

The Law from *wergild* to the post-modern turn: some thoughts.

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Initial thoughts on Restorative Justice

The world since Niccolò Machiavelli's (1469—1527) *The Prince* (original, *Il Principe*, 1513) has swerved¹ to a new construct which would be unrecognisable to the inaugurators of the European Renaissance, or Continental Early Modernism. Restorative justice has its ontology in Early Modern thinkers, especially, Marsilio Ficino (1433-99), Giovanni Pico della Mirandola² (1463-1494), and the Enlightenment thinker, Giambattista

¹ See Greenblatt S, *The Swerve: How the World Became Modern* (Norton 2011). Greenblatt in his "The Cultivation of Anxiety: King Lear and His Heirs," *Learning to curse: essays in early modern culture* (Routledge 2015), as also in his *The Swerve* clearly shows how there was a rupture in both political and specifically judicial discourses. The *wergild* or the man-price of the Scandinavian nations gave way to a more humane system of justice. Greenblatt is not a philosopher but a scholar of Early Modern literature. This author feels that literature has much to contribute to jurisprudence. Therefore, it is apt to illustrate the concept of the 'swerve' from Greenblatt. It is further interesting to note that the *wergild* is cognate with the Code of Hammurabi (circa 1750 B.C.) *Wergild* is also to be found in Rothair's Edict of 643 A.D. Therefore, it is only with the rise first of European Humanism and then of English humanism do we have the 'swerve' from the Mosaic Code to Christ's Laws of Love. Restorative justice as a concept in Europe and America has preoccupied both Judaic law makers in general and specifically, Hasidic Jews in the United States. Similarly, Christian exegetes have seen Jesus's commandments as the source of Restorative Justice in both Europe and the United States of America. On the concept of *wergild*, see Crosby MB, *The Making of a German Constitution: a Slow Revolution* (Berg 2011), pp. 108 & 120 for *wergild*'s importance understanding both justice and restorative justice even in 2017. The best and fullest lucid discussion on the concept of *wergild* is to be found in Simmel G and others, "The Money Equivalent of Personal Values: *Wergild*," *The philosophy of money* (Third enlarged edition, Routledge 2004). On the concept of restorative justice and *wergild* in Judaism see Gorsky J, *Exiles in Sepharad : The Jewish Millennium in Spain* (The Jewish Publication Society 2015). For a Christian understanding of restorative justice vis-à-vis the Mosaic Code see Chandler D, "The New Commandment," *The royal law of liberty: living in freedom under Christ's law of love* (Trafford 2003). The issues raised in this footnote are beyond the scope of this paper but nonetheless without mentioning these, it is impossible to re-interrogate the discourse of restorative justice now, that is, in mid-2017.

² Without his *De hominis dignitate* (*Oration on the Dignity of Man*, 1486); there would not have been possible any movement away from the Mosaic Law of an eye for an eye; the rediscovery of Jesus' primacy of Platonic 'agape'. Without 'agape' and Jesus' negation of Mosaic Laws, we would not have the removal of *wergild*, leading to restorative justice.

Vico³ (1668-1744). Ficino's role is in reviving Plato's political philosophy⁴ is important to any discussion on restorative justice. It was these early Modern thinkers who removed the concept of *wergild* from Europe. Mirandola's *Oration on the Dignity of Man* establishes the essential nature of man, the Christian *ecce homo*, leading to the Hasidic scholar Martin Buber's (1878-1968) restoration of dignity to the human person. Buber's emphasis on the essentiality of the presence ('Gegenwart') in his *I and Thou* (1923); that is to say, the essential dignity of the human person made in the image of Yahweh, is what will make explicit the need for rethinking problems posed by current prison systems in the British Isles and the United States of America. It is only when we see others as Buber's *Thou*, do we begin to understand the need to invest both metaphorically as well as literally in the study of the penal system in the light of restorative justice. A justice system which does not heal, does not restore, as it were, the humanity of the perpetrator, which does not set right the Covenant between the perpetrator and what Immanuel Kant terms the noumenon, is not justice. Machiavelli who seemed so pertinent at the beginning of this section can be set aside with the notorious *Codes* of Hammurabi (1754 BC) as being just too inhuman. Hammurabi had little to do with *wergild* since even the Sutton Hoo findings do not justify any cross-continental juridical exchange of ideas. *Wergild* is a very ancient and original European idea which exerted its power in the ancient world independently of Hammurabi's *Codes*. Machiavelli was mentioned at the beginning to show why we must reject *The Prince* as robbing the human person of what later Immanuel Kant will term ethical

