

The Measure with which We Measure

BY ANDREW SKOTNICKI

Does retribution—the infliction by the state of punishment on someone found guilty in a judicial hearing for disobeying the law—have any place in a Christian ethic? The weight of New Testament ethical teaching and Christian tradition resist any notion that we can willfully and morally bring harm upon another.

Despite a host of objections from people around the world, including Pope Benedict XVI, Troy Davis was executed by lethal injection at a state prison in Georgia in September, 2011. There were the usual post-mortems. A relative of Davis's alleged victim felt peace; proponents of retributive justice were satisfied that the giving and getting ratio had been balanced; others lamented the death of a man who, after twenty years, hardly resembled the young adult who first entered prison and whose conviction for killing an off-duty police officer during an altercation was based on the testimony of some witnesses who later recanted their statements. The most striking comment on Davis's fate, in my opinion, came from the noted theologian, Jürgen Moltmann, who rightly articulated the meaning of the event fully within the orbit of Christian ethics: "As Christians, we receive our salvation from the justifying righteousness of God. We reject all forms of retributive justice. We reject the death penalty in the name of God."¹ Whatever our own belief concerning the position taken by Moltmann on the legitimacy of what he calls "retributive justice," he challenges Christians to remember that we are first of all followers of Christ and, as such, must make him the measure against which we measure all that we do.

Admittedly, the phrase “retributive justice” is a slippery term.² To dispel any definitional uncertainty, in this essay I understand retribution to be the deliberate infliction by the state of vengeful, violent punishment (e.g., dehumanizing incarceration or death) upon someone found guilty in a judicial hearing for disobeying the law. I will argue that retribution in this sense has no place in an ethic that is faithful to the teachings of Christ and, I would add, to what we as members of the Church often have been and ought to be.

I would like to emphasize two points prior to beginning our discussion. First, in the rather antiseptic vocabulary and procedural formality of Western law and justice, it is important to remember that punishment is an act of violence. The late Robert Cover, noted professor at Yale Law School, has written: “Judges deal pain and death. That is not all that they do. Perhaps that is not what they usually do. But they *do* deal death, and pain. From John Winthrop through Warren Burger they have sat atop a pyramid of violence....”³ Second, in our judicial methodology the amount of punishment is determined and orchestrated in a subject/object duality: the offender must be presented and viewed primarily as a lawbreaker who is required to suffer at the hands of the state and its agents if found guilty of the culpable offense. It is vital to consider the troubling ambiguities in these juridical rituals and in the moral assumptions underlying them. Ronald Dworkin gives voice to the moral ghosts that haunt the daily determinations of the proper quantum of pain to which the legally culpable must be subject: “Day in and day out we send people to jail...or make them do things they do not want to do, under coercion of force, and we justify all of this by speaking of such persons as having broken the law.... Even in clear cases...we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce.”⁴

I will attempt to answer Dworkin’s conceptual challenge about the meaning of breaking the law by proposing what punishment ought to mean, at least to Christians. I will first argue that modern systems of law, and the punitive function at their core, operate in an antithetical relationship to the message of Christ—one that I take to be unconditionally receptive and compassionate toward both offenders and victims. We are called to *do* the same; and we are called to *be* the same. Second, concerning the meaning of punishment, I will insist that when we are any less than “perfect...as your heavenly Father is perfect” (Matthew 5:48), we suffer. We suffer alienation from our true self “hidden with Christ in God” (Colossians 3:3); and we suffer alienation from one another and from the body of Christ of which we are a part. That is suffering enough—all the suffering to which Christians can rightfully give assent.

MODERN SYSTEMS OF LAW ARE NOT CHRISTIAN

The conversation on punishment stimulated by Moltmann’s statement reflects two fundamental questions that at first appear to be synonymous

but often elicit competing motivations: how can we be committed *followers of Christ* paying attention to what we believe God is telling us in the New Testament, and how can we be committed *Christians*, paying attention to what we believe God is telling us through our own experience and through the tradition and teaching of the Church? Allow me to assume that we agree that we do not wish to affirm any dualist notion that those terms – that is, following Jesus and being a Christian – are, to any significant degree, mutually exclusive.

