



**How to Reform a Serial Killer:
The Buddhist Approach to Restorative Justice**
by

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Abstract

This article considers how Buddhist perspectives on crime and punishment support the contemporary movement toward restorative (in place of retributive) justice. It begins by examining the two Pāli *suttas* that most directly address these issues: the *Aṅgulimāla Sutta*, about the reform of a serial killer, and the *Lion's Roar Sutta*, about the responsibility of a ruler. Then it looks at the *Vinaya*, which has many implications for our understanding of motivation and reform, and finally at traditional Tibet to see how its criminal justice system embodied these Buddhist perspectives. It concludes with some reflections on why our present criminal justice systems serve the purposes of the state better than the needs of offenders and their victims.

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 may seem an odd question, but only until we try to answer it. To punish is to harm, and harming must be justified.² Three types of justification are usually offered: the harm of punishment is outweighed by some greater good (for example, 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 examined.

The first argument is a utilitarian one, and the usual objections against utilitarianism are all the more pointed when the issue is justice. 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 refutation, for there is the uncomfortable possibility that offenders today have become our scapegoats for larger social problems. And from a practical point of view this justification does not seem to be working. If punishment warns other would-be offenders, why does the United States, which incarcerates a larger percentage of its population than any other industrialized country, continue to have the one of the very highest crime rates?

The second argument, that punishment does not really harm the offender, has some force, but is not usually true today. The Quakers may have intended the penitentiary to be a place of penitence, but that meaning has long been lost, and there is little doubt that incarceration makes most offenders worse. The RAND Corporation report *Prisons versus Probation in California* found that recidivism is actually higher for offenders sent to prison than for similar offenders put on probation. That should not surprise us. Śākyamuni emphasized the importance of good friends, but if we look at prisons from that perspective, the predatory societies that they encourage make most of them more like hell than places to repent and reform. Prison settings dehumanize; they offer no way for prisoners to deal with their feelings of guilt and their need for forgiveness; many prisoners feel that they have been treated badly (and many have been), which diverts their attention from victims, who also lose the opportunity to work toward closure; and prison reinforces the low self-confidence and sense of self-failure that lead many prisoners to offend (Zehr 36–44). As often happens, an institution that does not fulfill its original purpose continues to exist for other reasons—in this case because, to tell the truth, we do not know what else to do with most offenders except remove them to places where they will be unable to re-offend.

The third argument, that harming offenders is good in itself, is more complicated because it incorporates several types of justifications. Historically the most common, and (although we do not like to admit it) perhaps still prevalent, is the desire for vengeance. In many cases this is understandable, but it is nevertheless morally unacceptable and socially destructive, undoubtedly “counter to our ultimate vision of what human society should be.” Another version of this argument sees punishment as

God's retribution; the Buddhist equivalent understands punishment more impersonally, as an effect of one's *karma*. However, this is not a good argument for *human* punishment: neither an omnipotent deity nor an objective moral law needs our help, especially since it is inevitable that human authorities will occasionally make mistakes (for example, execute innocents); in traditional Tibet, as Buddhist a society as any has been, *karma* was never used to justify punishment.

There are more philosophical versions of this argument, such as Kant's deontological view of punishment as rationally needed to maintain the cosmic order, and Hegel's idealist view that punishment "annuls the crime." Challenging such views would involve evaluating the metaphysical systems that they are part of, but there is no need to go into that here. The important point, I think, is that all versions of this third justification build upon our intuitive belief that something must be done to "make right" the harm that offenses cause to victims and to the social fabric. From that perspective, the basic problem with our present judicial systems is that they are not working well enough to make things right, and this problem seems to be so deeply rooted that we are encouraged to consider the judicial perspectives of other religious and cultural traditions. "The failure of contemporary criminal justice is not one of technique but of purpose; what is needed is not simply new programs but a new pattern of thinking" (Wright 159). Our understanding of justice may be connected with a social paradigm that we have difficulty seeing objectively because we are part of it. We sense that something may be wrong with our atomistic understanding of the social contract and its presumptions about how to pursue "the good life," but we are not sure which way to look for an alternative paradigm—in which case 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 to punishment, cannot really be separated from its understanding of human psychology (especially motivation and intention); of the relationship between the individual and society; and, last but not least, of its vision of human possibility, of what a good life is or can be. This suggests that the problem of how to have a good criminal justice system is not solely a secular concern, for issues of fairness and justice cannot be completely separated from the religious perspectives that they historically derive from. In the past, and even today for the vast majority of humankind, such issues are inextricably bound up with religious views and customs. Justice is one of those ultimate questions (like "the meaning of life") that bridge whatever distinctions we try to make between sacred and secular. It is not an historical accident that restorative justice programs have so often been promoted by Christian groups

(for example, Quakers and Mennonites).

