

MCC U.S. Office of Criminal Justice

220 W. High St.
Elkhart, Indiana 46516

MCC Canada Victim Offender Ministries

50 Kent Ave.
Kitchener, Ontario N2G 3R1

0285-500MCCC

New Perspectives on Crime and Justice:

Occasional Papers of the
MCC Canada Victim Offender Ministries Program
and the MCC U.S. Office of Criminal Justice

September 1985 Issue no. 4

In early April, 1985, representatives from Victim Offender Reconciliation Programs throughout North America gathered in Valparaiso, Indiana, for the annual VORP Gathering sponsored by the PACT Institute of Justice. Preceding that gathering, Mennonite Central Committee sponsored a one-day meeting to explore issues confronting the VORP movement from a faith perspective. The agenda included discussion and several presentations. This paper is an edited transcript of a presentation by Howard Zehr to that latter group. Zehr is currently working on a larger manuscript on the same theme.

Howard Zehr has been director of the Mennonite Central Committee U.S. Office of Criminal Justice since 1979. Between 1978 and 1982, he also served as director of Elkhart County PACT (now the Center for Community Justice), which operates both a Victim Offender Reconciliation Program and a Community Service Restitution Program. Zehr is author of a variety of publications including **Crime and the Development of Modern Society** (London, 1976) and many articles, booklets and handbooks. He received his M.A. from the University of Chicago and his Ph.D. from Rutgers University.

New Perspectives on Crime and Justice are issued irregularly as a means of sharing important papers and presentations. These "Occasional Papers" are sponsored jointly by the MCC Canada Victim Offender Ministries Program and the MCC U.S. Office of Criminal Justice. For information or to request copies of this booklet or a list of other available resources, contact either of these offices.

Copyright 1985
MCC U.S. Office of Criminal Justice

RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE

Howard Zehr

MCC U.S. Office of Criminal Justice
MCC Canada Victim Offender Ministries
1985

RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE

Let's start with what we know.

We know that the system we call "criminal justice" does not work. Certainly, at least, it does not work for victims.

Victims experience crime as deeply traumatic, as a violation of the self. They experience it as an assault on their sense of themselves as autonomous individuals in a predictable world. Crime raises fundamental questions of trust, of order, of faith. And this is true for many crimes we consider "minor" as well as for serious violent crimes.

Victims have many needs. They need chances to speak their feelings. They need to receive restitution. They need to experience justice: victims need some kind of moral statement of their blamelessness, of who is at fault, that this thing should not have happened to them. They need answers to the questions that plague them. They need a restoration of power because the offender has taken power away from them.

Above all, perhaps, victims need an experience of forgiveness. I do not have time here to explore this fully, and certainly I am not suggesting that forgiveness comes easily. I want to suggest, though, that forgiveness is a process of letting go. Victims need to be able to let go of the crime experience so that, while it will always—must always—be part of them, it will no longer dominate their lives. Without that, closure is difficult and the wound may fester for many years.

Much more needs to be said about what victims feel and need than is possible here—this has been only the briefest summary. My point, though, is this: victims have serious, important needs, yet few, if any, of them will be met in the criminal justice process.

In fact, the injury may very well be compounded. Victims find that they are mere footnotes in the process we call justice. If they are involved in their case at all, it will likely be as witnesses; if the state does not need them as witnesses, they will not be part of their own case. The offender has taken power from them and now, instead of returning power to them, the criminal law system also denies them power.

For victims, then, the system just is not working.

But it is not working for offenders either.

It is not preventing offenders from committing crimes, as we know well from recidivism figures. And it is not healing them. On the contrary, the experience of punishment and of imprisonment is deeply damaging, often encouraging rather than discouraging criminal behavior.

Nor is the justice system holding offenders accountable. Judges often talk about accountability, but what they usually mean is that when you do something wrong, you must take your punishment. I want to suggest that real accountability means something quite different. Genuine accountability means, first of all, that when you offend, you need to understand and take responsibility for what you did. Offenders need to be encouraged to understand the real human consequences of their actions. But accountability has a second component as well: offenders need to be encouraged to take responsibility for making things right, for righting the wrong. Understanding one's actions and taking responsibility for making things right—that is the real meaning of accountability.

Unfortunately, though, our legal process does not encourage such accountability on the part of offenders. Nowhere in the process are offenders given the opportunity to understand the implications of what they have done. Nowhere are they encouraged to question the stereotypes and rationalizations ("It's no big deal; they deserved it; insurance will cover it.") that made it possible for them to commit their offenses. In fact, by focusing on purely legal issues, the criminal process will tend to sidetrack their attention, causing them to focus on legal, technical definitions of guilt, on the possibilities for avoiding punishment, on the injustices they perceive themselves to undergo.

