

Healing Justice: A Buddhist Perspective

David R. LOY

要旨

仏教の罰に対する考え方は、人間心理の理解ならびに人間の可能性に関する見方と切り離して考えることはできない。正義は、私たちが聖と俗のいかなる区別をする場合にも橋渡しとなる究極的なものの一つであり、刑事裁判制度は常に、人々が互いにどのように関係すべきかという、より広い見方に由来している。

本稿は、2つの古代経典から始まっている。すなわち、連続殺人犯の矯正について書かれ罪と罰に関して最もよく知られた仏教書“the Angulimala Sutta”と犯罪や暴力を回避すべきであるという統治者の責任に関する“the Lion's Roar Sutta”である。次に、僧侶や尼の生活を律する規則を提供する仏教の“vinaya”について考察する。これらの規則は、動機づけ、教育、矯正について私たちが理解するにあたって大いに関係してくる。最後に、裁判制度がこれらの仏教的視点をどのように具体化したかを知るために、伝統的チベットについて考察する。

The history of punishment is in some respects like the history of war; it seems to accompany the human condition almost universally, to enjoy periods of glorification, to be commonly regarded as justified in many instances, and yet to run counter to our ultimate vision of what human society should be.¹

Why do we punish? It seems a silly question, but only until we try to answer it. To punish is to harm, and harming must be justified. Three types of justification are usually offered: the harm of punishment is outweighed by some greater good (e.g., it deters others); punishment does not really harm offenders (because it reforms them); and harming offenders is good in itself (because retribution “annuls the crime”). However, each of these reasons becomes problematical when we examine it.

The first argument is a utilitarian one, but it seems immoral to harm someone because we want to influence others' behavior; such a principle could also be used to justify scapegoating innocents. This is not just an abstract point, for there is the uncomfortable possibility that offenders today have become scapegoats for our social problems. And if punishment warns other would-be offenders, why does the United States, which punishes a larger percentage of its population than any other Western country, continue to have the highest crime rate?

The second argument, that punishment reforms rather than harms the offender,

obviously is not true now. The Quakers may have intended the penitentiary to be a place of penitence, yet there is little doubt that today incarceration makes most offenders worse. A RAND study found that recidivism is actually higher for offenders sent to prison than for similar offenders put on probation. That should not surprise us, for the predatory societies found in most prisons make them more like hell than places to repent and reform. Prison settings dehumanize, divert offenders' attention from victims, and reinforce their low self-esteem. As often happens, an institution which does not fulfill its original purpose continues to exist for other reasons — in this case because, to tell the truth, we have not known what else to do with most offenders.

The third argument, that harming offenders somehow annuls the crime, incorporates several types of justifications. The most common is the desire for vengeance, which is understandable but morally dubious and socially destructive. Another version sees punishment as God's retribution; the Buddhist equivalent understands punishment more impersonally, as an effect of one's karma. Neither is a good argument for human punishment: neither God nor an objective moral law needs our help, especially since it is inevitable that humans will occasionally make mistakes (e.g., execute innocents).

The important point is that all versions of this third justification build upon the intuitive belief that something must be done to "make right" the harm that offenses cause to victims and the social fabric. What motivates the restorative justice movement is the increasing recognition that our present judicial system is not doing this well enough. The problem, we are beginning to realize, is a deep one: we sense that there may be something wrong with our atomistic understanding of the social contract and its presumptions about "the good life", but we are not sure which way to look for an alternative paradigm — which is why it is essential to get perspectives on this paradigm that can only be provided by the worldviews and values of other cultures.

The Buddhist approach to punishment, like any other approach, cannot really be separated from its understanding of human psychology and its vision of human possibility. This suggests that criminal justice is not solely a secular issue, for questions of fairness and justice cannot be completely separated from the religious perspectives they historically derive from: for the vast majority of humankind, crime, punishment and reform are still inextricably bound up with religious views about sin, judgement and forgiveness. Justice is one of those ultimate issues that bridge whatever distinction we try to make between sacred and secular, and our criminal justice system will always be subordinate to our larger vision of how people should relate to each other. Then is penal failure a barometer of our social failure in this larger respect — of our inadequate vision of what personal and social possibilities there are? This would explain our discomfiting suspicion that criminals have become scapegoats, readily exploited by ambitious politicians (a fourth justification for

punishment, unfortunately).

