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More Justice, Less Law

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on Crime and Justice:**
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More Justice, Less Law

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More Justice, Less Law

We hear much about "law and order" these days. It is a key issue in the programs of most political parties: politicians are acutely aware of rising crime rates, increasing urban decay and unemployment, to mention but some of the significant symptoms of the malaise of our civilization.

It is interesting that "law and order" is the context in which such symptoms are seen — as though proscription and enforcement will somehow bring about order, will somehow keep the lid on! The "rule of law" is a phrase constantly placed before us by our leaders as a reified entity before which all will somehow magically become obedient, coherent and thus ordered. In reality, the law of itself can do nothing.

The law actually provides two major components. One is a protection for people. The other is the provision of a negative framework for the regulation of human behavior; the law mostly relates to the boundaries of human conduct by indicating what we may not do, or what in a civilized society is not permissible. This is not to deny the positive function of custom, law and regulation for as Fosdick has pointed out, "they are as indispensable to personality as a trellis is to guide the growth of a living vine."¹ The problem occurs when the trellis becomes so over-elaborated that it begins to stifle the life of the vine!

J.S. Mill argued that the only purpose for which power can rightfully be exercised over any member of a civilized community against his or her will is the positive one of preventing harm to others.² He therefore would only admit to one component of the law and that is the one of protection. However, as Robinson says,

This may, of course, involve prohibition or restriction. The *raison d'être* of the law is protection, not prohibition and

where there is no need for protection it should not intervene. It is not there to express what Charles Davies has called "the anger of morality" however abominable may be the object of its disapprobation. It is there as far as possible to enable people to be free, mature adult human beings. Of course, the law cannot make people adult human beings. It has a limited role in hindering the hindrances. It is limited because the free processes of influence, education, example and persuasion are so much more productive but as a last resort if a person refuses to respect the freedom of another, [or is dangerous to others or to himself³], there must be provision to compel him to respect their freedom or to safeguard them from danger.⁴

What the law cannot do is to create the conditions in which crime is less pervasive, for this involves not a reified concept but what actually happens between people both at the individual and personal and at the collective and political levels. This may be described as the creation of a quality of life that prevents and forestalls the wrongs that the law prohibits.

The contrast between the proscriptions, coercions and penalties of a legal system on the one hand and the creativity which produces quality of life on the other is, of course, arrestingly presented in New Testament terms by Paul. What he says is that when people trust legal regulation to do what only creative, spiritual life can do, they are riding for a fall: the code kills, the spirit gives life.

It should be noted that the law cannot entirely effect justice — if by justice, that is, one means a process which should lead to reconciliation at the center of which is the notion of a change of heart and perception on the part of the wrongdoer and the wronged. The important issue about such a change is that it is in response to motivation towards making amends. This is an inward discipline; it is not in obedience to a discipline imposed from without.

Recently the concept of reparation has been very much a "bandwagon" idea. Nevertheless, it is really, as I hope to show later, an integral part of the notion of justice. Lacey and others maintain

later, an integral part of the notion of justice. Lacey and others maintain that criminal justice is not simply a system for processing and punishing offenders; it is for "righting wrongs" and basic to this is the concept of reconciliation between offender, victim and society of which reparation is a part.⁵

The evidence for this view of the nature of criminal justice has been set out by many writers and broadly speaking can be traced to tribal communities. It did not, however, stop there. What is not sufficiently emphasized is that the distinctive idea of justice which formed the basis of western civilization's judicial system up until the 17th century originated in the dynamic concept of justice proclaimed by the 8th-century BC biblical prophets.⁶

Let us consider briefly five characteristics of this prophetic view of justice:⁷

1. The prophetic concept of justice was formed at a time of great inequality and social injustice. The prophets strongly argued that justice should be towards the poor and oppressed. They did not mean that the poor and oppressed should receive any different treatment from the rest of the community. Still less did they mean that wrong actions condemned in the rich were to be condoned in the poor. They held that there should be one law for all. In short, the 8th-century prophets saw justice as upholding the rights of the underdog. This was a key element in their notion of justice.