The criminal process, then, not only fails to encourage a real understanding of what they have done; it actively discourages such a realization. And it does nothing to encourage offenders to take responsibility to right the wrong they have committed.

I am increasingly impressed at the parallels between what victims and offenders go through.

I have suggested that for victims, crime involves a question of power. Part of what is so dehumanizing about being a victim is that power has been taken away. What is needed for healing is an experience of empowerment.

But offenders also need an experience of empowerment. For many offenders, crime is a way of asserting power, of asserting self-identity, in a world which defines worth in terms of access to power. Crime, for many, is a way of saying "I am somebody." My friend, an armed robber, who grew up black and poor, then spent 17 years in prison for his robberies, said it more clearly than most: "At least when I had a shotgun in my hand I was somebody."

Crime is often a way for offenders to assert power and worth, but in doing so they deny power to others. The unfortunate thing is that the criminal justice process compounds the problem by making pawns of both, by denying power to both victim and offender. The victim is left out of his or her own case; the offender's fate is decided by others, without encouragement to take responsibility for righting the wrong.

I have suggested that victims need to experience forgiveness. Offenders too need such an experience—how else are they to put their pasts behind them? But they also need opportunities for repentance and conversion. Confess, repent, turn around; admit responsibility, take responsibility for making things right, change directions—this is what needs to happen. But the criminal process has little room, provides little encouragement, for such events.

For offenders, the justice process will encourage anger, rationalization, denial of guilt and responsibility, feelings of powerlessness and dehumanization. As with victims, the wound will fester and grow.

So the system is not working for victims, and neither is it working for offenders.

We have known that for many years, and have tried many reforms, and they have not worked either.

This is not to say that "nothing works," that no "reform" programs have been without good results for the persons involved. What does seem to be true is that most criminal justice reforms of the past century have not done what was intended. All too often they have been perverted, coopted, coming to serve ends different than those intended. They have not brought about substantial improvements in the process of justice. The system of justice seems to be so impregnated with self-interest, so adaptive, that it takes in any new idea, molds it, changes it until it suits the system's own purposes.

Why? Why are victims so ignored? Why are offenders dealt with so ineffectively? Why do so many reforms fail? Why is crime so mystified, so mythologized, so susceptible to the machinations of politics and the press?

It seems to me that the reasons are fundamental, that they have to do with our very definitions of crime and of justice. Consequently, the situation cannot be changed by simply providing compensation or assistance to victims, by providing the possibility of alternative sanctions for offenders, or by other sorts of "tinkering." We have to go to root understandings and assumptions.

Let's look at some of those assumptions and definitions.

When a crime is committed, we assume that the most important thing that can happen is to establish guilt. That is the focal point of our entire criminal process: to establish who did it. What to do with the person once guilt is established is almost an afterthought. The focus is on the past, not the future.

Another assumption we make is that of just deserts: everyone must get what is coming to them. The metaphysical order of the universe has been upset and the balance must be righted.

Everyone must get what is due, and what is due is pain. Nils Christie has been very helpful in teaching us to call a spade a spade: what we are doing is inflicting pain. Penal law would be more honestly called "pain law" because in essence it is a system for inflicting graduated measures of pain.

Our legal system tends to define justice, not by the outcome, but by the process itself and by the intention behind it.

As Herman Bianchi has pointed out, it is the intention that matters. The intention of the law is to treat everyone fairly and equally, but whether that is actually achieved is less important than the design, the intention.

Moreover, the test of justice is whether the process was carried out correctly. We see justice as a system of right rules. Were the rules followed? If so, justice has been done. I could point to a variety of cases—including death penalty cases—where substantial questions of guilt or innocence remain unanswered but, because the rules were followed, appeals have been exhausted and justice is considered to have been done.

So we define justice as the establishment of blame and the imposition of pain, all administered according to right rules. But there is something even more basic: our legal system defines crime as an offense against the state, the government. Legally it is the state which has been violated, and it is up to the state to respond. So it is a professional proxy for the state—the prosecutor—who files charges, who pursues the case, who represents the victimized state. And it is a judge, another representative of the state, who decides the outcome.

It is no accident, then, that the crime victim, the person who has been victimized, is so left out of this process. He or she is not even part of the equation, not part of the definition of the offense. Victims are left out because they have no legal standing, because they are not part of the legal definition of the offense.