It is difficult to generalize about crime, because there are different types, committed by different types of people, which require different responses. The same is true for Buddhism: there is no such thing as the Buddhist tradition, for Buddhism has been extraordinarily adaptable in its spread to different places and cultures. Thailand, Tibet, China and Japan have had very different political and judicial systems, although some similar threads have been used in weaving their various patterns: especially the beliefs that all of us, offenders and victims alike, have the same Buddha-nature, which is not to be confused with our usual sense of self, an ever-changing collection of wholesome and unwholesome mental tendencies; that we are usually dominated by our greed, ill-will and delusion, but it is possible to change and outgrow them; and therefore the only reason to punish is education for reformation.²

We begin with two Pali (early) suttas which exemplify these threads: the Angulimāla Sutta, the best-known Buddhist text on crime and punishment, about the reform of a serial killer; and the Lion's Roar Sutta, on the responsibility of a ruler to prevent crime and violence. Although the first may be based upon a true incident, both suttas are obviously mythic, which does not reduce their interest for us, since our concern is Buddhist attitudes. Then we will look at the Buddhist vinaya, which supplies the rules and corrective measures that regulate the lives of Buddhist bhikkhus (monks) and bhikkunis (nuns); these have many implications for our psychological understanding of motivation, education and reform. Finally, we look to traditional Tibet to see how its judicial system embodied these Buddhist perspectives. Tibet's lack of church/state separation means it is not a model that a modern secular and pluralistic society can duplicate — or are we already duplicating it? Does our usual distinction between the religious and civil spheres merely obscure the fact that the state has become a "secular god" for us?

The Angulimāla Sutta³

Angulimāla was a merciless bandit, who murdered many people and wore their fingers as a garland (hence his name, literally "finger-garland"). Although warned about him, the Blessed One (Sakyamuni Buddha) walks silently into his area. When Angulimāla tries to catch him, however, the Buddha performs a supernatural feat: Angulimāla, walking as fast as he can, cannot catch up with him, even though the Buddha is walking at his normal pace. Astonished, Angulimāla calls out "Stop, recluse!"

Still walking, the Buddha answers: "I have stopped, Angulimāla; you stop

too." In response to Angulimala's puzzlement, he explains: "I have stopped forever, abstaining from violence towards living beings; but you show no such restraint." This impresses Angulimala so much that he renounces evil forever and asks to join the sangha; and the Buddha accepts him as a bhikkhu.

Meanwhile, people had gathered at the gates of King Pasenadi's palace, demanding that Angulimala be stopped. King Pasadeni goes forth with five hundred men to capture him. When he meets the Buddha and explains his quest, the Buddha responds: if you were to see that he is now a good bhikkhu, who abstains from killing, etc., how would you treat him?

The king replies that he would pay homage to him as a good bhikkhu, and is surprised when the Buddha points out Angulimala seated nearby. The king marvels that the Buddha was able to tame the untamed and bring peace to the unpeaceful. "Venerable sir, we ourselves could not tame him with force or weapons, yet the Blessed One has tamed him without force or weapons." Then he departs.

Soon after, the venerable Angulimala realizes the supreme goal of the holy life and attains nirvana, Later, however, during an almsround, he is beaten by townspeople, but the Buddha tells him to bear it, for it is a result of his past karma. The sutta concludes with some verses by Angulimala, for example: "Who checks the evil deeds he did/ By doing wholesome deeds instead,/ He illuminates the world/ Like the moon freed from a cloud."

The point of this sutta is not difficult to see: we need only contrast Angulimala's fate with what our retributive justice system would do to him. The importance of this story within the Buddhist tradition highlights the only reason Buddhism accepts for punishing an offender: to help re-form his or her character. Then there is no reason to punish someone who has already reformed himself. There is no mention of punishment as a deterrent; on the contrary, the case of Angulimala may be seen as setting a negative example, implying that one can escape punishment by becoming a bhikkhu, as if the sangha were something like the French foreign legion. There is also no hint that punishment is needed to "annul the crime", although Angulimala does suffer karmic consequences which even his nirvana (spiritual perfection) cannot escape. More generally, determining what judicial response is right or wrong — what is just — cannot be abstracted from the particular situation of the offender.

