

From Canada

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WESTERN CRIMINAL LAW AND THE RE-EMERGENCE OF RESTORATIVE JUSTICE

By Wayne Northey

Introduction

It is an honour to share a few words at this second Restorative Justice Global World eConference.

In thinking of the overall theme, “Living justice,” this talk will take us in the direction of a “Life-Giving Justice”: one that ever offers hope; leaves no one out; orients invariably towards those too often at the bottom of our planned or inevitable hierarchies - what Catholic theologian Gustavo Gutiérrez coined to be a “preferential option for the poor.”

This idea of living justice will be reprised throughout.

In response to an essay I recently uploaded to the Academia.edu website, about the spiritual roots of restorative justice (Restorative Justice and Spiritual Origins), there came a robust critique of the paper, stating that it was part of the wider injurious societal impact that this “movement” has had since its beginnings, wherever incorporated.

His critique helped focus my remarks today. I shall reflect on Restorative Justice history in the past half century; and then to go much further back - indeed to the Greco-Roman civilizations of the Ancient World, in both of which the Western World has its deep roots.

The other great Ancient World tradition back of Western history is of course the Judeo-Christian legacy - the Christian story engaged also in this talk.

For better or for worse, the Western legal tradition has impacted - indeed dominated - Criminal Justice Systems around the globe. There is of course one tragic obvious reason: European global Empire-building and colonization.

What initially drew me to Restorative Justice in 1977, when I became second Director of the first Restorative Justice initiative in Canada - that was eventually imitated repeatedly worldwide - its initial allurements, was its peacemaking ethic. That has perdured ever since.

The Greco-Roman World, and The Moral Earthquake of the First Century
Renowned British historian Sir Larry Siedentop in his brilliant study, *Inventing the Individual: The Origins of Western Liberalism*, writing on a vast historical canvas, asks at the outset whether it even makes sense to talk about “the West.” He answers emphatically, Yes!, indicating:

If we look at the West against a global background, the striking thing about our situation is that we are in a competition of beliefs, whether we like it or not. (Siedentop, Larry. *Inventing the Individual*, Penguin Books Ltd.; p. 1)

A little later:

This book . . . will take moral beliefs as seriously as possible . . . [I]t seems to me that moral beliefs have given a clear overall ‘direction’ to Western history. (Siedentop, Larry. *Inventing the Individual*, Penguin Books Ltd.; p. 2)

The author proceeds in the rest of the book to tell the story of a new ethical impulse that burst onto the scene in the time of ancient Rome; one that ultimately profoundly shaped the Western world of contemporary liberal society: our world. And, I will argue, in its good-angels side, it shaped also the birth, early impetus, and early theory of Restorative Justice. That comes later. To be noted: there is a bad-angels side too.

Siedentop describes the dominant Greco-Roman cultural ethos to be one shaped for centuries by moral beliefs that finally knew monumental challenge in the first century AD.

He describes an Ancient World which was profoundly religious. The family and its worship of sacred ancestors - veritable small “churches” one might say - were for centuries the central building blocks of ancient society. That culture, in its Greek and Roman iterations, could not have been more foreign to the contemporary prominent place of the Western liberal individual, upheld by (in its ideals):

- belief in individual liberty,
- belief in the fundamental moral equality of all individuals,

- a related embrace of equality, such that it became the basis of a legal system and of a representative form of government fitting for a society of such individuals.

Again: these are contemporary Western ideals. No jurisdiction has ever fully attained these, but they will be missed if they are gone.¹

The ancient city was decidedly not seen as an association of individuals, possessed of individual conscience or choice. Kingship was the highest priesthood of the city. Laws were the necessary consequences of religious belief. There was no concept ever in Greco-Roman history of any kind of nonreligious secularism.

Foreigners, women and slaves had no rights, no participation in public life, in short: no place in society.

There was in both ancient cultures a pervasive rationality of profound inequality.

Siedentop sums up:

At the core of ancient thinking we have found the assumption of natural inequality. Whether in the domestic sphere, in public life or when contemplating the cosmos, Greeks and Romans did not see anything like a level playing field. Rather, they instinctively saw a hierarchy or pyramid. (Siedentop, Larry. *Inventing the Individual*. Penguin Books Ltd.; p. 51.)

Then a moral earthquake erupted in an obscure corner of the Roman Empire: Palestine.

We read:

First, Jesus crucified; then, Jesus resurrected. Previously in antiquity, it was the patriarchal family that had been the agency of immortality. Now, through the story of Jesus, individual moral agency was raised up as providing a unique window into the nature of things, into the experience of grace rather than necessity, a glimpse of something transcending death. The individual replaced the family as the focus of immortality. (Siedentop, Larry. *Inventing the Individual*. Penguin Books Ltd.; p. 58)

The Apostle Paul played a central role subsequently in seeding Christianity throughout the Roman Empire. The pinnacle of his enterprise was spreading the message of love of Other: neighbour and enemy.

