RESTORATIVE JUSTICE AND COERCIVE POWER?

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INTRODUCTION

I open this paper with a confession of biases. As an ordained minister I believe that restorative justice is a biblical and theological alternative to retributive justice. I believe in its purest form it is, as Howard Zehr (1990, p. 94) has described it, a paradigm shift from a retributive system of justice. One of the attributes of the different lens, the restorative lens, is to elevate informal processes, create clandestine participation by victims, offenders and communities erstwhile eschewing reliance upon the mechanisms of the nation state and its formidable reservoir of coercive power. Indeed, the avoidance of state power coercion is a key ingredient of a paradigm shift and a restorative lens.

Many of our citizens, myself included, believe the history of modern and post-modern criminal justice and corrections is a history of failure. What we have tried has not achieved desired results approximating collective hopes and expectations. A common denominator in all of these paradigms has been reliance upon the application of coercive power to obtain desired results.

On the other hand, power dynamics in some form are unavoidable even in the most communitarian settings. Coercion can occur in the absence of police forces, jails, prosecutors and judges.

The subject of this paper is a question that has concerned me for some time: "What levels and forms of coercive power can exist within restorative justice and not eliminate its status as a paradigm shift, a new lens?" Where is
tipping point, so to speak? I engage in this exercise not expecting to propound absolute answers in the conclusion.

CHAPTER ONE

Michel Foucault: Analysis of the Development and Attributes of Modern Criminal Justice and Corrections

Michel Foucault described his purpose in writing *Discipline and Punish*

*The Birth of the Prison:*

This book is intended as a correlative history of the modern soul and of a new power to judge; a genealogy of the present scientifc-legal complex from which the power to punish derives its bases, justifications and rules, from which it extends its effects and by which it masks its exorbitant singularity (Foucault, 1995, p. 23).

Foucault is does not use the term soul as it is understood in Christian theology (Foucault, 1995, p. 9). Rather he uses the term, it seems, to refer to the non-body composition of a human being. It is the locus of thought, personality, attitude, the behavior producing arena (Foucault, 1995, p. 16). With coercive power it can be changed, adapted, formed or formed anew.

He likens the acceptance of the sovereign’s ability to punish, as in corrections, to the acceptance of the sovereign’s ability to wage war. Both activities address enemies of the state. Crime is akin to rebellion (Foucault, 1995, pp. 48-50). With the transition from monarch to republic came a subtle shift in purpose “…from vengeance of the sovereign to the defence (sic) of society” (Foucault, 1995, p. 90).
Punishment now is “…a political tactic” (Foucault, 1995, p. 23). Penal law and human science are immersed in a kind of matrix of epistemological development. Separation of distinct domains is not possible. The exercise of power can be used in positive expressions as well as repressive ones. Focus on the body and soul as a unity coupled with scientific analysis has impacted how coercive power is utilized (Foucault, 1995, pp. 23-24).

The Enlightenment brought about a new penal style. Coercive power was no less involved. But spectacle was replaced with the goal of correction. Punishment was less immediate and physical, but more individualized (Foucault, 1995, p. 8). It involved an analysis of the capabilities and traits of the individual offender coupled with a belief that punishment could create a desire to change and provide the tools for pro-social living (Foucault, 1995, p. 18).

The power to punish became diffused and fragmented in a sense. Each person involved in the judicial, correctional or treatment process became a kind of judge (Foucault, 1995, p. 21). Judgments about sanity and normalcy became part of the judicial/penal process (Foucault, 1995, p. 20). The focus moved steadily toward function and utility rather than responsibility (Foucault, 1995, p. 21).

Perhaps in reaction to regal excesses, the Enlightenment was concerned that the power to punish be proportional to the damage done. It was important to accomplish just deserts, prevent repetition by the offender and deter others
from such conduct (Foucault, 1995, pp. 92-93). A detailed scientific process of analysis emerged which included the additional elements of individually tailored punishment, explicit legislation and the need to prove truth of charge (Foucault, 1995, pp. 94-101). The combined effect was a bifurcation of the power to punish. One track dealt with the individual offender and his actions (Foucault, 1995, p. 101). The other dealt with collective offenders as a field of analysis. Both tracks impacted how power was deployed.

