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THE INCORPORATION OF RESTORATIVE JUSTICE IN THE CANADIAN MILITARY JUSTICE SYSTEM

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TABLE OF CONTENTS

ABSTRACT

The Canadian military justice system mandates the disposition of service offences through legal processes requiring adjudication, a finding of guilt or innocence and, on conviction, a sentencing. At the same time, the civilian Canadian justice system does not require the resolution of disputes exclusively through trial-based judicial processes and this signals a military-civilian disconnect in the perceptions and practices of ensuring that justice is served.

The absence of formalized diversion practices in the Canadian Armed Forces is surprising, given the justification for maintaining a military justice system separate from civilian courts. The swift and vigorous adjudication of offences, employing the summary trial in particular, is viewed as the best means of re-instilling strong unit discipline and good morale: two key enablers of the operational effectiveness of the Canadian Armed Forces.

Two concerns exist when using a service tribunal to maintain discipline. First, discipline is a means of maintaining social control within a community; this control requires strong bonds between members and a cultural value of following rules. Punishment serves as a vehicle for the weakening of social bonds or for ostracism at worst, or merely quantifies the cost of committing an offence at best; it also has questionable deterrent value. Second, there is precedent within units of the Canadian Armed Forces for the use of diversion processes to handle disciplinary matters when problem-solving is deemed to be more effective for resolution than an assessment of fault.

The introduction of a formalized restorative justice diversion mechanism embedded within the military justice system may, in some circumstances, better serve the objectives of the summary trial process: to provide an opportunity for personal reflection on the importance of military values, and to enforce discipline.

THE INCORPORATION OF RESTORATIVE JUSTICE IN THE CANADIAN MILITARY JUSTICE SYSTEM

INTRODUCTION

Legislative reform and procedural changes to any justice system involve continuous improvement measures over time, and the military justice system is no exception.[1] The evolution of the Canadian military justice system has been a long and meandering one, and has often been accompanied by resistance to change. In recent years resistance has been somewhat set aside in favour of continuous modernization of the military justice system in response to changing interpretations of human rights and the civilian criminal code. The current Canadian Military justice system is one that attempts to reflect current Canadian values and rights, although it has not always been the case.

British laws and legal practices provided the initial framework for military law in Canada; laws that traced their heritage to the establishment of courts of chivalry during the European middle ages.[2] These laws were still used following the Confederation of Canada[3]; during the nineteenth and early twentieth centuries Canada's military predominantly used British military law for the separate services, modified from time to

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[1] However, these changes are often met with resistance among military members and concern that changes imposed in response to shifting societal expectations will serve to destroy military discipline. As an example, following the ban on flogging imposed by the British *1881 Army Act*, military authorities disparaged the perceived civilian encroachment over military law and the resultant loss of an essential disciplinary tool. Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*, (Vancouver: UBC Press, 1999), 11-12.

[2] *Ibid.*, 4.

[3] Confederation was the process by which the federal Dominion of Canada was formed on July 1, 1867 by the merger of four formerly British colonies.

time by legislation and regulations designed to address particular Canadian requirements.[4] As a result, prior to 1950 and the passage of the *National Defence Act*[5], there was a hodgepodge of service discipline rules across the military forces, with the exception of the Royal Canadian Navy which had initiated the development of a single code for use in naval units. Military law and the means to enforce discipline was a "confusion of authorities" until passage of the *National Defence Act*.[6]

The impetus for the creation of a *Code of Service Discipline*[7] was twofold. First, the disparate standards across the services was untenable to politicians and the public alike, and second there was a general frustration with the military justice system felt by civilians who joined the military to serve in World War II and who brought with them expectations of the "rights" they were afforded in civilian court processes.[8] The *National Defence Act*, and its embedded uniform *Code of Service Discipline*, provided the armed services of Canada with a more civilian-patterned justice system, and outlined a range of judicial processes which included the summary trial[9] as the lowest level of adjudication

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[4] Madsen, Chris. *Another Kind of Justice*…, 6.

[5] *National Defence Act*, R.S.C., c. N-5 (2013)

[6] Jerry S Pitzul and John C. Mcguire, "A Perspective on Canada's Code of Service Discipline" in *Evolving Military Justice*, ed. Eugene R. Fidell and Dwight H. Sullivan (Annapolis: Naval Institute Press, 2002), 236.

[7] *National Defence Act*, R.S.C., c. N-5 (2013), Part III.

[8] Pitzul and Mcguire, "A Perspective on Canada's Code of Service Discipline", 237.

[9] The military justice system has two kinds of service tribunals: the court martial and the summary trial. A court martial is a formal military court presided over by a legally qualified military judge. The procedures followed by a court martial are formal and similar to those followed by civilian criminal courts. Members facing a court martial are entitled to a lawyer free of charge from the Director of Defence Counsel Services and may also retain a civilian lawyer at the member's own expense. The prosecution is conducted by a legally-qualified officer from the Canadian military. A summary trial is the less formal of the two service tribunals and uses a truncated process. A summary trial is presided over by a commanding

following a charge of a service offence.[10]

Since the passage of the *National Defence Act*, numerous changes to the military judicial system have been and continue to be made.[11] However, the method for handling service offences has remained constant: the mandated disposition of a service offence by a legal process requiring adjudication, a finding of guilt or innocence and, on conviction, a sentence. This exclusivity of trial-based judicial processes is not absolute in the modern Canadian criminal justice system. In this regard, a significant military-civilian disconnect remains in the perceptions and practices of ensuring that justice is served.

This paper argues for the introduction of a formalized diversion mechanism embedded within the military justice system. Diversion processes, such as restorative justice, can in some circumstances better serve the objectives of the summary trial process: to provide an opportunity for personal reflection on the importance of military values, and to enforce discipline.

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officer, a delegated officer or a superior commander. Military rules of evidence do not apply at summary trials, there is no right to be represented by legal counsel, although the member is entitled to an Assisting Officer; and there is no right of appeal to a judicial body. The accused may "admit to the particulars" in a summary trial, but not plead guilty; in other words, the accused is agreeing with certain facts related to the alleged offence that are set out in the statement of particulars and consenting to dispense with the requirement that they be proven by calling evidence. These could be all or just some of the particulars. The procedures at a summary trial are straightforward and the powers of punishment are limited in scope. As a result, summary trials are not meant to try serious military offences. Office of the Judge Advocate General, *Military Justice at the Summary Trial Level*, B-BG-005-027/AF-011 (Ottawa: DND, 2011), 3-2 – 3.3.

[10] "Service offence" is defined as "an offence under the *National Defence Act*, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the *Code of Service Discipline*." *Queen's Orders and Regulations for the Canadian Forces*, Volume 1, Section 1.02. A charge is a formal accusation that a person subject to the Code of Service Discipline has committed a service offence. A charge "is laid when it is reduced to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings and signed by a person authorized to lay charges." *Military Justice at the Summary Trial Level*, 3-8.

[11] Pitzul and Mcguire, "A Perspective on Canada's Code of Service Discipline", 240.

POST-CHARTER EVOLUTION IN CANADIAN MILITARY LAW

Military law has evolved for hundreds of years, and usually lags behind but mirrors developments in the criminal justice system. Since the enactment of the *Charter of Rights and Freedoms*[12] in 1982 the Canadian military justice system has endeavoured to keep pace with the many developments of the rights-focused civilian justice system.

The existence and validity of the Canadian military justice system was implicitly recognized by the *Charter of Rights and Freedoms*, a document which forms part of the *Constitution Act*[13] of Canada. This acceptance was a critical requirement in 1982 for the continued existence of military justice, for without the exception granted in the *Charter of Rights and Freedoms* the ability to render military justice in-house would have ceased. In the decades since, the processes and practices of the military justice system have been subject to numerous changes in order to remain consistent with Canadian legal interpretations of rights and freedoms.[14]

Even so, changes to the military justice system have occasionally come about in lurches rather than through a slow, deliberate evolution. In general these episodes have been reactive measures to external events. One post-*Charter* bout of episodic change came about on the heels of work done by the *Special Advisory Group on Military Justice and Military Police Investigation Services* chaired by the late Right Honourable Brian

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[12] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[13] *Constitution Act*, 1982.

[14] Patrick J. LeSage, *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence*, last accessed 3 March 2013, http://www.forces.gc.ca/site/reports-rapports/patrick-lesage/_pdf/DND-Final-English-Report.pdf.

Dickson[15]. This group was charged by the Minister of National Defence in 1997 to review the *Code of Service Discipline*, the procedures for enforcing and investigating offences against the *Code*, and the prosecution and punishment of those who commit them.[16] The group also separately reviewed the quasi-judicial role played by the Minister of National Defence under the *National Defence Act*. These two reviews, carried out by the *Special Advisory Group* were in part a reaction to the impact of incidents involving Canadian soldiers in Somalia in the early 1990s. These incidents had deleterious impact on the perceptions of the public about the Canadian Armed Forces, and raised concerns about the organization as a whole and specifically about the effectiveness of the military justice system in maintaining discipline.

The concerns in question centered on incidents involving Canadian soldiers participating in United Nations peacekeeping efforts in Somalia.[17] In the spring of 1993 the brutal beating death of a Somali teenager at the hands of two soldiers created an international incident and opened what ultimately became a Pandora's Box of leadership transgressions.[18] As reporters sought information about the incident, indications of more problems emerged. The death of Shidane Abukar Arone, documented by photos which

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[15] Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: DND, 1997).

[16] LeSage, *Report of the Second Independent Review Authority.*

[17] A full description of the history of the mission, incidents and findings may be found in the Somalia Commission of Inquiry Report. *Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997), last accessed 14 January 2103. http://www.dnd.ca/somalia/somaliae.htm.

[18] Jane Gerster, "Experts wonder if military remembers lessons from Somalia affair," *Vancouver Sun*, March 16, 2013, http://www.vancouversun.com/touch/news/national-news/Experts+wonder+military+remembers+lessons+from+Somalia/8109767/story.html

were published in 1994, suggested recurring discipline problems and widespread internal leadership failures in one component unit of the Canadian Airborne Regiment and prompted the establishment of the *Somalia Commission of Inquiry* in 1995 led by Judge Gilles Létourneau[19]. While the work of the Commission was cut short, the final report of the inquiry was a striking attack on the procedures, support and leadership of not just the Regiment, but of the Canadian Armed Forces as a whole.

The repercussions of the incidents in Somalia resulted in leadership, training and disciplinary reforms on multiple fronts, one of those being the military justice system. In part, the *Somalia Commission of Inquiry* report stated "the military justice system in place during the Somalia deployment, and largely still in place today [1997] exhibited serious deficiencies. These deficiencies contributed to disciplinary problems before and during deployment."[20]

Running parallel to the *Somalia Commission of Inquiry*, the *Special Advisory Group on Military Justice and Military Police Investigation Services* found that numerous elements of the military justice system failed to keep pace with the sensibilities Canadian public.[21] One example was the sanctioned punishment under the *Code of Service Discipline* of the death penalty despite capital punishment having been removed as a penalty in the Canadian civilian courts in 1976.[22] The work of the *Special Advisory Group* constituted a wholesale review of the military justice system, resulting in

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[19] *Dishonoured Legacy…,* Volume 1.

[20] *Ibid.*

[21] *Report of the Special Advisory Group on Military Justice.*

[22] Kelly Blidook , *Constituency Influence in Parliament: Countering the Centre* (Vancouver: UBC Press, 2012), 97.

numerous recommendations for improvement. These recommendations were backed up by information obtained by the *Somalia Commission of Inquiry*.[23]

Following these concurrent reviews, many of the processes and procedure of the military justice system were amended through the passage of a series of bills, including Bill C-25 *An Act to amend the National Defence Act and to Make Consequential Amendments to Other Act*s.[24] These bills served to modernize the military justice system and, further, established competence requirements for those persons within the Canadian Armed Forces involved in the administration of justice. So effective were these changes that the Honourable Antonio Lamer, in his 2003 independent review of the provisions of the National Defence Act, one of a series of reviews required every five years under the provisions of Bill C-25, stated: "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence."[25] This opinion was by and large endorsed through the activities of the 2011 follow-on review.[26]

While by no means a perfect system, the Department of National Defence continues to explore avenues for improvement in a variety of areas related to military law generally, and to the military justice system specifically. The practice of other countries such as the United Kingdom, Australia, and New Zealand, to have looked at the Canadian military justice as an example when they sought to overhaul or refine their military

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[23] *Dishonoured Legacy…*, Volume 5.

[24] S.C. 1998, c. 35.

[25] Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35.* last accessed 15 February 2013, http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf.

[26] LeSage, *Report of the Second Independent Review Authority…*

justice systems might suggest that Canada is considered an international benchmark for a well-functioning military justice system.[27]

Notwithstanding this endorsement of the Canadian military justice system, and its current adaptation rate for evolving Canadian law, in many respects it still lags behind the civilian criminal justice system. One area that is absent in Canada's military justice system, but that has seen considerable gains in the realm of civilian justice, is consideration of formalized diversion practices, and in particular, restorative justice.

Restorative justice has been defined as "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal."[28] Restorative justice's focus is on the deleterious impact of crime on the framework and membership of society, in contrast to court trials which address legally relevant issues while protecting parties' rights. Parties to a restorative justice process engage in a form of values-based learning about the duties, obligations and responsibilities citizens have to their society and to fellow community members. Diversionary practices, such as restorative justice, are selected by representatives of the state (e.g. police, Crown counsel) to resolve an injustice when such an approach is deemed more effective to prevent further crimes by the offender. Not surprisingly, it is an appealing option to the state for dealing with

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[27] Michael Gibson, "Canada's Military Justice System," *Canadian Military Journal*. Vol. 12, No. 2 (Spring 2012): 61.

[28] John Braithwaite, "Restorative Justice and De-Professionalization," *The Good Society* 13 (1) (2004): 29.

disciplining youth and first-time offenders because of restorative justice's citizen-development component.[29]

The absence of diversion practices in the Canadian Armed Forces is surprising, given the underlying and enduring reasons for maintaining a separate military justice system, and in particular the reasoning behind permitting individuals without professional legal training or licensing to try military personnel who have committed service offences. "The Canadian military justice system has two fundamental purposes: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and, to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. It thus serves the ends of both discipline and justice."[30]

Discipline, efficiency and morale appear to be assessed by the Canadian Armed Forces as best accomplished through deterrent rules and punishment of violators by fines and incapacitation. Leadership deals with discipline and efficiency, so it also follows that justice needs to be executed by leadership at a more expedient and personal threshold that in the civilian justice system. The system of service tribunals and its deterrent nature are viewed as important contributors to the maintenance of control over the members of the Canadian Armed Forces by the leadership cadre.

However, discipline and justice are not solely maintained through deterrence and punishment. Effecting behavioural change and enforcing societal standards of conduct,

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[29] Public Safety Canada, "Restorative Justice in Cases of Serious Crime," last accessed 3 July 2013, http://www.publicsafety.gc.ca/res/cor/sum/cprs200507_1-eng.aspx.

[30] Gibson, "Canada's Military Justice System", 62.

also termed *social control*, are equally effectively achieved through processes that focus on the reparation of relationships and loyalties; those that are abandoned through the commission of a service offence. Further, historical evidence suggests that these processes occur within the Canadian Armed Forces, but are not recognized as elements of the official spectrum of judicial and quasi judicial processes that are available to Commanders and the personnel who serve Canada.[31]

The most recent change to the military justice system, as encompassed in Bill C-15 *Strengthening Military Justice in the Defence of Canada Act*, made changes to the National Defence Act to give recognition to victims of service offences and allows the provision of victim impact statements in the sentencing phase of military trials.[32] This step serves to recognize, in a formal way, that service offences have a psychological impact on other members of the community. The incorporation of restorative justice into military justice processes are quite possibly a next logical step. Deleterious victim and third party impacts, both individual and community, are implicitly acknowledged by Bill C-15 as outcomes of service offences, and harmful impact to community is the concern of restorative justice.

Ongoing changes in the military justice system, like those of Bill C-15, clearly signal that the Canadian government holds a desire to keep the military justice system

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[31] Minor transgressions such as lateness or early departure which fall under "absence without authority", are often dealt with informally by senior non-commissioned personnel engaging in a "one-way" conversation or a collaborative discussion when addressing infrequent transgressions of junior members. Additionally, transgressions which constitute offences under the *Code of Service Discipline* may be handled exclusively as administrative matters attracting progressive discipline involving escalating responses intended to correct the negative behaviour, starting with a formal counseling session by the chain of command.

[32] Bill C-15 *Strengthening Military Justice in the Defence of Canada Act,* 2013.

relevant to those subject to it. Additionally the government recognizes an obligation to the public, who have an expectation of a well disciplined and justly-managed military force who support and uphold the public institutions of Canada. Institutional loyalty and the importance of the roles and responsibilities of individuals in society are matters of overriding concern in restorative justice. The importance of these key elements of restorative justice would suggest that, if incorporated into the military justice system, such processes could serve to enhance discipline and morale, and complement other values-based training and professional development activities.

In order to be effective and accepted by leadership and service members alike, the incorporation of restorative justice as an element of the military justice system must be clearly aligned and consistent with the underlying purpose for a distinct military justice system. Accordingly, consideration of the adoption of restorative justice must be introduced with "creativity and leadership…in shaping and testing new approaches while at the same time being appropriately respectful of tradition, values and empirically demonstrable special demands of the jurisdiction"[33] To do otherwise could generate objections to a process that, by its collaborative and community-based nature, could be perceived as having the potential to erode the power of command and compromise control of personnel. Fortunately, the writings of political philosophers and legal academics lend support to articulating the connection between discipline, justice and value-based community and cultural strengthening; all desired outcomes of both military and restorative justice.

