

*From Canada*

## A NEW PARADIGM OF JUSTICE \*

By Wayne Northey

### Part I. The Present System

The system of crime control is not working very well. In various studies only just emerging in Canada, *victims* feel practically devastated by the criminal act, and almost entirely unaided by the present system.<sup>1</sup> Their experience is deeply traumatic, raising profound questions about their very identity and security in a world which suddenly appears more threatening and far less predictable. At that point, several needs emerge:

- the victim wishes to give vent to his or her feelings, perhaps scream them at both the perpetrator of the crime, and those in the system who seem only interested in the ‘facts’ of the case, as if their raw emotional response is not a crucial fact;
- the victim needs some kind of restitution to compensate for his or her loss;
- he or she needs some kind of vindication for the suffering, i.e. an experience of fundamental justice, which will somehow set things right;
- the victim needs a restoration of power when the entire experience which follows, including the victimisation, is one of complete powerlessness;
- and he has a further need of forgiveness and release.

But the current system is not designed to deliver any of the above. At best it happens incidentally in her contact with the authorities. As Nils Christie observes: “Training in law is training in simplification. It is a trained incapacity to look at all values in a situation, and instead to select only the legally relevant ones, that is, those defined by the high priests within the system to be the relevant ones.”<sup>2</sup> Victims’ concerns are simply irrelevant in our state-controlled justice system.

Certainly the system is not working for *offenders*. In my personal interaction with hundreds of offenders over the last ten years, they consistently express a sense of injustice at the hands of the ‘system’. Many concede, of course, their own culpability, but it is a case of invoking the old adage: “two wrongs do not make a right”. Karl Menninger’s book title *The Crime of Punishment* is an apt statement of their case, although one may not endorse every line of his book.

But the issue goes deeper still. Apart from the profound feelings of injustice created by our system, the offender is simply mystified by the entire justice process. His clear perceptions are often that unfortunately he was caught, and, the *eye-for-an-eye* model (as mistakenly understood from the biblical precept), has become ‘tit for tat’. After all, it is his world too. He has no confrontation with the victim(s), no chance to speak for himself, and no moral, social, or economic considerations are being raised. The court system is adversarial, designed, like the ancient Greco-Roman prototype, to apply the right rules to the right circumstances in the right way, that is all.

The offender, instead, needs to admit to a certain amount of accountability. This, of course, is not the whole story. He, or she, also needs to be empowered, just as the victim does: to gain a sense that what is happening to him or her is not all external imposition. But in state-imposed justice, it is rarely otherwise.

Likewise, the offender must experience forgiveness, which should include at least the opportunity to ask for forgiveness and repent. This may not be done in the abstract, but in the presence of the victim(s).

Finally, the system is not working *vis à vis* its many *reforms*. This is particularly so in the history of the reform of penitentiaries. It is the sad story of co-option to the predominant end of all penitentiaries: punishment and security.<sup>3</sup>

### **Why is the System not Working?**

In one sense, it is preposterous to attempt to answer the question of why the system is not working in a few paragraphs. In another, however, it may be advanced that some fundamental assumptions and definitions, as pointers to the inadequacy of the entire system, need to be examined.

When the question is approached from the victim's point of view, a fundamental reality of the present system is the non-status of the victim. The State - *Regina* in the British tradition at present - is robbed, raped, or murdered, etc. The modern State makes the victim superfluous - except as a witness. The State's response is, therefore, the antithesis of the personal. When offenders are in view, concepts of 'just deserts' and 'penalty' are paramount, combined with the need to attach appropriate guilt and blame. The State's duty is, when all euphemistic language is stripped away, to inflict pain at a profoundly impersonal level. Nils Christie says that basic state law is therefore pain-law, concerned with 'pain delivery' just like 'milk delivery', to which his response is: "Dreadful!"<sup>4</sup>

As indicated, the entire orientation of the system is, therefore, towards a kind of game-playing, where rules, precedents, and 'process' are all-important. Justice Oliver Wendell Holmes is said to have responded once to a friend's admonition to go and do justice, with the words: "I don't do justice, I simply play the game according to the rules". Crime is defined in terms of 'lawbreaking' - a breach of rules and regulations - not of relationships between persons.

Hence victims and offenders are really irrelevant - as persons - to the proceedings. Therefore feelings disappear too.

## **Part II. A New Paradigm**

This is why a new way of thinking about crime and punishment must precede any attempts at reform. There must be a paradigm shift - to use a concept from the sciences. Paradigm shifts in the sciences have not come about without controversy and much political involvement. But the present criminal justice system paradigm is by no means the only model available, historically or theoretically. The following part of this article deals with the development of the present paradigm in our Western history, as an encouragement for consideration to be given to the presentation of a new paradigm in the next section.