Punishment was not to be used arbitrarily. It was to be used to make crime less attractive to the offender and all other persons. It should be used to change the offender’s lifestyle by using various levels of deprivation and incentives (Foucault, 1995, pp. 104-109).

Prisons were placed into service as punishment. Nevertheless they also became a locus for the imposition of additional sanctions (Foucault, 1995, p. 114). A system of such structures was instituted so that mechanisms would be available to deal with a variety of offenders with flexibility and adaptability (Foucault, 1995, pp. 115-116).

A discontinuity developed. On the one hand there was judicial openness. On the other, the prison enabled a level of secrecy and autonomy that contradicted the desire for transparency. The power to punish had all the potential for arbitrariness as the king’s power to decide who should be punished (Foucault, 1995, p. 129). “The emergence of the prison marks the
institutionalization of the power to punish…” (Foucault, 1995, p. 130).

Punishment ripened into a form of coercion (Foucault, 1995, p. 131).

Foucault saw military training as representative of the way coercive came to be used in modernity, including, but not limited to, in criminal justice and correction (Foucault, 1995, p. 135). People are more useful as they are more docile. They become more amenable to obedience. Controlled environments create the possibility for “uninterrupted coercion.” Discipline became a general form of domination (Foucault, 1995, p. 137). The power over one’s own body was separated and placed into the hands of others (Foucault, 1995, p. 138). No detail was unimportant because of the potential to seize and control it (Foucault, 1995, p. 140, 141, 149, 162-163).

Discipline could be used to design and control space such as buildings, time, such as through time tables and classification and organization of people into units. The latter involves separation and differentiation.

Perhaps the most important ingredient in the coercive disciplinary machine is surveillance or the hierarchical ability to see every person and everything. This ability is a form of power that allows for maximum control and requires a specially trained work force with a specific orientation to the surroundings (Foucault, 1995, p. 171, 174).

With surveillance and visibility of all details, even minor ones, the progression of discipline moved to defining norms. Coercion, through the use
of power, both with positive and negative expressions, came to be used to create normalcy. This kind of discipline filled gaps between published standards and expectations. It was corrective in character. Coercion became a kind extra-judicial penalty. Foucault asks if the power of the Norm which evolved through disciplinary techniques has created a new modern law of society, e.g. one must meet the expectations of the norm (Foucault, 1995, pp. 177-183).

From the school setting, he observes that the examination also emerged as part of the societal disciplinary progression. In function it combines surveillance with normalizing judgment. The examination transforms the economy of surveillance into an exercise of power (Foucault, 1995, pp. 184-187). The examination places persons in the vortex of coercive power. They are both object and subject and become a “case” (Foucault, 1995, pp. 191-192).

The Panopican design of prisons, creating maximum visibility makes possible the perfect exercise of power. Because interventions are always possible it has a mental effect on those subject to its control. It automatizes and depersonalizes power so that the immediate use of force isn’t even needed to regulate. It is a laboratory to experiment with altering behavior (Foucault, 1995, pp. 202-206).

The modern society is a disciplinary society characterized by permanent and exhaustive surveillance. Discipline is a form of power. It affects most of our modern institutions. Foucault postulates that modern society is not
characterized by community but rather the relationship of the individual to the state. It has become a disciplinary society (Foucault, 1995, pp. 214-216).

In summary, the transition from monarchy to republic in the Western world has been characterized by no decentralization of nation state power. The Enlightenment brought about the development of a new science: Discipline. Within that science resides the power and inclination to determine norms and deviants. There is a belief that deviancy can transform to norms through the application of coercive power. The development of criminal justice and corrections, along with many other institutions can be understood as an expression of this development. But the coercive power resides in a number of persons and positions.

CHAPTER TWO

A Brief Historical Analysis of Corrections since the Enlightenment

It seems well settled that prisons have a relatively brief history as the end product of criminal justice proceedings. For most of Western history they existed for political purposes, pre-trial detention, prisoners of war and Debtors (Van Ness, 1986, p. 75). Prisons were used to secure persons but not to punish them (Foucault, 1995, p. 118).