Nevertheless, this story is unsatisfactory from a restorative viewpoint. The sutta says nothing about the families of Angulimala's victims, or the larger social consequences of his crimes, except for the crowds at King Pasenadi's gate. That the humble monk Angulimala is stoned by villagers indicates more than bad karma; it implies that there has been no attempt at restorative justice which takes account of his effects on society. The social fabric of the community has been rent, yet there is no effort to "make things right". The particular situation of the offender is addressed by abstracting

him from his social context. It would be unfair to take this as indicating a Buddhist indifference to society, yet it does exemplify the early Buddhist attitude to spiritual salvation: liberation is an individual matter, and the path to achieving it involves leaving society, not transforming it.

The Lion's Roar Sutta⁴

The Cakkavatti—sihanada Sutta addresses the relationship between criminal justice and social justice, especially the connection between poverty and violence. The Buddha often summarized his teachings into four noble truths: life is dukkha (unsatisfactory); the cause of dukkha; the end of dukkha; and the way to end dukkha. According to this Buddhist approach, the way to control crime naturally follows from correctly understanding the causes of crime. In this sutta the Buddha tells the story of a monarch in the distant past who initially venerated and relied upon the dhamma, doing as his sage advised: "Let no crime prevail in your kingdom, and to those who are in need, give property." Later, however, he began to rule according to his own ideas and did not give property to the needy, with the result that poverty became rife. Due to poverty one man took what was not given and was arrested; when the king asked him why, the man said he had nothing to live on. So the king gave him some property, saying that it would be enough to carry on a business and support his family.

Exactly the same thing happened to another man; and when other people heard about this they too decided to steal so they would be treated the same way. Then the king realized that if he continued to give property to such men, theft would continue to increase. So he decided to get tough on the next thief: "I had better make an end of him, finish him off once for all, and cut his head off." And he did.

At this point in the story, one might expect a moralistic parable about the importance of deterring crime, but it turns in exactly the opposite direction.

Hearing about this, people thought: "Now let us get sharp swords made for us, and then we can take from anybody what is not given, we will make an end of them, finish them off once and for all and cut off their heads." So, having procured some sharp swords, they launched murderous assaults on villages, towns and cities, and went in for highway—robbery, killing their victims by cutting off their heads.

Thus, from the not giving of property to the needy, poverty became rife, from the growth of poverty, the taking of what was not given increased, from the increase of theft, the use of weapons increased, from the increased use of weapons, the taking of life increased . . .

Despite some fanciful elements, this myth has important implications for our understanding

of crime and punishment. The first point is that poverty is presented as the root cause of immoral behavior such as theft, violence, falsehood, etc. Unlike what we might expect from a supposedly world-denying religion, the Buddhist solution has nothing to do with accepting our poverty karma. The problem begins when the king does not give property to the needy — that is, when the state neglects its responsibility to maintain distributive justice. According to this influential sutta, crime, violence and immorality cannot be separated from broader questions about the justice or injustice of the social order. The solution is not to “crack down” harshly with severe punishments but to provide for people’s basic needs. “The aim would be, not to create a society in which people in general were afraid to break the law, but one in which they could live sufficiently rewarding lives without doing so” (Wright 7). Today we prefer to throw our money at “wars on crime”, but social indications suggest what the king belatedly realized, that such wars no one wins.

That brings us to the second point of the Lion’s Roar Sutta, its understanding of violence. Instead of solving the problem, the king’s violent attempt at deterrence sets off an explosion of violence that leads to social collapse. If punishment is sometimes a mirror-image of the crime, in this case the crimes are a mirror-image of the punishment. The state’s violence reinforces the belief that violence works. When the state uses violence against those who do things it does not permit, we should not be surprised when some of its citizens feel entitled to do the same (Pepinsky 301). Such retributive violence “tends to confirm the outlook and life experiences of many offenders. Wrongs must be repaid by wrong and those who offend deserve vengeance. Many crimes are committed by people ‘punishing’ their family, the neighbors, their acquaintances” (Zehr 77). The emphasis on nonviolence within so much of the Buddhist tradition is not because of some otherworldly preoccupations; it is based upon the psychological insight that violence breeds violence. This is a clear example, if anything is, of the maxim that our means cannot be divorced from our ends. If there is no way to peace, peace itself must be the way. Since the state is not exempt from this truth, we must find some way to incorporate it into our judicial systems.