In practice this notion of justice did not operate. The rich, the aristocrats and the businessmen sold out the poor, building up their own estates and fortunes within the law as administered. The poor had no redress, for the influence of the wealthy held sway over the administration of the law. It was against this that the prophets spoke.

2. Justice for the prophets was about people and what happens to them and between them. The prophets were urgent and persistent in this view. The Hebrew language at this point in its development

had very few abstract nouns; they mostly emerged later in the language's development. Words like righteousness, love and justice were not seen as ideas or as abstractions but as activities. In a sense there was no idea of justice as a concept but only as a just act. For example, where wrongdoer and wronged have come together, or have in biblical terms "atoned," there to the Hebrew would be justice or righteousness. It was only in the syncretism which occurred later in the Judaeo-Christian tradition, largely through the influence of Greek thought, that more abstract and complicated notions arise. The prophets, of course, related all this to God but even here their whole view was permeated by what happens to people: even their view of God had not to do with whether God is or exists, but assumed that God *does*.⁸

3. Prophetic justice has to do with the putting right of wrongs which existed in the community. This notion again was in no sense static, remote or legalistic — rather it was active, essentially based in the relationship within the community between those who committed and those who suffered wrong.⁹

4. There was a strong commitment involved in all this to the idea of contract. The word used was that of "covenant", between the wrongdoer and the wronged, often assisted in its establishment by a mediator ("daysman"). The Hebrew notion of covenant was chiefly about God's covenant with Israel, but it was also about a contract between people and the loyalty (the approximate Hebrew translation means something like "steadfastness") which should exist between the parties to it. The loyalty was expected from both sides, even if the parties were not equal.

5. Reparation was a key concept in the process of "righting wrongs". In early writers the word was used as a kind of shorthand for a way of bringing about reconciliation between people who are separated by wrongdoing on the part of one or both. In early biblical communities, reparation was often a sign in the form of an offering made by the guilty person to the victim (known as sin or guilt offerings). What is interesting is that this was usually done

without recourse to litigation: . . . the avoidance of litigation arose from the recognition that the community should take responsibility for its own problems and probably also because reconciliation is not a process which can be ordered or directed.¹⁰

Jesus followed in the tradition of the 8th-century prophets and went even further in his concept of justice and reconciliation. One example may assist in understanding its radical nature.¹¹ In the case of personal injury at the time of Jesus, the victim could demand an eye from the aggressor if his own eye had been destroyed. The hard-line lawyers (Sadducees) of Jesus' day went along with its literal observance. The more liberal lawyers (Pharisees) went for financial compensation: though theoretically having to uphold and fulfill the law, they found their way around it by saying the victim could extract the aggressor's eye only if it were exactly like its own in size and color and since this condition is never present, the principle of retaliation was retained without its fiendish expression. Now Jesus rejects this: "He required undiscourageable goodwill even towards those who injure — the vindictiveness that desires an eye for an eye was conquered at its source in the heart of the injured man."¹² The whole point is that justice is essentially an inward matter developed by inward motivation. It is not something that can be compelled from without.

Perhaps the greatest emphasis of the Christian end of the Judaeo-Christian tradition in relation to justice is that it is essentially concerned with a change of heart and mind and thus of perception. This people-centered notion of justice arises out of the belief that people, and therefore structures, can change; it was not founded on any deterministic notion as, for example, in psycho-analytical approaches or in systems theory. Basic to this concept of justice is the idea that there can be no reconciliation, no putting right of wrongs, unless there is the motivation for it, that is unless there is the will on the part of both the wrongdoer and the victim. There can be no coming together without both parties having some desire to put things right. The idea of repentance is central here. The

word, however, is often misrepresented and would be better understood in its literal sense of "change of mind".