³ Vico in his 1708 work, *De Nostris Temporis Studiorum Ratione (On the Order of the Scholarly Disciplines of Our Times)* makes a case for considering many sides of one argument. That is, in plain terms, Vico makes a case for sympathy directed towards the human person. Human agency is prioritised, but not at the cost of humanism qua humanity. Vico makes the case for the Vitruvian man to be a person made abject and therefore worthy of respect and thus affects jurisprudence, since the being human demands justice which does not punish but restore one's dignity and in a more Judaeo-Christian sense, demands empathy. Thus, both Pico della Mirandola and Vico pave the way for restorative justice.

⁴ Plato's treatment of the jury in his *Phaedo* and earlier, in his *Republic* cannot be omitted in any discussion on restorative justice but their full implications are beyond this essay's purview. Suffice it to say that Plato was reread by Ficino who along with other Neo-Platonists, made a strong case for treating the human person with empathy and thus in this sense, contributed to a more humane system of justice and thus both Plato and the Neoplatonists are important in our discussions about restorative justice.

'categorical imperatives'. Without logocentric ethics, there cannot be crimes; without logocentric absolute and radical Kantian evil, there cannot be crimes and without crimes do not arise and need for justice or restoration of dignity to the perpetrator. Absolute evil is to be won over by absolute humanity derived from the aforementioned Early Modern thinkers and radical evil needs to be countered with the Kantian categorical imperative of absolute good. This is the good that Iris Murdoch wrote of in her book *The Sovereignty of Good* (1970). It is keeping in mind this swerve that we now seek methods to reform the penal system in the British Isles. Increased technological advances, more stringent laws by the United Nations have done little to change the criminal-correction system in the United Kingdom. In fact technology facilitates Michel Foucault's (1926-84) *panopticon's* becoming truly the all-roving eye of the Big Brother; and Foucault's book *Discipline and Punish: The Birth of the Prison* (1975) seems more prophetic and in a certain sense, more Orwellian than ever. The much-touted differences between the crime and the criminal; the sin and the sinner are all the more pronounced by their ubiquitous absence.

Punishment using prisons was not very popular until the late 18th century. One of the reasons why we find a lack of mention of prisons till then is more insidious: criminals and the clinically insane were kept all together in abysmal-subliminal places. This was because a criminal was supposed to lose her or his humanity by the acting out or praxes of criminal intent. This loss of humanity was conflated with the loss of sanity. Therefore, the criminal justice system while meting out disproportionate punishment to perpetrators of crime; made the mentally ill, criminal. This is a perfect travesty of justice. Even today, there is a tendency to conflate clinical mental ill health with (Kantian) radical evil-doers. The deviant presupposes a norm; this scale of deviancy is produced through a nexus between pharmacologists, psychiatrists and the mental healthcare system as is seen in the various versions of the *The*

Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association. Therefore, deviancy itself is a fluid term and what is criminal is itself continually in a flux. Thus we need to separate absolute acts of crimes like murder (excluding that in self-defense), child-abuse and rapes from what is loosely termed both in jurisprudence and in psychiatry as deviancy. Rather, for the purpose of this paper we will interrogate radical evils and our reaction as an Aristotelian *polity* to such crimes. The past century has seen unprecedented violence and prisons have been mostly used as tools for removing subversive socially defiant forces, as distinct from criminal or deviant individuals who meet often arbitrary criteria set in the version of the DSM then in force, from repressive regimes. Prisons, as Antonio Gramsci (1891-1937) pointed out during his incarcerations are stable state machinery effecting the *realpolitik* of oppressions and effects the silence of dissent. Prison systems the world over are marked by the hegemonic powers of institutions of governance including those of the hierarchic judiciary⁵. The original swerve understood the prison system to be corrective. It is in fact atavistic.