Pepinsky, in a discussion of Buddhism, has pointed out that the problem of justice is part of a broader issue: how to make all our relationships just and peaceful—in general, how humans can get along. When conflict occurs, how can we restore peace, instead of responding in kind? If this is the main problem, the issue of a good criminal justice system must be viewed as subordinate to our larger vision of how people are to relate to each other. Buddhist teachings agree with Pepinsky that conflict is inevitable as long as we are the kind of people that we are; the issue, then, is how to learn from these conflicts.

Unless we can make peace in the privacy of our own homes, men with women, adults with children and with older people, we cannot build peace outside in our other workplaces and in our nations. Research on peacemaking in criminology thus becomes the study of how and where people manage to make peace, under the assumption that the principles that create or destroy peace are the same from the Smith family kitchen to the Pentagon and the prison. (Pepinsky 305)

This, however, is not the focus of our present criminal justice systems.

Are the defects of our judicial system then manifestations of a wider social failure? As many have observed, perhaps criminal justice cannot be achieved without social justice. Expressed another way, if we punish offenders so that they will pay their “debt to society,” we should also consider whether society is meeting its obligations to them. We cannot hope to reintegrate offenders back into the community when there are so few communities left to integrate back into, and this lack means that many victims also face similar problems in trying to heal the harm that they have experienced. Maybe our criminal justice system is a barometer of our social failure in these other respects: ultimately, of our inadequate vision of what personal and social possibilities there are, which I think many people today experience as a loss of vision and hope.

This would explain our uncomfortable suspicion that criminals often become scapegoats, their offenses easily exploited by ambitious politicians trying to get (re)elected (a fourth justification for punishment, unfortunately). Crime reminds us that something is wrong with society, but that is something we do not like to think about, so it is tempting to banish the problem by blaming “them” for what we do not like. Yet the interdependence between “us” and “them” can be turned around and transformed into a source of hope: the increasingly obvious failure of our criminal justice system can be used as a focal point to address this larger crisis. A successful reformation of judicial systems could have important implications for many other social problems.

It is difficult to generalize about crime, because there are many different types of crime, committed by many different types of people, which may require many different kinds of responses. Because this paper is concerned to present a Buddhist perspective, the first thing to emphasize is that the same is true for Buddhism itself. Buddhist countries (more precisely, countries with a predominant number of Buddhists) such as Thailand, Tibet, China and Japan have had and continue to have very different judicial as well as political systems. Despite their important differences, however, some very similar threads have been used to weave their various patterns. Perhaps the predominant threads that will recur in the following sections are, first, 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; secondly, we are usually dominated by our greed, malice, and delusion, but it is possible for all of us to change and outgrow them; hence, thirdly, the only acceptable reason for punishment is education and reformation.

We begin with the two Pāli *suttas* that most directly address these issues: the *Aṅgulimāla Sutta*, the most famous Buddhist text on crime and punishment, about the reform of a serial killer; and the *Lion's Roar Sutta*, which considers the role of a ruler in avoiding crime and violence. Although the first may be based upon a true incident, both are obviously mythic, which does not reduce their interest for us, since our concern is not historical fact, but Buddhist attitudes. Then we look at the Buddhist *Vinaya*, which supplies the rules and corrective measures that regulate the lives of Buddhist *bhikkhus* and *bhikkhunīs*. Because the Buddhist *sangha* is a voluntary order, the direct relevance of these regulations is limited, yet they have many implications for our psychological understanding of motivation, education, and reform. Finally, we will look to traditional Tibet to see how its criminal justice system embodied these Buddhist perspectives. Tibet too seems to be of limited value to us, because its 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? I conclude with some reflections on the role of the state. Does our usual distinction between religious and civil spheres merely obscure the fact that the state has become a “secular god” for us? Is that why our present criminal justice system serves the purposes of the state (to maintain its power) better than the needs of offenders and their victims?