No wonder that in spite of our reforms, we have not been able to incorporate victims into the justice process in any integral way. While I think victim compensation and victim assistance are important programs, I am pessimistic about the possibilities for a substantial impact because they do not attack the fundamental issue—the definition of crime which excludes crime victims.

We define crime as an offense against the state. We define justice as the establishment of blame and the imposition of pain under the guidance of right rules.

I think it is essential to remember that this definition of crime and justice, as common-sensical as it may seem, is only one paradigm, only one possible way of looking at crime and at justice. We have been so dominated by our assumptions that we often assume it is the only way, or at least the only right way, to approach the issue.

It is not. It is not the only possible model or paradigm of justice—not logically, not historically.

Some of you may be aware of Thomas Kuhn's **The Structure of Scientific Revolutions**. Using the 17th century scientific revolution as a model, Kuhn advances a theory of scientific revolutions which may have some bearing here.

Kuhn notes that the way we understand and explain the world at any time is governed by a particular model. A scientific revolution—and, by implication, an intellectual revolution—occurs when that model comes to be seen as inadequate and is replaced by a different model, a different way of understanding and explaining phenomenon. Scientific and intellectual “revolutions” represent shifts in paradigms.

The classic scientific revolution of the 17th century is a case in point. Before Copernicus, human understanding of the universe was governed by the Ptolemaic paradigm or model. In this understanding, the earth was central, with planets and heavenly bodies whirling around in orbits which consisted of some sort of crystalline spheres. While this may seem ludicrous to us today, it seemed to fit what people saw and it meshed with important philosophical, scientific and theological assumptions. It was common-sensical. It was a paradigm which governed understandings and was used to explain phenomena.

For many years this paradigm seemed to fit, adequately explaining what was seen and experienced. But aberrations and dysfunctions cropped up—in fact, some were observed right from the start. At first, these aberrations seemed to offer no real threat to the paradigm. Adjustments could be made. For example, the phenomenon of retrograde motion—the fact that planets seemed to move backward briefly during rotation—was explained by adding “epicycles” to the model. Apparently planets rotated in smaller orbits or spheres as they moved along in their larger orbits.

In the 16th century, Copernicus suggested a different model, one which put the sun at the center. Few, however, took his suggestion seriously. It flew in the face of too many assumptions, threatened too many theological and philosophical ideas. It seemed nonsensical. But by the early 17th century more accurate observations of the skies (made possible by telescopes and careful observations) began to create increasing problems in the old model. The number of epicycles necessary to make the model work became ridiculous, for example.

Numerous efforts were made to shore up the model. Finally, though, a series of discoveries, synthesized by Isaac Newton in a new paradigm, brought about a revolution in our understanding of the universe. In this model, the sun is central to our galaxy. The “laws” which govern the movement of planets are one with those which govern forces on the earth.

This understanding made modern science possible, became today's common sense, but is understood now by scientists to also be just one model, and an imperfect model at that. Newtonian physics is useful in everyday life, but it is inaccurate for much scientific work: the Einsteinian paradigm must be used to incorporate the complexity, the plasticity, of time and space.

Kuhn's point, in short, is that the way we explain and make sense out of phenomena is governed by paradigms. Our paradigms, however, are often rather incomplete reflections of reality and do not adequately fit every situation. So we make adjustments, build in epicycles, to try to make them work. Gradually the number of aberrations grows. At the same time, we make attempts to salvage the model, adding more epicycles until, hopefully, a new paradigm emerges, a new way of putting the pieces together that fits experience better. That is the structure, the pattern, of scientific and intellectual revolutions.

Why this long excursion into the history of science? First, it may help us to be more humble about our understandings, to see our definitions and assumptions as models rather than as absolutes. And second, it may suggest the possibility of a paradigm change in justice.

Randy Barnett has suggested that state-centered and punishment-centered assumptions constitute just such a paradigm, and that this paradigm is in the process of breaking down. We may, he suggests, be on the verge of a revolution in our understanding of crime and justice.

As with the Ptolemaic paradigm, problems have been seen right from the start, and they have multiplied with time. Thus we had to invent epicycles.

The concept of proportionate punishment, an Enlightenment concept, was an attempt to limit the imposition of pain, to inflict it in measured, "scientific," doses. It did not question the fact of imposing pain, but attempted to grade it to fit the offense. Prison caught on because it was a way of grading pain. Similarly, the Enlightenment did not question the centrality of the state's role, but concerned itself with limiting the arbitrary power of the state.

