

We are probably all familiar with the phrase, “thinking outside the box.” As the phrase suggests, to solve a problem we must get outside the box, our frame of thought, and its inherent assumptions and rules in order to analyse and solve problems within the box. It’s not as easy as it sounds, since what is reality for us is that which is within the box. Thinking outside of what is considered normal and acceptable is often considered fantasy or unrealistic. Dr. Elizabeth M. (Liz) Elliot (2011) has noted that in our searching for an alternative paradigm regarding justice, we must get out of the box of retributive thinking. She writes, “Because we are inclined to consider punishment *within* a paradigm that is punishment based, reconsidering the notion of punishment itself seems ludicrous. Abandoning punishment in this context amounts to doing nothing in response to wrongdoing” (p. 27). This implicit deeply rooted logic in the mind of individuals and society is at the heart of the persistence of retributive justice practices. A paradigm shift is necessary; only by getting outside the box of mythical habitual, logic, will we be able to see that not punishing is not equal to doing nothing (Elliot 2011, p.27). She notes further that adherence to the belief that punishment is necessary for justice to be done is the biggest challenge in making a change in thinking from retributive justice to restorative justice (p.297).

Restorative justice advocates such as Liz Elliott (2011) suggest we move our focus from crime, to harms, to address the actual needs communities have for healing, and to rebuild relationships after a crime (p,77, 83). Inherently here, is also a shift from punishment, to problem solving, with a goal of shalom. Many of us, however, have been raised in a cultural setting, and often attending a church, that equates judgment and justice with retribution and punishment. To even think of an alternative such as restorative justice that nullifies punishment as pain application, is incomprehensible, it just does not make sense. From within the punitive box of thought, if there is no punishment, nothing is being done, and there is no justice. Thus we should not be amazed at the resistance to a wide affirmation of restorative justice, for it challenges thinking ingrained in all of us raised and socialized in North American culture. As well, punishment thinking is imbedded in public institutional structures, punishment having become institutionalized.

Is there any hope this side of the second coming for any for any lasting change? I believe there is, but working on this will require faith in the restorative model as a comprehensive, historically, and biblically, well-grounded model; and, we must work persistently, cooperatively, avoiding the competitive and dogmatic traditions alive as shadows of the retributive box. Learning to think outside of the punishment will lead to doing justice differently. Often, one is considered a bit of a nut for speaking from another paradigm to those to those fixed within the retributive paradigm. Non-dogmatic dialogue is required, working respectfully with others of different points of view in humility; in other words, recognizing the complex nature of interpreting scripture and society, and that there is always more to learn. As human beings, we all are part of the very culture and reality which we try to understand; it is not always easy to see our own stuff, making our discernment and interpretation difficult; the more so as one is fixed dogmatically within the retribution thought box.

Traditionally, justice is thought of as rooted in the ancient definition that justice means for each to receive what each is due, good to those who do good, evil to those who do evil: the ancient reciprocity

code. The negative side of the code, *lex talionis*, is what today, the state is mandated to deliver, namely pain or hard treatment, proportional to the evil of the crime, served as justice. In our modern classical justice model, retribution is grounded in utilitarian and rationalist thought, we make choices based on balancing rewards and risks or possible losses, much as we do when making a purchase. The fear of punishment due to making a bad choice is said to deter crime; it is simple matter of individual choice. This is the implicit logic which drives the wheels of criminal justice system regarding retribution. Oddly, many think that this negative side of the ancient code is primary justice. Christians might cite the Old Testament and select NT verses on God's wrath and just retribution. One gets wearied after thirty years of working both in church and the justice system planting seeds for change and seeing few tangible changes in public thinking or in systemic penalty. In my weariness though, I am not without hope, but it has urged me to ponder the sticking points concerning restorative justice as a comprehensive paradigm. Reticence to explore and embrace alternatives to retributive punishment is expressed not only in the political and public mind, but also in the mind of the church. I must acknowledging that churches and faith groups of the peace tradition such as the Mennonites, the Quakers, and others, are also concerned about the support for retribution dominant in the mind of Canadian society today. In addition to the hard work of paradigm change, I wish to briefly consider the following sticking points or stumbling stones to the concept and comprehensive practice of Restorative Justice: 1) Punishment as a multi-faceted, complex, dynamically intertwined social cultural institution; 2) deeply ingrained retributive beliefs and the practice of a hermeneutic of retribution; and, 3) the bifurcation of church and state.