Perhaps the oldest model of the modern prison is Raphius of Amsterdam. The administration had the authority to determine and shorten sentences to some extent. Work performed in community was a central feature of the model. There were a variety of methods employed to encourage inmates
toward good from evil. It began operation in 1596. There were timetables, religious instruction, supervision and surveillance (Foucault, 1995, pp. 120-121).

“The maison de force at Ghent (1749) organized penal labour around economic imperatives.” The core belief was that idleness was the primary reason for crime. Yet it sought to make convict labor socially advantageous by reducing tax burdens through convict labor and enlarging the work force. The hope was to make lazy people enjoy work by using coercive means (Foucault, 1995, pp. 121-122).

The English (1775) added isolation as an essential ingredient of the prison paradigm. Isolation was not only a shock but would cause positive introspection. There was a concern that the penal setting not resemble and ordinary factory (Foucault, 1995, p. 122).

The “penitentiary approach” was developed by Quakers in Philadelphia in 1790. The primary assumption was that the criminal’s environment was the source of the anti-social behavior. Isolation, solitude, religious instruction, silence and the opportunity for reflection, remorse and repentance were methods employed. There was a complete extraction from the former environment so that no visits or news from the outside was permitted (Van Ness, 1986, pp. 75-76).

Life was totally controlled and partitioned by timetables. Work was part of the program. The key was to operate on the prisoner’s soul. The work of the
administration was carried out away from public view and the administration evaluated each prisoner individually before the coercive techniques were applied (Foucault, 1995, pp. 124-125).

The penitentiary model was modified in the Auburn approach of New York (1825). Strenuous labor and the imposition of discipline were the primary components. To some extent the underlying assumption of criminality was the lack of self discipline and sloth found in the offenders. The coercive power was applied to break offenders rather than change their souls and bring about repentance (Van Ness, 1986, pp. 76-77).

The next penal stage was the reformatory (late nineteenth century). It resulted in part from the failure of earlier models to achieve the transformation of offenders. This theory conceded the existence of a certain incorrigible element. The others, however, primarily younger, might not return to crime if provided education and vocational training along with other corrective applications. The use of an indeterminate sentence was urged so that incentives would exist for those who took individual reform seriously (Van Ness, 1986, pp. 78-79). This maximized the ability to tailor correctional methods to the individual. The reformatory approach represented a shift toward crime prevention from punishment and atonement (Foucault, 1995, pp. 126-127). The results of the reformatory effort were also disappointing.

The next model was the medical model which treated criminal behavior as a sickness and focused on treatment as the answer. Correction became the
key concept in this model. This model coincided with the development of behavioral sciences beginning in the late nineteenth century (Van Ness, 1986, pp. 79-80).

From my professional experience, it seems that the medical model yielded at some point to what may be called the “incapacitation” or “nothing works” capitulation (Pavlich, 2007, p. 5). In other words, inherent in this approach is an acknowledgement that all previous models have failed to achieve the desired transformation of offenders in measurable form. The foundation of this theory is that all that can be hoped for is to incapacitate offenders for as long as it can be justified. Only incapacitation is guaranteed to prevent recidivism. A small percentage of offenders commit a vast majority of the crimes. If we can identify those offenders and incapacitate them, it doesn’t matter what it costs, it will be cheaper than the social and economic cost of the crimes they would have committed had they had the opportunity. The theory is still heavily indebted to the surveillance, study and classification of offenders coupled with the maximum utilization of nation state power.

It seems that this approach has now yielded to hybrid form of the medical model. It can be called the era of “Best Practices” or “Evidence Based Practices” model. This phenomenon is in vogue in a number of diverse disciplines in our culture. It is prevalent in corrections as well. It emerged in the late twenty years or so.
The essence of the theory is that through research we can and have determined that in fact some things work. It is possible to provide certain tools for change to certain people and change does in fact result. The goal is to deploy scarce resources to specifically targeted groups in such a way as to cultivate effectiveness. Effectiveness is discoverable through research, primarily meta-analysis, comparing control groups with those who receive a particular program or treatment (Latessa, 2008, p. 31, 42).

As a person who works in direct ministry with offenders and who once worked with them in the capacity of a criminal defense attorney, I find the operative assumptions of most of these theories to have empirical validity. Does environment bear a relationship to criminal misconduct as the penitentiary model assumed? Most definitely it does. Does it matter if someone comes from poverty, abusive circumstances, reared in an anti-social value systems characterized by chaos and frequent residential mobility? Yes.