But that "epicycle" did not work very well. Prisons also turned out to be brutal, needing reform right from the start. Even proportionate punishment failed to deter effectively. Proportionate punishment seemed to have its problems.

So the concept of rehabilitation was born, but that too led to problems. It didn't work and it was terribly susceptible to abuse. This reform, like the concept of proportionate punishment, attempted to rescue the paradigm without questioning fundamentals. When it did not work, the pendulum swung back to punishment. The underlying assumption that pain must be inflicted remains unquestioned.

Victim compensation, Barnett notes, can be seen as another such "epicycle." It too tries to tinker with the model, to correct a problem, but without asking basic questions.

But the dysfunctions are so great, and so widely recognized, that an intellectual revolution just might be possible. Disenchantment with the state/punishment paradigm, with what might be called the "retributive paradigm," is so great that we may be on the verge of a paradigm change.

There are certain problems in applying Kuhn's pattern of paradigm change. It does not, for example, take into account the politics of paradigm change. However, I want to make two points here. First, there are glimmers of hope that change may be coming. And second, it is important for us to step back and realize that our model is only that—one model, one paradigm. Other models can be conceived.

In fact, other models have predominated throughout most of western history. It is difficult to realize sometimes that the paradigm which we consider so natural, so logical, has in fact governed our understanding of crime and justice for only a few centuries. We have not always done it like this.

Let me interject a warning here. What I am going to suggest will be a bit scattered. I am going to jump through centuries, generalizing rather freely. While I have been working on this for some time, I have not had yet had time to assimilate all my reading. So my suggestions also must be considered somewhat tentative.

My thesis is that western (and possibly early near-eastern) history has been dominated by a dialectic between what Bruce Lenman and Geoffrey Parker have called "community justice" and "state justice."

State justice reared its head early—you can see it already in the Code of Hammurabi—but it has only come to be predominate in the past several centuries. Instead, community justice has governed understandings throughout most of our history.

Several themes are important in an attempt to develop an historical perspective.

One theme has to do with the modern division between criminal and civil law. Criminal law is characterized by the centrality given to the state: the state is victim, and the state prosecutes. It is dominated by a coercive, punishment motif. Civil law, on the other hand, assumes that two private parties are in conflict, with the state being asked to arbitrate between them, and the outcome focuses largely on making things right, on compensation. The division of law into these two types is quite recent, an important historical development.

A second theme is included in the preceding theme. This is the idea that it is the state's responsibility, even monopoly, to prosecute. That too is new, although its roots go back to perhaps the 12th and 13th centuries.

A third theme is the assumption that punishment is normative. The idea of punishment is old, of course, but some scholars suggest that it is relatively recent that punitiveness became normal and dominant. This is contrary to common images of primitive, vigilante vengeance.

For most of our history in the West, non-judicial, non-legal dispute resolution techniques have dominated. People traditionally have been very reluctant to call in the state, even when the state claimed a role. In fact, a great deal of stigma was attached to going to the state and asking it to prosecute. For centuries the state's role in prosecution was quite minimal.

Instead, it was considered the business of the community to solve its own disputes. Even when state-operated courts became available, they were often places of last resort, and it was common to settle out of court after court proceedings had been initiated. Out-of-court settlements were so normal, in fact, that a new French legal code as late as 1670 prohibited the state from getting involved if the parties came to a settlement, even after proceedings had begun.

Most of our history has been dominated by informal dispute resolution processes for conflicts, including many of the conflicts today defined as crimes, and these processes highlighted negotiation/arbitration models. Agreements were negotiated, sometimes using community leaders or neighbors in key roles. Agreements were validated by local notables, by government notaries, by priests: often parties would go before such a person, once an agreement was made, and make it binding. But they were negotiated rather than imposed.

To what extent these methods were used for the most serious crimes is still uncertain. Herman Bianchi, however, has argued that sanctuaries were a key part of western civilization for just this purpose: a place for those who

committed the most serious crimes to run to, to be safe, while they negotiated an agreement with the victim and/or family.

The process emphasized negotiation, therefore, and the expected outcome was compensation. Restitution to victims was common, perhaps even normative, even though violent retribution is our usual picture.

Even "an eye for an eye" justice focused on compensation. In some cases, it was a way of establishing restitution—the value of an eye for the value of an eye. Limit the response, in other words, and convert it to restitution.

When "eye for an eye" justice was taken literally, however, it still was seen as compensation. When someone in a collectivist, tribal, clan society is killed or hurt, the balance of power between groups is upset. Balance is restored by repayment in kind. An eye for an eye, taken literally, is both a means of limiting violence and of compensating groups for the loss of, or damage to, one of its members.