Paul's notion of "love"—one that ideally embraces neighbour and enemy alike, is sacrificial for the Other, but never of the Other—this love-ethic provided a new concept of rationality previously unknown in the Ancient World. And it was, said Paul and the early Christians, open to all. For Paul, all had moral agency: male, female, slave, free, Jew, Gentile, etc. Paul claimed love obliterated all class and caste distinctions, all gender, all slavery, and all racial dividing walls of hostility. In short: it was profoundly a life-giving as opposed to a death-dealing new ethic.

In the ancient world, virtue meant rewarding your friends and punishing/destroying your enemies.

An alternative idea came from [first-century] Galilee: what is best in life is to love your enemies, and see them reconciled to you. [The great 20th-century Jewish scholar] Hannah Arendt—the first woman appointed to a full professorship at Princeton University—claimed, "... the discoverer of the role of forgiveness in the realm of human affairs was Jesus of Nazareth." This may be debatable, but he certainly gave the idea unique publicity. (Six Surprising Ways Jesus Changed The World— John Ortberg)

And for us who have either given or received true forgiveness, it impacts invariably as providing a whole new lease on life: indeed wondrously life-giving—a "living justice".

The renowned Yale University historian, Jaroslav Pelikan, wrote last century:

Regardless of what anyone may personally think or believe about him, Jesus of Nazareth has been the dominant figure in the history of Western Culture for almost 20 centuries. If it were possible, with some sort of super magnet, to pull out of history every scrap of metal bearing at least a trace of his name, how much would be left? (Jesus through the Centuries; His Place in the History of Culture, Jaroslav Pelikan, New Haven: Yale University Press, p. 1)

Early 20th-century British historian, C. J. Cadoux, in an Epilogue to his massive study, *The Early Church and the World* (1925 & 1955), says of that era:

... we certainly have a moral reformatory movement on a scale and with a potency unparalleled at any other epoch before or since. ... [T]he achievements of the early Church can defy comparison with those of any other moral or religious movement known to history (p. 611).

Brilliant 20th-century scholar, Ivan Illich, claims that the Good Samaritan Story is the epitome of the new ethic of Jesus, and of the early church. As such, along the lines of Hannah Arendt, he claims it is an unprecedented new ethic, unknown previously in the annals of history until the telling of that story. Illich comments thus:

According to the Gospel of Luke, a challenge is raised to Jesus: But who, then, is this other, this neighbour? Through his persistent questioning, an expert of the law reveals a primal yearning for the intimation of limits. He grasps desperately for a frame of reference, for a categorical delimitation identifying where the commitment of charity can safely cease. He expects Jesus to tell him what he wants to hear: a line in the sand revealing who is, and consequently who is not, a neighbor for whom I am responsible.

Jesus responds with a parable.

A traveler on his way from Jerusalem is attacked by bandits, ruthlessly beaten, stripped naked, and left for dead in a ditch. A priest comes along and after him a Levite, but both pass him by. Finally, a Samaritan (that is, an outsider, excluded and despised), sees the man, binds and dresses his wounds, and takes him to an inn to care for him without charge. Jesus then returns the question: Who was a neighbor? [The answer came back from the legal Beagle:] “The one who had mercy on him.” (Lk. 10:35-37). [Then follows Jesus’ admonition: “Go and do likewise.”]

In saying “Go and do likewise,” what Jesus tells the inquisitive lawyer is not to go and find neighbors “out there,” but to choose to be a neighbor to the one you happen upon, even if he is a Samaritan[—religiously at total enmity with the Jews of the time.] Far beyond the unilateral transfer of disinterested aid, the Samaritan is moved—“in his gut” the text says—by the call of this wounded man. His response opens the possibility of a new relation of charity that transgresses both the predetermined “we” of our tightly regulated social boundaries, and the “I” of our own illusions of autonomous self-sufficiency.

Through an encounter of sheer contingency, a proportionality is opened between the Samaritan and the wounded man that clears the space for the creation of a new “we,” a new bond of

reciprocity, a new communion. (The Rivers North of the Future: The Testament of Ivan Illich, David Cayley, Toronto: House of Anansi Press, p. 197)

One could add: it was of a new life-giving justice unheard of in that world: a “living justice.”

Illich nevertheless contends that this horizon also carries with it the possibility of its rejection, corruption, and subjugation.