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[33] Eugene Fidell, "The Culture of Change in Military Law," in *Evolving Military Justice*, ed. Eugene R. Fidell and Dwight H. Sullivan (Annapolis: Naval Institute Press, 2002), 168.

THE SOCIAL CONTRACT

Military justice procedures mirror those applied in civilian criminal courts, with some differences. For example, service tribunals are not jury trials. However, military and civilian trials serve the same function of trying and punishing those who break society's laws. The civilian justice system categorizes offences as either summary or indictable with differing processes in place to handle them; likewise the military justice system provides for categorization of offences and differing processes in place to handle them, being: trials that are summary in nature and others by court martial. The type of service tribunal selected depends on a variety of factors including the rank of the accused, the nature of the offence and the severity of the punishment generally associated with a guilty finding for the crime. The procedures of a summary trial are less formal than at courts martial and powers of punishment are more limited than the powers of punishment of courts martial.

Summary trials are designed to speedily deal with relatively minor service offences. These offences are generally associated with *Code of Service Discipline* rules that are important for the maintenance of military discipline and efficiency at the unit level. These trials allow a unit Commanding Officer to effectively administer justice and return the member to duty expediently. Summary trials are viewed as important contributors to the operational effectiveness of the Canadian Armed Forces, as evidenced by their rate of use. In terms of trial-based means of enforcing service members' adherence to rules and regulations, summary trials dominate the landscape of the military

justice system, annually trying approximately 95 percent of service offence cases.[34] The summary trial processes conducted "exemplify the attributes of promptness, portability, and flexibility."[35]

A summary trial is more than a mere process to administer punishment for offences expeditiously, although it does that task well.[36] Summary trials are also an institutional byproduct of the unique social undertaking military members agree to upon enrolment. Military members have dual responsibilities and obligations as citizens; a primary duty to Canada and a second one to the Canadian Armed Forces. The second "citizenship" is an additional social undertaking, or social contract, military personnel enter into in addition to the one they implicitly agree to as civilian citizens of Canada. This second social contract has a higher contractual obligation in the matter of discipline, described as: "a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed."[37]

In order to meet the obligations of the military social contract, individual discipline must be learned, embraced and developed through institutional training and experience, and occasionally through correction. "In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is

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[34] Office of the Judge Advocate General, "Summary Trials Statistics", last accessed 18 April 2013, http://www.forces.gc.ca/jag/publications/index-eng.asp .

[35] Colonel Michael R Gibson, *Evidence of meeting #66 for National Defence in the 41st Parliament, 1st Session.* 13 February 2013, last accessed 6 May 2013, http://openparliament.ca/committees/national-defence/41-1/66/colonel-michael-r-gibson-1/only/ .

[36] The task is also accomplished with a 97% conviction rate, some of which were as a result of the offender admitting to the particulars of the case. Michel Drapeau, *Meeting number 65 of the Standing Committee on National Defence,* last accessed 13 February 2013, http://openparliament.ca/committees/national-defence/41-1/65/?page=1

[37] Gibson, "Canada's Military Justice System", 62.

indispensable. Thus, it is a mistake to talk of balancing discipline and justice – the two are inseparable."[38] To maintain order within a society, laws and other rules are instituted to guide citizens in their daily conduct with others. The military also establishes rules and laws for its members, but the enhanced requirement for discipline results in higher penalties for transgressions against the social contract, and the summary trial system is often the vehicle used to assess these penalties.

On the whole, society's citizens do not access the court system, and the majority of military members willingly follow the rules established to maintain discipline. Some citizens, however, do not follow an established rule, which begs the question: why is it that people choose to follow or not follow society's rules? Further, in what way does the justice system effect behaviour change in people after they violate the rules? In order to understand the interplay between discipline and justice, and to understand how trials and the court system function to correct deviant behaviour, an understanding of why rules and laws exist and why members of a society chose to follow them is helpful.

For the most part, it would stand to reason that people tend to follow certain protocols living in society with each other. If this were not the case, then each person would have the opportunity to gain more assets, prestige and power by simply taking the possessions of another person, either by force or by killing them. If no one followed any form of social protocols, eventually the human species would be exterminated in a gains-based battle to have it all. Clearly this has not occurred at any point in history, for the humans continue to walk the earth, despite the opportunities and advantages that can be gained through wealth.

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[38] *Ibid.*

Since earliest recorded history, and likely prior, thinkers and philosophers have grappled with the question of why people choose to conform to the rules of society when this choice might not necessarily be in their best interest. Around the world the majority of citizens do not plunder and steal, but rather go about their daily interactions with others in neighbourly fashion, seemingly choosing relationships over material goods. This neighbourly behaviour that people choose to exhibit may also be termed "moral" behaviour.

The question of what benefits and mechanisms exist to compel humans to collectively behave morally has resulted in many scholarly answers. One of the theories suggesting why the motivation to act morally seems to have universal application is referred to as "social contract theory."[39] There are many variations of the theory within the body of work on social contracts, but as a general principle this theory suggests that the natural human state is living as individuals within a situation of communal chaos and, occasionally, violence. In order to prosper, raise families and accumulate wealth, humans choose to create societies by establishing an agreement or "contract" between themselves. These contracts are pledges to set aside hostilities and create communal order so that people can live more peacefully. Within these established societies people work together for mutual benefit by acting morally on two levels: collectively by strictly following the society's rules, and individually by voluntarily integrating the behaviours, values and standards demanded of the society.[40]

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[39] Louis Pojman and James Fieser, *Ethics: Discovering Right and Wrong* (Boston: Wadsworth, 2012), 65.

[40] *Ibid.*

The fundamental basis for the legitimacy of states and their community-generated laws is this concept of the social contract. Through the mechanism of the social contract, citizens retain certain natural rights, accept restrictions on certain liberties, assume certain duties, and pool certain powers to be exercised collectively.[41] As a political concept, social contract theory explains the basis of governmental power.[42] As a community-building concept, it explains adoption of and adherence to the values, customs and traditions of a group or groups an individual chooses to associate with.

The acknowledged originator of the concept of the social contract was an English philosopher, Thomas Hobbes; outlined in his book *Leviathan*.[43] Written during the time of the English Civil War (1642–1651) the book's publication in 1651 coincided with the victory, albeit temporary, of those favouring democratic rule by citizens.[44] This victory of the people abolished the English monarchy and resulted in the beheading of the English king, Charles I. In the resultant progenitive leadership vacuum, philosophers sought ways to understand how a non-monarchical government could rule with legitimacy, and how that legitimacy would be generated. The royalist Thomas Hobbes was one of those philosophers.

Hobbes believed that people are not naturally good, but are fundamentally greedy and consistently act out of perceived self interest, seeking to maximize personal

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[41] *Ibid*., 70.

[42] *Ibid*., 66.

[43] Thomas Hobbes, *Leviathan*, Chapter 13, Project Gutenberg Ebook, html, last accessed 24 July 2013, http://www.gutenberg.org/files/3207/3207-h/3207-h.htm

[44] Ana Maria Stănilă, "Nature and society with Th. Hobbes and J.J. Rousseau. The evolution of man from the natural state to the social state and the social contract," *Scientific Journal of Humanistic Studies* (October 1, 2012), 60.

gratification and avoid harm. Further, he suggested that humans are all relatively equal in strength and either alone or in groups they have the ability to harm or kill each other. These two inherent features of humanity, if left unchecked, would lead to a state of social instability where life, as he famously penned, is "solitary, poor, nasty, brutish and short."[45] This situation of war between men, and by men against all, he termed a "state of nature" in which there are no laws, rules or standards except those people apply to themselves, and there is no concept of justice.[46]

Hobbes argued that a state of anarchy and chaos is ultimately in no one's self interest, and that at some level all individuals know this. It is this understanding of the negative nature of their natural state that inspires people to enter into a social contract. Individual freedoms are surrendered in favour of security, prosperity and peace, all generated from within a system of laws based on the "general will" of the group, or society. Further, the system of laws that serve to create a peaceful society are monitored by a governing body that seeks to punish those who do not follow the society's rules. Only within this social contract can moral behaviour arise, can enforceable laws be developed, or can notions of right or wrong, justice and injustice apply.[47]

Hobbes was by no means the only philosopher who espoused social contract theory, and his theory was not necessarily adopted carte blanche by others who followed his overall line of reasoning. Jean-Jacques Rousseau did not envision the natural state of humans as being at war, but rather suggested that people in their natural state were simply

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[45] Hobbes, *Leviathan*, Chapter 13.

[46] Pojman and Fieser, *Ethics*…, 66.

[47] *Ibid.*, 67.

undeveloped in regards to reasoning and morality.[48] Unlike Hobbes, who viewed laws as a means to create order, Rousseau saw laws as protective in nature. He believed that "the civilized state of human being not only transforms the actions of a rational human into moral actions, but it also corrupts him, by making him vulnerable."[49] According to Rousseau this vulnerability necessitates state protection of individuals against transgressors by a system of laws, and the mechanisms to enforce these laws through the detection and punishment of transgressors.

Regardless of how the nature of the pre-society human existence was viewed, both philosophers agreed that that the "state" is invented out of individuals' necessity to protect their wealth. Accepting some rules and obligations through the social contract allows humans to become part of a social community, one to which they willingly turn over executive and judicial responsibility. In turn, these new citizens of the state accept restrained freedom over absolute freedom which implies willingly adopting and obeying the established rules (society's laws) or attracting punishment.[50] In return for giving power to the state, citizens gain rights which place limits on the power the state can exercise over them. Philosophically speaking, not only will a society create the mechanisms to protect a person's possessions through laws, it will protect a person and the state from acting immorally or counter to the general will.[51] To avoid being trapped

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[48] Jean Jacques Rousseau, The *Social Contract, or Principles of Political Right*. Chapter 4. Project Gutenberg Ebook, HTML, last accessed 24 July 2013, http://www.gutenberg.org/files/3207/3207-h/3207-h.htm

[49] Stänilä, "Nature and society…", 61.

[50] *Ibid*., 62.

[51] *Ibid*., 63.

in behaviour driven by their natural, selfish or undeveloped beings, people will delegate "the individual freedom to the general will, [and] the community as a whole will force the individual to be free in the sense that the social community will establish a set of rules that will prevent him of being obliged to act against his will."[52]

The mid-last-millennial European trend of overturning or restricting monarchic rules was followed by a period of citizen-based rule through the mechanism of the state. States became responsible for maintaining legal systems and punishing citizens for violations of the law. The social contract with the state obligated citizens to accept this establishment and rule of law, and enter into an adjudication system that previously had been more of a private and local area of concern.[53] Over time, with the passage of more laws designed to accommodate the requirements of an orderly society, states in effect were passing laws to govern human behaviour; laws which reflected the group's collective understanding of custom, culture, right and wrong. In other words, the expectations for a disciplined community, allowing for individual safety and prosperity, were prescribed by the law.

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[52] *Ibid*., 62.

[53] Lena Halldenius, "Kant on Freedom and Obligation Under Law," *Constellations* Volume 18, No 2, (2011): 177-179.

LAW, JUSTICE AND THE SOCIAL CONTRACT

The "law" in relation to the notion of a social contract, is meant to describe the means by which social interaction is regulated in a way that supports the objectives of the social contract, being: safety, harmony, prosperity and the accumulation of wealth. Further, "law" describes a provision for the means by which adverse social interactions, or violations of the law, can be controlled.[54] These "legal" laws do not refer to regularities in the behaviour of things such as scientific empirical laws do, but instead "the law" prescribes desirable human conduct and prohibits undesirable conduct.[55]

The regulation of human behaviour requires that laws set out the structural framework in which governance is built and provide adjudication mechanisms such as courts and tribunals, which are empowered to resolve two broad types of disputes: those between citizens (civil law) and between citizens and the state (criminal law).[56] Beyond this transactional purpose, the law also serves to inform and instruct citizens on expectations of the particular society they choose to live in.[57]

It is generally held that the law has two broad general purposes: first, the law should contribute to a more orderly society, and second the law should contribute to a more just society.[58] In contributing to a more orderly society, state-sanctioned resolution

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[54] *Military Justice at the Summary Trial Level*, 1-1.

[55] Steven J. Burton, *Law and Legal Reasoning* (Boston: Little, Brown and Company, 1995), 4.

[56] *Military Justice at the Summary Trial Level*, 1-1.

[57] Pojman and Fieser, *Ethics*…, 156.

[58] Burton, *Law and Legal Reasoning,* 103.

to disputes is essential. Unsettled disputes cause disorder and discomfort and even the most non-violent disputes can be highly disruptive to the disputants and others; disputes violate the social contract. Settlement of non-violent disputes can often be accomplished through out-of-court measures, but if disputants persist in their anti-social behaviour compulsory public dispute settlement procedures such as court are used to determine a fair resolution. This principle applies equally whether disputes are between individuals, or between the community and a citizen. Neutral third party assessment of fairness should, in turn, contribute to a more just society.[59]

The law, therefore, is concerned with potential or actual breakdown of the social contract. The existence of law provides no insight into why people choose to behave in accordance with that which is expected by the social contract, laws only outline what will happen if they do not. The creation of a disciplined society has therefore not been adequately explained by the social contract or its resultant laws.

Some philosophers suggest that people follow the rule of law not merely because laws are developed and legislated by a state-sanctioned institution; law is binding because people perceive it to be legitimate and "sound in principle."[60] People in a society accept the law as legitimate and right and then willingly guide their conduct by applying themselves to society's rules, which have been established for everyone.[61] This implies that people self-regulate their own conduct; it also implies that people's conduct is not

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[59] Burton, *Law and Legal Reasoning*, 104.

[60] George P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996), 12.

[61] Robert S. Gerstein, "The Practice of Fidelity to Law," in *Compliance and the Law*, ed Samuel Krilov, Keith O Boyum, Jerry N. Clark, Robert C. Shaeffer and Susan O. White, (Beverly Hills: Sage Publications, 1972), 35.

manipulatively enforced by officials and institutions acting in accordance with the rules. Rather, people feel a sense of obligation to follow the rules because they believe everyone should follow them.[62] Adherence to law implies that people have made a commitment to the society to follow uniformly applicable rules "when their conduct affects the interests of others, not when they made such decisions on the basis of their own discretion."[63]

The reality is that people are not on a day-to-day basis consciously evaluating their conduct as being community-minded or altruistic. At some point in their journey into adulthood, people learn the value of discipline and incorporate the value into their personal conduct framework. On a day-to-day basis citizens generally abide by the law due to a habit of compliance, a sense of obligation and occasionally due to the threat of sanction, such as enforced loss of personal freedom and/or property.[64] At first glance, there would appear to be many reasons to not violate the law ranging from psychological impact through to incarceration, and for the most part people chose to obey the law. Some people, however, do not.

Despite the obligation to the social contract, an expectation of neighbourliness, and the threat of punishment, laws are not necessarily obeyed. Laws can be enacted to prescribe acceptable human behaviour, however some people will continue to behave as they wish, contrary to these laws and against the wishes of their neighbours. These violations of the law, and the expectations of their peers, necessitate a response from

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[62] Fletcher, *Basic Concepts…,* 44.

[63] Gerstein, "The Practice of Fidelity to Law", 35.

[64] Burton, *Law and Legal Reasoning,* 107.

society. Generally, the response is not to change the law to fit the unacceptable behaviour, or for citizens to extract punishment for transgressions against them; the accepted response is to discipline the deviant conduct through state-sanctioned practices that can include stigmatization, sanctions and punishment.[65] The state, rather than individuals, sees to it that "justice is served", which raises the question: what is justice?

Defining exactly what "justice" means can prove problematic, and there are many interpretations that vary depending on historical context, culture, and philosophical approach. Historically, justice has been viewed from many standpoints ranging from accepting law as the purview of the gods or fate through to the existence of a cosmic plan. In more modern times, humanistic bases generally form the cornerstone of understanding justice.

Modern notions of justice can reflect the several-thousand year old *lex talionis* retaliatory edicts of Babylonian ruler Hammurabi, which called for justice through punishment in equal measure to the violation, societal rank depending, and no more.[66] Sometimes justice is defined in a substantive and distributive way. In some understandings distributive justice is achieved through equality, maintaining that people should get or have the same amount of community benefit, regardless of how hard they

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[65] Fletcher, *Basic Concepts…,* 29.

[66] George E Vincent, "The Laws of Hammurabi," *American Journal of Sociology*, Vol. 9 Issue 6 (1904): 744.

work; others define justice distributively in terms of equity, being: a benefit in proportion to what they contributed to producing those benefits relative to others.[67]

These definitions look at the impact that a dispute has had on the prosperity of an individual and seeks to return the victim to a state where they are no less prosperous than they were before the dispute. The distributions are substantive in nature and are generally concerned with material wealth or opportunity.

While this may seem straightforward, different cultures may reflect divergent perceptions or visions of outcome or "substantive" justice.[68] Justice in substantial matters as in the amount or method of asset redistribution or in the payment of penalties for a violation of the law will vary with differing moral outlooks, societal preferences and diverse conceptions of what is "good."[69] The reestablishment of prosperity to a victim may sometimes be class-based, with prosperity more generously re-allocated depending on an individual's social status or position. Sometimes a value of the loss cannot be easily ascertained, or is a highly subjective amount. As a result of the disparities inherent with concepts of substantive justice, some individuals view a substantive resolution to a dispute as not being fair due to the application of judgment and discretion in defining prosperity and opportunity.