Such justice is also a way of vindicating the victim. Both restitution and vengeance may often have been intended less to punish than to vindicate the moral rightness of the victim. In a small, tightly-organized community, the victim needed a moral statement to the community that they were right and that the other person was wrong. They needed moral compensation.

So restitution was common. Violent revenge did occur, but it may not have happened as frequently as we often assume. And both restitution and vengeance may have been intended less as punishment than as moral vindication and as a means of balancing power.

Much more work needs to be done, but my point is this: we have had a long history of community justice in our culture. Until recently, it was not assumed that the state had a duty to prosecute most crimes, and certainly not assumed that the state had a monopoly on prosecution.

Through most of our history, two systems of justice have coexisted—state justice and community justice—which both complemented and conflicted with each other. Community justice tended to focus on restitution through a somewhat informal process of mediation and arbitration. State justice tended to be more punitive, more formal, and put the state at the center, although until recently it did not claim a monopoly.

Traditionally, at least on the Continent, when individuals wished to use state courts, individuals had to bring the complaint. The victim had to initiate proceedings, and could decide when to terminate them. The state functioned as a kind of regulatory system. It was an accusatorial system: if you were a victim, you came forward and accused someone, and the state could not do anything unless you did this. If you did, the state would locate the accused person, bring them before you, and regulate the dispute. But the victim had to trigger the process and could terminate it as well.

During the 12th century, however, the state began to take a larger role and began to initiate some prosecutions. This process seems to have been tied, at least in part, to the revival of Roman law. It was during this time that Roman law was rediscovered; law schools began to teach it, and the Church picked it up and made it the basis of canon law.

The Inquisition was one outcome of this transformation of Roman law into canon law. In the Inquisition, the Church initiated prosecution, sought evidence and carried the prosecution through. Canon law, therefore, provided a model for state-initiated prosecution.

Evidently the state began to adopt this model which provided for a more aggressive, powerful role for the central authority. This takeover by the state was gradual and was much resisted, but eventually was victorious.

So this enlarged responsibility and power for the state in the prosecution of crime seems to have been based on the revival of Roman law, which was introduced through canon law, then adopted and secularized by the state.

Many reasons for this trend can be suggested. They may have to do with the breakdown of community or the needs of an emerging capitalist order. They seem to have something to do with Christian theology. They certainly have something to do with the dynamics of emerging nation states: I view the modern state as an exceedingly greedy institution which will keep growing unless we can keep it in check, and criminal law is one of its primary means of expressing power. But I do not pretend to understand how to sort out the roots of this process.

Although this is an oversimplification of reality, I am arguing that history has been a dialectic between two rival systems. Community justice was basically extra-legal, often negotiated, often restitutive. State justice was legal, expressing formal rationalism and rules, the rigidification of custom and principles derived from the Roman tradition into law. It was imposed justice, punitive justice, hierarchical justice.

During the past two centuries this latter model has won, but not without a fight, and not completely. In American history, for example, there has been a long and persistent history of alternative dispute resolution processes. Jerold Auerbach, in *Justice Without Law?*, outlines an amazing variety of examples. The state tried to coopt them, and often eventually did, but they have been very persistent.

In fact, even in the United States the idea that the state ought to prosecute crimes is relatively new. Until a hundred years ago, it was not assumed that it was up to prosecutors to initiate all prosecutions; many were left to individuals to initiate.

We are beginning to recognize that a legal revolution has taken place in western history, a revolution with tremendous implications but until recently much neglected by historians. Its dimensions have included a separation of law into criminal and civil, an assumption of state centrality and monopoly in conflicts which are legally defined as criminal, a movement from private to public justice, an assumption that punishment is normative, a movement from custom to formal legal structures.

Parallel with the rise of the state as the central actor and the increase in punitiveness was the rise of the modern prison. Many would argue that it is no accident that these developments coincide chronologically.

I have suggested two historical models: state justice and community justice. There is, however, a third way: covenant justice. In some ways it has links with both community and state justice, but in covenant justice the patterns are transformed. Millard Lind has outlined this well when he traces "the transformation of justice from Moses to Jesus."

Many assume that the primary theme of Old Testament justice is retribution, that "an eye for an eye" is the central paradigm. This view is inadequate, for a number of reasons.