There is a temptation [indeed danger] to try to manage and, eventually, to legislate this new love, to create an institution that will guarantee it, insure it, and protect it by criminalizing its opposite. (ibid, p. 56)

I shall return to this with reference to the rise of the Western legal tradition, in considering Illich’s profound reworking of the insight that “The corruption of the best is the worst.”²

Siedentop once more:

So in Paul’s writings we see the emergence of a new sense of justice, founded on the assumption of moral equality rather than on natural inequality. . . Paul’s conception of the Christ exalts the freedom and power of human agency, when rightly directed. In his vision of Jesus, Paul discovered a moral reality which enabled him to lay the foundation for a new, universal social role [for the individual]. (Siedentop, Larry. *Inventing the Individual*. Penguin Books Ltd.; p. 66.)

A side note: The ethical tools therefore by which Christianity is critiqued today, certainly not without in part good reason in the West, are provided to Western culture in the first place by the revolutionary moral eruption of Christian faith in the first century.

CBC Ideas broadcaster, David Cayley, in his masterful book on Ivan Illich published last year, puts the point this way:

Modern [Western] reformers complain, quite justly, about the violence of Christianity, [René] Girard³ says, but they fail to notice that “they can complain [only] because they have [the ethical framework of] Christianity to complain with.” In this way, there arises [ironically enough] a race of super-Christians who have renounced Christianity but have no other basis for their fantastic hopes and their extreme sensitivity to injustice than the Gospel

that they consider to be entirely superseded [in contemporary Western secular society]. This creates an extremely confusing situation for . . . those who take their own good will for granted and believe themselves to be the authors of their own “values.” (Ivan Illich: *An Intellectual Journey*, p. 404. Emphasis added.)

Such have obviously perhaps never questioned, nor apparently at least researched, the origins of their own ethical epistemology—how they know what is ethical and what is not—that if done would point to the unprecedented Christian ethical upheaval of the first-century Greek and Roman world.

The rest of Siedentop’s remarkable historical narrative leads to this conclusion:

A moral revolution in the first centuries AD—the discovery of human freedom and its universal potential—led to a social revolution in the West. The invention of a new, equal social role, the individual, gradually displaced the claims of family, tribe and caste as the basis of social organisation. . . The roots of liberalism—belief in individual liberty, in the fundamental moral equality of individuals, that equality should be the basis of a legal system and that only a representative form of government is fitting for such a society—all these . . . were pioneered by Christian thinkers of the Middle Ages, who drew on the moral revolution carried out by the early church. It was the arguments of canon lawyers, theologians and philosophers from the eleventh to the fourteenth centuries, rather than the Renaissance, that laid the foundation for liberal democracy. (From book description on Amazon, emphasis added.)

Restorative Justice and Peacemaking: The Corruption of the Best is the Worst (*Corruptio Optimi Pessima*)

“Violence is the ethos of our times,” begins theologian Walter Wink’s brilliant assessment of contemporary Western culture. (*Engaging the Powers: Discernment and Resistance in a World of Domination*, Walter Wink, Philadelphia: Fortress Press, 1992, p. 13). By “violence” is meant the deliberate infliction of harm upon, and denial of human dignity to, another.

This is of course also what “penal” (from the Latin word for pain or penalty: *poena*) means: the purposeful infliction of pain upon another as an end in itself: ‘pain delivery like milk delivery,’ as the great Norwegian criminologist, Nils Christie, aptly catches its quintessence and banality⁴.

“The banality of evil” is a phrase coined with reference to the Holocaust by the brilliant Jewish philosopher, Hannah Arendt, in *Eichmann in Jerusalem: A Report on the Banality of Evil*, (London: Penguin Classics, 2010.) Such a designation also applies to Western retributive justice.

Violence in Western culture—in all human cultures—is bar none the dominant spirituality of our age; one ever death-dealing, never life-giving. It is and has been the driving spirituality of Western penal law as well.

Centrality of Western Christian Spirituality for Criminal Justice

The defining ethos of Western spirituality has been Christianity. It has also been for a millennium the reigning legal ideology including in its secular form. While it is salutary to discuss other world spiritualities with reference to Western penal law, no other religion or spirituality has remotely impacted the formation of the Western legal tradition like Christianity. Harold Berman’s *magisterial Law and Revolution: The Formation of the Western Legal Tradition* (1983/1997)⁵ describes this interaction of law and Christianity as singularly formative of the Western legal system.

In 2001, The State University of New York (SUNY) Press published *The Spiritual Roots of Restorative Justice*, (ed. Michael Hadley). I participated with former senior chaplain and Assistant Commissioner of the Correctional Service of Canada, Pierre Allard, in writing the chapter on Christianity. It is a ground-breaking book in discovering how various world spiritualities point towards Restorative Justice.

Further, in Canada and many other countries, aboriginal spiritualities are also of special interest, resurgence, and import. Rupert Ross’ book, *Returning to the Teachings: Exploring Aboriginal Justice* (1996) is an outstanding publication, eventually followed by several others.