Punishment as a complex social cultural institution.

Punishment is deeply ingrained in our thinking as human beings in the Western World, it is an institution. As a social cultural institution it facilitates the ethos and makes punishment seem reasonable. Socially habituated practices become normal and accepted behaviour. British criminologist David Garland (1990) notes regarding the institutionalized nature of the practice of sanctioned punishment and prisons, quoting in part from L. Stone's, *The past and the present revisited*: "Twentieth century prisons survive simply because they have taken on a quasi-independent life of their own, which enables them to survive the overwhelming evidence of their social dysfunction" (Garland 1990, p.5). Our thinking about punishment is caught and learned in the processes of our psycho-social development from childhood on through the impressionable years (Redekop, 2008, p.147). Redekop further identifies the overuse of coercive child discipline in the home as the bridge by which childhood experience is transferred in adulthood to the support of retributive state polices (p.182). Human beings are culturally and socially enmeshed. Culture does not exist in a vacuum, suggests Garland (1990), values, conceptions, sensibilities, and social meanings reside in and are "...actively created and recreated by our social practices and institutions—and punishment plays its part in this generative and regenerative process" (p. 251). The way conflicts are dealt with, and deviant behavior is commonly handled, becomes learned behaviour and is what has become to be considered common sense and normal in a society. Garland uses the term *penality*, "...a complex of laws, processes, and discourses....," to identify the holistic multi-dimensional existence of the institution of legal punishment in public and private thought and formal practice of justice (Garland, 1990, p.10, n.12). Carl Stauffer (2013) in a recent Restorative Justice Blog refers to resistance to a comprehensive paradigm change arising from the complex nature

of the criminal justice system which is solidly rooted in the retributive paradigm. He implies, however, that the idea is not to pit one paradigm against the other, but to work actively and holistically with all the dynamics and interrelated aspects of system and society. Stauffer writes, "Social movement theory argues that critical mass transformative 'tipping points' have historically occurred only when advocates of change on the *inside* and agents of provocation on the outside have collaborated to reinforce the undergoing transformative changing of a system" (Para. 6).

Garland (1990) stresses the importance of acknowledging study of the sociology of punishment in theorizing about penalty. The social and cultural aspects of society are both act, and are acted upon, by institutions of justice; social mentalities and sensibilities act significantly upon the criminal justice. Penalty takes place in the real world of daily life. "Somehow or other," states Garland, "We must learn to view it [penalty] both in its integrity, as an *institution*, and in its relatedness, as a *social* institution (Garland, 1990, p., 283). Further he notes that penal institutions are cause as well as effect with regard to culture, it is a two-way interactive process (p.249). A holistic approach is necessary, suggests Garland, to resist overgeneralizations and reductionism, that of reducing a complex social legal reality to a "...one-dimensional image of punishment" (p.9). Social determinatives are not in isolation from the other interacting social legal forces, and he laments that the social cultural dynamics are often overlooked or considered irrelevant (p. 248ff). Punishment and more broadly, penalty, is situated in a particular society and a particular culture in particular history; it is not a-historical or abstracted from the reality of life's interrelationships and forces (Garland, 1990, p. 29). Following from the quantum science-like dynamics of penalty, I suggest that our theology and political constructs are also enmeshed with the dominant punitive, competitive cosmologies and ideologies of our time and culture. Dominant thought forms predispose us to interpret scripture in a certain way, also about justice. Human nature seems easily discouraged by complexity, and desires a simple single solution. When a paradigm shift is not readily apprehended it is also easy to give up on the efforts to promote change to the dominant reigning retributive paradigm. Many would also say that there it is also a deep human tendency to seeking revenge, and, to them, and us, thinking implicitly friendly to retribution.