If we agree with that assumption, there are two options available to us concerning retribution (as defined here): If it is morally legitimate, we have to argue that both the weight of New Testament ethical teaching (not a few specific passages) and Christian tradition (not a few quotes from a catechism or some other authoritative source) provide sanction for the infliction of violent punishment. If we believe that retribution is not morally legitimate, we have to argue that the weight of New Testament ethical teaching (not a few specific passages) and the weight of Christian tradition (not a few quotes from authoritative sources) resist any notion that we can willfully and morally bring harm upon offenders.

Since I have declared that the second option is the proper choice for Christians, let me offer my own explanation as to why the first position is not only unfavorable but leads precisely to the kind of polarized identity that we wish to avoid. First, the weight of Scripture leans strongly toward mercy, forgiveness, and love over any form of retribution toward those who do us harm.⁵ Attempts to elevate discrete sayings in the Gospels that hint at anything less than unconditional regard for all distort the unity, simplicity, and benevolence of the message of Christ.⁶ Paul's advice to hand the incestuous Christian over to Satan (1 Corinthians 5:5; cf. 1 Timothy 1:19-20) must be measured against the many injunctions to care for those who have fallen into sin, and against his wise reminder that the sufferings of the penitent heart are greater than the temporal and corporal inflictions made by one human upon another (Galatians 6:1; 2 Corinthians 2:6-8; 7:9-10; 2 Thessalonians 3:14-15).⁷ The well-known passage in Romans 13:1-7 (echoed in 1 Peter 2:13-14) that God has ordained and blesses coercive action by the state against the lawless has been viewed by a litany of scripture scholars either as a reference to household ethics or an anomaly (perhaps inserted by a later redactor) in a sequence of guidelines in which, among other things, Christians are cautioned to avoid all forms of vengeance (Romans 12:19-20).⁸ Despite this, the verses in question are often given more ethical prominence by many Christians than the Sermon on the Mount. It was not until the second millennium that some medieval theologians and significant figures like Martin Luther elevated the passage to a place of prominence in Christian ethics, using it to confer divinely legitimated violent power upon the secular realm.

Second, the history of the Church – certainly before the twelfth century and, in many respects, thereafter – demonstrates wariness, if not fear, among

Christians to bring harm upon the guilty. Prior to the creation of canon law and its inquisitorial legal method (case and procedural law, a professional judiciary, law schools, etc.), all offenses were interpreted and adjudicated by representatives of the Church under the adversarial system. There was no distinction between sin and crime (adultery was as much a crime as theft was a sin). An offense was solely an offense against another and against God. As the Germanic tribes came under the influence of the Church, the ancient blood feud was replaced with the “moot,” wherein mediators attempted to settle a dispute by building trust between the contending parties.⁹ Where such mediation failed and the case was sufficiently serious, no punishment could be meted out without the sworn testimony of reliable witnesses. The difficulty repeatedly faced at that time was not that trustworthy people with sufficient knowledge of the details of the case were lacking. Their reticence to testify was based upon their faith in the Scriptures wherein Christians are cautioned against judging the speck in the eye of another knowing full well that a log is lodged in their own (Matthew 7:3), that the measure with which they measure will be measured back to them (Luke 6:38), and wherein Christ himself stated, “friend, who set me to be a judge or arbiter over you?” (Luke 12:14).¹⁰