But as indicated above, given the unmatched dominance of Christianity in influencing the development of the Western legal tradition, I shall focus hereon in upon Christian spirituality and attendant penal abolition⁶.

It is the contention of this talk that the Christian ethos offers a dramatically alternative narrative and vision of criminal justice procedure in contradistinction to that of resort to violence—a monopoly of which, the Western state holds. The story the Christian faith tells is timeless wellspring for the spirituality of nonviolence and penal abolition, however sadly unfaithful Christian adherents have been to the plot-line down through the ages⁷.

Some Brief Church History

In *God's Just Vengeance: Crime, Violence and the Rhetoric of Salvation*, (Cambridge: Cambridge University Press., Timothy Gorringer, 1996), we learn that both Charles and John Wesley, famed founders of the Methodist church in the 18th century, were deeply committed to caring for the poor, including responsiveness to Jesus' powerful words of solidarity with the imprisoned: "I was in prison and you came to visit me." (Matt 25:36)" Nonetheless, we read of this account by Charles Wesley after his visit to Newgate prison, July, 1738, on the morning he accompanied nine prisoners to the gallows:

"They were all cheerful, full of comfort, peace and triumph, assuredly persuaded that Christ had died for them and waited to receive them into paradise. . . I never saw such calm triumph, such incredible indifference to dying." He returned home and wrote: "Full of peace and confidence in our friends' happiness. That hour under the gallows was the most blessed hour of my life (ibid, p. 4).

This form of spirituality was widespread amongst Protestants and Catholics, and became known as "gallows-pietism."⁸ It could not have been more opposite to a living justice of forgiveness and new beginnings.

Now the Wesley's and their followers were genuinely concerned for the poor. One Christian historian therefore plaintively asks:

What was it, then, which prevented them from seeing . . . 'that law grinds the poor' and 'rich men make the law'? How was it that they could see people . . . whose hopeless background they perfectly understood, go to the gallows for offences which were trivial⁹ and which involved no violence against the person, without exerting themselves to have the sentence[s] commuted? . . . How is it that the question whether the law might be wrong, or even wicked, does not arise for these good Christian people? How could they come away from scenes of judicial murder feeling that this was 'the most blessed day of their lives?' (ibid, p. 5)

One might similarly ask, with regard to contemporary Western criminal law:

How is it that the question whether criminal law might be wrong, or even wicked, does not arise for people committed to Christian spirituality? How could harsh sentences to penal institutions and

the death penalty be embraced as quintessentially Christian by followers of the One who said: “[God] has sent me to proclaim freedom for the prisoners . . .,” and “I desire mercy, not sacrifice”; and who himself was executed by the best legal system of the day (Roman), and by guardians of the high point of then contemporary monotheistic religious spirituality (Judaism)?

As discussed, the eruption of Christian spirituality initially in the first century had a profound, subversive political dynamic at its very core. It also represented an unprecedented anthropological thrust that broke with ubiquitous dominant contemporary cultural scapegoating patterns. In honouring and worshipping “the executed God”¹⁰, early Christians became irksome dissidents to the dominant mythology of culturally and state-sanctioned scapegoating violence.

René Girard as indicated has studied scapegoating violence across a sweeping interdisciplinary landscape¹¹. In turn, his publications have inspired an enormous body of published research that similarly discerns a scapegoat mechanism in human cultures throughout history, contemporary Western no less¹².

As a large body of scholarship demonstrates, what “happened” to Jesus’ and early church teaching was the legalization and embrace of Christian worship and Church by Roman Emperor Constantine in the early fourth century¹³. One writer dubs it a “Judas kiss.”

Historian Alistair Kee comments on the Constantinian era:

And this is the greatest irony, that Constantine achieved by kindness what his predecessors had not been able to achieve by force. Without a threat or a blow, and all unsuspecting, the Christians were led into captivity and their religion transformed into a new imperial cult. . . But this achievement, unheralded then, unrecognized now, represents Constantine’s greatest conquest, the one which has persisted largely unchallenged through the centuries in Europe and wherever European Christianity has spread (Constantine Versus Christ: The Triumph of Ideology, Alistair Kee, London: SCM Press Ltd., 1982, p. 154).

The writer adds that

. . . the reign of Constantine is a fundamental turning-point in the history of Europe, and not only Europe. From that time the imperial ideology, with all its implications for the accumulation of wealth

and the exercise of power over the weak, was given religious legitimization by the church (ibid, p. 168).

While this is arguably overstated, and while it took centuries to play out, for the sake of time, I shall not dwell on this era, but move on in a moment to the time of that era's full flowering, that began impacting the course of Western history in the 11th century—another major Western history turning-point—namely the first of six Western cultural upheavals: the Papal Revolution.

