HEALING MEMORY, ONTOLOGICAL INTIMACY, AND U.S. IMPRISONMENT: TOWARD A CHRISTIAN POLITICS OF "GOOD PUNISHMENT" IN CIVIL SOCIETY

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> Knowledge of God is not an escape into the safe heights of pure ideas, but an entry into the need of the present world, sharing in its suffering, its activity, and its hope.[1]
>
> Karl Barth

I
THE PROBLEM OF RETRIBUTIVIST CRIMINAL PUNISHMENT

When it comes to the practice of criminal punishment in the United States, there is a widespread retributivist spirit that haunts the nation's courts, jails, and prisons. This retributivist spirit is expressive of a wider and all too pervasive violence and vengeance that characterize so much of American culture, and reveals an unfortunate bone-deep truth concerning human associations in general: no other creatures on earth engage in intra-species violence and other forms of harm as routinely, intensely, and wantonly as do human beings. We humans consistently display a will-to-power that far exceeds our basic need to survive and flourish comfortably. This basic fact of associational human life is frequently on display in both the commission of crimes and in the state-sanctioned retributive measures meant to punish wrongdoing. From petty robbery, felony rape, and murder, to the willful neglect of the basic survival needs of the earth's most vulnerable persons, to the monstrous narratives of genocide that routinely accompany human history, to the routine violence and degradation faced by prisoners (*while in prison*), the shadow side of human existence requires continuous considerations of "effective remedies" that serve to mitigate, if not halt, the all too routine aggression and neglect *homo sapiens* inflict on one another and the rest of creation.

Whether we are speaking of more localized street-level assaults on human persons or crimes against humanity, the development and codification of criminal laws, by civil authorities and among nations, is intended to aid and vindicate various understandings and outcomes of justice. Yet laws aimed at

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1. EBERHARD BUSCH, KARL BARTH: HIS LIFE FROM LETTERS AND AUTOBIOGRAPHICAL TEXTS 100 (John Bowden trans., 1994).

securing justice (variously understood) routinely inflict punishment on guilty parties. "Punishment" should be understood here as the application of officially sanctioned harm, suffering, or some other remedy of unpleasantness (not necessarily pain) as means of retribution; that is, paying back the offence, or evening the score, in the service of satisfying the requirements of retributivist justice. Such punishments in this society may include imprisonment (where hate, anger, and vindictiveness commonly fester) as well as state-sponsored execution.

Although societal theories of punishment that are other than retributive influence thinking about crime and punishment, retribution characterizes the fundamental (even if unintended) function of criminal punishment in the United States. Other classic aims of criminal sanction are of course present as well; they include deterrence, prevention, rehabilitation, reform, and incapacitation. Nonetheless, the bedrock of U.S. penal theory and practice is retribution. It is commonly held by criminal justice authorities, victims of crime, politicians, and the general public that "paying back the offence," or "just desert," requires the infliction of suffering and/or pain that is proportional to the offence as a method best suited to satisfying the requirements of justice. This retributive punishment, which is the leading impulse of criminal justice in the United States, is at fundamental odds with a peaceable Christian approach to punishment.

A major difficulty with our society's criminal justice efforts today is that we not only send offenders to prison *as* punishment, we also send them there *for* punishment.

When disproportionately large numbers of young black and Latino men are doing time in overcrowded, single-sex, racist, ethnocentric, and routinely violent institutions of social vengeance and degradation, it is not reasonable, on balance, to expect positive contributions from them when they return to their families, communities, and to society at large. The use of incarceration as a principal means of criminal punishment, on a scale as unprecedented as that in the United States, has not achieved a significantly less fearful or safer society. Indeed, with just five percent of the world's population, the United States holds roughly a quarter of its prisoners.[2]

Not only might one question the nation's reliance on imprisoning such a large portion of its population relative to the rest of the world, one might also wish to discern the extent to which mass incarceration as social policy significantly transforms the nation's own best expectations for itself. The

2. *See* THE AMERICAN PRISON SYSTEM at vii (Peter G. Herman ed., 2001); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1, *available at* http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all. In 2009 The Pew Center on the States compiled information from Justice Department and Census Bureau statistics, with a conclusion that, "[t]he United States has 5 percent of the world's population, but 25 percent of the world's prison inmates." *Study: 7.3 Million in U.S. Prison System in '07*, CNN (Mar. 2, 2009), http://articles.cnn.com/2009-03-02/justice/record.prison.population_1_prison-system-prison-population-corrections?_s=PM:CRIME.