Some have argued, for example, that the words we translate into English as retribution really do not mean that. Also, the phrase "an eye for an eye" does not occur as often as most of us assume; the phrase is used, I believe, only three or four times. And we often misunderstand its function. An "eye for an eye" was intended as a limit, not a command. If someone takes your eye, respond in proportion. Limit your response. Do this much, and only this much. An "eye for an eye" was intended to introduce limits in a society unused to the rule of law.

Some have also argued that the concept was designed as a way of converting wrongs to compensation. As I suggested earlier, it may have been intended as "the value of an eye for an eye." And it was designed as way of maintaining a balance of power between groups.

Our understanding of an eye for an eye has often been off base, oversimplified, and has overemphasized its importance. An eye for an eye is NOT the central paradigm of Old Testament justice. Restitution, forgiveness, reconciliation are just as important, perhaps more important. In fact, in many ways the central theme of the Old Testament is a theology of restoration.

I have recently been rereading Leviticus, Exodus and Deuteronomy. I have been struck with how often forgiveness and restoration appear there. We have been so dominated by retributive language that we often overlooked these other themes.

So my first point about covenant law is this: retribution is not as central to Old Testament justice as if often assumed, and we have often misunderstood the functions of this theme.

My second point is that we must understand that the meaning of law in the Old Testament is much different than ours today. Law certainly does not mean the legal formalism that is integral to today's understanding of law. Bianchi has helped us to understand that in the Old Testament, law is conversation, "palaver." Law is a "wise indication" of the way we ought to go, and we ought to talk about that. Old Testament law does not have the sense of rigidity and formalism that our law does. Law points a direction, and it must be discussed.

We tend to see the Ten Commandments as purely prohibition: "Do not do these things." Bianchi suggests, however, that they should be read as promise. God is saying, "If you walk in my ways, if you are true to my covenant, this is how you shall live. You will not kill. You will not commit adultery." It's a promise.

The differences in our concepts of law are much more profound than I have outlined here. What is important is that we realize that we cannot simply transfer Old Testament laws to the twentieth-century legal milieu.

Furthermore, justice in the Old Testament is not based on a state law model. In fact, a consistent theme is the warning against becoming like other nations with a coercive kingship structure. Israel's kings were to be different, subject to God and God's commandments. They were not to be above the law, not to be the source of law, as was the case in other nations.

Consequently, even when Israel adopted laws with parallels to those of other surrounding nations (for example, the Code of Hammurabi), they were transformed. They were set in a covenant context, and did not assume the centrality of the state as others did.

Our information about the structure and administration of Old Testament law is quite fragmentary. However, it seems clear that the law was not administered by police and public prosecution. There was no police force which ran around, arresting people for wrongdoing. There were no state prosecutors to bring charges in formal courts. Instead, as Hans Boecker has described it for us, justice seems to have been done at the gate, at the open place in the city where people met, where things were happening, where the market took place, where people talked. If you had a complaint against someone, you brought it to this place. Here justice was done in a structured but democratic and fairly unbureaucratic way. It involved much negotiation, much discussion, and the focus was on a solution rather than some abstract concept of justice. The idea that justice is an abstract balancing was a Roman, not a Hebrew concept. Covenant justice was making things right, finding a settlement, restoring Shalom.

The key to Old Testament justice was the concept of Shalom - of making things right, of living in peace and harmony with one another in right relationship. Restitution and restoration overshadowed punishment as a theme because the goal was restoration to right relationships.

The test of justice, then, was not whether the right rules, the right procedures, were followed. Justice was to be tested by the outcome, by its fruits. As Bianchi has pointed out, if the tree bears good fruit, it is justice; if not, it is not justice. Justice is to be tested by the outcome, not the procedures, and it must come out with right relationships. Justice is a process of making things right.

Jesus continues and expands this theme of covenant justice. He focuses on the recovery of wholeness in community with one another and with God. In the New Testament as in the Old, justice has a relational focus.

And Jesus raises real questions about some of the central assumptions of today's retributive justice. He seems to suggest real caution about focusing on blame-fixing. He casts doubt on the idea of just deserts. And his primary focus is on the ethic of love and forgiveness rather than punishment.

It seems to me that the central focus of covenant justice, in both its Old and New Testament forms, is on love, on restoration, on relationships. It is the kind of thing we talk about in VORP (Victim Offender Reconciliation Program). Crime is a wound in human relationships. The feelings that victim and offender have toward one another are not peripheral issues, as assumed by our justice system, but are the heart of the matter. Relationships are central.