The *Aṅgulimāla Sutta*³

Aṅgulimāla was a merciless bandit who single-handedly laid waste to villages, towns, and even whole districts, murdering people and wearing

their fingers as a garland (hence his name, literally “finger-garland”). The commentaries give a rather implausible account of how he became a killer, obviously intended to persuade us that he was not really such a bad guy after all. Although warned about him, the Blessed One walks silently into his area. When Āṅgulimāla tries to catch him, however, Śākyamuni Buddha performs a feat of supernatural power: Āṅgulimāla, walking as fast as he can, cannot catch up with him, even though the Buddha is walking at his normal pace. Astonished, Āṅgulimāla calls out “Stop, recluse!”

Still walking, the Buddha answers: “I have stopped, Āṅgulimāla; you stop too.” In response to Āṅgulimāla’s puzzlement, he explains: “I have stopped forever, abstaining from violence towards living beings; but you have no restraint towards things that live.” This impresses Āṅgulimāla so much that he renounces evil forever and asks to join the *sangha*; and the Buddha welcomes him as a new *bhikkhu*.

Meanwhile, great crowds of people had gathered at the gates of King Pasenadi’s palace, demanding that Āṅgulimāla be stopped. King Pasadeni goes forth to capture him with a cavalry of five hundred men. 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 living beings and so forth, 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 Āṅgulimāla seated nearby. After offering him robes, almsfood, and so forth, 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, after paying homage to the Buddha.

Soon after, the venerable Āṅgulimāla, diligent and resolute, realizes for himself the supreme goal of the holy life and becomes an *arahant* (attains *nibbāna*). Later, however, during an almsround, he is attacked and beaten by townspeople; the Buddha tells him to bear it, for it is a result of his past *karma*. The *sutta* concludes with some verses that Āṅgulimāla utters while experiencing the bliss of deliverance, 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 the fate of Āṅgulimāla with what our retributive justice system would do to him. The importance of this story within the Buddhist tradition highlights the only reason that Buddhism accepts for punishing an offender: to help reform his or her character. Then there is absolutely no reason to punish someone who has already reformed himself. There is no mention of pun-

ishment as a deterrent; on the contrary, the case of Āṅgulimāla 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 Āṅgulimāla does suffer karmic consequences that even his *arahantship* (a condition of spiritual perfection) cannot escape. Note that in this case the judicial role of secular authority is unnecessary, or rather superseded: the king defers to the Buddha as an alternative spiritual authority. This text may have been used politically to make exactly that point: the *sangha* as a religious community is exempt from civil control. If so, it was successful, at least initially, for Indian rulers often left the *sangha* alone. Yet that should not divert us from the main point: once someone has realized the error of his ways, what further reason is there to punish? 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 myth is unsatisfactory from a restorative point of view. The *sutta* says nothing about the families of Āṅgulimāla’s victims or the larger social consequences of his crimes, except for the crowds at King Pasenadi’s gate. That the humble monk Āṅgulimāla is stoned by villagers indicates more than bad *karma*; it implies that there has been no attempt at restorative or transformative justice that takes account of his effects on society. The social fabric of the community has been rent, yet there is no attempt to “make things right.” The particular situation of the offender is addressed by abstracting him from his social context, from those affected by his offense. It would be unfair to take this as indicating an early Buddhist indifference to society; many other *suttas* demonstrate a wider social concern, including the *Lion’s Roar Sutta* (see below). Yet it does seem to 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 Sutta*⁴

The *Cakkavatti-Sīhanāda* (the Lion’s Roar on the Turning of the Wheel) *Sutta* addresses the relationship between criminal justice and social justice, especially the connection between poverty and violence. In accordance with the usual Buddhist approach to remedying problems,⁵ the way to control crime naturally follows from the correct understanding the causes of crime, and this *sutta* considers those causes. The Buddha tells the story of a righteous monarch in the distant past who initially venerated and relied upon the *dhamma*, 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, which meant that the people did not prosper as well as before. Although maintaining public order, he did not give property to the needy, with the result that an increasing number of people became poor. Due to poverty, one man took what was not given and was arrested; when the king asked him why he stole, 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 that 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. (*Dīgha Nikaya* iii 67–68, in *The Long Discourses of the Buddha*, 399–400)