increased scale of incarceration over more than three decades has an impact that extends far broader than just individual victims, prisoners, and their families. The collateral consequences of society's reliance on large-scale incarceration as a primary means of achieving "criminal justice" include the exacerbation of racial divisions, broad-scale economic hardship, and economic and social risk for the most vulnerable of the nation's residents, particularly children, the homeless, the mentally and emotionally ill, the jobless, and the drug-addicted. In addition, incarceration on such a large scale poses fundamental questions of justice, fairness, and citizenship in a democratic society.[3]

II
DRAWING FROM STANLEY HAUERWAS

In light of this all too brief articulation of the nation's unfortunate allegiance to retributive punishment, Christian moral theology focused on criminal justice contributes to society by imagining and translating something of the "peaceable" virtues of "good punishment" into better state-sponsored practices of criminal justice. I hope to persuade civil authorities and the public to pursue forms of criminal sanction that do not function under the alienating spell of retribution as the primary purposeful aim of punishment. For the past several years, I have been developing and refining a theological ethics of good punishment most significantly by way of a reconstructive critique of Stanley Hauerwas's theological ethics of punishment.[4]

Central to Christian theological perspectives on criminal punishment is the requirement of discerning the difference Jesus Christ makes for Christian understanding and possible participation in society's meting out of punishment. I advance here a thesis significantly indebted to Hauerwas's work; a Christian praxis of good punishment offers a healing politics of better hope for society's practice of criminal justice. Good punishment, as an embodied Christian praxis, involves a particular story-informed and worshipful practice of "healing memory" in the service of "ontological intimacy." Essentially, good punishment involves a peaceable Christian politics of healing the memories of wrongdoing by way of the acknowledgement of sin within a communal setting of forgiveness and reconciliation. Ontological intimacy is the Christian confession that all things participate in the power of God's being through bonds of radical communion. A Christian theological grammar of ontological intimacy confesses that all that exists does so because of a deeply rooted, primordial communion with God.[5] This is a Christian confession of profound interrelatedness.

3. *See* Marc Mauer & Meda Chesney-Lind, *Introduction*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 1–2 (Marc Mauer & Meda Chesney Lind eds., 2002).

4. *See* JAMES LOGAN, GOOD PUNISHMENT?: CHRISTIAN MORAL PRACTICE AND U.S. IMPRISONMENT 143 (2008).

5. Here Hauerwas is drawing on Archbishop Francis Cardinal George's "Catholic Christianity

Ontological intimacy is the goal that peaceable Christians strive for in our worshipful practices of healing memories. Christian practices aimed at healing the memories of sin, in the service of our divinely grounded ontological intimacy, anchor the Christian understanding and practice of good punishment. Christian good punishment offers a model of good news to a society racked by so much anxiety and violence associated with the common human fear of crime. It is a worshipful community's good news of suffering presence and peaceable character in the face of violence and death.

III
POLITICS OF HEALING MEMORY AS GOOD PUNISHMENT

A fundamental theological dimension of Hauerwas's ethics of punishment is his insistence that "'sin and forgiveness' names the realities that make the Christian commitment to peace intelligible."[6] Ontologically, argues Hauerwas, crime is a subset of sin. Since the Christian narrative of Jesus ultimately highlights forgiveness over sin, forgiveness must be viewed as a more determinative reality than punishment. God does not punish us for our sin according to Hauerwas. On his view, sin is self-inflicted punishment that is healed through "reconciliation with God, ourselves, and our wronged neighbor."[7] The acknowledgment of sin is made possible through reconciliation. The reality of sin, forgiveness, and reconciliation is a realism constituting the heart of the Christian commitment to nonviolence according to Hauerwas, who insists that

> Christians are not committed to nonviolence because we believe nonviolence is an effective strategy to free the world of war. Rather, we are nonviolent because we know we live in a world at war yet believe that the forgiveness wrought on the cross of Christ makes it possible for us to live nonviolently in a world at war. In like manner we know we do not live in a world free of murder. Indeed, like advocates of just war, we know how important it is to distinguish between murder and other ways life is taken. Yet we also know that God's forgiveness is not only for those who are the victims of murder but for murderers.[8]

Hauerwas goes on to insist that a peaceable Christian understanding of punishment cannot avoid grappling with the common human instinct for vengeance. Hauerwas's Christian alternative to vengeance is a form of justice which purifies vengeance. The theological content of such justice "is the name and confession: Jesus is the Christ of God. Jesus Christ is the language that ends the silences that threaten to destroy us. Christ is the memory that makes possible the memory of the wrongs we have done as well as [the wrongs] that

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and the Millennium: Frontiers of the Mind in the 21st Century," p. 2, which is a manuscript copy of the Archbishop's speech he received from a friend. *See* STANLEY HAUERWAS, A BETTER HOPE: RESOURCES FOR A CHURCH CONFRONTING CAPITALISM, DEMOCRACY, AND POSTMODERNITY 11–12 (2000).