The Vinaya⁵

The Vinaya Pitaka is, in effect, a canonical compendium of the rules that bhikkhus and bhikkunis are expected to follow. The vinaya is based upon sila morality, which, although only one part of the three-part path (the others are samadhi concentration and prajna wisdom), provides the ethical foundation essential for all Buddhists. The five basic sila precepts are to abstain from killing, stealing, improper sexual behaviour, lying, and intoxicants. These precepts help us eradicate the three roots of evil: “As

lust, malice and delusion are the basis of all undesirable volitional activity done by means of thoughts, word and body, the disciplinary code or Buddhist Laws are regarded as a means established for the rise of detached actions which finally result in pure expressions of body, speech and thought" (Ratnapala 42).

Although now rigidly codified, the vinaya approach is quite practical. Almost all rules originate from actual events (what we would call case law) rather than from hypothetical possibilities of wrong-doing. "The spirit of the law suggests that the laws act more or less as sign-posts or 'danger zones' indicating that one should be careful here, keeping in mind the example or examples of individuals who fell into trouble by this or that strategem" (Ratnapala 42). Since not derived from God or any other absolute authority, these rules are always open to revision, except for the four parajikas (sexual intercourse, stealing, killing a human being, and lying about one's spiritual attainment) which constitute automatic self-expulsion. Following the rules well is not in itself the goal; the reason for rules is that they promote personal and spiritual development.

The vinaya approach is very practical in another way too: in its realistic attitude towards human weakness. It is the nature of unenlightened human beings to be afflicted by greed, ill-will and delusion; that is, all of us are somewhat mad. As long as human beings are unenlightened, then, there will be crime. The extent of crime can be reduced by improving social and economic conditions, but no human society will ever be able to eradicate crime completely. This is consistent with the Buddhist attitude towards self-perfection: we improve only gradually, step by step, which implies that offences should be evaluated with tolerance and compassion.

If we are all somewhat insane, the insanity defense is always somewhat applicable, for there can be no presumption of free will or simple self-determination. Freedom is not a matter of liberating individual self-will (often motivated by greed, etc.) but overcoming such willfulness; not gained by removing external restraints, but by self-control and spiritual awakening. This denies the distinction we are usually quick to make between an offender and the rest of us. The rehabilitative model of secular therapy denies the offender's dignity and responsibility, as Conrad Brunk points out, but Buddhism avoids this problem by emphasizing the continuity between offenders and us: the difference is only a matter of degree — at most. According to Buddhism, the issue is not punishment but correction, and the best antidote to crime is to help people realize the full consequences of their actions (Ratnapala 12-13).

In determining the nature of an offence against the vinaya, everything about an offender's situation is taken into consideration in order to make the best possible judgement about what should be done: one's past, character and intelligence, the nature and conduct of one's associates, as well as whether or not one has confessed. This may be contrasted to our own judicial preoccupation with the black-or-white

question of guilty/not guilty. "Degrees of severity of the offense may vary, but in the end there are no degrees of guilt", which teaches "the hidden message that people can be evaluated in simple dichotomies." From a perspective that takes the offender's self-reformation (and is there any other type?) seriously, such an approach is seriously flawed:

Much evidence suggests that offenders often do not act freely or at least do not perceive themselves as capable of free action. . . . Ideas of human freedom and thus responsibility necessarily take on a different hue in such a context. (Zehr 70)

The vinaya supports the notion that our preoccupation with guilt is based on an erroneous understanding of human nature and how it changes. "Guilt says something about the quality of the person who did this and has a 'sticky,' indelible quality" (Zehr 69). Buddhist emphasis on the transience of everything means there is nothing indelible about our unwholesome mental tendencies; deep-rooted ones may be difficult to eradicate, but that is because they are an engrained result of past habits, not an "essential" part of us.