Are offenders often people with little self-discipline and prone to sloth? It has been my experience. Would correcting these conditions tend to reduce the inclination to offend? It seems reasonable.

Is the lack of education and vocational training common among offenders? Yes. Would correcting these deficiencies seem reasonably calculated to lower recidivism? It would seem so.

Does criminal behavior seem like a sickness in many cases? Is there now a known overlap of mental illness and addiction in the offender
population? Of course there is. Therefore, treatment would seem to be a reasonable approach.

What frightens me as I reflect on this history is that in spite of the reasonableness of the various premises, two common denominators exist. All these experiments are considered failed projects and all had in common their reliance upon the application of coercive power to accomplish the desired ends.

The very existence of the incapacitation theory confirms a consensus of failure as to earlier theories. Interestingly, it employs the coercive power without any hope of transformation. Here coercive power is itself the end product. It only relies on the sciences to identify those persons who do the most harm. That requires a great deal of state centered power for the task.

Although the best practices approach is more optimistic, it still relies heavily on the use of power dynamics described by Foucault. This includes the classification of offender by categories: LSI-R risks and needs, substance abuse assessments, sex offender treatment, types of mental illness and addiction, domestic violence, mental deficiency levels, age, etc. The surveillance, observation and classification described by Foucault are employed at ever greater heights. While I applaud the optimism, I believe the jury is still out as to degree of effectiveness.

Finally, as an ordained United Methodist minister steeped in the Arminian theology of John Wesley and as a committed restorative justice
advocate from a biblical and theological perspective, I cannot ignore my understanding of a God who, though capable of unimaginable applications of coercive power, has chosen instead to give to humans complete freedom of thought and action. God’s grace is always resistible. God may woo us preveniently, yet God gives us the freedom even to reject a relationship with God (Runyon, 1998, p. 27). Is there a message in that as to the reasonable expectations from the utilization of coercive power?

CHAPTER THREE

Values and Processes of Restorative Justice

Howard Zehr has written about justice from a paradigm analysis. Reality becomes concrete in the form or paradigms. The retributive system of justice, which is the predominant paradigm in our county, has decided that certain forms of misconduct are crimes and the victim is the state itself. An infraction triggers the activation of the enormous resources of the state in the form of police, prosecutors, judges and often prisons. Punishment is the outcome (Zehr, 1990, p. 87, 89). Public justice has replaced private justice (Zehr, 1990, p. 97). The application of coercive power is endemic to the system and its processes.

Community justice, a typical dimension or attribute of restorative justice operated to create settlements outside of state-created mechanisms. The process valued relationships and reconciliation. It recognized the importance of the actual involvement in the process of the persons who had been harmed
and those who had created harm. Settlements were in the nature of restitution

One application of restorative justice is the circle process. The process is
classified by certain basic shifts:

1. from coercion to healing; 2. from solely individual to individual and
Collective accountability; 3. from primary reliance upon the state to
greater self-reliance within the community; 4. from justice as “getting
even” to justice as “getting well.” (Pranis, Stuart, & Wedge, 2003, p. 10).

Here freedom from coercion is clearly a foundational value as is distance from
state processes.

Restorative justice has also been described as an approach to needs-
based justice.

Proponents of restorative justice know that justice cannot be done by
someone or administered to someone (Sullivan and Tift, 2005, p. 116).

These authors further contend that “…power-based social arrangements and
hierarchically-ordered relationships deny the possibility of satisfaction of the
needs of all” (Sullivan & Tifft, 2005, p 117.) Therefore the offender is also seen
as a person who comes to the process with needs. This reality creates some
other power-based issues to be addressed herein.

The move away from coercive power has implications on the individual
level. It requires relinquishing power available to us because of position and
privilege in order gain advantage. It invites us to consider our personal stake
in utilizing state-centered coercive power. Sullivan and Tifft clearly have a
conviction that utilization of coercive state-centered power is anathema to
restorative justice. Foucault’s work is cited in this respect as contradictory to the restorative justice values they enumerate (Sullivan & Tifft, 2005, pp. 153-154).