A deeply engrained retributive hermeneutic

There exists a deeply entrenched hermeneutical tradition of retributive punishment. Anselm's influence was considerable in continued adherence to the ancient reciprocity code and its consequent belief in the absolute necessity for retributive punishment (Wolterstorff, 2011, pp. 192-193). It also seems that the sense of the richness and continuity of the covenantal, organic, and relational, nature of Old Testament Justice has been lost. Wolterstorff (2011) emphasizes, "Justice is not superseded in the New Testament, but justice lies at the heart of the New Testament Gospels (p.50). Pre- enlightenment justice was more akin to practical wisdom and communal health, than to an individualistic, positivist, punitive, Western traditions of modernity. The emphasis of the Old Testament is not on punishment; Paul Redekop (2008) identifies 56 references to punishment in the Bible, with 45 in the Old Testament; he counts 551 references to love, with 319 in the Old Testament (pp. 168-169). The Old Testament emphasis as a whole is not on retribution, but rather on grace, love, and restoration and peace; the measure for justice, *mishat*, was how the poor and marginalized were being valued and treated. A

holistic, organic, concept of salvation was expressed already in the Old Testaments with the concept of shalom and in the movement towards Jubilee fulfilled in Christ. It is interesting to note that ancient societies did not create punitive criminal justice systems such as we have today, not even the Romans created one. Our present system began with the Inquisition (Bianchi, 1985, p.21), and then was “reformed” following utilitarian and rationalist thought during the 18th/19th centuries.

Prisons in Jesus’ day did not practice mass incarceration as punishment as is done today especially in the USA, and in the last decade in Canada; however, the prisons then were not nice places, but held mostly political prisoners awaiting their fate as enemies of the state. Other non-political crimes were dealt with at the community level by locale mediators or functionaries for justice and community peace (Bianchi, 1985). Sadly the early church was influenced by the Roman model of “justice” towards the enemies of its empire, the church, often exercising cruel retribution upon its enemies, those it labelled heretics. In small scale cultures before the domination of Roman rule, some good, restorative practices were established, but eliminated by state monopoly after the modern states were formed. The Romans had reserved its best practices for its own citizens. Dutch criminologist Herman Bianchi (1985)¹ refers to the Anglo-Saxon, pre-Roman practice of *frith* circles, conflict resolution circles, or peace making circles. *Frith*, as a word, is related to the Dutch, *vrede*, peace, (English freedom), and is related in meaning to the Hebrew concept of *shalom*. *Frith* was a peace worked out locally in dialogue and collaboration. By contrast, the Roman concept of *pax* was a peace that was imposed militarily by Roman conquest and domination (p. 32, 93). There were death penalties in ancient small scale societies because avenging and feuding had seemed a sacred necessity, according to ancient cosmologies, to avenge the victims and purify or cleanse them from the ritual pollution that made them and society unclean until purified by an execution, or a *re-tribution*. Because out of control feuding could truly damage a society, many restraints had been put in place by certain societies. Moses established cities of refuge, and *lex talionis* actually was to act as a limiting factor in the ancient urge to avenge wrongs (Newman, 1981, p.29 Bianchi pp. 32-34). Pre-Roman societies had created mechanisms and engaged mediators to limit private feuding and promote just resolutions for the common good. Often *wergild* (*wergeld*) or money of proportional value was used as repayment of tribute. Application of retributive measures such as death or banishment were not automatic, but the result of the lack of willingness of the harmdoer to enter into dialogue regarding righting the wrong (Bianchi, 1985, p.32).

These uses of the term retribution, that of repaying the victims for the wrong done and restoring community wellbeing has been largely lost in the modernist rationalization and justification of retribution as monopolized by the state. The state has become the victim having eliminated the possibility of a direct transaction of addressing the wrongs to restoring peace. The enlightenment philosophers had reacted not to ancient practices, but the gala events at public executions and public spectacles of the gallows, the pillory, and pyre, in 17th and 18th century England (the bloody code) and Europe. These had brutal public demonstrations of cruelty to establish control by the state for social order as the stability of traditional medieval social structures were broken by the new economic and legal structures, moving towards land reform and contractualist thinking. Punishment as a concept lost

¹ There is an English translation of this book available, it may now be out of print: Bianchi, Herman (1994) *Justice as Sanctuary: Toward a New System of Crime Control*. Bloomington, IN: Indiana University Press.