The main concern of the vinaya is not ruling on guilt but determining the intention, because one's intention decides the nature of the offence. If there is no consent to commit an act one is not guilty of it; and the lighter the intention, the less grave the offence (Ratnapala 5, 93, 192).

Intention is also the most important factor in the operation of the law of karma, which according to Buddhism is created by volitional action: "I am the result of my own deed . . . whatever deed I do, whether good or bad, I shall become heir to it."⁶ A modern approach is to understand karma in terms of what Buddhism calls *sankharas*, our "mental formations" especially our habitual tendencies. These are very important for Buddhism because they are not tendencies we have but tendencies we are. Instead of being "my" habits, their interaction is what constructs my sense of "me". Then we are punished not for our sins but by them. People suffer or benefit not for what they have done but for what they have become, and what we intentionally do is what makes us what we are. My actions and my intentions build/rebuild my character just as food is assimilated to build/rebuild my physical body. If karma is this psychological truth about how we construct ourselves, or about how our selves are constructed by "our" greed, ill-will and delusion, then we can no longer accept the juridical presupposition of a self-determined subject wholly responsible for its own actions. Once we understand the mental tendencies that afflict all of us, desire for vengeance must be replaced with compassion that emphasizes reformation.

The system of punishments used within the sangha shows how these principles work in practice. The emphasis is on creating a situation that will help an offender to remember and reflect upon the offence, in order to overcome the mental tendencies that produced it. Most penalties involve what we now call probation. Probation is

usually regarded as a modern method of treatment derived from English common law, but it has been widely used in Buddhism for 2500 years, because consistent with the Buddhist concern not to punish but to reform. Once the probation was successfully finished, the bhikkhu returned to his previous position and status, so “the social image of the offender was not harmed. After the penalty, he was received back and he enjoyed the identical position he had earlier without stigma or contempt. Human dignity thus was always regarded as important in the court and in the society, while under a penalty or after rehabilitation” (Ratnapala 77). This contrasts with the humiliation built into our present retributive approach. A major factor in many offences is low self-esteem, and a restorative system must address this explicitly by focusing on ways to help offenders build self-esteem in the act of accepting responsibility for their actions.

This does not contradict the Buddhist teaching that there is no separate self. “Reintegration requires that we view ourselves (and others) as a complex measure of good and evil, injuries and strengths, and that while we resist and disparage the evil and compensate for our weaknesses, we also recognize and welcome the good and utilize our strengths” (Van Ness and Strong on reintegrative shaming, 118). This is precisely the Buddhist view of human nature, which does not presuppose a unitary soul or self-determining subject, but understands the self to be a composite of unwholesome and wholesome tendencies.

To sum up, the vinaya approach suggests that, if we are serious in our desire for a judicial system that truly heals, we must find a way to shift our focus from punishing guilt to reforming intention.

Tibetan justice⁷

Traditional Tibet provides an opportunity to observe how well the above principles can operate in lay society. The presupposition of its legal system was that conflict is created by our incorrect vision of situations, itself caused by our mental afflictions. In Tibetan Buddhist teachings there are six root afflictions (desire, anger, pride, ignorance, doubt, and incorrect view) and twenty secondary ones (including belligerence, resentment, spite, jealousy, and deceit) that cause us to perceive the world in an illusory way and engage in disputes. Again, we notice a Socratic-like understanding of human conflict: our immoral behavior is ultimately due to our wrong understanding, which only a spiritual awakening can wholly purify.

As long as our minds are afflicted, there is no question of free will, and Tibet’s judicial system did not presuppose it.

The goal of a legal proceeding was to calm the minds and relieve the anger of the disputants and then — through catharsis, expiation, restitution, and

appeasement — to rebalance the natural order. . . . A primary purpose of trial procedure was to uncover mental states if possible, and punishment was understood in terms of its effect upon the mind of the defendant (French 74-76).