As a result of this refusal to cooperate with the mechanics of retribution, the ordeal became the common way to determine judicial outcomes in the early Middle Ages. In brief, the defendant would be taken to the local church; a special oration would be made by the priest invoking God’s intervention in determining innocence or guilt; the culprit would have to grasp a red hot iron or submerge a hand in boiling water; the wound would be bandaged and after several days, again in church, the bandage would be removed. If healing was taking place, the defendant was innocent.¹¹ As legal historian James Whitman insists, the

ordeal was not instituted in order “to get the facts straight about the incident in question,” but in order to “spare human beings the responsibility of judgment.”¹² The same explanation holds for the origins of trial by jury. It was not a reform aimed at improving judicial procedure or a sign of democratic sentiment, it was a way for rulers and magistrates to compel others to engage in the morally fearsome task of judging and bringing harm upon another, thus sparing themselves from what they believed would be the judgment of God upon them. Simply put, our Christian ancestors were at that time by and large convinced that only God could judge another, and only a direct sign from God could justify bringing harm

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upon another, no matter how transparent or heinous the person's guilt.

To put it back in contemporary terms, as long as an offense, such as that attributed to Troy Davis, was understood in light of the gospel, many Christians could find no justification outside of an act of God to do violence to another. The decisive factor in overturning not only the ordeal, but the fear of Christians to will the punishment of others, was the inauguration of systems of law – first canon law

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which began its development in the late eleventh century and, in its wake, secular legal systems. With this epic turning of the moral tide, a third factor was brought into the equation of viewing human weakness: an offense was not only an affront to God and to the victim, it was also an affront to the law. In light of this legal revolution, perhaps the most influential revolution in Western history, the

meaning of human acts against their fellows took on a new appellation and gravity. They were not only sins that required forgiveness by a priest in confession, they were also crimes, and the offender had to be punished because he or she had broken the law.

I am arguing that this development, more than any other, is at the heart of the systematic divide in Christian consciousness between seeing the world and its institutions in light of the teaching of Christ, and seeing the teaching of Christ in light of one's membership in specific institutions. The advent of Christian legalism through canon law marked a day as regrettable as any in the history of the Church when, at least in effect, the absolution given in the sacrament of confession for a public offense bestowed forgiveness from God, but was insufficient to merit forgiveness from the Church. Secular polities based not only their legal codes and the punitive sentences that are their necessary complement upon canon law, they also, like the Church, helped to remove Christ more and more from the equation in understanding the meaning of a criminal act. As both Marcel Gauchet and Charles Taylor have argued, the vacuum created when the explicit teaching of Jesus against judgment and violence ceased to be imperative was soon filled by the coercive power of Church and state.¹³

Ever since codes of law were established, a new source of moral accountability not only competed with the gospel but routinely trumped its authority. To avoid any transparent dualism, more and more of the integrity of the gospel had to be sacrificed to satisfy the demands of order and sanction the

violence that must accompany legal systems to give them any authoritative legitimacy. More and more, Christian ethical accounts granted modern law and its punitive function a primary place in determining the demands incumbent upon Christians and the legitimate means to do violence to those who broke the law.

SIN IS PUNISHMENT ENOUGH FOR ANYONE

Both Scripture and Church tradition remind us that we cannot escape the internal reckoning with what we have done: “Where can I go from your spirit? Or where can I flee from your presence?” (Psalm 139:7). Christian anthropology is based on our creation by God in Christ: we were created “through him and for him” (Colossians 1:16-17). Sin is not a violation of laws, but a failure to honor the relationships that most truthfully define who we are: our intimate relation to Christ and, through him, to everything in creation. To fail to honor these sacred bonds is to dwell in darkness like the dead long forgotten (Psalm 143:3), to live a life worse than that of swine (Luke 15:16); it is, briefly put, to experience hell. At the core of the Western moral and penal tradition is not only the belief that all sin can be forgiven, but that the culture of monasticism reveals the blueprint for drawing the Spirit out from a heart encrusted with its own petty and destructive desires and hurts.