If the outcome of a legal process, then, is not viewed as serving justice, then serving justice may depend on the process providing justice and not the outcome.

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[67] Eric G. Lambert, Nancy Hogan, and Shannon M Barton-Bellessa, "The Association Between Perceptions of Distributive Justice and Procedural Justice With Support of Treatment and Support of Punishment Among Correctional Staff," *Journal of Offender Rehabilitation* Vol. 50 Issue 4 (2011):205.

[68] Fletcher, *Basic Concepts…,* 79.

[69] Stuart Hampshire, *Justice is Conflict*, (Princeton: Princeton University Press, 2000), 4.

Definitions of justice that focus on procedures, not outcomes, suggest that the justness of a decision can be determined by a fair process, regardless of whether that means it yields equal or equitable outcomes, or that it is predictable, or even accessible.[70] One view is that "fairness in procedures for resolving conflicts is the fundamental kind of fairness."[71] This is referred to as "procedural justice."

Procedural justice is concerned with the method and degree of transparency in the way which decisions are made. This is in contrast with distributive justice and its discussions of the equitability of the reparations, or the retributive justice of the Hammurabian eye-for-eye punishment of wrongdoing. This is not to suggest that procedural justice concepts resolve all the concerns associated with substantive or distributive notions of justice. On the contrary, establishing what is fair in procedural justice can also be problematic within the social contract.

The social contract theory lost favour with political philosophers in the 19th century, but in the mid 1900s political philosopher John Rawls reinvigorated the social-contract tradition in exploring the issue of fairness as justice.[72] Rawls's premise was that, when shielded from knowledge about other people in society, people are most interested in obtaining more "primary goods" throughout their lives: rights, liberties, opportunities, wealth and self-respect.[73] However, he argued, people in society are aware that not everyone shares the same view about which primary goods are best, how much of a

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[70] Ramona Paraschiv, "The Importance of Procedural Justice in Shaping Individuals' Perceptions of the Legal System," *Geopolitics, History & International Relations* Vol. 4 Issue 2 (2012): 165.

[71] Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000), 4.

[72] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), 5.

[73] *Ibid*., 123.

primary good is enough for others, or whether the primary goods should be used to pursue other goods that matter more. Further, people are aware that good fortune is allocated randomly at birth, and "the natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts."[74] What Rawls suggested was therefore that in order to achieve justice, the institutions of a society must be fair in the method that they use to provide opportunity.

Rawls suggested three kinds of procedural justice: imperfect procedural justice in which procedures are fair, but the result is not always just; perfect procedural justice in which procedures are fair and some sort of independent criteria exist to determine if the outcome is just; and pure procedural justice in which procedures are fair and by definition the outcome is just.[75] Other philosophers argue, however, that the law and the systems societies set up fall short of achieving perfect justice for three main reasons: humans make mistakes, perfect justice is not administrable, and the method to impose a final settlement may require compromise.[76]

Detractors of Rawls suggest that if justice is related to the particular social contract governing behaviour, then fairness cannot established in a vacuum devoid of the social construct in which it sits.[77] The requirements of procedural justice vary immensely

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[74] *Ibid*., 87.

[75] *Ibid*., 85-86.

[76] Burton, *Law and Legal Reasoning*, 161.

[77] James R Meindl and Karen Thompson, "Justice and Leadership: a Social Co-constructionist Agenda," in *Current Societal Concerns about Justice*, ed. Leo Montada and Melvin J Lerner, (New York: Plenum Press, 1996), 138.

in different places and times by virtue of local customs and rules, and this causes unfairness in any procedure, they contend. Philosophers concur that societal customs and conventions should be subordinate to a just and fair weighing of conflicting policies, proposals and opinions to arrive at a decision.[78] Whatever the society, dispute resolution procedures must allow for a fair hearing to all sides in a conflict, and the institutions that are involved in the resolution of the conflict must have earned respect and recognition by society.[79]

In addition to the substantive and procedural perspectives on justice, some modern moral philosophers suggest a psychological or transformative meaning of justice. One relatively modern definition of justice is "an active and life-giving virtue which defends and protects the dignity of every living person and is concerned with the common good, insofar as it is the guardian of relations between people."[80] This definition sees the law as having two distinct elements to it: the legal legislative element comprising the codification of right and wrong, and the moral element which concerns itself with a value system encompassing fairness, truth, honesty, respect and compassion.

In the modern Canadian legal framework outcomes are important, but dispute resolution is primarily governed by principles of procedural fairness wherein citizens are provided a meaningful opportunity to be heard, and to have disputes resolved by

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[78] Hampshire, *Justice is Conflict*, 55.

[79] *Ibid*.

[80] Jim Consedine, "Twin Pillars of Justice: Morality and the Law," in *Restorative Justice: Contemporary Themes and Practices*, ed. Helen Bowen and Jim Consedine (Lyttelton: Ploughshares, 1999), 37.

impartial arbitrators.[81] The degree of fairness in dispute resolution procedures varies, with circumstances that may deny opportunity to an individual subject to the highest degree of fairness (as for example personal liberty), and may subject an individual to a lesser degree of fairness when a dispute is more administrative in nature.[82] In effect, the degree of procedural fairness available to disputants operates on a sliding scale depending on the potential distributive or substantive impact on a person who violated society's rule set.

Setting aside notions of justice as being the purview of a god, or somehow administered at the discretion of solar influences, what is consistent in the broad overview of justice discussed above is that justice operates in the realm of interpersonal relationships. Each of these definitions suggest that what is "just" must be described and understood as being a matter of relationships with other members of society, whether as individuals or as represented by the state. Justice is a matter of community and the relationships between members of that community.

In short, people's perceptions of the fairness of processes and the distributive outcomes associated with dispute resolution both contribute to a sense of justice being attained: people are concerned about the outcome of a legal process, but they are also concerned with the process by which those outcomes were reached.[83] They are also making personal assessments of fairness within a social environment defined by neighbourly relationships between community members. If fairness is a matter of

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[81] *Military Justice at the Summary Trial Level,* 1-1.

[82] *Ibid.*

[83] Meindl and Thompson, "Justice and Leadership…", 144.

relationships and perceptions, then perhaps what is “just” is situation dependant. Therefore, it is not particularly helpful to look at one interpretation of justice independently of another, and it is possible that what is just is fundamentally best determined on a case-by-case basis with reference to an assessment of a just outcome as perceived by those parties to a dispute.

CRIME, DETERRENCE AND THE SOCIAL CONTRACT

Social contract theory suggests that people relinquish absolute freedom in return for an orderly society in which they can prosper. The constrained behaviour of the society which allows order to prevail is defined by law. Laws are followed because they are viewed as legitimate, just and sound in principle and, in the event that violations occur, disputes will be resolved impartially and fairly. Justice is served by the state, and orderly society prevails. In effect, the institutions of the social contract suggest "the right thing to do" and the average citizen would want do what is right because they value the relationships between citizens of the community.

Notwithstanding these logical social contract principles, there are still persons who, for a variety of reasons, dismiss the social contract that is offered to them between birth and adulthood. They choose "the wrong thing to do" despite the legitimacy of the laws established to prescribe moral behaviour. As a result, philosophers have examined the circumstances and motivations that would cause an individual to transgress against another.

Violations of the law which might attract a distributive fine or result in a loss of opportunity, for example incarceration, can be lumped for the purposes of social contract theory under the general term "crime". A definition of crime is "an act (usually a grave offence) punishable by law"[84] This definition, while useful for labeling the substantive outcome of undesirable behaviour as breaches of the law, does little to help understand

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[84] *The Canadian Oxford Dictionary* (Don Mills: Oxford University Press, 2001).

the nature of the criminal process or, in other words, the motivators to abandon the social contract and commit a crime against another person or a state institution.

"Crime whatever its form, is a kind of behaviour which is poorly regarded in the community compared to most other acts, and behaviour where this poor regard is institutionalized."[85] Implicit in this statement is the notion of a deliberate behaviour choice on the part of an individual. What distinguishes an act of crime from error is not necessarily the outcome, but the defiant nature of the choice to reject the social contract and violate social norms. In other words, the intent to disregard the established laws and controls that society has imposed makes a particular action a crime. This definition suggests that it is not so much the act itself that should be examined, but the motivators behind the act. Therefore a better process or motivator-based definition of crime might be "acts of force or fraud undertaken in pursuit of self interest."[86]

Social contract theory suggests that it is not to the ultimate benefit of individuals to pursue self interest through the domination of others and the appropriation of their wealth. Society has institutionalized its disregard for such activities by demanding punishment of those who choose to commit crimes. Nevertheless, a person might ask: "why not commit crimes if there is a possibility I will get away with it?" If an individual can break the social contract where it is to their benefit and not be punished, it is suggested that people will indeed take that chance.[87] Over history there have been many

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[85] John Braithwaite, *Crime, Shame and Reintegration*, (Cambridge: Cambridge University Press, 1989), 2.

[86] Michael R Gottfredson and Travis Hirschi, *A General Theory of Crime* (Stanford: Stanford University Press, 1990), 15.

[87] Pojman and Fieser. *Ethics*…, 71.

legal and social structures put in place to deter individuals from taking the chance, even if they were not to be caught in this lifetime. In addition to society's laws, many religious prohibitions exist, suggesting that punishment is available on earth if one is caught, but it is also available in the afterlife at a god's hands if one escapes detection.[88] The afterlife aside, an examination of the motivations to not commit crime in this life, given the apparent limitations of social contract theory, is essential to understanding the law.

Game theories are helpful in understanding why individuals might be inclined to forego the commission of crime. Researchers validate these theories using models of interaction involving games in which players make decisions in attempts to generate the most benefit to them personally: usually through cheating, deception or betrayal. What these games tend to demonstrate is that, while short-term gains are possible, with subsequent runs of the game over time, other players will catch on and retaliate. In effect Hobbes' vision of a natural human state of chaos is borne out through game theory simulations. Game theory suggests that cooperation with other players is the only path to long-term cumulative reward in these games involving limited or scarce resources.[89]

A decision to be fair and honest in dealing with others is in rational self-interest, which relies upon individuals to make reasoned and deliberate choices about the best long-term payoff to be had. Following this line of reasoning, it might then be fair to assume that criminal motivation is an irrational response to the conditions of society. Many theories of criminal behaviour exist ascribing anti-social behaviour to social, psychological, physical and intellectual factors that impede an individual from being

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[88] *Ibid.*, 73.

[89] *Ibid.*, 74.

rational, but on closer examination criminal behaviour can actually be rational behaviour if there are positive long-terms payoffs; this is the work of rational choice perspective theory.

The rational choice perspective theory of criminal motivation is a theory where offenders are viewed as active decision-makers, rather than reactive to adverse psychosocial needs.[90] The theory of rational choice is based on an assumption that people act based on the perceived consequences of that action, and people will choose those actions which maximize payoff and minimize costs.[91] Under this theory offenders are viewed as deciding on the time, location, targets and means of their offences and making those decisions from a purely personal perspective.[92]

Rational choice theory is similar to the notion of the social contract in that both rely on a rational person making a decision that enhances their own situation, but differs in that rational offenders have no recognition that a limited choice of action can result in a better overall personal situation in the long run. In effect, criminals are approaching the notion of violating the social contract from the same perspective as an individual who would uphold it; the difference is that the former is "not defeated by ill fortune."[93] This could be due to not experiencing game theory conditions and engaging in short term forecasts, not understanding that ill fortune could result, or engaging in a cost-benefit analysis and assessing the potential payoff as higher than either the likelihood of being

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[90] Ronald L Akers, "Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken," *Journal of Criminal Law & Criminology* (September 1990): 654.

[91] *Ibid*., 654.

[92] *Ibid*., 663.

[93] Rawls, *A Theory of Justice*…, 573.

caught or the level of punishment if caught. If this is so, the notion that even rational individuals might deliberately violate the social contract is not desirable. A rational decision to commit crime defeats the social contract's objective of creating orderly and safe society.

Assuming that criminals are rational individuals who undergo a form of cost-benefit analysis for any offences they might be considering, it is then logical to structure within a legal system a range of punishments that are known, undesirable and likely carry a cost weighting that outweighs, or has the potential to outweigh any benefit that could be derived from the commission of a crime. This form of "social insurance" will cause individuals to consider more seriously the specter of punishment in their cost-benefit analysis of potential actions and, theoretically, if the potential for punishment is significant enough, this will diminish perceptions of self-interest flowing from a particular behaviour. This is the basis on which the theory of deterrence is built.

To deter is to "discourage (someone) from doing something by instilling doubt or fear of the consequences."[94] According to deterrence theory, the pain of actual or threatened legal punishment should be seen as offsetting the motivation, pleasure or profit gained or anticipated from committing a crime. These motivations and profit or pleasure payouts are presumed to be constant across a range of individuals who might rationally contemplate an anti-social behaviour and, as a result the certainty of severe

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[94] *The Canadian Oxford Dictionary*.

enough punishment will yield a demonstrably poor cost-benefit result that will in turn deter criminal activity.[95]

Deterrence through punishment is seen as an essential component of most justice systems; it is not in society's best interest for repeated breaches of the law to occur so, assuming citizens are rational, in order to stop crime the costs of criminal action must be seen to outweigh the benefits. The objective of deterrence is to step in where the social contract is not strongly accepted or valued by individuals, and it acts as an additional bulwark against the adoption of anti-social behaviour. In order to maximize peace and prosperity to individuals, and thereby achieve social harmony, society is best served by the prevention of future harm and deterrence measures are seen to accomplish that.[96]

The prevention of criminal behaviour through a deterrent fear of punishment takes two forms: general deterrence and specific deterrence. Most court-applied forms of punishment such as fines and jail time are designed to induce all individuals, both potential offenders and past offenders, to complete the deterrence cost–benefit analysis, find it wanting and stop them from perpetrating the offence.[97]

General deterrence can be defined as the impact of the threat of legal punishment on the members of society at large. The success of general deterrence depends on the ability of the range of potential punishments to be publicized and understood.[98] As a

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[95] Akers, "Rational Choice…", 654.

[96] Kevin M. Carlsmith, John M. Darley and Paul H. Robinson, "Why Do We Punish? Deterrence and Just Desserts as Motives for Punishment," *Journal of Personality and Social Psychology* Vol. 83, No. 2 (2002):284.

[97] Carlsmith, Darley and Robinson, "Why Do We Punish? …", 284.

[98] *Ibid.,* 286.

result, general deterrence results from the perception by members of society that because laws are enforced, there is a risk of detection and punishment when society's laws are violated. With this knowledge in hand, individuals will accept restrained freedom over absolute freedom because they understand clearly the detrimental outcome to themselves personally, if not the outcome to society, and will act in self interest to avoid these outcomes.

On the other hand, specific deterrence can be seen as the impact of the actual legal punishment on a particular member of society who commits a crime, and is therefore concerned with an offender's actual experience of detection, prosecution, and punishment. The objective of specific deterrence is to dissuade an offender from re-offending.

The sentencing of a punishment, under a justice system that has deterrence as a pillar of crime prevention, is a key activity. Sentencing must be seen to be fair and be seen to serve justice as well as offering deterrent value. Judicial considerations during the sentencing process of trial include choosing the best means to reestablish the social contract by promoting a sense of responsibility in the offender.[99] Section 718 of the Criminal Code of Canada defines the purpose of sentencing thus:

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[99] *Criminal Code of Canada* R.S., 1985, c. C-46, s. 718.

> The fundamental purpose of sentencing is 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:
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> a. to denounce 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 acknowledgment of the harm done to victims and to the community.[100]

Notwithstanding the justice system's strong reliance on the crime-preventing deterrent effects of punishing offences as evidenced by the principle of sentencing, numerous studies call into question the ability for real or perceived punishments to actually deter members of society from rejecting or abandoning the social contract and committing crimes. Research has suggested that in the matter of general deterrence "fear of punishment by itself will be unrelated or weakly related to criminal acts."[101] Research does suggest that the threat of being apprehended reduces crime, which actually points to policing rather than punishment and calls into question the utility of creating and publishing a scale of punishments, or even administering them.

The result of specific deterrence in preventing the reoccurrence of anti-social behaviour among offenders is even more disappointing. Incarceration as a specific deterrent method, which in Canada is the most extreme form of criminal punishment available, does not appear to deter repeat crimes. In some studies it has been found that

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[100] *Criminal Code* (R.S.C., 1985, c. C-46).

[101] Akers, "Rational Choice…", 659.

offenders receiving jail sentences have been shown to have recidivism rates similar to those receiving community-based assessments, such as treatment, surveillance and community service.[102] Other studies show that those who have been most severely punished are actually the most likely to reoffend, suggesting that specific deterrence may be failing to achieve its purpose in some cases.[103]

Deterrence does not appear to fulfill its promises and step in where the social contract is not accepted or valued by individuals. Rather than providing any sort of transformative and deterrent role in reconnecting the offender to the social contract, the most effective purpose of a severe sentence appears to be the incapacitation of individuals who have abandoned the social contract. The denial of opportunities, both positive and negative, through the incarceration of chronic high risk offenders is likely in society's best interest, but is not an effective deterrent against future crime.[104]

Interestingly, the research landscape indicates that many offenders would prefer to go to prison than face community sanctions.[105] Indications are that those who will experience shame or embarrassment as a result of their involvement in a crime are less

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[102] P. Gendreau, C. Goggin, and F.T. Cullen, "The Effects of Prison Sentences on Recidivism," (Ottawa: Solicitor General Canada, 1999) last accessed 10 June 2013, http://www.publicsafety.gc.ca/res/cor/rep/1999-12-epsr-eng.aspx.