As if all that were not enough, this leads in turn to deliberate lying, speaking evil of another, adultery, harsh speech and idle chatter, covetousness and hatred, false opinions, incest, excessive greed, and—evidently the last straw—lack of respect for one’s parents, for ascetics, and for the head of one’s clan. The result—obviously meant to apply to our own situation today—is that people’s lifespan and beauty decrease, but those who abstain from such practices will increase in lifespan and beauty.⁶

In spite of 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, and so forth. Unlike what we might expect from a supposedly world-denying religion, the Buddhist solution has nothing to do with accepting one’s “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 what we now call 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. Much the same point is made in the *Kūṭadanta Sutta*, in which a chaplain tells a king that there is much lawlessness and civil disorder in his kingdom, making property insecure. The king is advised to deal with this not by taxation, nor by attempting to suppress it forcibly, but by improving the people's lot directly:

Suppose Your Majesty were to think: 'I will get rid of this plague of robbers by executions and imprisonment, or by confiscation, threats and banishment,' the plague would not be properly ended. ... To those in the kingdom who are engaged in cultivating crops and raising cattle, let Your Majesty distribute grain and fodder; to those in trade, give capital; to those in government service assign proper living wages. Then these people, being intent on their own occupations, will not harm the kingdom. Your Majesty's revenues will be great, the land will be tranquil and not beset by thieves, and the people, with joy in their hearts, will play with their children, and will dwell in open houses.⁷

We may be inclined to view this as an outmoded perspective from an ancient culture that never experienced the benefits of capitalism's "invisible hand," but it raises some sharp questions about a state's economic responsibilities to its own people. The basic point of both of these *suttas* is that the problem of crime should not be addressed apart from its economic and social context. 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). We prefer to throw our money at "wars on crime," although the results 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, and its causes. Instead of solving the problem, the king's violent attempt at deterrence sets off an explosion of violence that leads to social collapse. The *sutta* emphasizes this by using exactly the same words to present both the king's intentions and the intentions of the people who decide to become criminals. If punishment is sometimes a mirror-image of the crime (something that retributists propose), in this case the crime is a mirror-image of the punishment. Psychologically, the latter makes as much sense as the former. The state's violence reinforces the belief that violence works. When the state uses violence against those who do things that it does not permit, we should not be surprised when some of

its citizens feel entitled to do the same. 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. . . . Apparently the message some potential offenders receive is not that killing is wrong, but that those who wrong us deserve to die” (Pepinsky 301, 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. There is no way to peace; peace itself is the way. If the state is not exempt from this truth, we must find some way to incorporate it into our judicial systems.

The *Vinaya*⁸

The *Vinaya Piṭaka* is in effect a compendium of the rules that *bhikkhus* and *bhikkhunīs* are expected to follow. Since the *sangha* is an order of those who have renounced the world in order to follow the Buddha’s example and achieve a particular spiritual goal, the details of the *Vinaya* code are less important for our purposes than what they imply about the early Buddhist understanding of punishment and reformation. The *Vinaya* is based upon *sīla* morality, which provides the ethical foundation essential for any Buddhist, renunciate, or layperson. The five basic precepts are to abstain from killing, stealing, improper sexual behavior, lying, and intoxicants. The fundamental goal of these precepts is to help us eradicate our *lobha* lust, *dosa* ill-will, and *moha* delusion, the three roots of evil that afflict all of us except those who are awakened. “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 73).

Although now rigidly codified and some of its details outdated, the *Vinaya* is in fact quite practical in its approach. In almost all cases, a rule originates from an actual event (what today is called case law) rather than from a hypothetical possibility 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 stratagem” (Ratnapala 42). Because these rules are not derived from God or any other absolute authority, they are always open to revision, and on his deathbed the Buddha emphasized that all the lesser and minor precepts that had

evolved could be revised. Unfortunately, no one thought to ask him which he considered to be the major ones; he probably (although controversially) had in mind the four fundamental *pārājikas* (sexual intercourse, stealing, killing a human being, and lying about one's spiritual attainment) that constitute automatic "defeat" and self-expulsion from the *sangha*.⁹ Following the rules well is not in itself the goal; the reason for rules is that they are conducive to personal development and spiritual progress.