In fact, they describe as “violent” any system that has an uneven playing field, i.e., social arrangements for thriving. Violence includes the devaluation of the personhood of another. Violence is found, they allege, in our very competition/comparison based culture which promotes a kind domination by power and the generation and preservation of hierarchical differences (Sullivan & Tifft, 2005, pp. 119-120).

The Navajo peacemaking model is commonly viewed as an expression of Justice (Yazzie & Zion, 1996, p. 172). It is characterized by an elevated ethos of voluntariness.

The Navajo maxim is ‘it’s up to him’. That means that every individual has freedom of choice and action, and that one Navajo does not tell another what to do.

Force is only present in the form of persuasion. The focus is on community welfare. The individual is not supposed to put personal welfare above that. To do so is to act as one without family (Yazzie & Zion, 1996, p. 162).

The peacemaker in this tradition is respected for citizenship, spirituality, leadership and wisdom. Coercion is absolutely unacceptable. However, the cultural community is so strong that they cannot imagine life as an individual apart from this particular community (Johnstone, 2005, pp. 45-47).
Johnstone notes that the restorative justice experiments since the mid-1970s “…make minimal use of coercion and control” (Johnstone, 2005, p. 11). One of the core themes of restorative justice is that conflicts be dealt with in a community setting with minimal interference from authorities. Communities should learn to deal with issues without referring them to formal authorities. The formal structure is not designed to achieve restorative goals. Something less formal is required (Johnstone, 2005, pp. 12-15).

Restorative justice tends to value conflicts, crime included, as opportunities for community empowerment. Moral development can arise from conflict and the community can be strengthened. These opportunities are lost when conflicts are given over to the professionals of the state (Johnstone, 2005, pp. 144-147).

A systemic shift to restorative justice would amount to a fundamental shift in our manner viewing and responding to crime (Johnstone, 2005, p. 169).

That shift would most certainly be demonstrated in reduction of state involvement and a reduction in the application of coercive power to transform a deviant into a norm.

Ron Claassen (1995, p. 2) of Fresno Pacific University developed some Fundamental Principles of Restorative Justice as well as some Evaluation Continuums. The sixth principle is:

Restorative Justice prefers to the responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion (emphasis supplied) since healing in relationships and new learning are voluntary and cooperative.
processes.

Principle 9 dealing with the uncooperative offender still urges against the use of coercion but exposure to restorative justice education. The principles only mention government as a secondary victim in Principle 4 and Principle 7 (Claassen, 1995, p. 2).

Voluntariness of participation has been stressed as an essential element in many expressions of restorative justice. In the circle process no one is made to join or participate. Voluntariness is a principle (Pranis et al., 2003, p. 57). Before a VORP victim offender mediation takes place, both the victim and the offender are given the opportunity to decide whether or not to participate (Zehr, 1990, p. 162).

CHAPTER FOUR

Restorative Justice: Paradox, Complications & Power Schizophrenia

Although voluntariness, informality, negotiated settlements and private justice are all values and emphases of restorative justice contrasting with the application of coercive power, their existence, practically speaking, is fraught with complication. One complication has to do with semantics. It seems voluntariness is on one end of a continuum and the application of coercive power by use of force is on the other end. There are many verbs in the English language that describe intermediate stops on this continuum, e.g.: converse, reason, influence, persuade, manipulate, pressure, coerce, threaten, force. Some version of the above is inevitable. We do not live in a power vacuum.
Even the Navajo scenario has within it an indigenous cultural value that operates to some extent coercively.

John Braithwaite’s theory of reintegrative shaming is an example of restorative justice schizophrenia regarding coercion and power. He has postulated that shaming can be used to reduce crime in communities of common values and interdependence. Within such communities the shaming of offenders can bring about contrition and reform of offenders so long as re-acceptance is likely. On the other hand, when the level of shame is toxic, the offender will withdraw and be absorbed into a criminal subculture. This approach to justice is community based, private, informal and, in that sense, restorative (Braithwaite, 1994, pp. 54-56). On the other hand it advocates the utilization of coercion and recognizes the existence of a collective, although clandestine power base capable of exercising the coercion.