This past century, a large body of biblical scholarship upon rereading the founding texts, has discovered the truth of Mahatma Gandhi's brilliant and ironic statement:

The only people on earth who do not see Christ and his teachings as nonviolent are Christians."¹⁴

Gandhi also wrote:

The message of Jesus, as I understand it, is contained in the Sermon on the Mount . . . Much of what passes as Christianity is a negation of the Sermon on the Mount.¹⁵

This much at least may be stated unequivocally: there is . . . a great irony of history that the cross, [the early church] symbol of the ultimate triumph of peaceful means to peaceful ends, has been used as a standard in battle [ever since the era of Constantine in the fourth century.] (Anderson, Paul N., "Jesus and Peace," pp. 104 - 130, *The Church's Peace Witness*, Marlin E. Miller and Barbara Nelson Gingerich, editors, Grand Rapids: Eerdmans, 1992, p. 104; emphasis added).¹⁶

More Church History: The Satisfaction Theory of the Atonement and Western Penal Law

So the fourth-century Constantinian Shift in Christian spirituality, from an initial profound disavowal of state-sanctioned scapegoating violence, to an embrace of the very state violence that killed its Founder¹⁷, in a supreme irony, initiated also the devastatingly punitive and retributive Western penal law system that has been in place for almost a millennium.

From a biblical/Christian concept of justice where the victim's voice is primary, and where a dynamic attempt at reconciliation, restoration, transformation and shalom between offender, victim and community is centre-stage, there was a progressive move to a concept of justice where

the emerging State became the central “victim,” and where the true victim’s voice was silenced¹⁸. Hence we get Rex or Regina, or we the people, versus the offender.

Harold Berman explains:

... ‘The [novel eleventh-century] Gregorian concept of the Church almost demanded the invention of the concept of the State (Berman, Harold J., *ibid*, p. 404).’

And

... as the [11th-century] Papal Revolution gave birth to the modern Western State, so it gave birth also to modern Western legal systems, the first of which was the modern system of [Church] canon law (Berman, 1983/1997, p. 115).

There was also in the eleventh century the emergence of a novel theological atonement theory—about why Christ died—under the influence of the treatise, *Cur Deus Homo* (Why God Became Human) by Anselm of Canterbury. Explains Herald Berman:

However broadly Anselm conceived justice, reason required that he stop at the boundary of grace. God is bound by his own justice. If it is divinely just for a man to pay the price for his sins, it would be unjust, and therefore impossible, for God to remit the price. In *Cur Deus Homo* Anselm’s theology is a theology of [punitive/retributive] law. [. . . The rational order of the universe requires that sins always be punished.]

Before the time of Anselm (and in the Eastern Church still) it would have been considered wrong to analyze God’s justice in this way. . . [T]he whole exercise of a theology of [punitive] law was/is seen as a contradiction in terms. (Berman, 1983/1997, p. 180. Emphasis added).

Anselm’s theory profoundly created a Western “cultural affect”—structural societal ethos—of retributive justice in subsequent centuries right up to the present. Although his theology of ‘satisfaction,’ of ‘atonement’¹⁹ was never proclaimed as the official doctrine of the [Western] Christian church, it was widely accepted both in Catholicism and Protestantism and was to have devastatingly negative effects especially when applied to the criminal justice system²⁰. Over the differing voices of many other Western Christian interpreters, Anselm’s view, interpreted in a harshly punitive way in application to Western criminal law, remained dominant ever since.

Comments theologian Timothy Gorringer:

[In Anselm and his interpreters,] The debt humanity has incurred must be paid with human blood. The God who rejected sacrifice now demands it... From the start sacrifice and satisfaction run together. . . The God who liberates from law is now, in Anselm, understood as hypostasised, personified law. . . What remains. . . is a mysticism of pain which promises redemption to those who pay in blood. In this move a most fundamental inversion of the gospel is achieved, which prepares the way for the validation of criminal law as the instrument of God's justice instead of what it is in the gospel, an alienating construction which is at best a tragic necessity.

The penal consequences of this doctrine were grim indeed. As it entered the [Western] cultural bloodstream, was imaged in crucifixions painted over church chancels, recited at each celebration of the Eucharist, or hymned, so it created its own structure of affect one in which earthly punishment was demanded because God himself had demanded the death of his Son (Timothy Gorringer, *God's Just Vengeance: Crime, Violence and the Rhetoric of Salvation*, Cambridge: Cambridge University Press, 1996, pp. 102 & 103. Emphasis added).