ancient meanings of restoration of the wrong. Bianchi (1985) indicates that other words are available to connote the hard work of making things right that focused not on application of pain, but on the hard work of achieving a just solution; he refers to the Dutch word *straf* to get away from the word punishment derived from Latin, *poena*, meaning pain, or pain application. *Straf*, of origin a nautical term (e.g. stiff breeze), suggests working ones way through hard work to one's destination (p. 36). New words and tasks of a non-retributive paradigm reframe the task of justice on seeking a positive goal rather than maintaining reliance on the word "punishment," which keeps us stuck in the modern punishment paradigm. This is not to say that ancient societies were perfect, but a whiggish view of history as progress, builds blind spots to the effective pre-modern community justice structures and practices for edification and peace, and reads the Old Testament from within a retributive paradigm. One wonders where the voice of the formal church was during the formative years of our modern criminal justice system at the time of the reformers, Beccaria and Bentham.

In the media, and in many sermons nowadays that I hear, I recognize the influence of the modernist, positivist, punitive, hermeneutic tradition. There predominates in our Churches and society, a deeply ingrained theological and philosophical belief, probably largely inherited from Anselm's influence, in the absolute necessity of punishment for wrongdoers as God's desire for justice; as well, I see the influences of Beccaria and Bentham regarding demands for deterrence and retribution as punishment: Criminals deserve to be punished severely. The law is used as a club as a scare tactic: break the law and you go to jail. There is a stubborn hermeneutic of retribution pervasive in exegesis that has lost holistic interpretations. Confusion exists even in biblical translations (Wolterstorff, 2008; Bianchi 1985). Wolterstorff (2008) notes that of the 300 or so *dik* stem words in the New Testament, the root for the English word "justice, there is a lack of equivalents to the word in English, and translators had to make a choice, tending to mistranslate many instances and avoid using the English word "justice" (Wolterstorff, 2008, p.260). This is true of the word *dikaosune*, usually translated as "righteousness" rather than as "justice" (Dart, 2005, p. 51; Wolterstorff, 2008, p.111). Jesus would have said, blessed are they who hunger and thirst after justice. This is how it is actually translated in my Dutch Bible, as *gerechtigheit*, meaning, justice. *Dikaosune*, a significant N.T. word is often translated as "righteousness," translated as a personal passive quality of rectitude or holiness, when it should really be translated as, seeking, or doing Justice, in an active sense, to be dynamically equivalent with the original text and attitude of Jesus (Wolterstorff 2008, p. 112). In the beatitudes we are not called by Jesus solely to a personal private life of holiness and integrity, suggests Ron Dart, but more completely, Jesus is calling us "...to be seekers of justice, of the common good, of that which is just for all of us" (Dart, 2005, p. 51).

An holistic, organically grounded, model of practiced justice as promoted by Jesus, stands in continuity with the Old Testament, not in absolute discontinuity with it. The Law of Moses had been clear: do not take revenge, leave revenge up to God; love the Neighbour (Deut. 32:35; Lev. 19:15). The Tora's emphasis on guidance for relational covenantal practices in the O.T. are fulfilled in Christ, and deepened by His nullifying the ancient retributive code (do not retaliate, love the enemy); as well His reemphasizing the love command and extending this model for all neighbours, genders, and nations, including the enemy, flows from Old Testament roots. The New Testament tandem words, *krisis* and *dikaosune*, meaning "justice," "being just," and, "acting justly and fairly," need to be read in the spirit

of their Old Testament counterparts, *mishpat* and *tsedeka* - doing justice and acting accordingly, with a special concern for justice for the marginalized and oppressed in the land. The terms are primarily relational, and as well they signify wise instruction and direction, not law and order laid down for fear and compliance.

In ancient Israel, Yahweh was both covenantal Lord and Judge. Judgment was not done remotely and objectively by metaphysical code, but covenantal, social relationships, and covenant stipulations were practical, relational, participatory, and sought the good for all. The basic vision was to restore people and community to right relationships and to live rightly with God, seeking the common good for the community in covenant partnership. God was personally involved in the relationship as covenant lord, not indifferent to injustice especially to the poor and needy, the widow, orphan, and alien. Wolterstorff (2008) points out, that Israel's religion focused on salvation in this world, not, "...from this earthly existence" (p. 79). God in Christ calls us to follow that model of humbly practicing justice and kindness in our public social world, as well as in our private lives. God gets angry when injustice breaks covenant promises harming social relationships. In upholding justice for the downtrodden, God's just action does bring down the oppressor. However, judgment and justice can only be understood in this relational sense of justice, not in the modern legal sense as determined by legal positivism, and not from within the retributive or punishment paradigm.