### **State versus Community Justice**

There has been a long-standing dialectic between state and community justice stretching back to the near-east in ancient times. The Code of Hammurabi, for instance, codified much community justice, but it came out smelling of state law. But biblical justice, on the other hand, tended to transform even state law into community justice, adding a unique emphasis upon 'covenant', casting all law in an 'apodictic', personal address form, unknown to other ancient near eastern cultures. This led to many other instructive distinctions, which will not be discussed in this paper.<sup>5</sup>

But our western legal system did not really contain a consistent state law until the dawn of the Industrial Revolution. "... the modern distinction between the criminal and the civil aspects of a wrongful act, and thus between punishment and compensation, was foreign to almost all European legal systems before 1800."<sup>6</sup>

Furthermore, whilst the State had its fairly consistent list of ten 'heinous crimes' - common to much of mediaeval Europe, it interfered little in what today would be called 'criminal matters'. From the 13th to the 19th centuries, there was only a gradual erosion of that strongly-held

reluctance to prosecute before the courts. It was an *accusatorial* system, in which the wronged party was obliged to pursue personal redress of the crime. This was often tied in with the blood feud, where some kind of monetary compensation became preferable to the carrying out of a feud.

In the twelfth and thirteenth centuries, through a complex interaction of church and secular law, an inquisitorial form of law emerged. This was due partly to the ‘Papal Revolution’ of Gregory VII, and the codification of ecclesiastical law, which in turn led to the promulgation in 1234 of the *Decretals* under Pope Gregory IX, and partly to the rediscovery of the Justinian codification of Roman laws circa 1100. “... the state began to replace the individual as the guiding force behind prosecutions, and this resulted in attempts to define the use and the meaning of evidence, as well as a change in the general structure of courtroom and judicial procedure... With the appearance of the state as the sole source of prosecutorial energy, the criminal act could no longer be viewed as an attack by one person on another; it was now an offence committed against society at large.”<sup>7</sup>

Crime was transferred from the private to the public sector. This, itself, accelerated in the 16th and 17th centuries of Protestant Europe. Lutheran and Reformed churches followed this trend, not raising any specific questions about it. “The reformation attacked many ideas of medieval doctrine, but it never even pronounced doubts concerning the legitimacy of Greco-Roman [i.e. - ‘state punitive’] justice for a Christian culture.”<sup>8</sup>

The state emerged as supreme prosecutor for all criminal offences brought to its attention, and a proliferation of gruesome penalties ensued, including the widespread use of torture. Lenman and Parker comment: “This confusingly varied pattern of criminal legal practice... was produced by the interaction of two separate traditions of law. One... exalted restitutive justice and developed from the laws of the German tribes who invaded the Roman empire;... *community law*. The other, to be called *state law*, emphasised punitive justice, and was rooted, at least in part, in the legal system of that Empire and its Byzantine successor. The gradual displacement of the former by the latter, a process which began in the 10th century and lasted until the 19th century, was one of the central (yet most neglected) developments of European history, constituting a revolutionary change in legal methods and in the techniques of social control.”<sup>9</sup>

The constituent elements of this revolution were:

- the separation of criminal and civil wrongs;
- the assumption of the centrality of the state, thus moving all criminality to the public realm;
- the assumption of the normativeness of punishment . i.e., ‘pain delivery’, as a distinguishing mark of criminal law;
- a move to formal rationalism and codification of law, displacing custom law.

### **Part III. Towards this New Paradigm**

There is undoubtedly a need for a paradigm shift, as revolutionary as the shift towards a state monopoly on crime control which was discussed earlier. First and foremost, this is a question of definition. The new model of justice sees crime as a violation of one person by another, a conflict between persons, calling for restoration, reparation and reconciliation. The following is a list of contrasting aspects of the old and new:<sup>10</sup>

### **Old Paradigm: Retributive Justice**

1. Crime is defined as a violation of the state
2. Focus on establishing blame, on guilt, on past (did he or she do it?)
3. Adversarial relationship and process, normative
4. Imposition of pain to deter and prevent
5. Justice is defined by intent and by process: right rules
6. Conflictual nature of crime is obscured and repressed
7. One social injury is replaced by another
8. Community is on the sideline, and represented abstractly by the state
9. Encouragement of competitive, individualistic values
10. Action directed from the state to the offender; the victim must be passive
11. The offender's accountability is defined as taking punishment
12. The offence is defined in purely legal terms, devoid of moral, social economic dimensions
13. 'Debt' is owed to state and society in the abstract
14. The response is focused on offender's past behaviour
15. The stigma of crime is unremovable
16. There is no encouragement for experiences of repentance and forgiveness
17. The offender is removed from the situation caused by the offence
18. Attention is focused on debates between free will and social-psychological determinism in causation of the offence

### **New Paradigm: Restorative Justice**

1. Crime is defined as a violation of one person by another
2. Focus on problem solving, on liabilities and obligations, on future (what should be done?)
3. Dialogue and negotiation, normative
4. Restitution as means of restoring both parties; reconciliation and restoration as goal
5. Justice is defined as right relationships; judged by the outcome
6. Crime is recognised as conflict; the value of the conflict is recognised
7. Focus on the repair of social injury
8. Community is a facilitator in the restorative process
9. Encouragement of mutual aid
10. Victim and offender's roles are recognised in both the problem and the solution: the victim's rights and needs are recognised; the offender is encouraged to take responsibility
11. The offender's accountability is defined as understanding impact of action and helping decide how to make things right
12. The offence is understood in the whole context - moral, social and economic
13. Debt and liability to the victim is recognised
14. The response is focused on harmful consequences of the offender's behaviour
15. The stigma of crime is removable through restorative action
16. There are possibilities open for experiences of forgiveness and repentance
17. The offender is kept in the situation, but the behaviour is reversed from harming to helping
18. Focus on present responsibility for effects of behaviour, regardless of explanation. (Leaves room for both free. will and determinism).