In other words: With the advent of the Papal Revolution of the 11th and 12th centuries under Pope Gregory VII, there was established the Western Church's legal and political unity and power above all competing authorities. Simultaneously there was the rise of the university, and the beginnings of the science of Western criminal law as a new field of study. There developed over the succeeding centuries a profoundly punitive/retributive criminal justice strain perhaps unique to world history.

By the birth of the modern prison in the late eighteenth century²¹, and persisting to the present, what emerged was a penal system dedicated to a “mysticism of pain”—with no redemption. (That's why by contrast the Stephen King novella and movie, *The Shawshank Redemption*, is so gripping!)

Another scholar—and friend, Vern Redekop, drawing on the work of René Girard, asks in application of the earlier-mentioned Girardian scapegoat theory,

Is it possible that what we call a criminal justice system is really a scapegoat mechanism (Scapegoats, the Bible, and Criminal Justice: Interacting with René Girard, Vern Redekop, Akron: Mennonite Central Committee, 1993, p. 1)?

He continues later:

In a secular democratic society, nothing is as sacred as the law code and the justice system which enforces it. The buildings in which laws are made are the most elaborate and the courts in which decisions are made about points of law are the most stately. Formality, uniforms, and respect surround the agents of law (ibid, p. 16).

He finally states baldly:

It is possible to think of the criminal justice system as one gigantic scapegoat mechanism for society. . . [A] tiny percentage of offenders who are severely punished can be thought of as a collective scapegoat for society (ibid, pp. 33 & 34).

The entire Girardian project in reading the Christian Bible points to a profound and revolutionary nonviolent image of God, one that, as explained, erupted into human history through Jesus, Paul and the church in the first century. It discerns a persistent dynamic of subversion within the Judeo-Christian Tradition itself whereby God is shorn of all violent attributes. It is a process “in travail,” whose culmination in Jesus on the Cross is the ultimate negation of all violence in God and hence, *mutatis mutandi*, [in that light] should be so for all humanity. Says one commentator:

The experience of being morally shaken by a public execution is the beginning of an anthropological and spiritual revolution for which the term ‘Christianity’ was coined decades after the public execution of Jesus. *Violence Unveiled: Humanity at the Crossroads*, Gil Bailie, New York: Crossroad, 1995, p. 83).

Since Constantine in the 4th century pragmatically and politically, and since Anselm theologically in the 11th century, the church has tragically and inconceivably claimed legitimacy for the very violence that killed its Founder!²² It further arrogated to itself, and society under its influence, that same rightfulness. This is perhaps the most amazing inversion of Christian spirituality in the long history of the Church.

René Girard, and the plethora of articles and books inspired by his writings, point to a reading of God in the Christian Scriptures

. . . which is absolutely incompatible with any perception of God as involved in violence, separation, anger, or exclusion. (Knowing Jesus, James Alison, Springfield: Templegate, 1993, p. 48).

Read as fundamental texts of cultural deconstruction, the Christian Scriptures emerge as arguably the most radical demythologizing texts known to humanity, and certainly in the West—because they capture the revolutionary peacemaking trajectory of the first century, one that simultaneously embraces nonviolence.

The highly violent nature of the Western legal tradition arguably would have been vastly different had this more faithful reading of the founding texts been dominant. That is in fact the burden of Timothy Gorringe's masterful work, *God's Just Vengeance*, as seen above. It profoundly critiques a certain interpretation and application of Anselm's satisfaction theory of the atonement that lead to a highly punitive Western Criminal Justice tradition.

So instead of a merciful and compassionate God as revealed in Jesus the Christ, the Christian "god" became a severe sentencing judge²³ (for the past millennium the dominant Western image of God) bent on punishment and almost literally 'blood-thirsty.' Christians who used the Cross to scapegoat the Jews for centuries, to lead Crusades and persecute/prosecute others, especially criminals, totally reversed what the Cross had originally stood for in the story of Jesus' death and resurrection.

Conclusion

I have attempted a scan of highlights from over 2,000 years of Western history in relation to the ethics of crime and punishment. We have touched down on:

- highlights of Ancient Greco-Roman history;
- of the world-shattering eruption of Christianity in the first century and subsequent "invention" of the contemporary Western liberal individual;
- of the fourth-century consequential Constantinian Shift away from that first-century revolution;

- of the tragic detour in the 11th century, representing the nadir of the profound Constantinian Shift of the fourth century, towards a harshly retributive justice system that has dominated Western liberal culture—and largely remains that way—into the 21st century;
- of Ivan Illich’s development of “the corruption of the best is the worst;”
- of René Girard’s theories of scapegoating violence applied to the state;
- of the emergence of Restorative Justice as a peacemaking, not a warmaking, dynamic.