Covenant justice also seems to focus more on problem-solving than on blame-fixing. As Bianchi has suggested, it focuses more on liabilities than on guilt. When you commit a crime, you create a certain debt, an obligation, a liability that must be met. Crime creates an obligation—to restore, to repair, to undo. Things must be made right. And the test, the focus, of justice is the outcome, not the process.

So the tension today is between three basic models. State justice is dominant but seriously flawed. Community justice has a long history and many possibilities, but it too has its pitfalls and has been largely coopted by state justice. Then there is covenant justice. Our problem is to understand and find our way through these models.

But my goal today is quite limited: we must realize that many of the problems in the way we do justice today are rooted in our understanding of justice, and that this particular understanding is only one possible way, one paradigm. Others are possible, others have been lived out, others have actually dominated most of our history. In the long sweep of things, our present paradigm is really quite recent.

Now, if it is true that the problem lies in the way we understand crime and justice, how should we understand them? What would a new paradigm look like?

I would suggest that we define crime as it is experienced: as a violation of one person by another. Crime is a conflict between people, a violation against a person, not an offense against the state. The proper response ought to be one that restores. In place of a retributive paradigm, we need to be guided by a restorative paradigm.

I have tried to sketch out, in table form, the contrasting characteristics of the two paradigms. [See Appendix] It is very sketchy and highly theoretical at this point, but might help to clarify the differences.

And the differences are significant.

The old paradigm makes the state into the victim, thus placing the state at the center, leaving out the individual victim, and denying the interpersonal character of the offense. The new paradigm defines crime as a conflict between persons, putting the individuals and their relationship at center stage.

The old paradigm is based on a conflictual, adversarial, model, but sees the essential conflict between individual and state, and utilizes a method that heightens conflict. The new paradigm recognizes that the essential conflict is between individuals and encourages dialogue and negotiation. It encourages victim and offender to see one another as persons, to establish or re-establish a relationship.

The central focus of the old paradigm is on the past, on blame-fixing. While the new paradigm would encourage responsibility for past behavior, its focus would be on the future, on problem-solving, on the obligations created by the offense.

Restoration, making things right, would replace the imposition of pain as the expected outcome in new paradigm justice. Restitution would be common, not exceptional. Instead of committing one social injury in response to another, a restorative paradigm would focus on healing.

Retributive justice defines justice the Roman way, as right rules, measuring justice by the intention and the process. Restorative justice would define justice the Hebrew way, as right relationships, measured by the outcome.

As Auerbach has pointed out, modern justice grows out of but also encourages competitive individualism. A restorative, negotiated focus should encourage mutual aid, a sense of mutuality, of community, of fellowship.

In today's justice, all action is hierarchical, from the top down. The state acts on the offender, with the victim on the sidelines. Restorative justice would put victim and offender at the center, helping to decide what is to be done about what has happened. Thus the definition of accountability would change. Instead of "paying a debt to society" by experiencing punishment, accountability would mean understanding and taking responsibility for what has been done and taking action to make things right. Instead of owing an abstract debt to society, paid in an abstract way by experiencing punishment, the offender would owe a debt to the victim, to be repaid in a concrete way.

Retributive justice as we know it views everything in purely legal terms. As Nils Christie has said, legal training is trained tunnel vision. In law school, you are taught that only legally-defined issues are relevant. Restorative justice will require us to look at behavior in its entire context—moral, social, economic, political.

All this is, of course, very fragmentary and very theoretical. However, as Kay Harris has pointed out, our problem in the past is that we have attempted to provide alternative programs without offering alternative values. We need an alternative vision, not simply alternative sentences.

What such a vision means in practice is still hard to say. Some have suggested that we abolish criminal law—a slightly radical but intriguing idea! Herman Bianchi is suggesting that, historically, it has been good to have competing systems—they provide a useful corrective to one another, and pose a choice for participants. So perhaps we need to work at setting up a separate but parallel justice system without abolishing the old. Perhaps, as Martin Wright suggests, we need to make more use of what we already have by "civilizing" our legal process—that is, by drawing on and expanding the civil process that already exists.

All this raises many questions, of course, and suggests many dangers. Good intentions can, and often do, go awry; just look, for example, at the history of prisons, which were advocated by Christians with the best of intentions.

Should something like this be attempted on a societal level, or is it something that belongs primarily within the church? And what about the politics of paradigm change? Make no mistake: the criminal justice industry is big business, shot through with all kinds of self-interest, and will not be changed easily.

Can such a model actually work? We know from VORP that it can work, that it does work, in many cases, with certain kinds of crime. But are there limits? Where are they? It is our responsibility to find out.