Another complication is the coercive components that exist structurally in some restorative practices. The Reparative Boards of Vermont are often regarded as a restorative justice expression because there is some informality of process and creativity of sanctions and a community justice resemblance. Citizens are the board members. Addressing the harm of the crime, the needs of victims, reintegration of offenders and making things right are examples of the assigned tasks. Yet they are created by action of the Vermont Department of Corrections and referrals are made by prosecutors and judges so the application of coercive power awaits those who fail in the program (Karp &
Walther, 2001, pp. 199-215). How could board members, offenders and victims not be impacted by this?

The concept advanced by Sullivan and Tifft that a component of restorative justice is that of meeting needs, mentioned earlier, also poses some complications. Offenders are, more often than not, needy people. Following a needs evaluation, restorative justice might often include, even in a negotiated settlement, a drug alcohol assessment of the offender with the expectation that if treatment is recommended it should be sought. It could also include a provision that the offender complete a cognitive therapy paradigm or GED coursework. Obtaining minimal education and ameliorating criminal thinking are appropriate and frequently encountered offender needs. How are such provisions enforced other than through the power of the state lurking in the shadows? The same problem exists when other terms such as restitution payment are ignored by offenders.

Drug courts are another institution that has many restorative attributes. In Oklahoma, Mental Health courts exist which are quite similar. A restorative model would withhold any prosecution while the offender participated in the process. The judge and the attorneys become involved in the life of the defendant. They become cheerleaders of sorts. If the offender fails, everyone fails. All participants are united in the single goal of the offender’s recovery. Treatment plans are individualized (Shavelson, 2001). Yet these models are characterized by close supervision, drug testing, frequent court appearances
before the assigned judge who remains in the case for the duration. Sanctions are immediate and certain (Manley from Shavelson, 2001, p. 307). All of which contribute to their effectiveness. Referrals, at least in Oklahoma, are made by the prosecutor. Again the enormous power of the state is always around the corner. It must bear some influence on the entire cast. Yet they have proved effective in changing lives, a goal of restorative justice (Manley from Shavelson, 2001, p. 307).

In an effort to distinguish the restorative expressions that presently exist from the paradigm shift, the changing of lenses, originally proposed, Howard Zehr (personal communication, April 4, 2003), and others have drawn a distinction between restorative justice, a paradigm shift, and restorative practices, the applications that occur within a retributive system.

Even the notion of paradigm shift reveals a certain paradox. One argument is that by utilizing restorative, informal processes, state control was actually being expanded in its reach (Pavlich, 2005, pp. 7-8). In other words, reduction of state control must be demonstrated to support any claim of shift.

The paradigm shift can be described as an alternative to the existing system. Pavlich refers to the alternative or shift as “Restorative Governmentalities.” This vision raises four questions: 1. “What is governed” 2. “Who is governed” (vision of) 3. “Who governs” (designated governors) 4. “What is appropriate governing?”
The answers to the questions in broad terms are that harms are the subject of government and a task is to identify key stakeholders and involve them in a process. Those most impacted by a conflict are the governors. Appropriate governing looks to the future by seeking resolution or healing of conflict. This, Pavlich concludes, is of such broad scope and so centralized in its description that it is not really an alternative but a supplanting (Pavlich, 2005, pp. 11-14).

For purposes of this paper the point seems to be that it requires an exercise of coercive power to create the alternative and it is not clear the power decentralizes or diminishes after a paradigm shift is accomplished. Pavlic describes the situation as “imitor: to imitate, substitute.”

…the paradox of imitor is used to connote restorative governmentalities’ simultaneous attempt to offer a substitute for criminal justice whilst predicking themselves on (and so imitating) existing criminal justice arrangements (Pavlich, 2005, pp. 14-15).

On the other hand the case for paradigm shift or alternative is made on the basis of an entirely different set of values. It eschews adversarialism and retribution. Restorative justice views the demands of justice differently. The distinction from retributive justice is ethical, ontological and practical. It defines itself as outside the coercive approach and claims voluntariness and communitarianism as values (Pavlich, 2005, pp. 16-17).

Restorative processes is a way of describing restorative justice as working within the existing retributive system. Only the processes are the
alternative. The ontology and ethics of retributive system are still paramount and primary. Pavlich labels that reality as an “appendage” to existing criminal justice. Reform of the system is subordinate as the restorative processes dwell within it (Pavlich, 2005, p. 18). Pavlich summarizes the paradox:

The impulse to be both alternative and appendage is highlighted, and indeed supported, by the ambiguities of claiming to provide a radically different framework of values that are not entirely absent from the criminal justice system.