In 1993, theologian/activist Lee Griffith published an astonishing book entitled: *The Fall of the Prison: Biblical Perspectives on Prison Abolition*. His is a tour de force on a spirituality of penal abolition. The book’s opening shot is:

The gospel is profoundly scandalous, and until we hear at least a whisper of its scandal, we risk not hearing any part of it (Griffith, 1993, p. 1).

One wonders: How indeed can a Christian spirituality, responsive to the revolutionary and liberating thrust of the early church’s New Testament founding texts, so utterly contradictory of state-sanctioned scapegoating violence, support penal (pain delivery!) justice?

That is one “peculiar question” I leave us with.

A still grander question is:

In light of moral beliefs occasioning the six major revolutions in the past millennium of Western history, first of which is the Papal Revolution, can it be that the worldwide flowering of Restorative Justice is at the vanguard of yet another global Revolution: one called “Inclusive Justice,” that never excludes, never punishes as an end, that always elevates the victim, gives solace to the impacted community, while fully embracing the wrongdoer? Dare one so hope?

This kind of Living Justice—in keeping with the Conference’s theme—is life-giving for all.

René Girard states:

In the Hebrew Bible, there is clearly a dynamic that moves in the direction of the rehabilitation of the victims, but it is not a cut-and-dried thing. Rather, it is a process under way, a text in travail; it is not a chronologically progressive process, but a struggle that advances and retreats. I see the Gospels as the climactic achievement of that trend, and therefore as the essential text in the cultural upheaval of the modern world (Hamerton-Kelly, *op.cit.*, p. 141. Emphasis added).

If Girard is right, then a central part of that “cultural upheaval” is the emergence of Restorative Justice: a profoundly peacemaking, not warmaking; a dramatically life-giving not death-dealing response to crime.

NOTE: I discuss at length penal abolition in my other presentation for this Conference, entitled:

Restorative Justice: Peacemaking Not Warmaking; Transformative Justice: Penal Abolitionism Not Prison Reform.

Notes

- 1 This is a riff on Astra Taylor’s riveting book title: *Democracy May Not Exist, but We’ll Miss It When It’s Gone*. The book also is great.
- 2 A quick preview:
Illich sums up these dangers in his formula *corruptio optimi pessima*. This old adage, in one form or another, can be traced to many sources, including Aristotle, Aquinas, and Shakespeare, who says in Sonnet 94 that “. . . sweetest things turn sourest by their deeds / Lilies that fester smell far worse than weeds.” It’s a saying that implies a proportion between the best and the worst—the radiance of the world’s “mysterious vocation to glory” continues to be expressed in the “demonic night” produced by its perversion—and therefore a continuing relationship between them. Without the offer of the best, there would have been no worst. (Ivan Illich: *An Intellectual Journey*, David Cayley, University Park, PA: The Pennsylvania State University Press, p. 350.)
- 3 A French polymath, historian, literary critic, and philosopher of social science whose work belongs to the tradition of philosophical anthropology.—Wikipedia
- 4 *Limits to Pain*, Nils Christie, Oxford: Martin Robertson, 1982.

- 5 The sequel to this massive study is another grand tome: *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*.
- 6 René Girard, whom I will further discuss below, also indicates that quite ironically, “Christianity” in the academy is the “last politically correct scapegoat (*Violent Origins: Walter Burkert, René Girard, and Jonathan Z. Smith on Ritual Killing and Cultural Formation*, Robert Hamerton-Kelly, ed., Stanford: Stanford University Press, 1994, p. xi).” Again to underscore: This is in the West a “super-Christian” scapegoating, as indicated by David Cayley above, citing René Girard, whose liberal values only emerged because of the Christian revolution of the first and subsequent centuries.
- 7 A variation on the above is:
[Theologian] Stanley Hauerwas has suggested that the only thing that makes the Christian church different from any other group in society is that the church is the only community that gathers around the true story. It is not the piety, or the sincerity, or the morality of the church that distinguishes us (Christians have no monopoly on virtue). It is the story we treasure, the story from which we derive our identity, our vision, and our values. And for us to do that would be a horrible mistake, if it were not a true story, indeed the true story, which exposes the lies, deceptions, and half-truths upon which human beings and human societies so often stake their lot (Christopher Marshall. “Paul and Christian Social Responsibility,” *Anvil*, Volume 17, No 1, 2000, p. 13.)
Siedentop would add however that the “morality of the church” was the cataclysmic ethical transformation of Greco-Roman culture that began in the first century.
- 8 Gallows-pietism rested on the conviction that the soul of the one whose bodily life was destroyed on the scaffold not only departed to a life beyond the grave, but that the nature and quality of that other life could be dramatically and eternally affected by the manner in which bodily death on the scaffold was endured. . .
When it worked, it was obvious to all that the gallows was a special work of God, a providential occasion where proper dispositions for a good Christian death were ideally enacted in a grand public liturgy from which all could learn important lessons in both living and dying as good Christians. (*The Death Penalty: An Historical and Theological Survey*, James J. Megivern, New York: Paulist Press, 1997, pp. 213 & 162).
- 9 There was a high point of more than 200, some say as many as 300, capital offences in Britain in the 18th century.
- 10 See my book review of: *The Executed God: The Way of the Cross in Lockdown America*, by Mark Lewis Taylor.
- 11 David Cayley’s five-part CBC Ideas superb broadcast on Girard is entitled: *The Scapegoat: René Girard’s Anthropology of Violence & Religion*. Cayley eventually also wrote a book on Girard’s ideas: *The Ideas of René Girard: An Anthropology of Religion and Violence*.
- 12 See *Colloquium on Violence and Religion* for a vast array of resources by and about his thought.
- 13 See *The Church’s Peace Witness*, Marlin E. Miller and Barbara Nelson Gingerich, editors, (*Grand Rapids: Eerdmans, 1992*), for an extended discussion of this and related issues.