6. *Id.* at 209.
7. *Id.*
8. *Id.*

have been done to us."[9]

Notwithstanding Hauerwas's call for Christians to embody a peaceable form of justice which purifies vengeance, he does correctly point out in his work that even Christians committed to nonviolence do reach out to each other in a manner that some may call punishment. However, the proper name given by Christians to punishment understood as a politics of healing memory is not retribution. Rather, the name given to Christian punishment is "excommunication" or "binding and loosing." To have one's offense confronted by one's sisters and brothers because of sin is a call to reconciliation. For Hauerwas, penance and forgiveness are critical components of reconciliation. The Christian version of excommunication advanced by Hauerwas is one which calls offenders home to be reunited with the community of sinners called the church. Indeed, Hauerwas's understanding of excommunication should not be confused with practices of exclusion that have often signaled the utter spiritual condemnation of persons over the centuries in many Catholic and Protestant religious contexts. Critically for Hauerwas, it is in the context of the peaceable worship of God that healing memories and excommunication gain intelligibility.[10]

IV

THE POSSIBILITY OF GOOD PUNISHMENT IN LIBERAL CIVIL SOCIETY

I have been attempting to translate aspects of the peaceable Christian witness of good punishment in the wider civil society—*something, by the way, Hauerwas tends to frown upon*. Within this context, I have imagined the following: The Christian conception of sin as "alienation" (or estrangement) in the wider public domain. I have also tried to reimagine incarceration itself in terms of a forgiving and reconciling Christian practice of excommunication.

It would be fair to say that the church's practice of excommunication, as an expression of good punishment, constitutes good news for the society insofar as it offers a peaceable counter-witness against the violence of human alienation. Such a counter-witness has, at least, important pragmatic implications for society. Indeed, in a society where an underlying ethos of "vulgar individualism" reigns, the Christian practice of "excommunication" teaches important lessons concerning the common bonds of human mutuality—for better or worse. More to the point though, the Christian practice of excommunication, translated at the level of state-sanctioned punishment, suggests that even convicted felons ought to be viewed as inextricably bonded to the human family. Even those society marks as felons ought not be viewed as trespassers on the human race. While it is true that offenders must take individual responsibility for the crimes they commit, their crimes ought not be

9. *Id.* at 146.

10. *See, e.g.*, STANELY HAUERWAS, PERFORMING THE FAITH: BONHOEFFER AND THE PRACTICE OF NONVIOLENCE 185 (2004).

viewed as estranged from the wider and complex family, communal, and social dynamics that produce and reproduce crime and the necessity to punish.

Hauerwas might have some real concerns with this proposition. After all, excommunication as a practice of punishment grounded in the peaceable, forgiving, and reconciling narrative and politics of Jesus has no corollary within a liberal civil society. While Christians practice punishment undergirded by the indispensable development of story-informed communities of character, which are grounded in Jesus Christ, liberal societies share no such common ground. Therefore, civil discernments and arguments about "punishment," and "justice," and "peace" inevitably end in intractable disagreements. As much as it may be argued that liberal society offers a moral tradition of democracy, which provides a commonly understood background of agreement concerning "equal dignity," "inalienable rights," and "justice for all," and is founded on the voluntary consent of individuals, who are allegedly born free and independent, the real difficulty is that the nation's powerful currents of individualism and general lack of common civic character development (except in times of national crisis), will make forgiving and reconciling practices of punishment difficult at best. We as a nation are apparently more comfortable practicing forms of punishment that alienate us from one another. Instead of healing our memories of crime in the service of reconciliation, we tend to punish in a manner that turns us away from our better mutual affections for one another whenever the violence of crime makes visit upon us.