Cupitt has shown that this point is one of some subtlety and complexity.¹³ This change of heart and mind happens in a disruptive way and is totally radical. What it does is to reverse ordinary human valuation so that, in the words of Jesus, there is a preference for the "lost over the safe, the sick over the healthy and the sinners over the righteous", or as Cupitt puts it, "sensible self-absorbed and busy people begin to look ridiculous and sick and needy people begin to look sensible".¹⁴

However, there is a second string to this because Jesus, as with the 8th-century prophets, saw justice not only in terms of changing the self but also changing the structures, political and otherwise, of society in order to create equality. Both the prophets and Jesus looked towards a better society in which the oppressed, the poor and the ill could get justice. The Judaeo-Christian view of justice, therefore, should be read both at the individual/personal, and political/structural levels. The values of change of heart, mind, and perception occur when people become aware of the problems and the issues of others. This occurs, for example, when the wrongdoer becomes aware of what he has done to the victim, regrets it and begins to recognize something of the problems and needs of the victim. Similarly, the victim becomes more aware of the problems and needs of the wrongdoer and that the structure often fails to give equality to him or her.

There was some small evidence of this in a recent review of the Warwickshire Reparation Scheme in which some fifty of the attempts at reparation were examined. Although reparations were done indirectly, without victim-offender encounters, and were concerned with repairing properties by offenders for victims under the Community Service Scheme, the project seemed to be dealing with some of the components of change indicated earlier. For example, in almost all cases offenders became aware of the trauma which victims experience when their house is broken into. Victims

also seemed to gain some understanding of factors which may be causal in offending behavior. Victims often said that they had not realized that offenders were able to do such skilled work. Why was it that they were not given proper work to do by society? Why were their skills not being used? Though not earth-shattering, these comments are of great interest as they express some potential for change of attitude and value both individually and on a wider basis. If reparation is well effected, it seems to be one of the most significant ways in which the community can really learn about the causal factors of crime.

In recapitulation, justice according to the Judaeo-Christian tradition is about putting wrongs right within the community. It is about people being equal before justice. It is about what happens to and between people rather than about concepts. It is about what happens to people within a covenant or contract and as far as possible outside of litigation. Its implications are for a change of heart and mind, of policies and of structures. It is phenomenological, not deductive; dynamic not static; spiritual not legal. It is about the creation of a quality of life in which those who offend can face the consequences of their actions and take responsibility for their lives within the community. It is equally about victims and the community at large facing the issues of offending and its causes.

There are, of course, some problems inherent in the foregoing.

The first and most obvious is that this idea of justice is not the one mainly in operation in the judicial system in this society. There are many reasons for this. "To understand the social message of the prophets, we must banish from our minds a view that is deeply ingrained in western culture, namely, that justice is behavior that conforms to an ethical or legal norm."¹⁵ Justice is done, we say, when a judge decides impartially in terms of legal norms and precedents. People are righteous when they live up to standards accepted by their community, nation or religious tradition. But the 8th-century prophets and subsequently the Christian tradition of

justice also refer to the fulfillment of responsibilities that arise out of particular relationships within the community, an essentially communitarian approach. The question for the Judaeo-Christian tradition is, as Anderson says, whether "one actually has the power to take part in the relationships of society with dignity and responsibility." Essential to the whole notion of justice was that individuals "live and move and have their being in a context of social relationships."¹⁶

Powerful influences over the centuries have changed our concept of justice. One of the most significant of these was that of the Greek ideas of justice which were static, uninvolved, "objective" approaches as, for example, in the ideas propounded by the Epicureans.¹⁷ Another major influence would be the rather more bureaucratic ideas of law developed by Rome and perhaps the other significant influence has been that of the Utilitarian approach developed from about the 17th century onwards. Out of this latter approach emerged a judicial system administered centrally. All of these influences contributed to a static and legalistic rather than a dynamic concept of justice.

The criminal justice system now seems largely geared to administering the law by way of processing offenders upwards through a tariff which is concerned with how much punishment, deterrence or even treatment is necessary. The question often being posed is "what is this offense worth and where does it rate?", rather than "how can this wrong be put right?" This leaves out the victim and the community and the potential for facing issues about offending and its causes. It also divorces offenders from what they have done and from its implications. Even worse, the logic of the criminal justice system must be called greatly into question in that it continually seeks for alternatives to imprisonment, suggesting that the objective of the criminal justice system is the imposition of custodial sentences.