That is your, is our, challenge: will VORP be just another alternative program, an alternative that becomes institutionalized, ossified, coopted until it is just another program, and perhaps not an alternative at all? Or will VORP be a means of exploring, communicating, embodying an alternative vision? Will it demonstrate that there is another way? Could it even be the beginning of a quiet revolution?

That is, at least in part, up to us. For me that is an exciting dream. But it is also an awesome responsibility.

APPENDIX

Paradigms of Justice Old and New

Old Paradigm Retributive Justice

1. Crime defined as violation of the state
2. Focus on establishing blame, on guilt, on past (did he/she do it?)
3. Adversarial relationships & process normative
4. Imposition of pain to punish and deter/prevent
5. Justice defined by intent and by process: right rules
6. Interpersonal, conflictual nature of crime obscured, repressed; conflict seen as individual vs. state
7. One social injury replaced by another
8. Community on sideline, represented abstractly by state
9. Encouragement of competitive, individualistic values
10. Action directed from state to offender:
 - victim ignored
 - offender passive
11. Offender accountability defined as taking punishment
12. Offense defined in purely legal terms, devoid of moral, social, economic, political dimensions
13. "Debt" owed to state and society in the abstract
14. Response focused on offender's past behavior
15. Stigma of crime unremovable
16. No encouragement for repentance and forgiveness
17. Dependence upon proxy professionals

New Paradigm Restorative Justice

1. Crime defined as 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 a means of restoring **both** parties; reconciliation/restoration as goal
5. Justice defined as right relationships; judged by the outcome.
6. Crime recognized as interpersonal conflict; value of conflict recognized
7. Focus on repair of social injury
8. Community as facilitator in restorative process
9. Encouragement of mutuality
10. Victim and offender's roles recognized in both problem and solution:
 - victim rights/needs recognized
 - offender encouraged to take responsibility
11. Offender accountability defined as understanding impact of action and helping decide how to make things right
12. Offense understood in whole context—moral, social, economic, political
13. Debt/liability to victim recognized
14. Response focused on harmful consequences of offender's behavior
15. Stigma of crime removable through restorative action
16. Possibilities for repentance and forgiveness
17. Direct involvement by participants

Selected References

- Auerbach, Jerold S. **Justice Without Law?** Oxford University Press, 1983.
- Barnett, Randy. "Restitution: A New Paradigm of Criminal Justice," in Burt Galaway and Joe Hudson, **Perspectives on Crime Victims**. C.V. Mosby Co., 1981.
- Bianchi, Herman. **A Biblical Vision of Justice** (Issue No. 2 of **New Perspectives on Crime and Justice**). MCC.
- Berman, Harold J. "The Religious Foundations of Western Law," in **The Catholic University of America Law Review**, Spring, 1975, pp. 490-508.
- Boecker, Hans Jochen. **Law and the Administration of Justice in the Old Testament and Ancient East**. Augsburg Publishing House, 1980.
- Christie, Nils. **Crime, Pain and Death** (Issue No. 1 of **New Perspectives on Crime and Justice**). MCC.
- Christie, Nils. **Limits to Pain**. Columbia University Press, 1981.
- Harris, Kay. "Strategies, Values, and the Emerging Generation of Alternatives to Incarceration" in **New York University Review of Law and Social Change**, Vol. XII, No. 1, pp. 141-170.
- Kuhn, Thomas. **The Structure of Scientific Revolutions**. University of Chicago Press, 2nd Edition, 1970.
- Lind, Millard. "Law in the Old Testament" in Willard M. Swartley, ed., **The Bible and Law** (Occasional Papers No. 3 of the Council of Mennonite Seminaries, Elkhart, Indiana). 1982
- Lind, Millard. "The Transformation of Justice: From Moses to Jesus." Duplicated manuscript available from MCC.
- Lenman, Bruce and Parker, Geoffrey. "The State, the Community and the Criminal Law in Early Modern Europe" in V.A.C. Gatrell et. al., ed., **Crime and the Law: The Social History of Crime in Western Europe Since 1500**. Europa Publications, 1980.
- Wright, Martin. **Making Good: Prisons, Punishment and Beyond**. Burnett Books, 1982.

OTHER ISSUES OF THE OCCASIONAL PAPERS

- Bianchi, Herman. **A Biblical Vision of Justice**. Issue No. 2.
- Christie, Nils. **Crime, Pain and Death**. Issue No. 1.
- Klaassen, Walter. **Peoplehood and the Law**. Issue No. 3.

For a list of other resources, contact the MCC offices listed here.