All of this notwithstanding, peaceable Christianity offers glimpses of a better way in the society in which we live. When it comes to criminal punishment, one way forward might be to forge common agreement that views the fact of incarceration itself—that is, the physical loss of freedom—as the *sole* "punishing" dimension of incarceration. In other words, convicted offenders ought to be sent to prison *as* punishment and not *for* punishment. With this basic civil commitment in place, healing the memories of the crimes committed by those confined to prisons as punishment will entail the development of virtues and practices that help offenders re-enter society better than when they were removed. This will mean the development of widespread civic virtues that lead to practices committed to addiction, mental health, and educational efforts aimed at the transformation of those marked as criminals. So too might healing the memories of crimes mean working toward returning most offenders to a society of living wages in employment, safe and secure housing, strong medical and mental health access, a sound education, and the dismantling of institutions that profit from the incarceration of human bodies. While such efforts toward good punishment will never wipe out the memories of crime, a "reconciled memory" (a transformative "coming to better terms with the memories of crime") may well result if offenders become more productive residents of the communities and civil society in which we all share. Indeed, incarceration in the wider civil society, like excommunication in the church, ought to be an occasion for inviting offenders to reconciled human associations. The tragic memories of crime would be further aided if the resources that were brought to bear for the

positive transformation of offenders were also made available to the victims of crime and/or their families, as well as to those workers who administer corrections on the front lines of criminal justice.

Another sign of the Christian practice of healing memories carried into the civil imagination is restorative justice. All too briefly articulated, models of restorative justice represent a more systemic, peaceable witness that Christians, and others, contribute to a society way too committed to the violence of retributive punishment. Restorative justice is a phrase that "encompasses a variety of programs and practices" based on an "alternative framework for thinking about wrongdoing."[11] Restorative justice is community-based and deals with offenders through a victim-oriented process of restoration.[12] Restorative approaches to criminal justice, in opposition to retributive frameworks, reject the idea that it is primarily the infliction of suffering and pain that will vindicate wrongdoing. While it is not unusual for victims (or their surrogates) and offenders to meet at some point during a restorative justice process, prominent proponents of restorative justice assert that forgiveness and reconciliation are *not* primary goals. Nonetheless, the context does provide a setting where some degree of either or both might occur. Restorative justice advocates should include forgiveness and reconciliation as stated goals where at all possible.

It should be noted that restorative justice practitioners do not necessarily view restorative justice as an alternative to the state's normal criminal justice process. In some felony cases—rape, murder, and domestic violence, for example—the framework may prove less useful or desirable. This notwithstanding, the usefulness of restorative justice has sometimes been apparent even in the most serious of felony cases. At base, restorative justice, as an alternative lens through which peaceable Christians engage prison reform, expresses values that comport to a better Christian vision for society. Such values include a *respect* for all persons, enemies included. It is an approach to justice that acknowledges both the individuality and radical interconnectedness of all persons. According to Howard Zehr, one of the nation's leading advocates of restorative justice, restorative justice

> argues that what truly vindicates is acknowledgement of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and to help them transform their lives.[13]

Such transformation means that memories of crime will need to be healed, although not forgotten. Healing the memories of crime in the service of forgiveness and reconciliation will be very difficult because memories of criminal offences soak us with so many unresolved and justified feelings of anxiety, rage, vengeance, fear, and helplessness.

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11. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 5 (2002).
12. *Id.* at 24.
13. *Id.* at 59.

V
LEARNING TO REMEMBER WELL

As Hauerwas rightly suggests in his work, when Christians practice good punishment as excommunication they understand that while *memories of sin cannot be denied or forgotten*, the politics of healing memory breaks the link between offense and death, bringing to an end the history of violence. God upsets the logic and power of violence by forgiving humanity for its sin, including humanity's own grand execution of God's Son Jesus Christ. It is precisely because this most horrendous of crimes is not forgotten by God that a grace-soaked forgiveness is made possible. Hauerwas affirms that, "[f]orgiveness is not forgetfulness, it maintains the offending past in all its concreteness; nor is it lax, it calls for conversion."[14] He maintains that it is the Christian God that makes it possible for the church to be a community of memory, for the church is "God's memory for the world." God's memory for the world, then, involves "not forgetting but having our memories transformed through the discovery that our sins cannot determine God's will for our lives."[15] Hauerwas's basic theological argument here is that the church best exemplifies its witness to the world when it *remembers* itself as a tradition committed to being a living testimony to the difference Jesus' life, death, and resurrection makes in the world. Against societal convention the church is to embody peaceableness. As a holy people, the church understands its gift to society as that of modeling suffering love and endurance. Moreover, Hauerwas contends that Christian reconciliation is deeply illiberal; it is an idea fundamentally at odds with society's liberal, social–political arrangements. This is because members of the church, that is, the Body of Christ, know themselves not in the first instance as free and autonomous individuals pursuing happiness under a social contract but, rather, as bound to God, to their tradition, and to one another. According to Hauerwas, the problem with all forms of liberal social–political arrangements is that they tempt Christians to falsely believe that freedom and rationality are independent of narrative—that is, that we are free to the extent we have no story. It is the memoriless contractual ethos of liberalism, with its supreme valuation of individual freedom, which destroys Christian virtue in Hauerwas's view.