[103] Thomas Gabor and Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities,and Justice System Expenditures*, (Ottawa: Department of Justice, 2002) last accessed 29 May 13, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_1/rr02_1.pdf

[104] Gendreau Goggin and Cullen, "The Effects of Prison Sentences on Recidivism".

[105] Gabor and Crutcher, *Mandatory Minimum Penalties….*

likely to commit that crime.[106] This speaks not necessarily to a failure of deterrence as a theory but perhaps a failure of the tools of deterrence that the justice system has relied upon for so long. If the embarrassment or shame experienced by an offender provides better protection to society from recidivism, deterrence may be better achieved through moral prohibitions associated with anti-social behaviour. In effect, publically revealing that an offender has broken the social contract may be a better method of specific deterrence, and possibly a better method of general deterrence.

Research results are not inconsistent with the notion that, under the social contract, justice is understood as being a matter of relationships with other members of society. The punishment related to a violation against a person may be most acutely felt when it involves a personal interaction by the offender with the harmed individual. At some level, exploiting the element of relationship in community may reconnect the offender with the needs of community, with a better-informed rational decision-making framework and, importantly, with the social contract.

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[106] H.G. Grasmick, Robert, J. Bursik Jr.,and Bruce J. Arneklev, "Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions," *Criminology* 31(1) (1993): 41-67.

SOCIAL CONTROL AND THE SOCIAL CONTRACT

Laws assist in creating order for society and outline punishments for the purposes of deterrence and sentencing, but the assessment of whether justice is served appears at best to be complex and fluid. The presence of law does not prevent crime; neither does deterrence fully answer the question of why people still commit delinquent acts which fly in the face of the social contract. At first blush this would suggest that the social contract is a flawed theory that should be abandoned. However, there is a suggestion that community sanctions are effective in reducing recidivism, suggesting that research in the area of relationships in society may hold the key to understanding the power of the social contract, and how it operates to achieve an orderly society.

Social bond or social control theories provide a framework for examining the impact of relationships on the behaviour of individuals in society. There are a number of variations on the theory but generally social control theory provides insight into how and why the behaviour of an individual conforms to that which is generally expected in society, by suggesting that attention should be paid to reasons why the social contract is respected, rather than focus on reasons why some individuals reject that contract. Embryonic social control theory principles can be traced back to Thomas Hobbes' social contract theory. Referring to the inherent tendency of individuals toward self-indulgence and evil which results in a chaotic world, he took the approach of asking how to ensure people would not be concerned exclusively with self-interest when he suggested the restraining influence of the social contract and the corresponding role of government.[107]

[107] Hobbes, *Leviathan*, Chapter 14.

Theories of social control suggest that rather than looking for reasons why people engage in criminal behaviour, instead the more important work is gaining an understanding of why people do not commit crimes.[108] The general premise of these theories is that every person naturally possesses a hedonistic drive to act in selfish and aggressive ways, ones that that can lead to criminal behavior but that for the most part people choose to control.[109] As a result, understanding what motivates a person to not follow their natural preferences should yield information that reduces crime and creates a more orderly society. Social control theory shares similarities with social contract theory as both argue that human nature would create a chaotic world were there no constraints imposed by implicit social contracts, agreements and arrangements among people.[110]

Under social control theory, low personal self-control would explain an individual's propensity to commit crimes and high self-control could explain an individual's likelihood of conforming to social norms and laws. Contrary to the rational choice theory, some researchers suggest that the likelihood of committing a crime depends in large part upon a person's level of control over impulsive behaviour, pointing to the low level of skill or planning involved in many routine crimes.[111] While some complex crimes require a great deal of planning and skill, for the most part excluding high-level corporate fraud or murder contract for hire situations, self interest and self control as motivators to commit crime have proven to have withstood empirical

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[108] Travis W. Franklin, Jacinta M. Gau and Travis C. Pratt, *Key Ideas in Criminology and Criminal Justice*, (Thousand Oaks, CA: SAGE Publications, Inc, 2011), 58.

[109] *Ibid*., 57.

[110] Hobbes, *Leviathan*, Chapter 14.

[111] Gottfredson and Hirschi. *A General Theory of Crime*, 89.

criminology research.[112] The question that then must be answered is: how is self control attained?

As a sociological theory rather than a psychological one, social control theory suggests the locus for control is found in a person's pro-social values and the bonds they form to people and institutions. These theories attribute law-breaking to the weakness, breakdown, or absence of social bonds that are presumed to encourage law-abiding conduct in members of society.[113] Therefore, the challenge to the state in exerting social control over citizens is found in the degree to which social groups or institutions can make norms or rules effective, and this in turn is related to the affection people have for those group and institutions.

Social control theory suggests that deterrence and rational choice theories are connected to social and behavioral learning theories.[114] One of the earlier and still influential social bond/social control theories suggests that social bonds are formed through four interrelated variables that may affect one's likelihood of conforming to, or deviating from, the norms of society: attachment, commitment, involvement and beliefs.[115] Attachment refers to the level of emotional connection and empathy that one has for other community members and institutions. Commitment refers to people's investment in and the importance of their social relationships, relationships which they would not want to jeopardize by committing deviant acts. Involvement refers to how

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[112] Franklin et al., *Key Ideas*…, 54.

[113] Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969), 16.

[114] Akers, "Rational Choice…", 655.

[115] Hirschi, *Causes of Delinquency*, 162-191.

much time people are choosing to spend in participating in legitimate community building activities and, finally, belief refers to the acceptance of the value and desirability of obeying society's rules and the degree to which one behaves in conformity to the law.

The overarching assumption of this theory is that the more important community values, members and institutions are to a person, the less likely he or she is to engage in criminal or deviant behavior. The first two variables noted above seem to make it possible for social control processes to curb or prevent delinquency in youth, and possibly prevent white collar crime, the latter of which can exhibit a low detection rate and possess poor deterrent value.[116] In short, the more committed individuals are to the social contract with each other and the state, the more likely they are to agree to the rules of conduct because they learn to understand that it is in the collective and, by extension, their personal best interest.

The motivation to commit crime is assumed to be constant across the population under social control theory. The social bonds that control our behavior are social conventions rather than formally adopted laws, and importantly they are bonds that have been internalized through experience, teaching and cultural immersion.[117] Deviance results when an individual's bond to their society is weak or broken. Social control theory suggests that the way to create an orderly and prosperous society is to develop strong individual bonds within and to the state in order to thwart crimes, or repair broken bonds

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[116] Braithwaite, *Crime, Shame and Reintegration*, 68.

[117] Desmond P. Ellis, "The Hobbesian Problem of Order: A Critical Appraisal of the Normative Solution," *American Sociological Review* Vol. 36, No. 4 (Aug., 1971): 697.

to prevent recidivism.[118] This perspective on crime reduction is the one in which informal and restorative justice practices were incubated.

According to social control theory, through the bonds of social connectedness a certain "ethical certainty" about right and wrong within a particular society or culture is developed within individuals.[119] Through living within the patterns of community life, interacting positively with groups and institutions and feeling connected and attached to others, a strong moral deterrent is generated.[120] This moral deterrent is not an externally imposed deterrent; it comes from and is generated within the individual.

A significant body of research on social control theory centers on youth offenders. The interest in juvenile crime is an important area in criminology because actions at the point when individuals are being socially and psychologically formed into full members of the community affect their relationship with the community as adults. A socially-bonded transformation from youth to adult will better guarantee law-abiding citizens, the research suggests.[121] The process of acculturating civilians into the military culture is also a transformative process, and there are parallels to citizen development and the formation of bonds to the military institution and resultant individual loyalty, discipline and operational effectiveness.[122]

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[118] Ibid., 698.

[119] Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Portland: Hart Publishing, 2010), 122.

[120] *Ibid*., 122.

[121] Hirschi, *Causes of Delinquency*, 160.

[122] Allan D. English, *Understanding Military Culture: A Canadian Perspective* (Montreal: McGill-Queen's University Press, 2004), 23.

If institutional bonding is an important part of military acculturation, then social control theory is a key to understanding discipline, deterrence and loyalty. The suggestion from the research is that this is a moral development process based in the bonds created between an individual and the community they are a part of. If discipline is best attained through developmental processes, then this research calls into question the efficiency of using corrective measures such as punishment in order to maintain or enforce discipline within the ranks of a military unit.

Understanding the dynamics of discipline therefore requires a departure from considerations of deterrence and punishment under the law, to a focus on the examination of the development of morals and moral behaviour. Understanding the nature of discipline appears to require an understanding of the basis of a person's choice, through moral deterrence, to adhere to the social contact.

ETHICS AND THE SOCIAL CONTRACT

The general premise of the social contract and social control theory is that every person naturally possesses a hedonistic drive to act in selfish and aggressive ways, ways that can lead to criminal behavior. The determination of how best to accomplish justice and punishment depends largely, then, on the assumptions being made about the nature of people who could potentially enter the criminal justice system as offenders.

Political philosophers have categorized people as any of rational, irrational, or virtuous.[123] Each of these categorizations, if accepted by a particular society, will result in a different manifestation of the society's legal justice system.

A rational person is motivated to adhere to the social contract by assessing the likelihood and impact of being punished for an offence relative to the possible personal reward and, if the legal system were structured properly, that person would not commit a crime.[124] If the assumption about potential offenders is that they are, by and large, rational beings, then the emphasis of a particular society's justice system will reflect the previous discussion on externally imposed deterrent processes designed to curb antisocial behaviour.

Where the assumption about the fundamental nature of the people who live in a society and who are likely to commit offences is that they are irrational or incompetent, the predominance of judicial measures in that society must be in the nature of detection,

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[123] John Braithwaite and Heather Strang, "Connecting Philosophy and Practice" in *Restorative Justice, (*Dartmouth: Ashgate, 2000), 204.

[124] Carlsmith, Darley and Robinson, "Why Do We Punish?...", 284.

punishment and incapacitation. Where a society views their citizens as incapable of reasoning, it is logical to suggest that it is in society's best interest to imprison citizens who violate the rules because they are simply unable to understand or commit to a social contract.

Where there is an underlying assumption that the citizens of a community are fundamentally virtuous, however, social control-based dispute resolution processes that incorporate an emphasis on behaviour change and citizenship development will be an integral part of society's justice system.[125] These processes are generally referred to as restorative justice processes.

Virtues can be described as "trained behavioural dispositions that result in habitual acts of moral goodness."[126] The value of virtuousness is in the actions and behaviours it inspires. Virtues have been viewed as an important component in excellence of character; they are not something an individual is born with, but are developed over a lifetime. The development of virtues, morals, or a person's ethical framework, is an iterative process as the "virtuous person" seeks to live a good life, and in particular to live a good life in community.[127] Virtues are not an intellectual or reasoning skill, instead virtues center on the generation and experience of feelings such as sympathy and loyalty.

Virtue, like justice, operates in the realm of interpersonal relationships. Thomas Hobbes contended that virtues were essential for maintaining the peace within the social

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[125] Braithwaite and Strang, "Connecting Philosophy…", 209.

[126] Pojman and Fieser, *Ethics*…, 146-7.

[127] *Ibid.,* 148.

contract.[128] Under social contract theory, morality and virtues emerge through the forging of social agreements made in the transition from a state of chaos to a state of peaceful living. These virtues permit the willing adherence to rules, and the avoidance of anti-social behaviour. This virtuous attitude will, Hobbes contented, naturally translate into a disciplined community.[129]

Similarly, the ethical and disciplinary framework for the Canadian Armed Forces depends to a great extent on the notions of morality, ethics and virtue.[130] Morality is an individual matter and there is a close relationship between virtues, ethics and morality as understood in the military context.[131] In this context, ethics are the concern of particular roles individuals fill in their community, and in their interactions with others. In role, if people breach the rules they are said to behave unethically and bring dishonour to their position or social role. In contrast, when operating as private individuals, immoral action brings dishonour on them. The community-based nature of ethics is a particularly appropriate one to use given the collective nature of military life and operations and the blurred line between private life and a life of duty.[132]

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[128] *Ibid.,* 152

[129] *Ibid.,* 153.

[130] *CFJP-01 - Canadian Military Doctrine* (Ottawa: DND Canada, 2011), Section 0411.

[131] George P. Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996), 140.

[132] English, *Understanding Military Culture…, 10.*

Ethics can be defined as "moral principles; rules of conduct" with morals further defined as "concerned with goodness or badness of human behaviour."[133] Implicit in these definitions is the concept that ethics and morals are things that must be taught and passed from generation to generation. A military force, with unique behavioural expectations not present in the greater society, by extension holds an even greater concern with the teaching and learning of the standards and expectations of specific behaviour, which include such motivators as loyalty and discipline.[134] In effect, the rules of the military's unique social contract must be actively taught and reinforced, due in part to the interdependencies demanded of military units and personnel.

Ethos is related to ethics, but is seen as even less of an individual matter, in role or in private, than is the notion of ethics. Ethos is a "characteristic spirit or attitude of a community"[135] which emphasizes not the rules of conduct that comprise ethics, but the underlying spirit which motivates the ideas, customs and culture of the community. Its community-centric definition suggests that ethos can only arise through the collective attitude and action of a society's members. Canadian military ethos comprises values, beliefs, and expectations that identify and explain fundamental beliefs about military service.[136] Through the exercise of military ethos, the willing subordination of the armed forces to civilian control and the rule of law is achieved.[137] Military ethos also supports

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[133] *The Canadian Oxford Dictionary*.

[134] English, *Understanding Military Culture…, 23.*

[135] *The Canadian Oxford Dictionary*.

[136] *CFJP-01 - Canadian Military Doctrine*, Section 0411.

[137] *Ibid.*

and demands its own social contract embedded within the greater Canadian society setting.

There are four core military values that are part of the Canadian Armed Forces' military ethos: duty, loyalty, integrity and courage. The cornerstone beliefs and expectations about military service that mark it as a distinct community includes:

- Unlimited liability, the fundamental condition under which all members of the CF are required to accept, without reservation, that they must carry out their missions and tasks regardless of personal discomfort, fear, or danger.
- Fighting spirit, the fundamental quality required during combat operations in order to act decisively and aggressively in the application of lethal force.
- Discipline helps build the cohesion that enables individuals and units to achieve objectives that could not be attained by military skills alone and allows compliance with the interests and goals of the military institution while instilling shared values and common standards.
- Teamwork builds cohesion while combining the individual talents and skills of team members to enhance versatility and flexibility in the execution of assigned tasks and missions. [138]

Taken together these beliefs and expectations define the military ethos, an ethos that is actively developed and nurtured to create a distinct and functionally-essential culture.[139] From a social contract perspective, Hobbes defined injustice as the breaking of the moral commitment that people made to each other; through the lens of virtue, keeping promises therefore becomes a moral obligation.[140] Social contract theory demands the keeping of promises made to each other to ensure prosperity and peace. By extension, within an organization that is an instrument of the state, military personnel have a moral

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[138] *Ibid.,* Section 0414.

[139] English, *Understanding Military Culture…, 23.*

[140] Malham M. Wakin, "The Ethics of Leadership I," in *War Morality and the Military Profession*, ed. Malham M. Wakin, (Boulder: Westview Press, 1986), 189.

obligation to obey superior orders, as these orders represent promises made to citizens of the state.

DISCIPLINE AND THE SOCIAL CONTRACT

The military, as an arm of the state, holds a special and subordinate role within a society.[141] Its existence is at the pleasure of the state, and by extension the individuals who have created that state, and is bound by an obligation that is state-centric. In this spirit Samuel Huntington, writing on the legitimacy of war and the state, demanded that the military view the state as the primary entity, to be attended to above personal considerations; further, as an instrument of the state, loyalty and obedience are of paramount importance.[142] The business of the military is, and may only be, the business of the legitimate state that creates it.

As a result of the special obligations and relationship the military has with the state, the anti-individualistic and collective orientation of a country's military force represents one of the strongest cultural differences between the relationship private citizens have with the state, and the relationship military personnel have with the state.[143] In essence, military personnel are of the state but not within the state, except as within an intact sub-component of the state. Military personnel must form their community bonds with that sub-component so that they function collectively as one entity. In order to achieve this collective orientation, two key moral commitments exist for military personnel: loyalty and discipline.

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[141] John Winthrop Hackett, "The Military in the Service of the State," in *War Morality and the Military Profession,* ed. Malham M. Wakin, (Boulder: Westview Press, 1986), 106.

[142] Samuel P. Huntington, *The Soldier and the State* (New York: Random House, 1957), 62.

[143] Wakin, "The Ethics of Leadership I", 184.