Another problem concerns size. What might have worked in small homogeneous communities is much more difficult to apply in

complex, industrialized, stratified societies. When I contributed to a judicial seminar on this subject recently, several judges pointed out to me that though they were sympathetic to this idea of justice, they could not see it working in modern society. Yet, although it is clearly more difficult, I believe it would be right for us to make the attempt. The impressionistic evidence from attempts being made to use this approach around the country indicate that it offers a better chance of offenders facing the consequences of their actions and accepting responsibility for their lives, and of the community facing the consequences of its policies, than if the offender is in custody.¹⁸

Let us finally consider some implications if this dynamic and spiritual notion were to be adopted by our criminal justice system.

An area in which there are clearly difficult implications is that concerning equality before justice. This is not a matter which can be dealt with by the criminal justice system fundamentally: it has wider political, economic and psycho-social implications. If an 8th-century prophet visited this society now, he might not find oppression and injustice to the same degree as in his own era. However, he would find that most detected crime is committed by young, unemployed, often homeless or rootless people. He would find that the amplification by the press and media of the increase in serious violent offenses masks the fact that much crime is not of a serious nature in the sense that it does not pose a great threat to others. These offenses ought to be contained and dealt with in the community, but are often not. Though such offending must not be condoned, it would be evident that many young people between the ages of about sixteen to twenty five years are excluded from responsible participation in society. Because of this, they are placed at risk of offending against the law.

A prophet from the Judaeo-Christian tradition of justice would be quick to point out that such inequality has no place in a civilized society. Further, he would point out that it is quite immoral that many thousands of people in this unequal position should have to be sacrificed while we wait for this, that, or some other economic

theory to work. The prophet would rapidly make clear that what matters is not systems and economic theories but people! A society like ours cannot wait; it must respond to the needs of those people who are oppressed now. Those who are oppressed need policies which will respond to the real range and depth of their needs which will create some real measure of equality.

"The health of a social organism depends upon the adequacy of its social structure as much as does the health of the body upon the bio-chemical processes. No degree of goodwill alone can cure a deficiency in glandular secretions; and no moral idealism can overcome a basic mechanical defect in the social structure."¹⁹ All of us in the criminal justice system, the National Association of Probation Officers, the Association of Chief Officers of Probation, the Law Society, the Central Council of Probation Committees, the Magistrates Association and others, must keep pressing on those in political power that there will be no real justice while such basic defects in the social structure exist. Between us we have the evidence more than most other people that this is the case.

In the meantime, there are some rather more specific implications for the criminal justice system.

One is that, on the whole, it is better to keep as many people as possible outside the criminal justice system for what substantially needs to be done in putting wrongs right cannot in the end be done by sanctions. This would clearly only relate to early offenders and is very much in line with some of the crime prevention work which is being done in diversion schemes in juvenile bureaus such as those in Northamptonshire, Devon and in my own county. In these schemes, through cautioning [warning] and voluntary agreements with offenders and victims, good reparative and reconciliatory work is done. There is some evidence to suggest that people are beginning to learn to face the consequences of their actions and take responsibility for themselves.

A further implication which arises from this view of justice is that when offenders come to court, as clearly they must if offenses are repeated and are of a more serious nature, they should come into a system which sees the community as the primary place for putting wrongs right and sees custody as the alternative only to be used when the issue of protecting the public and safeguarding them is paramount.²⁰ If this were to be the case, one could get rid of tariff systems. The probation service and others would be able to develop opportunities within the community for putting wrongs right and creating the situation in which offenders could face the consequences of their action without having to concern themselves with "high tariff interventions," trying to guess what the court will buy, or finding alternatives to imprisonment.

I think that a prophet imbued with the Judaeo-Christian view of justice would be arguing for more justice and less law. The development of what are called reparation schemes is, in fact, a way of invoking the old Judaeo-Christian notion of justice and would not require greater sanctions such as reparation orders by statute; use could be made of what already exists. The probation order could be used a lot more but in doing so it should be recognized that reparation and reconciliation rely on the motivation of the parties involved. It should be possible more and more to offer to the court an agreement between the victim and the offender which has been freely negotiated, particularly in which the victim has freely consented. This is paramount in any such arrangement. Victim support schemes have a very important role here: it is necessary for the victim support scheme visitor to assist the victim and to ensure that the victim agrees freely and not under any kind of pressure to help the offender. It would need to be demonstrated, of course, that such agreements actually work. In Warwickshire (and I believe in some other areas) the probation service has adopted a policy of agreements with offenders which are offered to courts without recourse to special conditions in probation orders. So far the impression is that these work well, although detailed evidence is yet required.

