. 718(2)(a) was added as follows:

All available sanctions that are reasonable other than imprisonment should be used.<sup>5</sup>

Judge Reilly comments:

The single greatest justification for our use of punishment in the penal system is deterrence. The theory is that if we punish people for wrongdoing, they will avoid the wrongdoing in order to avoid the punishments. We don't use the word “retribution” a lot because it sounds too biblical and vengeful. Although the system actually is all about retribution and vengeance, we like to talk about it as if we are really nice folks who only resort to punishment out of absolute necessity.<sup>6</sup>

In the chapter, “Anger, Hatred, Vengeance,” the Judge describes the case of a 3-year-old boy who died because his parents neglected and mistreated him.<sup>7</sup> The mother was suffering from post-partum depression and the father

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<sup>2</sup> *Ibid* at 2, 17.

<sup>3</sup> *Ibid* at 3.

<sup>4</sup> *Ibid* at 13; see also *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], s 718.

<sup>5</sup> See *Criminal Code*, *ibid*, s 718(2)(a).

<sup>6</sup> *Bad Law*, *supra* note 1 at 93.

<sup>7</sup> *Ibid* at 117.

from a form of psychosis.<sup>8</sup> They were convicted of manslaughter and sentenced to 16 years in prison.<sup>9</sup> He asks “Why?,” and answers:

Because what happened to that little boy makes us angry. We hate the people who did it to him and we want vengeance.<sup>10</sup>

However, the author does note that there are victims of criminal conduct who are willing to forgive, if not to forget, and, in his chapter “To Forgive or not to Forgive,” he discusses the benefits of such an attitude.<sup>11</sup>

Given the high rate of recidivism, the notion of deterrence may not be a particularly effective tool in promoting public safety. However, the book does acknowledge that imprisonment protects the public from dangerous criminals and cites a 1994 pamphlet by Dr. Ruth Morris entitled “But What About the Dangerous Few,” which estimated that the truly dangerous criminals amounted to only one or two percent of the total prison population (there may be more than a few; in 2017 there were 14,000 adults in federal prisons alone).<sup>12</sup> She was a Canadian social activist and author who advocated the abolition of prisons, and pointed out that eight times as many homicide victims are killed by family and friends as by street crime.<sup>13</sup> She also advocated that, while the dangerous few should be imprisoned, they should be treated humanely and provided with treatment and re-education in small personal environments.<sup>14</sup> Judge Reilly totally agrees.<sup>15</sup>

As stated above, the Judge would scrap our current system of criminal justice and substitute the traditional aboriginal system based on the concept of restorative justice.

He writes that one of the best examples of the conflict between punitive justice and restorative justice is the 19th century US, case of *Crow Dog v Spotted Tail*, and he describes the case as follows:

In traditional times Indigenous people would use the restorative process even for charges as serious as murder. On August 5, 1881, Crow Dog shot and killed

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at 118.

<sup>10</sup> *Ibid* at 118.

<sup>11</sup> *Ibid* at 111-15.

<sup>12</sup> *Ibid* at 88-89.

<sup>13</sup> *Ibid* at 88-89.

<sup>14</sup> *Ibid* at 90.

<sup>15</sup> *Ibid* at 88-91.

Spotted Tail. The circumstances surrounding the killing are vague. Both men were sub chiefs in the Brule Sioux nation. Crow Dog was a traditionalist and had fought in the Black Hills War, including the battle of the Little Big Horn. Spotted Tail was an accommodationist and did not fight in the war. This may have been a cause for bad blood between them. There is also a reference to Spotted Tail having taken Light in the Lodge, the wife of Medicine Bear, a crippled man, into his household as his second wife, which may also have contributed to the animosity between himself and Crow Dog.

In any event, after the shooting, the matter was settled within the tribe according to long standing tribal custom. Crow Dog was to make restitution to Spotted Tail's family in the sum of US \$600 (about US \$15,000 today), eight horses and one blanket.<sup>16</sup>

Nevertheless, Crow Dog was charged and convicted of murder under the laws of the Dakota Territory, but this conviction was set aside by the US Supreme Court on the ground that federal law should not be construed to apply to crimes committed by one Indian against the person or property of another Indian.<sup>17</sup> However, in 1885 Congress enacted the *Major Crimes Act* which brought seven major crimes under federal law, and this was later increased to 15.<sup>18</sup>

In the chapter, "Restorative Justice," the judge relates his own experiences with community justice conferencing, and he writes:

The "community" is defined very simply as "those who did it and those who had it done to them." This encompasses anyone affected by the offence, and includes people related to the offender.

The results of these community justice circles were amazing. In my view they demonstrated the power of conversation and forgiveness.<sup>19</sup>

He gives an example of one he conducted:

Lazarus Wesley and his wife, Lily Wesley, both Stoney elders, were at the Chiniki restaurant at Morley after an emotional funeral. The deceased had been murdered. One of their granddaughters became engaged in a fight with one of the cooks at the restaurant. She and the cook had a child together and there was a dispute about child support. The police were called. They arrested the granddaughter. What they saw was a woman causing a disturbance in a public place, harassing a man at his place of employment. and arrested her. Upon seeing this Lazarus interfered and there was a scuffle between him and a police officer. Lily attempted to hit the officer with her cane, and the officer arrested both her and Lazarus, and

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<sup>16</sup> *Ibid* at 75.

<sup>17</sup> *Ibid* at 75-76.

<sup>18</sup> *Ibid* at 76.

<sup>19</sup> *Ibid* at 29.

charged Lazarus with assaulting a police officer. Lily slipped and fell on the icy parking lot outside the restaurant and sustained minor injuries. Lenny Wesley, one of the Wesleys' sons, was determined to sue the police because of the way they had treated his parents.<sup>20</sup>

Judge Reilly convened a community justice conference, and, although a number of people attended, he heard only from those who had been present at the restaurant.<sup>21</sup>

They talked about what had happened and how they felt about it. The granddaughter talked about her difficulties with child support and her child's father, the cook, her parents talked about seeing their daughter being arrested, the police officers talked about the crowd they faced at the restaurant and trying to control what appeared to be an explosive situation, the officer who had the confrontation with Lazarus apologized for his disrespect for the elder. Lenny addressed the officers and said that, after hearing everyone speak, he was satisfied they had done the best they could in the circumstances, the officers replied they had a better understanding of the situation and would withdraw the assault charge against Lazarus.<sup>22</sup>

In addition to the central theme of restorative justice, the book features insightful chapters on related topics including not only those mentioned, but also: Getting to Know the Stoneys; The Origin of Process; The Evil Cornwallis; Milton Born With a Tooth; The Right Thing; Respect; Paradigm Change; Rupert Ross; Punishment; Deterrence; Due Process; Sawbonna; Rev. Dale Lang; Advocacy v Conversation; Polarization; Drug Prohibitions; Sexual Offences; One Side Fits All; The TRC; and FAQ.

Judge Reilly has provided much food for thought and a thoroughly good and educative read.

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<sup>20</sup> *Ibid* at 29–30.

<sup>21</sup> *Ibid* at 30.

<sup>22</sup> *Ibid* at 31.