The word "loyalty" has strong ties to the notion of law. The root for "law" is the Latin *lex* which is also the root for the French words *loi* and *loyauté* or loyalty.[144] Loyal persons recognize their ties to others, and "become fully themselves in recognizing the way their bonds with others limit their freedom of choice."[145] The law recognizes duties of loyalty when the duty rests on choice and contract, both conditions that are present when a choice to serve in the military is made.[146]

Loyalty can also be viewed as a form of partiality or willingness to be closer to some than to others. For Canadian Armed Forces members, loyalty:

> …is related to duty and reflects personal allegiance to Canada and Canadian values as well as faithfulness to comrades in arms. Loyalty is based on mutual trust and requires all … members to support the intentions of superiors and to obey lawful orders and directions. It imposes special obligations on commanders to ensure that subordinates are treated fairly and in a manner consistent with professional military values. It also requires that commanders properly prepare and train their subordinates for the tasks that they may be assigned and take appropriate action to ensure their physical, moral, and spiritual well being.[147]

Loyalty is not something that just happens, it is an attitude that is developed. Loyalty is a function of an individual's relationship to the state and their relationship to others; loyalty is learned and is a matter of moral choice.

The notions of discipline, loyalty and the law are intertwined.[148] In order to have a military force, its members must be trained and motivated to fight, training that by

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[144] "Online Etymological Dictionary," last accessed 18 June 2013, http://www.etymonline.com/

[145] Fletcher, *Basic Concepts…,* 174.

[146] *Ibid*.

[147] *CFJP-01 - Canadian Military Doctrine*, Section 0410.

[148] *Military Justice at the Summary Trial Level*,1-8.

necessity requires that military members be willing and able to suppress self-interest and be told when and where to apply violence in the interest of the state.[149] This ability stands in contrast to the civilian world where self-interest is allowed to come into play when making decisions about where and how people work. Loyalty, like virtue, can only be seen and understood through behaviours that demonstrate it. The tie that links loyalty to the military ethos, and allows it to develop, is discipline.

The word discipline is defined as "training, especially of the mind and character, aimed at producing self control, obedience, orderly conduct, etc." and comes from the Latin *discere,* to learn.[150] Discipline establishes behavioural boundaries around free choice in the context of service life and defines the parameters for how a member's loyalty is demonstrated. Discipline is the intangible set of promises that military members make to each other and the state in forging their own unique and separate social contract. Understanding the social contract of, and how justice is viewed in, a military force requires an understanding of discipline.

Discipline serves a three-fold purpose:

- controlling an armed force to prevent abuse of its power,
- ensuring military personnel carry out assigned orders in the face of danger, and
- assisting in assimilating a recruit to the institutional values of the military.[151]

The first point above refers to the political control a nation needs over its armed forces, the second reflects a leadership and followership requirement, and the last item speaks to

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[149] *Ibid.*

[150] *The Canadian Oxford Dictionary.*

[151] *Military Justice at the Summary Trial Level,* 1-9.

the practice of instilling personal discipline in each military member. Discipline therefore is achieved through developing both collective discipline and discipline at the individual level.

Individual discipline results in the personal commitment of an individual to the greater aims of the organization. When joining the military, individuals enter a second, and explicit, social contract where they agree to set aside their personal interests, concerns, and fears to pursue the purpose of the group collectively. Developing discipline, and by extension loyalty, is not a straightforward process. "Discipline among professionals is fundamentally self-discipline that facilitates immediate and willing obedience to lawful orders and directives while strengthening individuals to cope with the demands and stresses of operations."[152] Discipline is a matter of internal development achieved through reflective practices balanced with life experiences.

In the military, am individual must be willing to subordinate him or herself to the common good of the team and common task; in an increasingly individualistic Canadian society however, a lower priority is given to values of the community and the subordination of the self to that of the team.[153] Whether or not that signals a crack in the Canadian social contract is debatable, but it does highlight the divergence of military culture and Canadian culture at large.

The values of duty, loyalty, integrity and courage would seem to be laudable Canadian values for members of the general social contract, but realistically they reflect

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[152] Department of National Defence, *Duty with Honour* (Ottawa: Canadian Forces Leadership Institute, 2003), 27.

[153] Donna Winslow, "Canadian Society and its Army," *Canadian Military Journal,* Volume 4, Number 4 (Winter 2003-2004): 21.

more closely the values of the older generations in Canada, generations not viewed as being of warfighting age.[154] Changes in the country's demographics and an overall shift in societal values have resulted in new military members enlisting without a developed military ethos, much less an underlying value system closely aligned with that of the military community. As a result, current military recruits may have more difficulty accepting some of the elements of military ethos and the behaviours that ethos demands than recruits of twenty years ago.[155] "Deference to authority figures has waned: authority has to be earned and not taken for granted in Canada."[156] The challenge of extracting this commitment to the military behaviours and expectations becomes a more complex task in this environment.

The teaching of standards of performance and behaviour associated with military discipline is predominantly accomplished by militaries in two ways: one through a punitive process that deters and punishes undesirable behaviour and the other through encouraging internal control by developing community ties and interdependencies. In this way the military justice system and the training system merge to achieve the same end.

The first method of instilling discipline is by the deterrent threat and levying of punishments in the event of a breach in the rules established to define military behaviour. The main focus of the term "military justice" revolves around sanctions administered though summary trials or courts martial.[157] Military justice therefore functions in a

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[154] *Ibid.*

[155] *Ibid.*

[156] *Ibid.*

[157] *Military Justice at the Summary Trial Level*, 2-10.

manner aligned with a rational-actor, deterrence-based justice system. Military rules, however, include not just offences found in civilian criminal law, but also offences such as absence without authority and insubordination; offences which in the civilian employment world are not desired behaviours by any means, but are not subject to punitive sanction.[158] This suggests that the military justice system functions as a method of attaining social control of its rational-acting members through deterrence and punishment.

The second method is through teaching and leading people to develop an internalized system of virtues, ethics and discipline. The process of acclimation to a state of collective discipline starts with general military or basic training, the initial indoctrination and instruction given to new personnel.[159] This training serves to indoctrinate recruits into the way of life in the Canadian Armed Forces and develops community ties and interdependencies. Repetitive training and drills are employed to teach the standards of performance and behaviour required of a military member, and in particular within a collective context.[160] This training occurs throughout a member's career, whether through formal leadership coursing or technical skills application.[161] As such the process is a structured approach to developing those virtues that Hobbes felt were important to the maintenance of the social contract. When these activities are

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[158] *Ibid.,* 1-10.

[159] "Canadian Forces Training " last accessed 17 Jun 2013, http://www.forces.ca/en/page/training-90#introduction-0

[160] "Canadian Forces Leadership and Recruit School " last accessed 17 Jun 2013, http://www.cflrs.forces.gc.ca/menu/ps/rec/pv-pv/index-eng.asp

[161] *Leadership in the Canadian Forces: Leading People* (Ottawa: Canadian Forces Leadership Institute, 2007), 40.

viewed through a transformative lens it is suggested that members of the Canadian Armed Forces are viewed as virtuous actors.

Whether viewed as virtuous or rational actors, members' indoctrination activities may involve value-based training with concurrent discipline development through the laying of charges and the convening of a summary trial to adjudicate a value breach. This latter activity is often referred to as "the hatless dance"[162] by participants, and offers a subtext that a summary trial is not always acknowledged as an opportunity for personal reflection, values alignment and transformation.[163] Instead, using the allegory of a dance, it may be viewed by military members as an incident-focused activity that is purely transactional in nature. As a result, there is a disconnect between the development of favorable bonds with groups and institutions that is essential to law abiding and disciplined individuals and the application of disciplinary measures, measures with limited social-contract development or deterrent value.[164]

The summary trial, however, is selected as the preferred remedial process when teaching and leadership fail to orient a military member's behaviour. This choice bears some examination given the disconnect between the perceived nature of the military

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[162] "The headdress of an accused member shall be removed (unless required for religious or spiritual reasons) prior to a summary trial, along with any articles that could be used as projectiles. Prior to the administration of oaths, all members present shall be ordered to remove headdress (unless required for religious or spiritual reasons). On completion of the administration of oaths, members present who removed their headdress, other than the accused, shall be ordered to replace headdress." *Canadian Forces Dress Instructions* A-DH-265-000/AG-001, (Ottawa: DND, 2011), 2-3-2.

[163] As mentioned on numerous threads on the Army.ca forum pages, for example https://forums.army.ca/forums/index.php?topic=84183.15;wap2

[164] Akers, "Rational Choice…", 659.

member as virtuous in a training context, and the assumption of the member as a rational actor from the military justice perspective.

MILITARY LAW AND DISCIPLINE

Law is designed so that individuals can achieve external freedom, and laws provide a framework for the relations between people in society; morality speaks to internal freedom, the struggle within each person between reason and desire.[165] While law and morality operate within different spheres, military law cannot be considered in isolation, in particular given the ethical obligations of military service and the dynamics of leadership and followership.[166] Military law is sanctioned by statute, reflects the military ethos, and the requirement to obey these laws is absolute for members of the military.

Statutory law is a type of law or laws derived from the passage of a Parliamentary Act, the *National Defence Act*[167] being one of them.[168] The purpose of a statutory law such as the *National Defence Act* is to exercise political control over certain aspects of societal activity.[169] The organization of the military is accomplished through the mechanism of the *National Defence Act*, and control of the military and its members is facilitated by the embedded *Code of Service Discipline* and the various regulations, orders and instructions that also flow from the *National Defence Act*.[170] The *Code of Service Discipline*[171] is the

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[165] Fletcher, *Basic Concepts …,* 141.

[166] Steven Shavell, *Law Versus Morality as Regulators of Conduct* (New Haven: American Law and Economics Association, 2002), 2.

[167] *National Defence Act*, R.S.C., c. N-5 (2013)

[168] *Military Justice at the Summary Trial Level*, 1-2.

[169] *Ibid.*

[170] *Ibid.*

[171] *National Defence Act*, R.S.C., c. N-5 (2013) Part III.

foundation of the Canadian military justice system, and sets out disciplinary jurisdiction, service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals, and post-trial review.[172]

The Canadian *Charter of Rights and Freedoms*[173] recognizes the legitimacy of a separate military justice system at item 11, where it states that "any person charged with an offence has the right...(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury."[174] This support for a military justice system, separate from but overseen by civilian courts, has been further upheld by the Supreme Court of Canada.[175] The perceived requirement of the military to be able to swiftly and, if required for the purposes of discipline, harshly deal with crimes and breaches of discipline has been validated as an important ability due to the nature of a military force's line of business, being the application of violence. "To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct."[176] This is an interesting perspective given the research suggesting that harsher sentencing has a negative correlation with recidivism.[177]

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[172] *Military Justice at the Summary Trial Level…,* 1-24

[173] Part I *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[174] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

[175] MacKay v. The Queen. [1980] 2 S.C.R. 370.

[176] Canada. Department of National Defence. *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces: Summary*

The Canadian Armed Forces relies extensively on deterrence to effect the maintenance of discipline; this is accomplished in part by offering training in military law, opening service tribunals to spectators and through publication of the results of service tribunals. This system of discipline comprised primarily of *The Code of Service Discipline* and the *Queen's Orders and Regulations*[178] is not merely concerned with obedience to laws, but also reflects the values and principles of service life that Canadian citizens expect from the military. These values and principles include:

- obedience to Authority,[179]
- enforcement of discipline,[180] and
- the welfare of subordinates.[181]

Obedience to authority and the maintenance of unit discipline is essential for unit effectiveness, regardless of whether a unit is deployed or military personnel are working within Canada.[182] One of the institutional activities designed with the intent of maintaining discipline is the summary trial system and there is strong evidence that it is frequently used for this purpose, particularly at the rank of Officer Cadet and for non-commissioned personnel at ranks at or below Corporal/Leading Seaman. "The summary

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Trials Reporting Period 1 April 2009 to 31 March 2010 (Ottawa: Department of National Defence, 2011), Section 1.1.

[177] Gabor and Crutcher, *Mandatory Minimum Penalties….*

[178] *Queens Orders and Regulations for the Canadian Forces.*

[179] *Ibid.*, 19.01.

[180] *Ibid.*, 4.02, 5.01, 19.01 and 19.015.

[181] *Ibid.*, 4.02.

[182] *Duty with Honour*, 59.

trial system is vital to the maintenance of discipline at the unit level and therefore essential to the life and death work the military performs on a daily basis."[183]

The purpose of sentencing in a military trial is consistent with civilian courts, and is designed to afford:

- specific deterrence, in the sense of deterrent effect on the member personally,
- general deterrence; that is deterrence for others who might be tempted to commit similar offences,
- denunciation of the conduct, and
- reformation and rehabilitation of the offender.[184]

Sentences imposed by a summary trial are directed to be the minimum necessary given the ultimate aim of restoring discipline in the military member and in the military society.[185] This suggests that what impacts an individual also impacts the community as a whole, and that the strength of the community depends on the loyalty and obedience of an individual. Sentencing in the Canadian Armed Forces is consistent with the maintenance of a social contract.

In 2009-2010 a total of a 1943 summary trials were held in Canada, an increase of approximately 2.3% over the previous year, suggesting that nearly 4% of the Canadian Armed Forces experienced a session at the "captain's table".[186] Over half of all charges

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[183] Lesage, *Report of the Second Independent Review Authority…*

[184] *Military Justice at the Summary Trial Level,* 14-1.

[185] The Queen. v. Lieutenant(N) J.M. Price, 2009 CM 4009.

[186] *Annual Report of the Judge Advocate General.*

during this reporting period were laid under section129 of the *National Defence Act* for acts, conduct or neglect to the prejudice of good order and discipline.[187]

Each year surveys are sent to active participants in the military justice system and, despite general satisfaction with the military justice system, concerns are nevertheless raised in relation to the timeliness of proceedings and the complexity of court martial and summary trial procedural requirements.[188] It was also interesting to note that even after going through a summary trial, many respondents to the annual survey expressed ignorance and confusion over the process.

However, the mere existence of laws, even with the threat of punishment for transgression, is insufficient to ensure that military laws governing behaviour will be followed. Individual members must commit to obey and enforce them, and mechanisms to ensure this commitment is firmly seated must be present.[189] The authority to maintain discipline at the unit level is concentrated in the hands of the Commanding Officer, and reflects the personal nature of leadership and the maintenance of discipline.[190] As a result, military law implicitly demands the promotion of the welfare and well-being of subordinates and the reinforcement of the leader-follower dynamic, as well as the efficiency of personnel. Military justice, therefore, is as much about leadership,

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[187] *Ibid.,* Section 3.4.

[188] *Ibid.,*. Section 4.2.

[189] *Military Justice at the Summary Trial Level*, 1-18.

[190] *Ibid.,* 1-13.

community relationships and power dynamics as it is about the maintenance of discipline.[191]

This view of military justice is therefore completely consistent with the broad overview of the definition of justice within the social contract as operating in the realm of interpersonal relationships. What is "just" must be described and understood as being a matter of relationships with other members of society, whether as individuals or as represented by the state. In addition to the application of military justice, the power dynamic relationship inherent in the maintenance of discipline is also at work during general military and other military cultural indoctrination activities.[192] These latter activities are not transactional, in the manner of a summary trial, but rather take place in the sphere of transformational leadership.

Transformational leadership is an important component in effecting organizational change and developing organizational culture.[193] Rather than emphasize discrete task-based transactions between leaders and followers, transformational leadership deals with the overarching issues of values and mission, purpose and commitment.[194] Transformational leadership activities are more likely to keep questions

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[191] James R. Meindl and Karen Thompson, "Justice and Leadership: a Social Co-constructionist Agenda," in *Current Societal Concerns about Justice*, ed. Leo Montada and Melvin J Lerner., (New York: Plenum Press, 1996), 141.

[192] English, *Understanding Military Culture…,* 23.

[193] Meindl and Thompson. "Justice and Leadership…", 145.

[194] *Ibid*.

of organizational missions and values foremost in followers' minds, with procedural matters being relatively less important.[195]

Given the previously noted transactional perspective that many military offenders hold relative to the summary trial process, there is an argument to be had that trial, sentencing and punishment may not accomplish the opportunity for reflection, values alignment and a strengthened social contract with the military. What a summary trial process may actually be is a venue that merely establishes the financial or liberty cost of breaking the rules to little or no deterrent effect, and the existence of repeat offences for minor violations might support that perspective.

Transactional processes have been demonstrated as ineffective in supporting the reinforcement of discipline. A report of a *Commission of Inquiry* struck to examine three separate incidents of mutinous acts that occurred in Royal Canadian Navy ships post World War II, noted "the only discipline which in the final analysis is worthwhile is one which is based upon pride in a great service, a belief in essential justice, and the willing obedience that is given..."[196] The thrust of the report was to emphasize the importance of communication, teaching and setting the conditions for the development of an internalized, virtue-based discipline.

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[195] *Ibid.,* 146.

[196] E.R, Mainguy, L.C Audette, and L.E Brockington, *Report on certain 'Incidents' which occurred on board HMC Ships ATHABASKAN, CRESCENT and MAGNIFICENT and on other matters concerning the Royal Canadian Navy* (Ottawa: King's Printer and Controller of Stationery, 1949).

An element of the report, which has become known by naval personnel simply as the Mainguy Report,[197] which speaks even more significantly to the notion that enhanced discipline is not the result of punishment, was detail on how these incidents were handled. Mutiny is considered a most heinous crime within the military justice system.[198] Military members found guilty of mutiny were, and still are, liable to imprisonment for life, and in the contemporary punishment scale of the 1940s, death. Notwithstanding, or perhaps because of, the punishment that conviction could attract, these instances of what were referred to as "mutinous acts" were not handled through charges of mutiny, although some "slackness" charges were laid and cautions were given.[199] Later the matters were referred to the *Commission of Inquiry* to unearth what leadership failures led to the mutinies. Charges, trial and punishment were deemed to be inappropriate to achieve the aim: the maintenance of discipline.