This included the disputants attempting to reharmonize their relations after a court settlement. For example, the law codes specified a "getting together payment" to finance a meeting where all the parties would drink and eat together, to promote a reconciliation. In general, coercion was considered ineffective, for no one could be forced to follow a moral path. The disputants had to work out their own difficulties to find a true solution. Therefore even a decision accepted by all parties would lose its finality whenever they no longer agreed to it, and cases could be reopened at any later date (French 138).

This emphasis on reharmonizing was embodied both in legal philosophy and in the different types of judicial process used to settle problems. Legal analysis employed two basic forms of causation, immediate and root, both derived from Buddhist scriptures; the root cause was usually considered more important, because the source of animosity had to be addressed to finally resolve the strife. The most common type of judicial process was internal settlement by the parties themselves. If that did not work, private and unofficial conciliators could be tried; this was usually preferred because it was informal, saved reputations, allowed flexible compromises, and was much less expensive. A third process involved visiting judges at home to get their informal opinion of the best way to proceed. Official court proceedings were a last resort.

This emphasis on consensus and calming the mind presupposed something generally accepted in Tibet but less acceptable to us: a belief that it is only the mind, not material possessions or status relations, that can bring us happiness; in more conventional Buddhist terms, it is my state of mind that determines whether I attain nirvana or burn in one of the hells. This helps us to see the more individualistic assumptions operative in our own judicial system, which emphasizes the personal pursuit of happiness, freedom of restraint by others, and the right to enjoy one's property without interference.

Tibetan officials were careful to distinguish religious beliefs from secular legal views when it came to settling a case. Nonetheless, Tibetan culture was permeated with a spiritual mentality, and the moral standards of the Buddha and his vinaya influenced every part of the legal system:

Each Tibetan knew that the moral Buddhist cared more for the welfare of others than for his or her own welfare, gave to others rather than amasses a fortune, rigorously tried to prevent harm to others, never engaged in any of the nonvirtuous acts, had complete devotion to the Buddha and his path, worked to eliminate anger and desire for material goods, accepted problems with

patience and endurance, and remained an enthusiastic perseverer in the quest for truth and enlightenment. As there was no confusion about this ideal, there was little ambiguity about how the moral actor would deal with a particular daily situation. Even though the average Tibetan may not have been any more likely to follow the moral path than a person in any other society, his or her understanding of that ideal path remained strong (French 77).

Since all societies require norms as well as sanctions, we may ask what comparable standards prevail in Western cultures. Generally, ours are more competitive and atomistic. In U.S. law, for example, "the question becomes 'Would a reasonable person leave ice on the sidewalk and foresee harm to a passerby?' The court and the individuals are not expected to know or to ask the moral question 'What would a correctly acting moral human have done under the same circumstances?'" In Tibet the accepted standard was not "a reasonable man" but the moral person exercising self-control; the members of a Tibetan village or neighborhood recognized that they had responsibility for other members. Unless there are special circumstances, a U.S. adult has no legal duty or responsibility to help others. "Tibetans find such an attitude repulsive and inhuman" (French 77, 142).

This emphasis on ending strife and calming the mind implied different attitudes towards determining legal truth and using precedents. "Whereas the American view is that legal truth emerges from the clash of opposing forces asserting their interests, Tibetans saw little value in weathering such a process with all its extremity, anger, and passion. Truth was understood in one of two ways: as an ideal and separate standard [hence normally unattainable], or as consensus — that is, the result when disagreeing parties reach a similar view of what happened and what should be done" (French 137). The necessity of consent so permeated the decision-making process that if the disputants could not agree, truth could not be reached.

This also reduced reliance on previous legal decisions as precedents. The need to work out the best way to end conflict meant that emphasis was on decisions harmonizing the group, rather than on decisions harmonizing with abstract legal principles. As a result, Tibetan jurisprudence eventually formulated a core of five factors to be considered: the uniqueness of each case (requiring a sensitivity to its particular features); what is suitable for punishment (no statutory guidelines for sentencing); considerations of karma (punishment should be oriented towards improving the offender's future life); the correct purposes of punishment (to reharmonize with the community and make offenders mindful of the seriousness of their offenses); and the correct types of punishment (incarceration was rare because of lack of facilities). Economic sanctions such as fines and damages were the most common, followed by physical punishment and forced labor; others included ostracism, publishing the offence, and reduction of official rank or loss of occupational status; capital punishment was also used occasionally. In general, local and nongovernmental

decisionmakers were believed to be more likely to find solutions that would actually rectify behavior and restore community harmony.