The *Vinaya* approach is very practical in another way too: in its realistic attitude toward human weakness. It is the nature of unenlightened human beings to be afflicted by craving, malice, 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 toward self-perfection: we improve only gradually, step by step (the example of *Āṅgulimāla* notwithstanding).¹⁰

If we are all somewhat insane, then the insanity defense is always somewhat applicable. The universality of greed, malice, and delusion means there can be no presumption of unfettered free will or simple self-determination. Freedom is not a matter of the individual self-will (often motivated by greed and the like), but a result of overcoming that kind of willfulness; it is not gained by removing external restraints, but a consequence of self-control and spiritual awakening. This denies the distinction that we are usually quick to make between an offender and the rest of us. According to Buddhism, the best method of treatment is education. "Education by example or depicting concrete occasions suited the Buddhist tradition best." The best antidote to crime is to help people realize the full consequences of such actions, in which case they will want to refrain from them (Ratnapala 12–13).

In determining the nature of an offense against the *Vinaya*, everything about an offender's situation is taken into consideration in order to make the best possible judgment about what should be done: one's past, character and intelligence, the nature and conduct of associates, and whether or not he or she has confessed. This may be contrasted to our own judicial preoccupation with the black-or-white question of "guilty"/"not guilty," "yes"/"no." "Degrees of severity of the offense may vary, but in the end there are no degrees of guilt. One is guilty or not guilty," which teaches "the hidden message that people can be evaluated in simple dichotomies" (Zehr 67).

The question of guilt is the hub of the entire criminal justice process. Establishing guilt is the central activity, and everything moves toward

or flows from that event. ... The centrality of guilt means that the actual outcome of the case receives less attention. Legal training concentrates on rules and processes related to guilt, and law students receive little training in sentence-negotiation or design. (Zehr 66)

From a perspective that takes the offender's self-reformation seriously, such an approach is seriously flawed:

[O]ffenders are constantly confronted with the terminology of guilt, but denied the language and clarity of meaning to make sense of it. ... Western laws and values are often predicated on a belief in the individual as a free moral agent. If someone commits a crime, she has done so willfully. Punishment is thus deserved because it is freely chosen. Individuals are personally and individually accountable. Guilt is individual. ... 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 this notion that our preoccupation with guilt is based on an erroneous understanding of human nature and an erroneous conclusion about the best way to change human nature. "Guilt says something about the quality of the person who did this and has a 'sticky,' indelible quality. Guilt adheres to a person more or less permanently, with few known solvents. It often becomes a primary, definitional characteristic of a person" (Zehr 69). In contrast, Buddhist emphasis on the transience of everything means that there is nothing indelible about our unwholesome mental tendencies. Deep-rooted ones may be difficult to eradicate, but that is because they are a result of past habits, not an "essential" part of us.

If free will is not presumed, and encouraging self-reformation is the most important thing, the main concern shifts from ruling on the suspect's guilt to determining his or her intention. This is the emphasis of the *Vinaya*. The intention of an accused person is always crucial, because one's intention decides the nature of the offense. If one does not consent to commit an act, then one is not guilty of it; and the lighter the intention, the less grave the offense (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. *Karma* is essential to the Buddhist understanding of justice, but how literally or metaphorically we understand it should have little, if any, effect on the moral code that a sincere Buddhist tries to follow. What is most important in either case is the basic teaching that "I am the result of my own deed; heir to deed; deeds are material; deeds are kin; deeds are foundation; whatever deed I do, whether good or bad, I shall become heir to it."¹¹ One modern approach to *karma* is to understand it in terms of what Buddhism

calls *saṅkhāras*, our “mental formations,” especially habitual tendencies. These are best understood not as tendencies we have, but as tendencies we *are*: instead of being “my” habits, their interaction is what constitutes my sense of “me.” But that does not mean that they are ineradicable: unwholesome *saṅkhāras* are to be differentiated from the liberatory possibilities that are available to all of us if we follow the path of replacing them with more wholesome mental tendencies.

The point of this interpretation is that 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. This conflation makes little sense if *karma* is understood dualistically as a kind of moral “dirt” attached to me, but it makes a great deal of sense if I am my habitual intentions, for then the important spiritual issue is the development of those intentions. In that case, 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—about how my sense-of-self is constructed by “my” greed, ill-will, and delusion—then we can no longer accept the juridical presupposition of a completely self-determined subject wholly responsible for its own actions. Again, we can no longer justify punishment as retributive, but must shift the focus of criminal justice to education and reformation.