⁵ See Gramsci A, *Prison Notebooks* (Joseph A Buttigieg and Antonio Callari trs Columbia University Press 2011)

(Pastiche) Thoughts on Jurisprudence:

There are many approaches to the meaning of jurisprudence and the etymologic meaning is readily available online in various avatars but we need to only stress its origins in being prudent (from *prudencia*)⁶. Circumspection and prudence are virtues which solidified as opaque ethical structures even before Patristics codified prudence as a major virtue. Rather, we will focus on the works of thinkers like Gary Minda⁷ and Kyron Huigens⁸. Minda's understanding of jurisprudence is a continuation of the Early Modern 'swerve' discussed in the *Introduction*. Minda writes:

Another group of postmodern critics, the *ironists*, attempt to facilitate the crisis and fragmentation of modern theory by employing postmodern criticism to 'displace, decenter, and weaken' central concepts of modern legal Western thought. They are ironists because they claim that the discourse of modern Western thought has been effective--very effective--but not for the reason

⁶ See among other sources readily available through search engines, the one at "Jurisprudence" (*The Free Dictionary* June 11, 2017) <<http://legaldictionary.thefreedictionary.com/jurisprudence>> accessed June 11, 2017. All freely available online sources are similar to each other in their definition of jurisprudence. This etymologic meaning is relevant to the discussion only in so far as it constitutes a general review of the term as part of 'literature' review and only in pointing out the need for prudence in deciding quanta of punishment for quanta of crime committed.

⁷ Minda G, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (Oxford University Press 1995)

⁸ Huigens's *The Jurisprudence of Punishment* which appeared in the *William and Mary Law Review*, April 2007 is very important to our discussion here. The entire article is relevant to this essay and no one single quotations can possibly do justice to the article. Therefore, this article by Huigens is footnoted, as necessary reading on restorative justice.

modernists imagine. Ironists assert that the significance of modernism lies not in specific prescriptions or social tasks, but rather that it lies in the intellectual pursuit of theory as an end to itself. (Minda 230)

It is this distrust of a metanarrative of power that marks this inquiry into restorative justice since we must question the nature of justice itself in the Prophetic mode. The Major and Minor Biblical Prophets kept questioning the Law and finally Mosaic Law was questioned by Christian exegetes and keeping in mind that both British and American lawmakers being mostly devout Christians we should see law in praxes within this Prophetic mode and through the swerve to the works of the likes of Minda and Huigens. Therefore, there arises the need to analyse the etymologic origins of jurisprudence. But with the caveat that prudence is a questionable trope since Richard Rorty (1931-2007)⁹. Restorative justice aka jurisprudence has to be structured around key findings within post-modernist tendencies in the legal system arising out of the works of the likes of Rorty.

...Legal realism argues that the real world practice of law is what determines what law is; the law has the force that it does because of what legislators, lawyers and judges do with it.¹⁰ The central target of legal realism was legal formalism: the classical view that judges do not make law, but mechanically apply it by logically deducing uniquely correct legal conclusions from a set of clear, consistent, and comprehensive legal rules.¹¹ Though many aspects of legal realism are today seen as exaggerated or outdated it established that law is not, and cannot be, an exact science.¹² Legal realism like legal positivism pose real dangers now. In this era of machine intelligence or AI, big data mining can become an inflexible process which delivers justice in a dystopic manner where Philip K. Dick's short story *Minority Report* (1957) is now more prescient than George Orwell's *Nineteen Eighty-Four* (1949). Restorative

⁹ Rorty R, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Harvard University Press 2003)

¹⁰ Robert A. Shiner, "Legal Realism," in Robert Audi, ed., *The Cambridge Dictionary of Philosophy*. (New York: Cambridge University Press) 1995

¹¹ Brian Leiter, "American Legal Realism," in Martin P. Golding and William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (eds.) Oxford, (Blackwell, 2005) 50

¹² Lief H. Carter and Thomas F. Burke, *Reason in Law*, (8th ed. Chicago, University of Chicago Press, 2015)

justice flounders at the dual doors of legal positivism and legal realism. Both the positivist and the realist views are mechanical and so to speak, materially deterministic reducing the scope for delivering justice which heals. Artificial Intelligence poses a threat to the delivery of justice in a manner which is mediated by algorithms of law and legal procedures. The danger as this researcher feels, is an overt reliance on procedures of law and structurally inscrutable government automatized forces making emotional appeals, on which restorative justice ultimately depends, redundant and will make a mockery of the humanity which justice of all forms including the Mosaic Law strives to enforce. As had been discussed earlier; Martin Buber's fear of treating normative criminals as *Thou* will be reduced to just A.I. interacting with *It*.

The post-modernity in law of Minda and Huigens mentioned above have now given over to the post-human. The post-human elicits the writing of this paper for data mining by social media pose real threats to all domains of life; and poses an imminent danger to any chance for restorative justice. No justice can be anymore tailored to individual cases if human decision making is removed and replaced with machines whose outcomes are predetermined.