In the West, the prison is a relatively late invention, at least as far as the secular world is concerned. Prisons were largely unheard of until the thirteenth century, and the real growth of imprisonment as the primary means of social censure did not begin until the nineteenth century. That was not the case, however, in the Church. The first prison was built when the first monastic rules were written—especially that of Benedict of Nursia in the sixth century—that required all monks to take a lifelong vow of stability. Monks were confined for life; and in cases where they fled the enclosure, they were apprehended and sent back to their monasteries.¹⁴

The revolution in penology that developed from this was stimulated by the question of what to do with monks who violated seriously the norms of conduct required for the communal life, not to mention the Christian life. The answer was confinement. However, confinement was not generally conceived as a retributive punishment administered upon the morally ailing brother; it was the culmination of the correctional process that Christ enjoins on his followers (Matthew 18:15-17): the offender is addressed by the aggrieved party; resistance to the petition leads to others beseeching the person to amend the disruptive behavior; finally, the matter is brought to the community where further recalcitrance merits “excommunication.” In the monastic context, that meant confinement in a cell wherein the offender would have to confront his alienation and suffer the journey to wholeness before reincorporation into the brotherhood. St. Benedict reveals in his thoughts on this process that one thing is essential: the love of the shepherd for the lost sheep. The monk must not be made to endure a suffering that stifles conver-

sion and furthers isolation. Rather, Benedict ordered that each prisoner must have a wise and holy monk to accompany him through the labyrinth of penance and the necessary pain that accompanies the journey to spiritual and communal health.¹⁵ In effect, Benedict understood the meaning behind Christ's counsel that the excommunicated Christian be treated like a pagan or a tax collector (Matthew 18:17), for it was precisely to such as these that the Reign of God belongs.

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This penitential formula is based on the conviction that the incarcerated need no additional suffering other than that produced in the refusal to honor and love the image of God imprinted upon all of creation and upon themselves. It also is based on the certainty that silence, solitude, prayer, work, and spiritual counsel are the soul's great healers, and that they alone can bring persons to their true

selves hidden with Christ in God. Throughout the history of the Church, revered saints have testified to the efficacy of creating the conditions for penance. They realized the penance would be difficult not because of suffering imposed by another but due to the suffering that takes place within the heart of every sinner. St. Cyprian never questioned whether those who had renounced their faith in order to escape persecution could be forgiven and welcomed back into the community of faith; he simply stated that they needed time apart to address "the wounds they are dying of."¹⁶ St. John Climacus spent a month living in the prison in his own community and was transformed by the experience of observing the pained cries of his brothers who beseeched God with nothing but "a speechless soul and a voiceless mind." He wrote that he considered those "fallen mourners to be more blessed" than other righteous Christians because they had more fully confronted and grieved for their sin.¹⁷

I believe that the weight of the New Testament and of the tradition of the Church declare that there is never a need for Christians to inflict violent retributive punishment on anyone. There have been many justifications for such punishment proffered by theologians and church officials but one notices that they inevitably trade in the currency of law, not gospel. For example, within my own tradition, the Catholic Church has largely repudiated its earlier assent of capital punishment but still cannot make the ban a total one because it sees its moral duty to support the right of the

state to punish legal violations.¹⁸ Readers may wish to consult their own faith tradition to see whether justifications for punishment rely on Scripture or statements by church leaders. It is my studied opinion that such justifications normally hallow the state as a necessary bulwark against disorder, law as a source of moral legitimacy, and Scripture as accommodating both.

The only thing we can be sure of each day as Christians is that we are obliged to bear our individual crosses and follow in the footsteps of Christ, making him the measure against which we measure all that we do. The cross is not a symbol of security, a talisman against suffering, and certainly not a weapon against the lawless; it is the sign that a life of dying to self makes one, to quote St. John of the Cross, a living flame of love who wills harm upon no one. All deaths are hard, none harder or more painful than the death of the false self; and it is only the false self in me that wills the suffering of those who have sinned, including those “dead men walking,” waiting their day with the executioner, whose sins are no worse than my own.