The system of punishments used within the *sangha* shows how these principles work in practice. Needless to say, there is no physical punishment; the emphasis is always on creating a situation that will help a *bhikkhu* or *bhikkhunī* to remember and reflect upon the offense, in order to overcome the mental tendencies that produced it. The Pāli word for punishment, *daṇḍa*, also means “restraint”: “What was necessary was to establish restraint because the volitional activity of the offender, undesirable in nature, has resulted in the commission of this serious offense” (Ratnapala 76).

A great variety of penalties were used to do this. An act of censure involved reproving a disputatious “maker of strife” in a *sangha* meeting and instructing him to mend his ways. An act of guidance placed an offender under the authority of a teacher to study the teachings. An act of banishment expelled an offender from a particular location/environment. An act of suspension could be used when an offender did not accept that his act was an offense; this prohibited the accused from associating with other monks. One of the most interesting punishments is the act of reconciliation, which could be used when a *bhikkhu* did something to disturb cordial relations with the laity; it required the *bhikkhu* to seek the pardon of the layperson toward whom he had behaved incorrectly (Ratnapala 161 ff). (Couldn’t this sometimes be appropriate in our public judicial system as well, requiring

the offender to seek the pardon of his victim?)

Most of these acts involved 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 2,500 years, because it is consistent with the Buddhist concern not to punish, but to reform an offender's intentions. With the exception of the four *pārājika* and the most minor offenses, all could be dealt with by probation.

A monk under probation should conduct himself properly ... he should not fall into that same offense for which he was granted probation, nor into another that is similar, nor into one that is worse, he should not find fault with the act [or] ... with those who carry out the act. ... Whatever is the Order's last seat, last sleeping-place, last dwelling-place, that should be given to him and he should consent to it [etc.].¹²

In most instances, the probation automatically ends after a fixed period of time. In other cases, an offender who accepted the penalties and mended his ways could apply to be rehabilitated; a *sangha* meeting would be called, and the act could be revoked. Once the probation was successfully finished, the monk returned to his previous position and status, so that "the social image of the offender was not harmed. After the penalty, he was received back, and he enjoyed the identical position that 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."¹³

There are some important similarities between this approach and what John Braithwaite has called "reintegrative shaming." Van Ness and Strong's description of this approach to reformation could serve just as well as a summary of the Buddhist approach:

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. [Braithwaite] noted that Japanese culture values apology as a gesture in which people divide themselves into good and bad parts with the good part renouncing the bad.¹⁴

This is very similar to 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 mental 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 divert our focus from punishing guilt to reforming intention.

Tibetan Justice¹⁵

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 engendered 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 afflictions (including belligerence, resentment, spite, jealousy, and deceit) that cause us to perceive the world in an illusory way and engage in disputes. Again, there is 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 vision is incorrect and 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" (French 74).

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. In a profound way, Tibetans saw no possible resolution to a conflict without calming the mind to the point at which the individuals involved could sincerely agree to conclude the strife. (French 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. Generally, 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 and end the conflict. 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 the legal philosophy and in the different types of judicial process used to settle problems. Legal analysis used two basic forms of causation: the immediate cause and the root cause, both of them deriving 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, conciliation, using 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 also presupposed something generally accepted in Tibet but less acceptable in the West today: 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 *nibbāna* 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 from 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. Crimes and disputes had to be settled in this world, without referring to karmic causes or effects, which are ultimately unknowable. 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. The law codes even cited them as the source of Tibetan law: "The Buddha preached the Ten Nonvirtuous Acts [killing, stealing, sexual misconduct; lying, abuse, gossip, slander; craving, malice, and wrong views] and their antidotes, the Ten Virtuous Acts. By relying on these, the ancient kings made the secular laws from the Ten Virtuous Acts" (quoted in French 80). The example of the Buddha provided an immutable standard of how to live:

Stories, parables, and jātaka tales (accounts of the Buddha's former lives) offered countless social examples of how the virtuous and the nonvirtuous actor operated in the daily world and provided Tibetans with a concrete understanding of proper action. 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 amassed 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. Moreover, that understanding prevailed in reasoning about legal cases, even over reasoning connected with community standards. (French 77)

Because all societies require models of how to live, norms as well as sanctions, we may ask what comparable standards prevail in Western cultures. Although we have a plurality of models, our standards tend to be 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?’” (French 80). 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 of the group; 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.”¹⁶