#### **Part IV. Where does One Go from Here?**

I mentioned earlier that reform, especially as it has been attempted in the penitentiaries, has consistently been fruitless. The reason, it seems, is commitment to the old paradigm. So, first and foremost, there must be an alternative vision before there can be any alternative programmes - no matter what aspect of the system one aims at. This alternative vision has been sketched in this article.

Nils Christie comments: “Victim compensation is such an obvious solution and used by most people in the world in most situations. Why is it not used at the state level in highly-industrialised countries? Or at least, why do we not immediately, with added insight, extend the system of victim compensation, and let the domain of penal law diminish?”<sup>11</sup>

*Why not* is indeed the challenge. One thing is certain: replacing one state system with another is not the solution. This always leads to the old paradigm with new players. No, with all the creativity one can muster, in making a commitment to this new vision, one must try to show to the state at every turn that there is a “most excellent way” (I Corinthians 12:31b): the way of restoration, forgiveness, healing. Nils Christie puts it well: “It will be important for us to grope our way forward towards solutions which compel those involved to listen instead of using force, to search for compromise instead of dictates, to find solutions which encourage compensation instead of reprisals and which, in old-fashioned terms, encourage men to do good instead of, as now, evil.”<sup>12</sup>

Jerold Auerbach underscores this preferred way of ‘justice without law’, whilst presenting, from the American experience, some sobering remarks.<sup>13</sup> With these in mind, and with caution, let us nonetheless proceed.

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## Notes

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[The above article was first published as the final chapter in: Bianchi, Herman & Swaaningen, René van (1986). *Abolitionism: Towards a Non-Repressive Approach Towards Crime*, Amsterdam: Free University Press. It is presented here amongst other reasons as an item of historical interest. **For the record:** Contemporary Western Restorative Justice theory and practice were *not* begun by Americans, though they have greatly contributed to its worldwide development and spread. Herman Bianchi, a Dutch criminologist, one of the editors of the above publication, is arguably the “grandfather” of Restorative Justice as a Western theoretical concept. The above book, published four years in advance of the first significant American offering on the subject, is one instance of Bianchi’s prior contributions. Mark Yantzi and Dave Worth were arguably (though there are other claimants) the first (their “Kitchener Experiment” was certainly the most replicated) *practitioners* in a Western criminal justice jurisdiction (Kitchener, Ontario, Canada, as described in: “The Kitchener Experiment”, Martin Wright and Burt Galaway, eds., *Mediation and Criminal Justice: Victims, Community, and Offenders*, Newbury Park, CA: Sage Publications. 1989.)]

1. See: Canadian Urban Victimization Survey, Ministry Secretariat, Programmes Branch, Solicitor General Canada.
2. Nils Christie, *Limits to Pain*, Martin Robertson, Oxford, 1982, p. 57.
3. see, for example, P.R.E.A.P., *Instead of Prisons; A Handbook for Abolitionists*, Syracuse, New York, 1976.
4. *ibid*, Christie, pp. 15, 16 and 18.
5. See, for example, *The Bible and Law*, ed. Willard M. Swartley, ‘Occasional Papers no. 3’ of the Council of Mennonite Seminaries, Institute of Mennonite studies, 3003 Bentam Aye, Elkhart, Indiana 46517, especially ‘Law in the Old Testament’ pp. 9-42, 1982.
6. *Crime and the Law, The Social History of Crime in Western Europe since 1500*, edited by V.A.C. Gatrell, Bruce Lenman, and Geoffrey Parker; “The State, the Community and the Criminal Law in Early Modern Europe”, by Lenman and Parker; London: Europa Publications, 1980, p. 12.
7. *Crime and Punishment in Early Modern Europe*, Michael R. Weisser, Atlantic Highlands, N.J., Humanities Press, 1979, p. 100. Cf. also Harold J. Berman, *Law and Revolution; The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass., & London, England, 1983.
8. Herman Bianchi, “Tsedeka-Justice”, *Review for Philosophy and Theology*, September, 1973, p. 308.
9. *ibid*, Gatrell *et al.*, p. 23 (emphasis mine); Cf. *ibid*, Berman, pp. 49-119.
10. This scheme is developed by Howard Zehr (see note above).
11. *ibid*, Christie, p. 94.
12. *ibid*, Christie, p. 98.
13. See: Jerold S. Auerbach, *Justice Without Law?*, Oxford University Press, Cambridge, Mass., & London, England, 1983.