NOTES

1 Tobias Winright, “Jürgen Moltmann on Capital Punishment,” *Catholic Moral Theology* (October 24, 2011), accessed November 29, 2011, catholicmoraltheology.com/jurgen-moltmann-on-capital-punishment/.

2 See the brief discussion of this ambiguity by Chris Marshall in “Divine Justice as Restorative Justice,” *Prison, Christian Ethics: A Series in Faith and Ethics*, 42 (Waco, TX: The Center for Christian Ethics at Baylor University, 2011), 11-19.

3 Robert M. Cover, “Violence and the Word,” *The Yale Law Journal* 95 (1986), 1601-1629, here citing 1609.

4 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 15.

5 In “Divine Justice as Restorative Justice” in this issue, Chris Marshall traces these themes of mercy, which he calls “relational or restorative justice,” through four levels of the biblical material—the language of justice and righteousness, the overarching biblical narrative, the moral guidance for law, and the functioning of the early Christian communities. Here I briefly explore the fourth level, which Marshall calls the “ecclesial level,” and extend the survey through the history of the Church in the Middle Ages.

6 Mark E. Biddle, *Missing the Mark: Sin and Its Consequences in Biblical Theology* (Nashville, TN: Abingdon Press, 2005), 95; and Paul F. M. Zahl, *Grace in Practice: A Theology of Everyday Life* (Grand Rapids, MI: Wm. B. Eerdmans, 2007), 55.

7 E. P. Sanders writes that despite Paul’s at times fiery denunciations of licentious and divisive conduct among members of the communities he founded, “we are still in quest of an instance in which a sinful *deed* is unmistakably said by Paul to lead to permanent exclusion or condemnation.” See *Paul, the Law, and the Jewish People* (Philadelphia, PA: Fortress Press, 1983), 110.

8 Luke Timothy Johnson writes that the passage has been used “to justify totalitarian and wicked regimes.” He adds that it is “too much weight for a few words of contingent remarks to bear.” See *Reading Romans* (New York: Crossroad, 1997), 185 and 189-190. Ernst Kasemann states the words are largely “an alien body” in the corpus of Paul’s writing that were subsequently used by Christians to open doors “not only to conservative but also to reactionary views even to the point of political fanaticism.” Kasemann contends that Paul is “not so much thinking of institutions as of organs and functions ranging from the tax

collector, to the police, magistrates, and Roman officials." See *Commentary on Romans*, translated by Geoffrey W. Bromily (Grand Rapids, MI: Wm. B. Eerdmans, 1980), 351 and 354. See also Roy A. Harrisville, *Romans* (Minneapolis, MN: Augsburg Publishing House, 1980), 203-204; and Douglas Moo, *The Epistle to the Romans* (Grand Rapids, MI: Wm. B. Eerdmans, 1996), 791.

9 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 56-57.

10 James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven, CT: Yale University Press, 2008), 57.

11 Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford, UK: Clarendon Press, 1986).

12 Whitman, *Origins of Reasonable Doubt*, 56.

13 Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, translated by Oscar Burge (Princeton, NJ: Princeton University Press, 1997), 34-38; Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007), 233.

14 Gregory the Great, Epistles XLI and XLII, in Philip Schaff and Henry Wace, eds., *Nicene and Post-Nicene Fathers*, Second Series, Volume XII (Grand Rapids, MI: Wm. B. Eerdmans, 1956), 87.

15 *Benedict's Rule: A Translation and Commentary*, translated by Terrence G. Kardong (Collegeville, MN: Liturgical Press, 1996), chapters 23-27.

16 St. Cyprian, *The Lapsed*, *Ancient Christian Writers*, 25, translated by Maurice Bévenot, S.J. (Westminster, MD: Newman Press, 1957), chapter 15.

17 St. John Climacus, *The Ladder of Divine Ascent*, translated by Lazarus Moore (London: Faber and Faber, 1959), Steps 5 and 7.

18 *Catechism of the Catholic Church* (New York: Doubleday, 1995), §2266.



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