The suggestion that the most egregious breaches of discipline were inappropriate for the application of military justice seems bizarre and unusual, particularly given the degree of emphasis in internal military writing on the importance of military justice. However, the dispute resolution processes related to these mutinies were not unusual or isolated to these specific incidents, in fact, it has been suggested that mutinies have

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[197] This short-form refernce for the report is demonstrated by the title of one article on the "incidents" - Richard Gimblett, "What The Mainguy Report Never Told Us: The Tradition of "Mutiny" in the Royal Canadian Navy Before 1949," *Canadian Military Journal*. Summer 2000.

[198] Mutiny is defined as "means collective insubordination or a combination of two or more persons in the resistance of lawful authority in any of Her Majesty's Forces or in any forces cooperating therewith." *National Defence Act* (R.S.C., 1985, c. N-5).

[199] Richard Gimblett, "Post War Incidents in the Royal Canadian Navy, 1949," in *The Insubordinate and the Non-compliant*, ed. Howard Coombs (Kingston" Canadian Defence Academy Press, 2007), 300.

occurred regularly in the Canadian military context without necessarily being addressed as such.[200] In the first half of the 20th century,

> …invariably, large numbers of a ship's company had joined together to give voice to some collective complaint for which there was no other officially sanctioned form of expression. Importantly, their officers...appear to have accepted the lock-in as a form of protest... No member of the [Royal Canadian Navy] was ever charged with mutiny.[201]

This approach seems counterintuitive to much of the direction and guidance surrounding the enforcement of discipline. In *Regina vs. Mckay* it was emphasized that "many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment."[202] Direction is provided to Commanding Officers, "if obedience can not be ensured by willing compliance then it must be enforced by corrective action" which can include administrative action and summary trial.[203]

"The disciplinary process is designed to correct, and if necessary, punish individual disobedience. The most significant threat to discipline is a group or systemic disobedience of...orders, direction, and standards of conduct."[204] The consequence of being found guilty of this significant threat was death, imprisonment for life or to less punishment. Yet examples of group disobedience are many but mutiny charges, trials and

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[200] Gimblett, "What The Mainguy Report Never Told Us…", also see *The Unwilling and the Reluctant*, ed. Craig Leslie Mantle (Kingston: Canadian Defence Academy Press, 2006).

[201] Gimblett, "What The Mainguy Report Never Told Us…", 88.

[202] MacKay v. The Queen. [1980] 2 S.C.R. 370.

[203] *Military Justice at the Summary Trial Level…,* 1-11.

[204] *Ibid*., 1-14.

convictions are few.[205] That a chargeable offence is institutionally viewed as something best dealt with in other ways is highlighted when a Canadian Armed Forces publication on leadership does not address the issue, inserting only a small section on resistance highlighting an inability to reliably control or discipline using the method of punishment.[206]

In a corporate sense, therefore, there is strong and compelling precedent for handling systemic or group failures leading to disobedience by employing forms of "diversion processes" in order that maximum information can be shared, root causes of systemic problems can be made known and resolved, and lessons learned can be extracted. Additionally, there is no precedent at all to suggest that individual failures leading to disobedience could not also be handled through a diversion process that would lead to an understanding of root causes of the failure of personal discipline, why that failure cannot be tolerated, and how behaviour change can be supported.

Writings on the social contract suggest punishment is a necessary element to achieve social control or discipline, in particular when erosion of the social contract is threatened, because citizens must be held accountable for their actions when they violate the rules. The Canadian Armed Forces has adopted this perspective in the evolution of military justice. However, there is silence on alternate forms of ensuring responsibility for action is accomplished in military justice processes or venues that permit maximum learning and communication. There is no philosophical recognition in the military justice

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[205] Christopher Ankersen, "Beyond Mutiny? instrumental and Expressive Understandings of Contemporary Collective Indiscipline," in *The Unwilling and the Reluctant*. ed. Craig Leslie Mantle. (Kingston: Canadian Defence Academy Press. 2006), 116.

[206] *Ibid*., 124.

system that the offender was and may still be a virtuous actor in the social contract and therefore would benefit from a discipline-building or restoring process; a process that imparts an understanding of appropriate relationships with other military members and the repercussions on the military society when rules are broken. Restorative justice or alternate diversion processes are simply not part of the official military justice landscape.

This silence stands unique in the face of a growing movement of such processes in the civilian prosecutorial world, and may be in part due to the military preference for discipline as deterrence, which has survived many reviews of the military justice system. As far back as 1835 a British royal commission examined the system of military punishments wherein officers remained firmly convinced that corporal punishment was essential for the proper maintenance of military discipline.[207] This publicly conservative perspective on the absolute link between discipline, deterrence and punishment persists and is reflective of the maintenance of the death penalty as a military sentencing option for over two decades after it ceased being so in the civilian justice system.[208]

Nevertheless, the privately-held informal and restorative preferences employed in circumstances of major failures of discipline, as evidenced in part by the Mainguy Report, point to an opportunity for sanctioned diversionary processes in the military justice system that would provide for a transformational disposition of military offences and better restore the discipline required by the social contract.

A move toward integrated restorative military justice processes is complicated by the social activist roots of alternate judicial measures.

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[207] Madsen, *Another Kind of Justice*, 9-10.

[208] Blidook, *Constituency Influence in Parliament…,* 97.

RESTORATIVE JUSTICE AND THE SOCIAL CONTRACT

The informal, or restorative, justice movement was largely born out of the social activism of the 1960s; activism which demanded greater substantive justice and procedural fairness from social and governmental institutions, or "the man".[209] Restorative justice is "an alternate form of justice that utilizes mediated conferencing as opposed to punishment to deter criminal behaviour."[210]

Restorative justice goes by many names, and within the court system is often referred to as a method of "diversion". Diversion in this context is the "disposition of a criminal complaint without a conviction, the non-criminal disposition being conditional on either the performance of specified obligations by the defendant or on his participation in counseling or treatment."[211] Today the range of processes for diversion- based resolution of crimes is wide and these processes encompass a nearly limitless range of options for reparation.

There are three cornerstone principles implicit in restorative justice theory:

- crime is an objective quality of the act, and not the person committing the act
- societal consensus opposes criminal behaviour; and

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[209] Joel F. Handler, *Law and the Search for Community* (Philadelphia: University of Pennsylvania Press, 1990), 49.

[210] Elizabeth Dansie, *A Multigroup Analysis of Reintegrative Shaming Theory: An Application to Drunk Driving Offences* (Logan, Utah: Utah State University, 2011), 5.

[211] Raymond T Nimmer, *Diversion: The search for Alternate Forms of Prosecution*, (Chicago: American Bar Foundation, 1974), 34.

- laws codify that societal consensus[212]

It is on the first principle that there is a subtle difference of principle from that of the court system. The courts are concerned with establishing guilt and sentencing of punishment; as such the process is past oriented, focusing primarily on what happened and not necessarily on the process of learning, on relationship development or on the repair of emotions involving those affected. No responsibility is placed on the offender to right the wrong, rather the role of the offender is to passively endure the punishment, and as a result of this punishment is to reflect on and learn from their societal error.[213] Through the lens of restorative justice, the occurrence of crime is not only a violation of the law, requiring denial of opportunity for an offender, it is also an occurrence of community harm that destroys relationships between its members and must be addressed.[214]

Ultimately in terms of the quality of the act, restorative justice views crime as an act that involves people, their relationships in community, and a breach of the social contract. Restorative justice does not reject the requirement to maintain the assessment of punishment in the justice spectrum, but demands additional obligations of the offender that are complementary to punitive measures.[215] This is most evident in the options for reparation that are deemed appropriate by each process. In the court system, sentencing

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[212] Christopher Uggen, "Reintegrating Braithwaite: Shame and Consensus in Criminological Theory," *Law & Social Inquiry* Vol. 18, No. 3, (Summer, 1993): 491.

[213] Dansie, *A Multigroup Analysis* …,. 12.

[214] Ibid., 13.

[215] Charles Barton, "Empowerment and Retribution in Criminal Justice," in *Restorative Justice*, ed. John Braithwaite and Heather Strong, (Dartmouth: Ashgate, 2000), 72.

activities involve directing the offender to engage in certain activities that are punitive in nature, whereas most reparation activities are designed with "repair" in mind, as the term suggests.[216] An agreement flowing from a successful restorative justice process requires some activities that serve to both build the offender's bonds to the community and serves to contribute to community building, as through community service such as volunteering.[217]

Restorative justice is embedded as a legal practice in Canada within the *Criminal Code of Canada*[218] at section 717:

> Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim.[219]

The implication of this wording is that unless the offender is a danger to society, restorative justice should be considered when it is suitable for the offender and meets the needs of the other parties to the matter. Where the social contract is assessed as being repairable, and the victim and other community members are willing to engage in a discussion of the impact of a violation on them, alternative measures are permissible.

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[216] *The Canadian Oxford Dictionary*..

[217] Annalise Acorn , *Compulsory Compassion*, (UBC Press: Vancouver, 2004), 21.

[218] Criminal Code (R.S.C., 1985, c. C-46)

[219] Criminal Code (R.S.C., 1985, c. C-46)

There are three elements to a restorative justice process.[220] First, the process must be voluntary for all parties and as a prerequisite the offender must admit to all the particulars of the charge or charges against them. Within restorative justice, responsibility for an inappropriate act or crime cannot be ignored. Second, the offender must be truthful, accept responsibility for the antisocial action and be willing to speak to both the action and ownership of the commission of the crime. Finally, the process must be face to face between the victim, the offender and the affected members of the community.

Restorative justice aims to repair community harm, strengthen the culture of a community and bring justice to the offences committed.[221] To accomplish this, the process brings together all parties with a stake in a particular offence to collectively resolve how to deal with the aftermath of an offence and its implications for the future.[222] Rather than viewing crime as a transactional incident, restorative justice views crime as harm done to a community.[223] This focus demands offender accountability to other people but also responsibility to the community.[224] Justice is subjectively assessed as being served by the parties to the restorative process, and objectively by the review authority for pre-trial diversions. Thus, a case-by-case determination of the justness of a

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[220] Zehr, Howard and Ali Gohar, *The Little Book of Restorative Justice*, (Intercourse, PA: Good Books, 2003), 22.

[221] Monica Schatz, "Vital Voice for Restorative Justice: The Community Members," in *Restorative Justice Across the East and the West,* ed. Katherine Van Wormer, (Hong Kong: Casa Verde Publishing. 2008), 81.

[222] Harry Mika and Howard Zehr, "A Restorative Framework for Community Justice Practice," in *Criminology, Conflict Resolution and Restorative Justice,* ed. Kieram McEvoy and Tim Newburn, (Houndmills: Palgrave Macmillan, 2003), 139.

[223] *Ibid.,* 140.

[224] *Ibid.*

dispute resolution serves to address the problems associated with varying interpretations of how justice is best attained.

Restorative justice practices do not minimize the necessity of the law. On the contrary, they uphold the social contract understanding that laws which address wrongful, deviant social behaviour are necessary to sustain community order and the social order that provides safety to its members.[225] What is different about restorative justice is that institutions involved in restorative practices suggest there are better ways of handling some offences in order to achieve justice, punishment and deterrence than through the psychologically- and community-detached court system. Informal justice systems are viewed as providing better justice, being more economical, using a more appropriate venue, and with remedies that are viewed as more adequate in many situations.[226]

There is a wide range of organizations and institutions involved in alternate dispute resolution and many forms of resolution processes, but they share similar features: these institutions are less bureaucratic than the court structures for which they substitute, they tend to be undifferentiated from the larger society by minimizing the use of professionals; and they favour substantive and procedural methods that are more vague and flexible.[227] In many ways these less formal features of restorative processes, relative

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[225] Schatz, "Vital Voice for Restorative Justice…", 80.

[226] Joel F. Handler, *Law and the Search for Community* (Philadelphia: University of Pennsylvania Press, 1990), .51.

[227] *Ibid.,* 50.

to court processes, are reflective of the summary trial process, as viewed in comparison to the courts martial process.[228]

Fundamentally, restorative justice is concerned with problem-solving, not guilt determination, and restorative justice processes set out to solve the problem of how to return an offender to the community with enhanced social bonds and a better understanding of the impact of crime on citizens and society alike. As a problem-solving process, versus a fault-finding one, there may be less need to focus on the facts of the case, and less need to withhold information, because problem solving emphasizes clarification and communication: it does not examine the past as much as it is future-oriented.[229] Unlike the court system, which focuses on the crime and appropriate punishment, alternate or restorative justice processes are concerned with autonomy, personal transformation, social contract and community.[230] The summary trial process is also concerned with problem-solving; the problem being how best to transform the offending member from an individual who chooses to engage in anti-social behaviour to a team member prepared to embrace the disciplinary requirements of a military force. The summary trial process, however, relies on punishment as the solution, which may not be the most efficient vehicle to accomplish this transformation.

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[228] *Military Justice at the Summary Trial Level,* 3-2 – 3.3.

[229] *Ibid.,* 53.

[230] *Ibid.,*.54.

In order to fully understand restorative justice, the four values of restorative justice must be understood: personalism, participation, reparation and reintegration.[231] These values might also be considered flagstones on a path to a state of offender reintegration, which is also the objective of military justice, particularly at the summary trial level.

Weaving through the philosophical roots of restorative justice is an attitude that crime is a personal matter.[232] Crime is not just a violation of laws, although it is that; by looking below that actual law to the purpose behind that law it is evident that a particular law is an artifact of a prized cultural norm of the community. As a result, in the restorative justice context crime is seen first and foremost as a violation of people and the relationship expectations demanded of the community, not merely as the violation of the law that was designed to protect them.[233]

In this spirit, an offender is required to admit to violating the expectations of community members directly to those community members, not just the victim but also to a representative of citizens as a whole. The personal relationship expectations are recognized as encompassing the parties directly involved in the crime and also the parties affected by the presence of that or any crime, being members of the community.[234] Restorative justice also acknowledges that in court the physical and emotional damage

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[231] Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2003), 21.

[232] Zehr and Gohar, *The Little Book of Restorative Justice*, 21.

[233] Mika and Zehr, "A Restorative Framework …", 140.

[234] Zehr and Gohar, *The Little Book of Restorative Justice*, 22.

done during the crime can be suppressed, or in the case of emotions, often ignored.[235] Bringing the act of crime to the personal level allows for the impact of the violation of a cultural norm to be acknowledged and the norm itself discussed, not the crime.

Restorative justice is also understood as operating at the individual level by serving to eliminate the underlying causes of the unacceptable behaviour, whether that is alienation from society, a lack of strong social bonds, a lack of understanding of the consequences of the act, or ignorance.[236] In societies where there is a strong commitment to place collective interests over individual interests there are stronger incentives for people to conform, and hence lower crime rates.[237] Those who argue against justice systems that offer only deterrence and incapacitation measures hold the belief that deterrence and incapacitation only serve to silence and marginalize the primary stakeholders in an offence.[238] One goal of restorative justice is to let the offender know that the community members are there to provide support for the offender and to demonstrate that the community is interested in and cares about the actions of all its members.[239]

In a restorative justice process the offender is given the opportunity to publicly accept responsibility for actions and the resultant crime and to offer reparation for the

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[235] Terry A. Maroney, "Emotional Regulation and Judicial Behavior," *California Law Review* Volume 99 Issue 6 (2011): 1499

[236] Barton, "Empowerment and Retribution …", 70.

[237] Sandra Walklate, "Communities and Conflict Resolution" " in *Criminology, Conflict Resolution and Restorative Justice.* ed. McEvoy, Kieram and Tim Newburn.(Houdsmills: Palgrave Macmillan, 2003), 210.

[238] Barton, "Empowerment and Retribution …", 58.

[239] Schatz, "Vital Voice…", 81.

results of anti-social and harmful behaviour. It is essential to restorative justice principles that it is made clear who was harmed and who has caused that harm. Furthermore the offender is made accountable for the harms he or she has caused.[240] In fact, acceptance of the particulars of the crime is an essential waypoint in the process, which if not reached, will not permit the restorative justice process to proceed.[241] This admission reinforces to the offender and to community members that the offender recognizes themselves as a full member of a law abiding community, that they recognize the norms of acceptable behaviour in that community, and accept personal responsibility for breaching those norms.

With this personalism view of restorative justice in mind, participation becomes essential to ensure that all parties are heard and the crime is understood from the multiple perspectives of legal impact, financial impact, and psychosocial impacts of the offender, victims and the community at large. Historically a community was indirectly understood as a victim of crime and of deviant behaviour, but restorative justice brings the community-as-victim into the hearing and in the resolution of the problem.[242] The full impact of a crime is required to be explored so that consensus-based, collective decision making results in an agreement that is seen by all parties to repair the harm caused in the physical and psychosocial realms, and ensure that justice is served.

Communities are a critical element in successful restorative justice processes. This is not necessarily a "community" as defined by the geography of towns, cities or

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[240] Cunneen and Hoyle, *Debating Restorative Justice*, 10.

[241] Zehr, and Gohar, *The Little Book of Restorative Justice*, 48.