This emphasis on ending strife and calming the mind even implied different attitudes toward legal truth and the use of legal precedents. Truthfulness and honesty were universally employed terms, but the Tibetan understanding of how to determine truth was quite different from ours. “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 preoccupied the whole 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 more abstract legal principles. As a result, Tibetan jurisprudence evolved in a different direction that 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 fixed punishment or statutory guidelines for sentencing); considerations of *karma* (punishment should be oriented toward improving the offender’s future life); the correct purposes of punishment (generally, to reharmonize with the community, the victim, and the gods; more specifically, to make offenders mindful of the seriousness of their offenses and of the need not to repeat them); and the correct types of punishment (incarceration was not usually imposed 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, publication of the offense, and reduction of official rank or loss of occupational status. Capital punishment was also used (an inconvenient fact somewhat inconsistent with French's rather idealized view), although apparently not often. In general, local and non-governmental decisionmakers were believed to be more likely to find solutions that would actually rectify behavior and work within the community to restore harmony.¹⁷

To sum up, Tibet provides an example of a country whose judicial system was organized according to very different principles. Nevertheless, 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. As French emphasizes, Tibet had no autonomous legal system, for its framework of "legal cosmology" was derived from the Tibetan worldview, and this almost entirely 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 commitment and civil authority is essential.

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 commitments? 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 particular worldview, which we take for granted just as much as Tibetans take for granted a Buddhist cosmology. The final section will suggest that, for us, the role of the Buddha is now taken, in part, by the state. This implies a rather different understanding of what is wrong with Western criminal justice systems.

A Genealogy of Justice

Law is our national religion; lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted. (Auerbach 121)

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. The Buddhist concern for restorative justice 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. In other words, our distinction between civil and criminal law hardly existed, even for the most grave offenses. The conception that, for example, killing is a crime—an offense against the community—did not exist until the state gained the power to enforce its penalties for such offenses. As monarchies grew more powerful, private settlements of crimes that it regarded as public wrongs were not permitted, because they were understood to undermine the crown’s authority. Centralization of the crown’s power meant that kings could assume the judicial role and enforce their judgments. This was justified by their new role as personifying society: “the king, in whom centers the whole majesty of the community, is supposed by law to be the person injured by every infraction of the public rights belonging to that community” (Wright 1–6, citing Blackstone 1778).

This development intersected with another in the religious sphere. Initially, Christian practice had emphasized accepting and forgiving wrongdoing. Like Buddhism, it was focused on the importance of reconciliation and directed toward spiritual salvation. Beginning in the eleventh century, however, theology and common law began to redefine crime as an offense against the metaphysical order, which caused a moral imbalance that needed to be righted. Crime became a sin against God, and it was the responsibility of the Church to purge such transgressions (Zehr 116, Loy 221–224).

These developments intersected in the sixteenth and seventeenth centuries, when the Reformation initiated a social crisis that culminated in the birth of the “self-subsisting” nation-state as we know it today. The schism within Christendom increased the leverage of civil rulers, and the balance of power between Church (moral authority) and state (secular authority) shifted to the latter. This allowed some rulers to appropriate the Church’s mantle of spiritual charisma. Their power became 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 interfere with their rule. Luther and Calvin also endorsed the punitive role of the state, which took over God’s role in administering punishment. The eventual overthrow of absolute rulers did not decentralize their power; it merely freed state institutions from responsibility to anything outside themselves, because 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. The impersonality of state justice led to an emphasis on formal law and due process, which meant a focus on the bureaucratic result (and thus on legal precedent), with little regard for the effects of this process on its participants (Wright 112). The objectivity of bureaucratic procedure engendered trust in the institution, which took the form of law and respect for law. But at a price:

As trust diminishes among individuals, bureaucracies, particularly legal bureaucracies, become more integral to the maintenance of social order and ultimately to the existence of society itself. In this context, 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 local breakdown of traditional communities created “mobile and atomized populations whose claim to humanity rests more and more on the assertion of individual rights vis-à-vis an impersonal, distant and highly bureaucratized government apparatus” (Camilleri 24).

The Anabaptists (Mennonites, Amish, Hutterites, etc.) understood that such a state is inherently coercive and reacted against it. They rejected the Lutheran/Calvinist accommodation with the new nation-state by refusing 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 that should not be worshipped.