As has been seen, the nature of this study is primarily through critiques of normative jurisprudence, which essentially recognizes what law ought to be in an ideal world and overlaps this idea with both moral and political philosophy.¹³ Deontology¹⁴, or 'the theory of duty or moral obligation' and utilitarianism¹⁵, the view that 'laws should be crafted so as to produce

¹³Robin West, *Normative Jurisprudence* (Cambridge University Press 2011)

¹⁴Webster's New World Dictionary of the American Language, (2d Coll. Ed. 1978) 378

¹⁵Habibi, Don "Mill's Moral Philosophy" *John Stuart Mill and the Ethic of Human Growth*. Dordrecht: Springer Netherlands, (2001) 89

the best consequences for the greatest number of people possible' are essential elements of this paper. Virtue jurisprudence is drawn upon and used to the extent that an ideal or utopian society cannot be created without virtuous people.¹⁶ Deontology and virtue jurisprudence both are equally harmful now in the post-human era where post-modernism and Cosmopolitanism are both giving ways to unthought of machine interference. Virtue as eudaimonia cannot be understood by any form of machine learning. The imminent death knell to concepts of restorative justice has been rung and unless we challenge set-tropes in tomes of legal lexicography, the chances are that wergild will return and we will be swerved into a pre-Early Modern legal system. Machines do not comprehend that human jurisprudence is never written in stone.

The quest to overcome the posthuman brings us to a relatively new and lesser known school of jurisprudence called therapeutic jurisprudence which is the study of how legal systems affect the emotions, behaviors and mental health of people.¹⁷

Therapeutic Jurisprudence has emerged as the theoretical foundation for an increasing number of "problem-solving courts" (*see* chapter 5) that have transformed the role of the judiciary. These paradigm shifts include drug treatment courts, domestic violence courts, mental health courts, re-entry courts, teen courts, and community courts.¹⁸ For example, the British National Health Services is employed routinely by magistrates to treat pedophiles with chemical castration protocols.

Initially therapeutic jurisprudence was employed in cases involving individuals with mental disabilities but subsequently expanded far beyond that narrow area; therapeutic jurisprudence presents a new model for assessing the impact of case- law and legislation, recognizing that, as a therapeutic agent, there are specific laws that can have therapeutic or anti-therapeutic

¹⁶Kyron Huigens, *Nietzsche and Aretaic Legal Theory*

¹⁷Black's Law Dictionary (9th ed. West Group, 2009)

¹⁸Winick and Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, 2003

consequences.¹⁹The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential without subordinating due process qua procedural principles.²⁰

Therapeutic jurisprudence “asks us to look at law as it actually impacts people's lives”²¹and focuses on the law's influence on emotional life and psychological well-being of the transgressor. It suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness”.^{22,23}

In this regard, the significance of the US Supreme Court's decision in *Olmstead v. L.C.* must be noted²⁴:

‘We have known – for decades – that community treatment “works” better, that there is less improper use of antipsychotic medication in community settings, that community patients are

¹⁹Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases? 42 Akron L. Rev. (2009) 885

²⁰*Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV., (2008), p.p. 575, 585-86.

²¹Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, (33 NOVA L. REV. 2009) 535

²²David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*,

²³ Daniel P. Stolle, David B. Wexler & Bruce J. Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Stolle 45, 2006)

²⁴527 U.S. 581 (1999)

less stigmatized, and stand a better chance of authentic reintegration into all aspects of social, economic and personal life'.²⁵

In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as "... a sea-change in ethical thinking about the role of law ... a movement towards a more distinctly relational approach to the practice of law ... which emphasizes psychological wellness over adversarial triumphalism".²⁶ Restorative justice now at least has the armour of therapeutic jurisprudence in transcending post-humanism. The post-human like pre-Renaissance forms of jurisprudence can only be negated by a human(e) judiciary where legal corrective measures instead of being coercive are in fact therapeutic. There is now a pressing need to overcome the post-human as once there was a pressing need to overcome both the *wergild* and the Law of the *Torah*.

²⁵Michael L. Perlin, "*Their Promises of Paradise*": *Will Olmstead v. L.C. Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, HOUS. L. REV. 37 (2000)

²⁶Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, (8 J.L. & MED 2001) (30) 328