[242] Schatz, "Vital Voice…", 80.

neighbourhoods, but rather as related to the degree to which a group shares values and cultural connections. Community is described as a group of people organized around shared beliefs, values and norms, from which emerges a shared identity or culture.[243] Communities with successful restorative justice systems are those where members have some responsibility to one another and a commitment to attend to each other's needs.[244] They are communities where individual members are motivated by common mores and beliefs.[245] In short, upholding and strengthening the social contract with each other and with the state is the underpinning of restorative justice.

In this light, restorative justice essentially imposes upon individuals certain community expectations about appropriate behaviour, and defines crime as a moral act for which the offender is responsible and accountable.[246] Breaking the bonds of their community by committing crime places an offender at risk of being excluded by others from the community, either by being identified as a criminal or through physical separation as in incarceration. This exclusion in turn creates a situation of a diminished social bond, less social control and therefore a higher disposition to commit further crimes. Societal bonds need to be reestablished if offenders are to be reintegrated into and derive benefit from their communities. While many initiatives can help victims recover from crimes committed against them, restorative justice can also re-socialize offenders

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[243] Cunneen and Hoyle, *Debating Restorative Justice*, 16.

[244] *Ibid.,* 18.

[245] *Ibid.,* 19.

[246] *Ibid.,* 121.

into law-abiding communities and encourage pro-social behaviours: caring about the rights and welfare of others.[247]

Once offenders have accounted for their behaviour by admitting the action, the multiple layers of harms done by the offending behaviour can be examined and discussed.[248] Societies then are charged with the task of socialization or integration of individuals into the moral order following a criminal act.[249] As a result, the latter part of the process shifts towards reintegrating offenders, moving on to see them as no longer distinct from the wider group.[250]

Before reintegration however, the community needs to, and has a right to, censure those who have transgressed community norms in order to reassert social order and shared commitment to the norms.[251] The community's acceptance and enforcement of the social contract places moral demands on the offender which can be inconsistent with a court process distant and separate from the society it serves.[252] In many ways, restorative justice mirrors "lower deck" or "barracks" justice, but without the violence. Stories abound of the old, and not so old, ways of resolving conflict through the semi-public administration of beating by peers, followed by reacceptance when it was assessed by the community of peers that justice had been served, and appropriate remorse, apology or

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[247] *Ibid.,* 25.

[248] *Ibid.,* 10.

[249] Uggen, "Reintegrating Braithwaite…", 486.

[250] Cunneen and Hoyle, *Debating Restorative Justice*, 10.

[251] *Ibid.,* 24.

[252] *Ibid.,* 122.

reparation had been extracted from the offender.[253] The process, while not particularly desirable, did ensure that relationships were repaired through a potentially cathartic, emotionally-laden process which was accompanied by punishment. A court system does not deal in the currency of emotional repair as much as it does punishment, and while it is certainly a far more procedurally just process, in regards to reparation the process often falls short. A court process rarely addresses the emotional or psychological imbalance created by the crime, and restorative justice argues that without addressing this element, compensation is not proportionate, nor is reparation achieved.

In the court system restitution addresses the value of property or opportunity lost during a crime, monetary or otherwise, with a view to restoring balance between the parties. As defined, restitution is "compensation for loss especially full or partial compensation paid by a criminal to a victim ordered as part of a criminal sentence or as a condition of probation."[254] This can be accomplished through compensation of losses created or the restitution of gains an offender might have made due to the crime. The challenge to accomplishing this state of balance occurs when the loss can not easily be quantified financially. Restorative justice, on the other hand, deals with reparation, "the act of making amends for a wrong"[255], and views the process of setting right the harm created; this often cannot be accomplished merely through financial means but requires a sharing of the impact of the violation of societal expectations. In short, restorative

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[253] Author, numerous personal communications.

[254] *Black's Law Dictionary*, ed. Bryan Garner *(* St Paul, Minnesota: Reuters, 1990).

[255] Ibid.

practices reduce the harm and impact of the consequences of wrongdoing, particularity for victims of crime.[256]

Restorative justice requires and expects reintegration of the offender into society, not further separation from it. Detention and punishment serve to signal to the community that the offender is not a full member of the community, or is different or flawed. Reintegration also demands that both the victim and community members successfully separate the act from the person who carried out that act, so that they are committed to accepting the offender as a community member.[257]

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[256] Barton, "Empowerment and Retribution …", 70.

[257] Roche, *Accountability in Restorative Justice*, 25.

RESTORATIVE SHAMING AND THE SOCIAL CONTRACT

One of dynamic that comes into play with restorative justice's personal and face-to-face process is moral suasion. A strong moral deterrent is provided through the social connectedness and moral certainty that restorative justice processes provide.[258] This moral deterrent is not an externally imposed deterrent, however; it is generated within the offender. The personal understanding of the impact of crime, or moral deterrence, hints at why individuals choose to be moral and adhere to the social contact. "Our first recourse should never involve securing respect for the law by threatening dire sanctions. Rather it should involve moral suasion about the virtue of respect for a particular law."[259] The particular way in which this is accomplished through a community process is shaming[260], a shaming that does not stigmatize, but builds consensus and is referred to as "restorative shaming".[261]

The theory of restorative or reintegrative shaming explains compliance with the law through the moralizing or community-building aspects of social control rather than through punitive action.[262] Shaming is employed by community members to educate the offender on the harmfulness of the criminal behaviour, whether that harm is to

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[258] Cunneen and Hoyle, *Debating Restorative Justice*, 122.

[259] John Braithwaite, "Pride in Criminological Dissensus," *Law & Social Inquiry* Vol. 18, No. 3 (Summer, 1993): 503.

[260] Shame is defined as a painful feeling of humiliation or distress caused by the consciousness of wrong or foolish behaviour: [an] action, or situation that brings a loss of respect or honour. *The Canadian Oxford Dictionary*.

[261] Braithwaite, "Pride in Criminological Dissensus", 511.

[262] Braithwaite, *Crime, Shame and Reintegration*, 9.

individuals or to the society at large, and to reestablish the social contract. During the reintegrative shaming process, an offender is treated as a person who has the obligation and responsibility to generally make the right choice; in effect they are treated as a virtuous person. Restorative justice processes with a shaming element are effective because the offender is treated as someone who is free to choose to adhere to society's laws, or not to follow the rules and face the disappointment of peers.[263]

A shaming approach results in an offender being in the situation of choosing one of three options when they are charged with a crime: publicly asserting innocence, admitting guilt and remorse to the victim and community, or publically rejecting the norms of the society they belong to. In the latter situation, where an offender takes the position that the offence is "no big deal", the offender in effect rejects the norms of the society. In rejecting the culturally valued norms of the community, the offender demonstrates "in the full view of the rest of society… the idea that her actions shows she needs moral education," education the community would be happy to provide. This stands in contrast to a court-based system which would issue a finding of guilt and merely remove the offender from community contact.[264]

Once shamed, the offender plays a more active part in repentance by apologizing for breaking the rule and committing a crime. Through the act of admitting to the

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[263] *Ibid.,* 10.

[264] *Ibid.,* 11.

particulars and apologizing, the offender acknowledges they violated the rules, and thereby affirms the validity of the rules as essential factors in maintaining social order.[265]

An interesting dynamic inherent to the restorative justice process is the tendency of offenders to overstate the seriousness of the violation and its deleterious impact on society. This excessive display of remorse and guilt on the offender's part allows the victim and other community members to assume a more forgiving role by cutting short the offender's self-condemnation.[266] This process has the embedded effect of forgiving the offender and extending permission to rejoin the group. The message to the offender is that they did wrong, but that the offence was not so horrible as to sever their role as a member of the community. It also builds upon the commitment of the community members, in that the offender's repentance further validates the worthiness of the rules of their society.[267]

The power of shaming is strong, and it is a natural reaction to a violation of trust; community trust lies at the centre of the social contract. Shaming is not shunning; shaming is not a permanent state or activity. "Deviance engenders a range of shaming responses. If the response retains the bonds between the shame and the rule violator, the shaming is said to be reintegrative."[268] Shaming is therefore seen in a very different light than "stigmatization, which is viewed as a process that excludes rule violators from full membership back in the group, causing them to align with other groups who are more

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[265] Uggen, "Reintegrating Braithwaite…", 491.

[266] *Ibid.,* 491.

[267] *Ibid.,* 492.

[268] *Ibid.,* 482.

accepting of their choices."[269] The process of shaming is a social one in which community disapproval is expressed in order to elicit remorse or condemnation and can be effected internally or externally.[270]

Shaming can be elicited through an expression of disapproval from another person, such as by way of an admonition by a judge or presiding officer[271], further accompanied by punishment. This may also be referred to as external deterrence. Through the lens of shaming practices, a summary trial could be viewed as a form of shunning or "degradation ceremony" as the offender stands out from all those present. The wearing of headdress by everyone except the offender is a clear and visual signal of the "otherness" of the member at trial.[272] Invariably, the presiding officer will take the opportunity to speak with the offender, generally during sentencing, in a manner designed to elicit shame or remorse in the member. Whether these actions in fact do elicit feelings of shame will depend on many variables, including the number of attendees at the trial and the esteem in which the presiding officer is held by the offender. Regardless, there is little reintegrative value offered in a summary trial and depending on the individual this may afford negligible shame or may be a stigmatizing event.

The second way shaming is expressed is through community socialization and the acceptance or rejection of behaviour by the greater community. This type of shaming works on two levels to affect social control. First, the shaming process deters further

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[269] *Ibid.,* 492.

[270] *Ibid.,* 492.

[271] In the context of a summary trial.

[272] *Canadian Forces Dress Instructions*, 2-3-2.

criminal behaviour because the social approval of others who are significant in a community is not something people wish to lose. Second, shaming and repentance are reflective activities that have an impact on an individual's consciousness, which in turn serves to build internal deterrence.[273] The key thing to note here is the role that a member of a social group plays: the source of the most powerful shame tends to come from members of your social group.[274] Shame caused by disapproval is not generally triggered by strangers, but is elicited when faced with disapproval from community members people are closest to.[275]

This is not to imply that everyone can be shamed. On the contrary, there are those who do not wish to or are unable to feel shame from even the closest family members or acquaintances. In these circumstances, punishment must remain an option for the commission of crimes.[276] The overriding consideration in using restorative justice in lieu of court processes is to ensure that the use of an alterative measures program not be inconsistent with the protection of society. If an offender feels no remorse or shame, it is likely that they will reoffend, and will likely be deemed not be suitable for restorative justice. The *Criminal Code* of Canada also denies the use of alternative measures if the offender denies involvement in the offence or wishes to have the matter dealt with in court.[277]

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[273] Braithwaite, *Crime, Shame and Reintegration*, 72.

[274] Uggen, "Reintegrating Braithwaite…", 490.

[275] Braithwaite and Strong. "Connecting Philosophy and Practice…", 215.

[276] Braithwaite, *Crime, Shame and Reintegration*, 84.

[277] *Criminal Code* s. 171.

The effects of reintegrative shaming are also less effective the weaker the influence that community or social group has over the offender. The precondition for a successful reintegrative shaming justice process is for the community or society to have a strong cultural preference for communitarianism.[278] A strong communitarian society combines a close network of individual interdependencies and strong cultural commitments to the mutual nature of many individual obligations. In communitarian cultures, group loyalties and mutual trust can overshadow individual interest, with the result that shaming is more effective in controlling crime than in loose, non-dependent cultures and societies.[279] Although shaming is a powerful agent of informal social control, the effectiveness of the shaming relies upon the degree of social consensus opposing the behaviour to be shamed.[280] It also relies on a tight alignment of the laws of the society and the moral order. The shaming function is a very effective tool within a family, and in situations where social institutions yield a high degree of self interest to an individual.[281] This occurs, in general, because individual members are somehow dependent on others in the community for their safety and security.

Individual interdependencies can be viewed through the lens of group loyalties. Group loyalties exist most strongly when the community has densely intermeshed dependencies absolutely required for the conduct of daily life or work. This involves recognition of mutual obligations and trust as part of that dependency, and these

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[278] Braithwaite, *Crime, Shame and Reintegration*, 71.

[279] Uggen, "Reintegrating Braithwaite…", 484.

[280] *Ibid.,* 485.

[281] *Ibid.,* 498.

interdependencies are strongly held to be a matter of group loyalty. In short, the community operates as the "antithesis of individualism."[282] In a society where high value is placed on the needs of others or the needs of the group itself, as is seen in a military force, people develop personal attachments to others in the community that can take precedent over their own needs.[283] These communities are more likely to engage in reintegrative shaming because it is more difficult to visualize a member of the tight-knit community as an "other": an outcast and criminal.[284]

Further, because the shaming process is socially constructed, there needs to be some intent to shame in a reintegrative way and there needs to be an acceptance of the community's offer of reintegration by the individual being shamed. Ultimately it is the individual being shamed that determines whether shaming is reintegrative. Shame's deterrent value comes not from the severity of the shaming action, but from the degree of positive relationships the offender has, and wishes to continue to have, with the community members involved in the shaming process. "Repute in the eyes of close acquaintances matters more to people than the opinions or actions of criminal justice officials."[285]

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[282] Braithwaite, *Crime, Shame and Reintegration…*, 86.

[283] "In the theater of operations . . . the presence of the enemy, and his capacity to injure and kill, give the dominant emotional tone to the combat outfit. . . . The impersonal threat of injury from the enemy, affecting all alike, produces a high degree of cohesion so that personal attachments throughout the unit become intensified. Friendships are easily made by those who might never have been compatible at home, and are cemented under fire. Out of the mutually shared hardships and dangers are born an altruism and generosity that transcend ordinary individual selfish interests." Roy R. Grinker, and John P. Spiegel, *Men Under Stress,* (Philadelphia: Blakiston Company, 1945), 21.

[284] Braithwaite and Strong. "Connecting Phliosphy and Practice", 217.

[285] Braithwaite, *Crime, Shame and Reintegration…*, 69

The Canadian Armed Forces is unique among federal government organizations when it comes to balancing risk and organizational responsibility. Military action entails significant risk and, in certain circumstances, failure by the armed forces can result in significant damage to, or failure of, the state. As such, the coordinated action of military units becomes an essential element of success. Likewise, members of the armed forces are required to place the concerns of the unit in achieving the coordinated action before their own personal well-being. This is reflected in the unlimited liability clause associated with military service, wherein members are required at the extreme to forfeit their lives in the pursuit of national objectives.[286] Militaries can only be effective when they are able to be employed, within the limits of their legal abilities, in applying violence on order.

In military forces, unit cohesion is seen as an important predictor of combat effectiveness.[287] In fact, so important is the cohesion-performance link that numerous studies have been undertaken over the years to assess the impact that the introduction of women, gays and lesbians into militaries would have on trust and cohesion in fighting units.[288] In the forming of social bonds within the military, the social contract is firmly at work to ensure personal safety as "…evidence shows that interpersonal trust in one's

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[286] *National Defence Act*, Section 33(1)

[287] Robert J. MacCoun and William M. Hix, "Unit Cohesion and Military Performance," Berkley Law University of California, 137-165, last accesses 23 July 2013, http://www.law.berkeley.edu/files/csls/Unit_Cohesion_and_Military_Performance_Ch5_MacCoun_Hix.pdf

[288] Ibid., 137.

comrades is distinct from interpersonal liking and that [military] professionals form this kind of trust rapidly in intense performance situations."[289]

The breakdown of the unique social contract that military personnel forge with each other is therefore of even more direct concern to military members than is a violation of the general society's social contract. Not only does the breakdown of the military social contract signal a weakness in the fabric of the society formed by it, it signals a failure of unit cohesion and by extension poses a very real risk to the safety and, at the extreme, the life of its members.

> Unit cohesion is the product of leadership, training, discipline, and high morale. It gives members of a unit the feeling that they can depend implicitly on their comrades. A strong and cohesive unit acts together under the direction of its official leaders. It is this sense of predictable dependability that gives a unit its strength, especially in stressful situations."[290]

Individuals in a military society must have, for their own safety and security, violations of the rules addressed in a swift and efficient manner, so that personal risk from the deviant behaviour of others is minimized or eliminated, and prevented from recurring again. Personal survival depends to a great deal on a strong social contract and the strongly-held value of interdependency and mutual support. Military personnel want to know that others "have their back" when it counts.

These dependencies are not the exclusive domain of combat. Daily interdependencies exist; aircrew rely on the diligence of the maintenance team to ensure their craft is airworthy, members of a ship's company rely on the Officer of the Watch to

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[289] Ibid., 157.

[290] *Dishonoured Legacy…*, Volume 2.

keep the ship safe in matters of navigation, and ground troops rely on service support elements to provide ammunition, food and water on a daily basis when in the field.

The military is a strong social institution that demands close interdependent bonds, and therefore it follows that it would be an appropriate community in which restorative justice and reintegrative shaming could play an important role in the justice system. Shaming is a direct, specific deterrent method and can also provide a form of general deterrence, although not deterrence based on punitive sanctions, but on emotional sanctions.[291] The "specific and deterrent effects of shame will be greater for persons who remain strongly attached in relationships or interdependency and affection because such persons will accrue greater interpersonal costs of shame. This is a reason why reintegrative shaming makes for more effective social control that stigmatization."[292]

Based on the research into restorative justice philosophy, values and practice, it is clear that the Canadian Armed Forces would be a suitable organization for blending restorative justice practices into the existing military justice system. The preexisting understanding of members as virtuous actors in the organization, the reliance on values and ethos that is group-held and supported, some preference and history of alternate forms of conflict resolution for significant crimes, and the existence of a community with a strong social contract all suggest that justice may be well served through alternate forms of resolution for conduct breaches.