Hobbes’s social contract theory is not reliable as an historical claim, but its understanding of the state’s origins is nonetheless revealing. For Hobbes, our distinctive quality is egoism, more precisely our “perpetual and restless desire for power after power.” The clash of our egoisms causes a social chaos whose only antidote is “that mortal God,” a sovereign who is able to establish order because it is to the advantage of all others to submit to his authority. “The state, created *ex nihilo*, was an artificial ordering of individual parts, not bound together by cohesion, as an organic community, but united by fear” (Toulmin 212). This gets at the heart of the issue: the contrast between the mutuality of genuine community, and the fear that motivates Hobbes’s contractual state composed of competing individuals. The state’s order is externally imposed and supervised, because in a social contract, the self-interest of others is perceived as a constant threat to our own self-interest, for “except that they be restrained through fear of some coercive power, every man will dread and distrust each other” (Hobbes quoted in Toulmin 213).

What does all this have to do with restorative justice? The all-important

issue here is the social *context* of justice. In a revelatory 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)

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. As Hobbes makes clear, however, fear is the origin of the state, for the state is the only thing that can protect my self-interest from yours. Whether or not this is true historically, it 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 and perhaps an irreconcilable conflict between Biblical/Buddhist justice and state justice. Our usual understanding of justice and mercy distinguishes 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 Jung is right that fear is the opposite of love, we are faced with two contradictory paradigms about the origins and role of justice. Then we are left with the question: which kind of society do we want to live in?¹⁸

Notes

¹Deirdre Golash, "Punishment: An Institution in Search of a Moral Grounding," 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.

²Etymologically, "punish" derives from same Indo-European root as "pain": *kwei-*.

³*Majjhima Nikaya* ii 98ff, in *The Middle Length Discourses of the Buddha*, 710–717.

⁴*Dīgha Nikaya* iii 65ff, in *The Long Discourses of the Buddha*, 395–405.

⁵For example, the Four Noble Truths.

⁶The *Cakkavatti-Sīhanāda Sutta* has been tampered with, in Gombrich's opinion, but the Theravādin tradition does not doubt it. Its "humane theory, which ascribes the origin of crime to economic conditions rather than to vice, is not typical of Indian thinking on such matters, which tends to conspiracy theories. Buddhism tends to find its causes for human events in human psychology. ... My personal feeling, which is no more than a guess, is that this idea is so bold and original that it is probably the Buddha's" (Gombrich, *Theravada Buddhism*, 83).

⁷*Dīgha Nikaya* i 135, in *The Long Discourses of the Buddha*, 135.

⁸This section draws heavily on Nandasena Ratnapala's *Crime and Punishment in the Buddhist Tradition*.

⁹It seems contrary to the restorative spirit of the *Vinaya* that the *pārājikas* can result only in permanent expulsion from the *sangha*, but pursuing that issue would take us too far from the main concern of this paper.

¹⁰The commentaries emphasize that Aṅgulimāla had "the supporting conditions for *arahantship*," apparently from spiritual practice in previous lifetimes.

¹¹*Aṅguttara Nikaya* iii 59; see also the *Dhammapada* verse 192.

¹²*Vinaya Piṭ.aka* v 45; see *Crime and Punishment in the Buddhist Tradition*, 194–196.

¹³*Crime and Punishment in the Buddhist Tradition*, 77.

¹⁴*Restoring Justice*, 118.

¹⁵This section draws heavily on Rebecca Redwood French's *The Golden Yoke*.

¹⁶French 77, 142.

¹⁷"Within the context of liberalism, we are controlled by atomism and contract. Our unity with others is based almost exclusively on the belief that such an association will advance our self-interest. In our rational assessment of situations, we are therefore unlikely to enter into a relationship

with an individual who is unable, at least theoretically, to advance our own interests. Such an unwillingness on our part excludes those with little power and few assets from engaging in contractual relations, thus creating the social problems (e.g., crime, poverty, unemployment, and so forth) that have plagued the liberal democracies. In our unwillingness to involve ourselves personally with such individuals, we have surrendered community control of these problems to the state” (Cordella 37).

¹⁸An earlier version of this paper was presented as “Healing Justice: A Buddhist Perspective” during a symposium on “The Spiritual Roots of Restorative Justice,” held at the Sorrento Conference Centre in British Columbia in August 1998. A revised and condensed version of that paper will be published in the proceedings of that symposium, edited by Michael Hadley. My thanks to Jennifer McCay for her editorial work on this full *JBE* version.

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