Volkmar Hertrich (1965) notes that the sense of the old testament word for judgment (*mishpat*), the counterpart of the N.T. word *krisis*, is to be seriously distinguished from the western notion inherited from the Roman system of the judge impartially giving judgment on the basis of the norms derived exclusively from *iustitia distributiva*. Hertrich states, "Appraisals of the OT based on the idea of a *iustitia distributiva* which operates according to a fixed norm of absolute morality will necessarily miss the mark. They do not see the true meaning of the OT witness because they fail to note that the judicial decisions of Yahweh in the covenant people and its history serve a specific goal. The justice worked out in this judgment is not *iustitia distributiva* it is *iustitia salutifera* [health bringing]" (Hertrich, p. 926). Bianchi (1985) following Martin Buber, notes that *tsedeka* justice looks not at mere intentions, but at the results; has justice actually provided justice for the poor, peace and community health and well-being to the victimized? If so, justice has been done; a tree is recognized by its fruit (p. 23). Judgment is like diagnosis, and justice is evaluating the results to see if the problem has been resolved. Laws and norms are needed as standards of course, but justice is not simply compliance to external law codes, but justice upholds people. It is this relational aspect of that has been specifically picked up by the proponents of restorative justice suggesting that the goal of justice is not punishment, but rather restoration, reconciliation and peace (Elliot 2011; Bianchi 1985; Zehr, 1990). There is still pain involved, that is part of the process of enduring reproof, the pain of facing the truth of the harm done, and the hard work of making things right. Eliminating retributive punishment does not mean that nothing is being done.

Punishment, *poena*, *pain*, of course must then be perceived outside the traditional punishment or retribution box. This is imperative also for traditional thinking about God's judgment. We need to see judgment, justice, and mercy holistically, inseparable from God's grace and His desire for shalom and the common good. We may not dissect God's justice from his mercy and grace. Buschel (1965)

emphasizes that God's judgment is not a myth, and, "there is an organic connection between the human act and its consequences in the Divine judgment" (p. 940). Hertrich (1965), regarding the Old Testament judgment of God, states that judgment of the wicked is the reverse side of the saving act of God, but is definitely not purificatory, rather it anticipates grace; judgment and grace are in tension, but entwined (p.932). An integrated fact is that salvation like forgiveness is a gift of God's grace in Christ, not meritoriously awarded. God forgives the repentant sinner and retributive punishment is not required, emphasizes Wolterstorff (2011), because God does not punish those He forgives (p.193). Schrenk (1964) offers that, "Forgiveness is an act of judgment in which the justice of God is fully vindicated" (p. 204). What is implied, though, is that God's corrective judgment will not focus so much on street crime as much as on structural oppression and exploitation of the poor and vulnerable by those who hold the power in the nations of the world today.

It seems that the church and society have been desensitized by the traditional dogma and practice of retribution, and have possibly relegated pre-modern understandings and practices of the Old Testament as obsolete, trumped by the New Testament. Enmeshed in the grip of the retributive paradigm, perhaps blinded by vivid imaginations and fears, people today regard the belief in the necessity and efficacy of punishment as absolute, as they read retributive punishment into their interpretations of the Bible. Wrongdoers must be punished it is commonly insisted, even if repentant, and to do justice to justice, no mere "slap on the wrist" will do. However, there is enough convincing exegetical and moral philosophical studies emphasizing that one cannot justify current penal practices as biblical, or as the will of God, or even solidly ethically grounded. The Enlightenment reformers rationalized the grounding of pain application in the hypothetical social contract; they never bothered to ask if penal punishment was just (Newman 1981, p.157, 163). I wonder if the church as a whole ever wrestled much with penal punishment as a moral ethical issue.