- 14 Quoted in *Engaging the Powers: Discernment and Resistance in a World of Domination*, Walter Wink, (Philadelphia: Fortress Press, 1992), p. 216.
- 15 Quoted in *Just Peacemaking: Transforming Initiatives for Justice and Peace*, Glen H. Stassen, (Louisville: Westminster/John Knox Press), 1992, p. 33.
- 16 This is more fully explored in my: “Prison, Sexual Assault, and Editing John Howard Yoder: One Man’s Story” by Andy Alexis-Baker.
- 17 There is an outstanding opening quote on this, full of great irony, from black death row prisoner Mumia Abu-Jamal in *The Executed God*:
Isn’t it odd that Christendom—that huge body of humankind that claims spiritual descent from the Jewish carpenter of Nazareth—claims to pray to and adore a being who was prisoner of Roman power, an inmate of the empire’s death row? That the one it considers the personification of the Creator of the Universe was tortured, humiliated, beaten, and crucified on a barren scrap of land on the imperial periphery, at Golgotha, the place of the skull? That the majority of its adherents strenuously support the state’s execution of thousands of imprisoned citizens? That the overwhelming majority of its judges, prosecutors, and lawyers—those who condemn, prosecute, and sell out the condemned—claim to be followers of the fettered, spat-upon, naked God? (p. xi).
- 18 This process is well described in: *Restoring Justice: An Introduction to Restorative Justice*, Daniel Van Ness, and Karen Heetderks Strong, (Cincinnati: Anderson Publishing Company, 1997.)
See also on emerging Western nation-states my book reviews of: *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* and *Migrations of the Holy: God, State, and the Political Meaning of the Church* by political theologian William T. Cavanaugh.
- 19 There have been three discernible views of the atonement in the history of the church (with many variations of each), of which the second, the “satisfaction theory,” has been the most dominant in Western history since the 11th century.
The second group of theories may be said to have originated with Anselm, who saw sin as dishonor to the majesty of God. On the cross the God-man rendered satisfaction for this dishonor. Along similar lines the Reformers thought that Christ paid the penalty sinners incurred when they broke God’s law (See: Leon Morris, *The New International Dictionary of the Christian Church*, J.D. Douglas, General Editor, “Atonement,” Grand Rapids: Zondervan Publishing House, 1974, p. 83).

- 20 The main justification [for “new concepts of sin and punishment based on the doctrine of the atonement”] given by Anselm and by his successors in Western theology was the concept of justice itself. Justice required that every sin (crime) be paid for by temporal suffering; that the suffering, the penalty, be appropriate to the sinful act; and that it vindicate (“avenge”) the particular law that was violated. As St. Thomas Aquinas said almost two centuries after Anselm’s time, both criminal and civil offenses require payment of compensation to the victim; but since crime, in contrast to tort, is a defiance of the law itself, punishment, and not merely reparation, must be imposed as the price for the violation of the law (Berman, 1983/1997, p. 183. *Italics in original; boldface mine.*)”
- 21 The Walnut Street Prison in Philadelphia, Pennsylvania was repurposed in 1790 to become a “penitentiary house,” (for inmates to become “penitent”) thereby initiating a vastly imitated new era of punishment for criminals. The classic study is by Michel Foucault: *Discipline and Punish: The Birth of the Prison*. He makes clear that, whereas in the past, physical punishments such as floggings, brandings, and mutilations, etc., were the norm, with the advent of the penitentiary, the very psyche of the person was now attacked, from which wounds it was virtually impossible to heal.
- 22 See again, Footnote 17.
- 23 One looks in vain, on the contrary, in the Gospels for any concept of God as “sentencing Judge” on the lips of Jesus.

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