In summary, Tibet provides an example of a country whose judicial system was organized according to very different principles. However, any attempt we might make to incorporate those principles into Western criminal justice would seem to be vitiated by one obvious problem: Buddhist Tibet was not a secular society. Its judicial system was not autonomous, for its framework of "legal cosmology" was derived from the Tibetan worldview, itself imbedded in a Buddhist cultural base. For a Tibetan, then, there was no clear division between religion and the state (French 346, 100). Such a judicial system is difficult to harmonize with our Western legal systems, which have evolved to fit secular and pluralistic societies. For the West, a distinction between religious and civil authority is basic.

Or is it? Is our judicial system an Enlightened secular alternative to such a religiously-based legal cosmology, or is it merely unaware of its own religious origins and assumptions? There is nothing unique about Tibet's legal system being derived from its worldview; that is true of any legal system. Ours too is embedded in a worldview which we take for granted just as much as Tibetans took for granted a Buddhist cosmology. I conclude by suggesting that, for us, the role of the Buddha has been assumed, in large part, by the state. This implies a rather different understanding of what is wrong with our criminal justice systems.

A Genealogy of Justice

Our understanding of justice, like every understanding of justice, is historically constructed. If we want to reconstruct justice, then, it is important to understand how we got where we are. But there is no perspectiveless perspective. It is our concern for restorative justice that enables us to see the history of jurisprudence in a new way.

In premodern Anglo-Saxon and Germanic law, the notion of a wrong to a person or his family was primary, that of an offense against the "common weal" secondary. Our distinction between civil and criminal law hardly existed, even for the most grave offenses. As monarchies grew more powerful, private settlements of crimes regarded as public wrongs were not permitted, because they were understood to undermine the Crown's authority.

This development intersected with another in the religious sphere. Initially, Christian practice had emphasized forgiving wrongdoing; like Buddhism, it was focused on reconciliation and spiritual salvation. Beginning in the eleventh century, however, theology and common law began to redefine crime as an offense against the

metaphysical order, which causes a moral imbalance that needs to be righted. Crime became a sin against God, and it was the responsibility of the Church to purge such transgressions (Zehr 116).

These developments intersected in the sixteenth and seventeenth centuries, when the Reformation initiated a social crisis that culminated in the birth of the nation—state as we know it today. The religious schism increased the leverage of civil rulers and the balance of power between Church and state shifted to the latter. This allowed some rulers to appropriate the Church's mantle of spiritual charisma. Their power could become absolute because they filled the new vacuum of spiritual authority by becoming, in effect, "secular gods" accountable only to God. Thanks to reformers such as Luther and Calvin, who postulated a vast gap between corrupt humanity and God's righteousness, the deity was now too far away to supervise their power. Luther and Calvin endorsed the punitive role of the state, which took over God's role in administering punishment. The eventual overthrow of absolute rulers freed state institutions from responsibility to anything outside themselves, since now they "embodied the people".

This gives us a different perspective on the state's new role as the legal victim of all crimes, with a monopoly on justice. Instead of viewing the nation—state as a solely secular institution, we should understand that our historically—conditioned allegiance to it is due to the fact that it took over some of the authority of schismatic and therefore somewhat discredited Christianity. Yet the objectivity and impersonality of state justice led to an emphasis on formal law and due process, with little regard for the effects of this process on its participants (Wright 112). Such "law can be viewed as being inversely related to personal trust. With respect to trust, bureaucracy can be viewed as the antithesis of community" (Cordella 35).

The Anabaptists understood that such a state is inherently coercive and refused to engage in its civil affairs, because state authority was antithetical to their own mutualist vision of community. In short, they saw the basic problem that the rest of us are just beginning to understand: if the nation—state is a god, it is a false one — an idol.