Bifurcation of church and state

There has been a persistent implicit perception that Christ was not involved in justice and politics, a logic reflected in the doctrine of separation of church and state. However, as we have seen, Christ was vitally involved in issues of justice in the social-political structures of his time. In many areas of his teaching and work on earth Christ was continuing in the OT prophetic tradition. He also affirmed the proper role of the state: "give to Caesar what he is due"; using words of reproof, Christ called the self-righteous religious-political functionaries back to their proper calling as keepers of shalom. Herman Bianchi (1985) implicates the two kingdom doctrine as justifying a double standard of justice, one of grace for the church, and one of the sword for retribution for the state to dispense, each in separate functionalist silos (p.25). Could it be that the reticence to do public justice is fear of ruffling the feathers of state power and of the corporate status quo? Another theological premise involved is the reformation's position on good works that we are saved by faith alone; fear of a social gospel? Does undue concern for personal salvation by grace alone, affect how we do justice for the neighbour? John Galtung (1997) thinks so. Evangelical passion for personal salvation to become right with God erodes the urgency and inclination for just treatment of the neighbour concludes Galtung (1997, p.44). I suspect the modern individualism and the social-contract world view also creates social distance. More can also be said about the separation of law and gospel, of God's justice and His mercy; or, dissecting shalom with a

reductionist, *already* and *not yet*, bifurcation. Much work needs to be done, but it seems that the “market” for alternative theological points of view is lean.

The modern state, through the justice system has incredible authority to act invasively and coercively suspend civil rights. Walter Wink (1998) regards the State, as one of the *powers that be* acting as a principality and power. A state is not inherently evil, it is vital in governance for the common good, but it sometimes must be called back to its creational purpose when it absolutizes its own rule in unjust ways (pp. 27-32). Here is the important role of the church between state and society acting as a prophetic guardian of justice for the vulnerable and poor against state or corporate domination and exploitation. Declaring an absolute antithesis, and living at a distance from the state and society theologically speaking, we lose the opportunity to develop a relevant and comprehensive grammar with which to address public issues intelligently and persuasively and to act as agents of change; approaches often vacillate between apathy and polemics. With such a bifurcation a passive resignation or an uncritical acceptance occurs regarding crime and punishment issues, often implicitly satisfied with a retributive approach of the status quo, except more is desired. It seems that an organic solidarity with the state beyond partisan dimensions is not nurtured in many evangelical circles. One’s party of choice is sanctioned, all other parties, especially those on the left, are demonized. We lose strategic opportunities to work within the structures of a nation to collaboratively work for transformation and change. The state too is a gift of God’s common grace for the establishment of the common good, to nurture shalom. As the old song goes, “They will know that we are Christians by our love” “guarding each person’s humanity and dignity,” so in the exercise of justice, it is not the only the State’s job, not simply God’s job, it is ours as well. Many times I have heard in a modernistic sense that the main responsibility of the state is the punishment of the wrongdoer. However, reading the Bible’s message about justice, mercy, and peace, and listening to pre-modern traditions we can affirm the wisdom of Ron Dart’s comment that the state has a, “...vital role to play in creating the common good as does society – the task is to define what is needful and necessary for one and all...” (Dart 2012, p.9). Justice in love, by state and individual does no evil to the neighbour.

I have briefly tried to show the complexity of a paradigm change in regards to retributive punishment. However, with dialogic pluralism (Wolterstorff, 2008), open mindedness, and collaboration with all disciplines and systems involved, as well as doing theology with eyes of non-retributive biblical justice; in faith, we can move mountains. Simply put, we must avoid being people of one book. Revenge thinking and belief in the retributive system is deeply rooted in society and change will take time. But a “tipping point” can occur when influences inside a system, and outside the system, coalesce for change (Stauffer, 2013). Both, working from the inside, as well as from the outside, are necessary; a collaborative problem solving approach will seek creative strategies in multiple related areas. An adversarial, combative approach will create factionalism and isolation of fixed polar opposites. There can be opposites, but they don’t necessarily have to be absolutely antithetical. To do this we must abandon dogma and certitudes, and exchange and “float” ideas in lateral thinking and dialogue. This will be an important challenge for those of us raised in Western Culture imbued in the logic, there can only be one right answer, and a hubris that insists that winning is everything. Paradigm change cannot be done by combat, but by dialog, parallel thinking and collaboration.

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