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[291] Braithwaite, *Crime, Shame and Reintegration…*, 81.

[292] *Ibid.*

MILITARY RESTORATIVE JUSTICE CONCERNS

The summary trial process has not received resounding support from persons close to the military justice system looking in. Mr. Gilles Létourneau, the former chair of the *Somalia Commission of Inquiry*, has stated that the summary trial process is unconstitutional due to the ability of that forum to deny a military member opportunity through incarceration, and possibly resulting in a criminal record without a number of essential elements of justice, such as the right to legal representation.[293] Further, changes to Canadian military law are met with strong resistance by the military, even in the face of Supreme Court rulings as to the constitutionality of aspects of military justice.[294] If resistance is present concerning matters of constitutionality, it stands to reason that an avant-garde process like a restorative justice option in lieu of summary trial would not be embraced enthusiastically. Certain areas of concern might be offered to suggest that restorative justice, and in particular reintegrative shaming, runs counter to the established and authorized practices and processes of the military justice system; ones that need to be anticipated, examined and addressed.

It could be perceived that few cases that would be suitable for restorative justice, and that the administration of justice is the responsibility of leadership; justice is served by quickly addressing conduct violations, finding guilt where appropriate and administering punishment. The summary trial may well be deemed as the best venue to

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[293] Gilles Létourneau *Meeting number 65 of the Standing Committee on National Defence*, February 13, 2013 last accessed 15 Jun 2013.; http://openparliament.ca/committees/national-defence/41-1/65/gilles-letourneau-1/only/

[294] *Ibid*.

use because "a high degree of emphasis is placed on rehabilitating offenders found guilty of minor disciplinary infractions."[295] However, given the high summary trial conviction rate of approximately 97%, and no right of appeal, the summary trial might be described as a system designed to gain convictions rather than to do justice to or rehabilitate the individual service member.[296]

A number of summary trial convictions may have been facilitated through admission of all or some of the particulars by the offender, implying that they are virtuous actors prepared to take responsibility for their actions. To what degree this is the case is unknown, but it does comprise a certain portion of those convictions.[297] It is this body of cases that would likely be referred to restorative justice, because the member is assuming personal leadership by admitting to the particulars and engaging in the process of seeing that justice is served. As such, there would be a number of cases that would be suitable for restorative justice.

Further, any diversion system needs to establish the type of offences that are suitable for restorative justice and those that must follow a traditional court-based justice system. It is likely that in the military context, offences that have no provision for the member to elect court martial and are minor disciplinary infractions would be the most appropriate offences that could be diverted to restorative justice. That is not to say that

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[295] *Military Justice at the Summary Trial Level*, 14-3.

[296] Michel Drapeau, *Meeting number 65 of the Standing Committee on National Defence*, February 13, 2013, last accessed 15 Jun 2013.; http://openparliament.ca/committees/national-defence/41-1/65/?page=2

[297] Author, personal experience as Presiding Officer at summary trial.

more significant offences could not be handled through restorative justice; these cases would require oversight by the Canadian Military Prosecution Service.[298]

Another possible argument against the use of restorative justice in lieu of a summary trial is that discretion would be used, instead of relying on one consistent method for handling service offences. The adoption of a restorative justice process within the military justice system would require choice and discretion on the part of charge layers, if restorative justice was considered pre-charge, or by third party review post-charge, likely by an agency such as the Canadian Military Prosecution Service.

Detractors of restorative practices could argue that discretion in matters of service offences is inappropriate; that discretion would undermine the disciplinary system by treating offenders differently. When offences are alleged to occur, it could be argued, charges must be laid when the evidence suggests that a service offence has occurred, guaranteeing consistency and fairness, and providing deterrent value.

However, in the civilian justice system discretion is omnipresent and is not necessarily seen to necessarily undermine the justice system.[299] For example, in law enforcement a police officer exercises choice in when to invoke authority, and Crown counsel exercises discretion in diverting a case. The criterion for the exercise of discretion in supporting a restorative diversion need only be that, all things being in balance, the needs of the service and of the member would be best served in a moral

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[298] The Canadian Military Prosecution Service is a special entity within the Canadian Armed Forces. Its role is to review cases referred for court-martial, to decide which cases should proceed, and to prosecute those cases. As such the role is similar to Crown counsels who are entrusted with the prosecution of offences and appeals related to the *Criminal Code* of Canada and provincial regulatory offences, and who recommend diversion of cases to restorative justice. More information may be obtained at http://www.forces.gc.ca/jag/dmp-dpm/index-eng.asp.

[299] Handler, *Law and the Search for Community*, 17.

discussion as opposed to a legal process. Precedent exists as outlined in the Mainguy Report which clearly articulated many gross exercises and smaller instances of discretion in the laying of a charge. It can also be argued that the option to administratively handle behavioural deficiencies through progressive discipline[300] rather than through a trial system currently exists. In large part the choice whether or not to apply the measures of progressive discipline depends on considerations of the deterrent and punishment value associated with any one person's behaviour.

Discomfort with restorative justice also comes from "the perception that such programs lack the sort of public accountability we expect from criminal justice institutions even if we do not always receive it."[301] This public accountability implies that the acceptance of responsibility for action can only properly be done in a public forum in front of any member of society who wishes to witness, and for which the resultant punishment can be assessed against those levied for other similar crimes to ensure equitability. Restorative justice forums are often closed, private affairs, couched in confidentiality by agreement of the parties, and reparations can be different from other similar crimes because of the groups case-specific assessment that justice has been served.[302]

The establishment of a restorative justice system must attend to matters of accountability, not merely to ensure fairness or afford agreement that justice is served.

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[300] Also referred to a "remedial measures" or "Administrative action".

[301] Roche, *Accountability in Restorative Justice*, 3.

[302] Ministry of Justice BC, *Community Accountability Programs* (Victoria: Queen's Printer, 2004), 17.

Restorative justice is not necessarily "nice" or tolerant; this is very much dependent on the prejudices and norms of the participants.[303] Some of the problems with restorative justice that require consideration are that the establishment of a restorative justice system includes the possibility that, without accountability, the door is open to vengeance tactics by victims or community members, or that it can be emotionally traumatizing to all parties.[304] Restorative justice can just as easily provide an opportunity for people to indulge their impulses for revenge and punitive, stigmatizing behaviour. Accountability in a restorative justice process is essential, as it is a check on the exercise of power.

Arguably, deemed lack of accountability in a restorative justice process could be a major impediment to any consideration of handling a charge wherein the offender admitted to the particulars in any way other than at the "captain's table."[305] There is a fine balance between the requirement for openness to allow for appropriate checks and balances, either by a review authority or by the community at large, and the privacy of the individuals most directly concerned: the offender and the victims. Any introduction of restorative justice into the military justice system would require careful consideration of confidentiality and any limits to it, and ensure a process standard and review function is incorporated, likely through Canadian Military Prosecution Service.

Context poses another source of resistance to restorative justice. Notwithstanding the several decades of experience with restorative justice in the criminal justice system in

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[303] Roche, *Accountability in Restorative Justice*, 2.

[304] *Ibid.*, 42.

[305] Although, the major detractor for the continued existence of the summary trial is precisely lack of accountability and resultant constitutionality. Gilles Létourneau *Meeting number 65 of the Standing Committee on National Defence*, February 13, 2013; Last accessed 15 Jun 2013.; http://openparliament.ca/committees/national-defence/41-1/65/gilles-letourneau-1/only/

Canada, restorative justice programs and practices are "embedded in a contemporary culture and political contact where punitive and exclusionary punishment is dominant."[306] This contemporary culture is the foundation from which current legislation has been developed; legislation that includes the *National Defence Act*. It could therefore be argued that restorative justice is not appropriate for the Canadian military justice system because the *National Defence Act* allows for only certain punishments on a finding of guilt, and any deviation from the powers of punishment that apply to various offenses would be contrary to law. Two arguments to this point follow.

First, in a summary trial although the accused can admit all the particulars of the charge, it is not possible for the accused to plead guilty to the charge. The presiding officer can make a finding of guilty only when all the required elements of the offence are met.[307] Because the member admits to the particulars, and does not and cannot plead guilty, the restorative justice process does not address a situation or determination of guilt. Any reparation agreement arrived at through restorative justice therefore falls outside of the *National Defence Act* scale of punishment provisions. An admission to all the particulars of an absence without authority might in a restorative justice process, for example, result in reparations in the order of assuming another person's duty watches or volunteer activities with a not-for-profit organization sponsored by the unit; punishments that are not even contemplated by the *National Defence Act*.

Secondly, restorative justice processes generally do not permit the admission of the particulars, made solely for the purposes of entering into a restorative process, to be

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[306] *Ibid.,* 6.

[307] *Military Justice at the Summary Trial Level*,13-11.

considered as an admission of the particulars for the purposes of a court trial. Therefore, in the event that a restorative justice process fails to achieve a reparation agreement, a trial process may continue and the member may choose to change what if any particulars they admit to (although in a military system a referral of the charge would be prudent for transparency reasons).[308] A summary trial following the failure of a restorative justice process would proceed without further deviation from process, and the scales of punishment offered by the *National Defence Act* would still be available in the event of a finding of guilt.

Given that there are no impediments posed by the *National Defence Act* to the development and execution of a reparation agreement, detractors of restorative justice may argue that such a process cannot rehabilitate an offender. No effective "punishment" exists because the activities found in a reparation agreement may not look like something found in the scale of punishment, and may in fact look more like community building activities. Returning to the social contract and the importance of social bonds is maintaining the integrity of the social contract provides perspective on this matter.

If the offence served to violate the rules of the social contract, it also served to disrupt the integrity of the social contract. That rules were violated suggests that the offender's bonds to the community were weak or somehow compromised, and further suggests that the community has now been exposed to risk because reliance on neither the social contract nor the member is guaranteed. In order to remedy this situation, and return the community back to a state of safety, the integrity of the social contract needs to be reestablished, as do the organizational social bonds of the offender. Therefore, in order

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[308] *Criminal Code* s 717.1

to return the community to a state of safety and certainty and to reconnect the offender with the community, reparations that serve to rebuild the community and educate the offender on their membership obligations to ensure that the social contract stays intact are logical and appropriate. Neither community building nor re-training is without effort, nor is it without some measure of denial of opportunity to the offender; time spent by an offender in community building or other activities takes away from their freedom to pursue their own interests. The only difference is that in community building reparation activities they are not distanced from the community; distance that is implied by "punishment".

Therefore in order for restorative justice to be effective within the military justice system, the notion that reparation is an alternative to punishment must be eliminated. The reality is that reparations developed in a restorative justice agreement are a form of denial of opportunity, similar to punishment activities and should be expressed as such consistently.[309]

Restorative justice also carries with it the risk that the reparation would not be proportionate to the gravity of the offence. On one hand, the circumstances of the case might suggest that mitigating factors affected the final outcomes; on the other, it could be argued that undue influence by any of the parties could result in the reparation being skewed to either too lenient or too harsh. This is less of a concern in a trial system because the doctrine of precedent gives special baseline status to sentences rendered in

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[309] Roche, *Accountability in Restorative Justice*, 43.

the past by the highest court in the relevant jurisdiction.[310] A judgment follows precedent when the facts of a previous case are so similar to those the case at hand that the same outcome is required.[311] Strict precedent is not possible within the agreement stage of the restorative justice process as it is the collective determination of "reasonableness" that guides the outcome. Therefore a form of judicial review by the Canadian Military Prosecution Service, similar to that used for Crown counsel diversion referrals, needs to be built into the system so that a third party is able to assess the agreement for reasonableness and proportionality, all circumstances factored in.[312]

Further, agreements reached under a restorative justice process may not conform to traditional sentencing principles such as consistency and proportionality, the latter seen to be important because it "must comply not just with the upper limits based on human rights but with lower ones based in public safety."[313] Accordingly, procedural safeguards should be in place to ensure that restorative justice decision makers may, if required, explain their decisions with the aim of improving the quality and legitimacy of those decisions.[314] Clearly, this step of disclosing the outcomes and reasoning of a restorative justice process would serve the interests of the military community.

A restorative justice process must also consider the process to be followed in the event of an offender failing to carry out or honour the terms of an agreement. In the

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[310] Burton, *Law and Legal Reasoning*, 29.

[311] *Ibid*., 29.

[312] Roche, *Accountability in Restorative Justice*, 43.

[313] *Ibid*., 5.

[314] *Ibid*., 21.

civilian context this generally takes the form of the file being returned to the police or the courts, who will then decide whether to resume formal prosecution and sentencing. This threat of prosecution is an important element of restorative justice that establishes a subtle social construct to the process.[315] This threat is, in effect, a method of guaranteeing that offenders will see the process and the resultant agreement through, even if their tendency is to succumb to their undisciplined side. It also provides assurances to the community members that, whether in a restorative justice process or in a traditional process, the offender will be held to account for breaches of discipline and damage to the community.

Finally, there exists the problem of how program success should be measured in an organization that strives to know if activities are achieving the desired effect; in the Canadian Armed Forces effectiveness is generally measured through the use of statistics. Measuring the success of restorative justice by reference to outcomes is problematic. Recidivism or cost effectiveness are not good performance metrics because they can negate other desired outcomes of the restorative justice process, such as the strengthening of the community or the moral growth of participants. In a recent study of restorative justice process there was a reported increase in self-esteem reported among offenders, in perceived levels of fairness by all parties and in responsibility acceptance (particularly in "victimless offences" like impaired driving).[316] Ultimately, by emphasizing the focus of the process on reparation and learning, it is possible to develop good, albeit subjective, measures of effectiveness.

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[315] *Ibid*., 45.

[316] Dansie, *A Multigroup Analysis.*

These many concerns are not insurmountable, but they speak clearly to the requirement for a carefully constructed and considered approach to the disposition of service offences through an alternate streaming process, such as restorative justice. This structural work is beyond the scope of this paper, however it is clear that the philosophical underpinnings and objectives of restorative justice are consistent with the maintenance of the social contract of the Canadian Armed Forces and the maintenance of discipline which is essential to the effective functioning of the military community.

CONCLUSION

Since the passage of the *National Defence Act*, numerous changes to the military judicial system have been made, and continue to be made.[317] These changes are often met with resistance and concern among military members that changes imposed in response to shifting societal expectations will destroy military discipline. This resistance is not surprising given the characterization of the Canadian military as a "non-adaptive culture."[318] One element of military justice has remained constant, however: mandated legal processes requiring adjudication, a finding of guilt or innocence and, on conviction; sentencing.

One area that has seen considerable gains in the civilian criminal justice system, and that is absent in Canada's military justice system, is consideration of formalized diversion practices, and in particular, restorative justice in cases where the offender is prepared to admit to the particulars. This absence of formalized diversion practices signals a disconnect from the very reason behind permitting Commanding Officers to try offences. In the circumstance of a service offence the overriding problem that must be solved is maintenance of discipline; the solution is seen as a leadership responsibility and it must ensure that further offences are deterred. As a problem solving tool, the summary trial process is not necessarily the right one to use.

A formalized diversion mechanism embedded within the military justice system, in particular restorative justice, may in some circumstances better serve the concerns and

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[317] Pitzula and Mcguire, "A Perspective on Canada's Code of Service Discipline", 240.

[318] English, *Understanding Military Culture*…, 8.

objectives of the summary trial process: to provide an opportunity for personal reflection on the importance of military values, and to enforce discipline. Many military offenders believe a summary trial process is merely a process to endure and to accept punishment from. Little or no learning occurs and there is a limited ability for broken social bonds that may have led to the offence to be repaired.

As a result, there is an argument to be had that trial, sentencing and punishment may not accomplish the opportunity for reflection, values alignment and a strengthened social contract with the military.

The preexisting understanding by the Canadian Armed Forces of its military members as virtuous citizens, the reliance on values and group-held ethos, a precedent of alternate forms of conflict resolution for significant crimes, and the existence of a community with a strong social contract all suggest that justice may be well served through alternate forms of resolution for conduct breaches.

The Canadian military justice system still lags in many respects behind the civilian criminal justice system. Summary trials stand at risk of being eliminated in favour of disciplinary proceedings because of the limitations they place on a service members rights. While they are relied upon heavily by the Canadian Armed Forces to accomplish the maintenance of discipline through punishment of anti-social behaviour and are relatively quick in relation to courts martial, a portion of them result in convictions based on a member's admission of the particulars and may be seen as forums for merely establishing the financial or liberty cost of a behavioural transgression.

Diversion practices, such as restorative justice, will not address the constitutionality of the summary trial process. What restorative justice can do is

accomplish the objectives of military justice better than a summary trial when the member admits to the particulars of the offence. Rather than attending a summary trial in a disengaged fashion with the sole objective of accepting punishment as the cost for a transgression, the member who admits to a violation of disciplinary rules is held to account for that choice and is required to re-engage with the team they consequently let down.

Much work lies ahead before restorative justice can hope to find a home in the military justice system. A carefully structured approach to ensure the constitutionality of the process is critical; alignment of Acts, orders and regulations will be required, and personnel need to be educated and trained in the ways of restorative justice. How this should be done is the work of subsequent research; this paper establishes the validity and congruency of restorative justice within the greater institutional requirement to maintain a disciplined and operationally effective fighting force.

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