Now, of course, much of what Hauerwas contends makes it difficult to translate the Christian politics of healing memories into a better hope for society, beyond offering a model of suffering endurance and love largely unattainable in a society grounded upon a social contract rather than on worshipful covenant. While acknowledging powerful dimensions of truthfulness in Hauerwas's assessment of the way things are, one can nonetheless try to imagine some possibilities of correspondence. After all, even Hauerwas

14. *See* HAUERWAS, *supra* note 5, at 151; Christian Duquoc, *The Forgiveness of God*, 184 CONCILIUM INTN'L J. THEOLOGY 35, 42 (1986).

15. HAUERWAS, *supra* note 5, at 152–53.

contends that, although the world does not share the Christian faith and therefore cannot be expected to live as Christians ought to live, this in no way means that a sectarian demarcation should be established indicating what Christians cannot ask of the societies in which they find themselves. Christians should actively model the peaceable politics of Jesus as a gift to the societies in which they live. But where societal practices do not conform to the peaceable politics of Jesus, Christian communities are duty bound not to participate.

While the best way forward in all this is not clear, one hope is that both the children of liberal contracts and the children of worshipful covenants might find in our punishing practices occasions to embrace versions of healing memory in the service of common ontological intimacy. With regard to the victims of crime in particular, a politics of healing memory in the context of the most unspeakably anguished and gruesome experiences of crime will take much patience and time. It will take time for families and communities to participate in anything like forgiveness and reconciliation when forced to face "the mother who can't sleep, tormented by wondering if her slain daughter's last cry was 'Mama'"; "the jogger who can't forget the crack of her nose breaking just before her rapist beat her into unconsciousness"; "the devoted Catholic who . . . can't quite shed his rage at the man in cowboy boots who stomped his elderly mother to death nearly thirty years ago"; or "the woman who goes away each Christmas because that's the season when her ex-husband stabbed their son and daughter, then killed himself."[16] These are the real memories that cry out for a difficult and effective justice that is soaked in revolutionary healing and reconciliation, but does not forget. Indeed, effective healing in the service of ontological intimacy must deal seriously, yet transformatively, with those who commit violent and death dealing crime.

Such a society must also deal transformatively with its own civic self. It must deal with the punishing and ubiquitous narratives of inhumanity that routinely emerge out of the nation's prisons; like the story of a self-described "Black punk," who while in prison had another inmate enter through his cell door after paying off a guard to unlock it. Of the Puerto Rican inmate who entered his cell, the anonymous Black punk tells his readers that

> this dude was BIG and he just walked right into my cell and told me he was going to fuck my sweet ass. I got up real fast and tried to run out the cell but he grabbed me by the hair and punched me in the face. I remember that I was bleeding from the nose and suddenly I was on the bunk, pants off and my legs were on his shoulders.
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> He told me that he liked his girls Black and that he wanted me to be his girl. I agreed to the arrangement and was his punk for the whole year I was there. He was into s & m, which was my first experience with that shit. It was my first experience with ride the whip' too. He would invite his buddies (Whites and Puerto Ricans) to his cell where I would be forced to sit on his lap with his dick up my ass. Then he would masturbate me while his friends would take turns raping my mouth. God, even now I'm humiliated telling anyone about that . . . . I learned that I had to do everything a

16. Cindi Lash, *Emotional Struggles of Crime Victims Showcased in New Play*, PITTSBURGH POST-GAZETTE, May 2, 2004, at C-1; *Cf.* HOWARD ZEHR, TRANSCENDING: REFLECTIONS OF CRIME VICTIMS (2001).

> wife did and my existence depended on his contentment. If I resisted his little torture scenes, he would beat me and I would wind up doing it anyway.[17]

It cannot be denied that both inside and outside prison such episodes of horrendous crime reflect the worse kinds of human animal aggression occurring each day in the United States. And it is critical that any Christian contemplating the radical nature of Christian penance, forgiveness, and reconciliation in the service of ontological intimacy faces the memory of such acts dead on. Christians, who are all too human, with trembling rage, fear, and anxiety, must stare into the pale dead face of misery on account of such acts and confront our understandable blood-thirst for revenge and retribution with the memory of an executed-yet-living God to guide us while living at the crossroads of Good Friday and Easter. As for the civil authorities and the wider liberal order, what common narrative(s) of civil virtue will ultimately guide them toward healing memory as an embodiment of good punishment? A profoundly difficult question indeed.

17. Anonymous, *The Story of A Black Punk*, *in* PRISON MASCULINITIES, 129 (Don Sabo, Terry A. Kupers & Willie London eds., 2001).