The old biblical communities often used a mediator or daysman enabling reparation and reconciliation to take place in order to help work out an agreement. When one considers the potential for change it may be necessary often to have someone who is skilled enough to organize and assist this process. There have been many suggestions about how this should be done: some have opted for systems of well trained volunteers, for example in some schemes in the United States. If the Probation Service were to be involved, then this could be done using officers already involved in conciliation methods in civil work, from which the Service has learned a great deal. It has been argued elsewhere that the Service could well transfer some of these methods to its work with offenders for this is all about the skills of helping to resolve conflict.²¹ If the Service were to develop a conciliation and mediation service, it would have the advantage of being able to transfer those skills increasingly into the criminal justice element of its work. It would also mean that officers involved in mediation would not be those who worked directly with offenders and would therefore be able to be seen, particularly by victims, as impartial.

Finally, the notion of "putting things right" or of reconciliation within the community is often seen as esoteric or idealistic. What is not recognized is that it is extremely practical. This fact is already being demonstrated by victim/offender mediation schemes of a voluntary nature and also via probation services in both the United States and Great Britain.

One of the problems with such schemes is that they tend to be peripheral. They are seen to exist only on the margins of mainstream criminal justice and because of this eventually may die. Indeed, one of the vested interests of institutional justice is to keep such schemes on the edges of the system, for to regard them as fundamental in any way would in itself be disruptive.

The way forward is for those of us who work in and around the criminal justice system to persist in creating imaginative approaches and schemes which cannot be ignored. It is also to be

like the 8th-century prophets: persistent and urgent in representing that the only significant way to restore the hurt caused by offending must focus on the community. It is only here that those who offend may be prepared to take the consequences of their actions and take responsibility for their lives. Only here can those offended against accept responsibilities for the policies which help to create the climate in which offending occurs. In these factors, after all, lie the prerequisites of reconciliation.

Footnotes

1. H.E. Fosdick, *On Being Fit to Live With* (Student Christian Movement Press, 1954).
2. J.S. Mill, *On Liberty* (1845).
3. Insertion by this author.
4. J.A.T. Robinson, *The Roots of a Radical* (Student Christian Movement Press, 1980).
5. Malcom Lacey, John Pendleton and Gordon Read, "Supervision in the Community: The Righting of Wrongs," in *Justice of the Peace and Local Government Review*, 1983.
6. John Pendleton, "Reparation as a Judicial Measure of Punishment," paper to the Conference Europeean de la Probation, Karlsruhe, West Germany, 1985. See also H.A. Prins, "The Notion of the TZADEK or Righteousness in the Old Testament: Motivation for Social Work," in *Social Work Today*, Vol. 5(2), 1974.
7. Pendleton, 1985.
8. H. Wheeler Robinson, *Religious Ideas of the Old Testament* (Duckworth, 1949).
9. N. Snaith, *Distinctive Ideas of the Old Testament* (Epworth Press, 1952).
10. A. Richardson, ed., *Theological Word Book of the Bible* (Student Christian Movement Press, 1951).
11. Fosdick, 1954.
12. Ibid.
13. D. Cupitt, *Jesus and the Gospel of God* (Butterworth, 1979).
14. Ibid.
15. B.W. Anderson, *The Eighth Century Prophets* (Society for the Promotion of Christian Knowledge, 1979).
16. Ibid.
17. Snaith, 1952.
18. Lacey et. al., 1983.
19. Reinhold Niebuhr, *Interpretation of Christian Ethics* (1949), as quoted in J.A.T. Robinson, "The Place of Law in the Field of Sex," in *The Roots of a Radical*.
20. John Pendleton, *Alternatives to Imprisonment, an evaluation of RSDO Conference* (University of Keele, 1982).
21. Lacey et. al., 1983.

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