What does all this have to do with restorative justice? The all—important issue is the social context of justice. In a wonderful passage, Zehr discusses the relationship between Biblical justice and love:

We tend to assume that love and mercy are different from or opposite to justice. A judge pronounces a sentence. Then as an act of mercy, she may mitigate the penalty. Biblical justice, however, grows out of love. Such justice is in fact an act of love which seeks to make things right. Love and justice are not opposites, nor are they in conflict. Instead, love provides for a justice which seeks first to make things right (139).

I hope to have shown that the same is true for Buddhism: Buddhist justice grows

out of a compassion for everyone involved when someone hurts another.

Logically, the opposite of love is hatred; but Jung and others have pointed out that the psychological opposite to love is fear. By no coincidence, Hobbes' theory of a social contract makes fear the origin of the state, for the absolute authority of the state is the only thing that can protect my self-interest from yours. True or not, that has become our myth: we legitimize the state's justice insofar as we accept that it is needed to protect us from each other.

This implies a sharp conflict between Biblical/Buddhist justice and state justice. The usual understanding of justice and mercy separates them; Zehr's Biblical understanding, and my Buddhist one, see justice growing out of mercy; but our myth about the social contract implies that the state's justice grows out of fear. If fear is indeed the opposite of love, we are faced with two contradictory paradigms about the origins and role of justice. Then the issue becomes which kind of society we want to live in.

Notes

1. Deirdre Golash, "Punishment", 11–12. This provocative paper presents the three main justifications for punishment, argues that each is flawed, and concludes that we should abolish our institutions of punishment.
2. There are many excellent works in English that provide an introduction of Buddhist teachings. For early Buddhism, see Rahula 1959; for Mahayana Buddhism, see Williams 1989.
3. Majjhima Nikaya ii 98ff, in *The Middle Length Discourses of the Buddha*, 710–717.
4. Digha Nikaya iii 65 ff, in *The Long Discourses of the Buddha*, 395–405.
5. This section draws heavily on Ratnapala's *Crime and Punishment in the Buddhist Tradition*.
6. Anguttara Nikaya iii, 59.
7. This section draws heavily on French's *The Golden Yoke*.

Bibliography

- Camilleri, Joseph, "Human Rights, Cultural Diversity and Conflict Resolution", *Pacifica Review* Vol. 6 no. 2 (1994).
- Chakravarti, Uma, *The Social Dimensions of Early Buddhism* (Delhi: Oxford University Press, 1987).
- Cordella, J. Peter, "Reconciliation and the Mutualist Model of Community", in Harold Pepinsky and Richard Quinney, *Criminology as Peacemaking* (Bloomington: Indiana University Press, 1991).
- French, Rebecca Redwood, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (Ithaca, NY: Cornell University Press, 1995).
- Golash, Deirdre, "Punishment: an institution in search of a moral grounding", in Christine Sistare, ed., *Punishment: Social Control and Coercion* (Center for Semiotic Research, 1994), pp. 11 – 28.
- Gombrich, Richard, *Theravada Buddhism* (London: Routledge, 1988).
- Liechty, Daniel, *Abstracts of the Complete Writings of Ernest Becker* (unpublished, distributed privately).
- The Long Discourses of the Buddha: A Translation of the Digha Nikaya*, trans. Maurice Walshe (Boston: Wisdom Publications, 1995).
- The Middle Length Discourses of the Buddha*, trans. Nanamoli and Bhikkhu Bodhi (Boston: Wisdom, 1995).
- Pepinsky, Harold, "Peacemaking in Criminology and Criminal Justice", in Harold Pepinsky and Richard Quinney, *Criminology as Peacemaking* (Bloomington: Indiana University Press, 1991).
- Rahula, Walpola, *What the Buddha Taught* (New York: Grove Press, 1959).
- Ratnapala, Nandasena, *Crime and Punishment in the Buddhist Tradition* (New Delhi: Mittal Publications, 1993).
- Van Ness, Daniel, and Karen H. Strong, *Restoring Justice* (Cincinnati: Anderson

Publishing Company, 1997).

Williams, Paul, Mahayana Buddhism (London: Routledge, 1989).

Wright, Martin, Justice for Victims and Offenders (Milton Keynes, Open University Press, 1991).

Zehr, Howard, Changing Lenses: a new focus for crime and justice (Scottsdale, Penn: Herald Press, 1990, 1996).