There remains, he contends, a connection to the criminal justice system that cannot be severed (Pavlich, 2005, p. 23). Specific examples of these are the still primary focus on offenders, retaining understandings of crime not entirely dissimilar from existing ones (criminal legislation is a kind of communal expression) and viewing offenders as the agents of harm (Pavlich, 2005, p. 82).

One final question to address in this chapter is what are reasonable and acceptable limits on a paradigm shift? Howard Zehr (personal communication, June 2007), has suggested that the retributive/adversarial system must always remain as a backup. There are cases when innocent people are charged. Restorative justice doesn’t work as well when guilt and innocence are in doubt. The adversarial system has some value in proving facts. Furthermore, just as ancient peoples found no solution but banishment in some situations, likewise there are some people who are unlikely to ever cease to be a danger to others and who will require some sort of secure setting.

CHAPTER FIVE

What are the Acceptable Limits on Coercive Power Within a Paradigm Shift?
If we accept the above boundaries, then this chapter begins with an acknowledgement that no paradigm shift is anticipated to be absolute. It will be qualified by the boundaries set forth above. The retributive/adversarial system will not be abolished, therefore the availability of coercive power will not disappear. Accepting that, the question becomes at what point is restorative justice more akin to a paradigm shift and at what point is it more of an appendage to the existing system?

Johnstone reminds us of what was lost in the shift from community justice to nation state justice. Victims were cast aside. Citizen responsibility for participation in justice was lost. Constructive and remedial responses to wrongdoing and offenders were replaced with a violent response leading perhaps to escalating levels of criminality. A costly governmental machinery was instituted (Johnstone, 2005, p. 42). The concentration of coercive power and its exercise contributed to each of these dimensions.

Zehr characterizes the paradigm shift as a matter of changing lenses (Zehr, 1990, p. 178). The function of a lens is to magnify some things and focus on some objects. Not all objects will be magnified. The focus will not always be in the same place. As a result, there are different measurements for the degree of shift. For example, all of the following are potential foci: participation of the offender, participation of victims, participation of the community, being accountable and taking responsibility (offender), apology, forgiveness,
settlement negotiated extra-judicially, restitution paid, needs of victims addressed, education of offender as to harm caused, both parties have opportunities to tell their stories, offender needs identified and addressed, voluntariness, identification of impacted parties and inclusion in process, reconciliation, involvement of faith community. Voluntariness and community participation, freedom from state centered coercion, exist alongside many other values.

Furthermore, Pavlich (2005, p. 6) asserts that restorative justice has a lineage which he describes:

In sum, restorative justice’s lineage includes the single and combined effects of: poverty reduction, community development and social defense initiatives; a rising informal justice movement bolstered by findings from legal anthropology coupled with a critique of Western legal forms; and high profile experiments with informal justice, including those relying on theological images and concepts.

In the list there are images that suggest an aversion to centralized coercive power. Yet there are also ones that suggest a reliance on some form of collective power, grass roots power, that would be have the ability to change the world through organization, influence and assertion.

Moreover, not all of the power developments described by Foucault are inconsistent with the values and ideas of restorative justice. The hope that consequences will bring about a change of heart in an offender and the offender will become persuaded not to repeat offenses is shared. The notion that offenders should be observed, studied, categorized as to needs and receive individualized treatment is also restorative. It is a deeply imbedded concept in
both VORP and circle processes. The hope that others will be persuaded that criminal misconduct should be avoided is also a shared hope. One could even argue that the application of coercive power described by Foucault is, in some respects, similar to the notion of need-based justice in regard to offenders.

The paradigm shift begins with the new lens (Zehr, 1990, pp. 179-180). It involves seeing the world differently. It involves a different attitude and it values community and creating bonds among people. If we operate from a different value system it will change the way in which offenders and victims are treated (Johnstone, 2005, pp. 54-55). Perhaps that is where the paradigm shift begins—a changed thinking. The changed outlook may ultimately lead to a different, more reserved deployment of coercive power. Only applications consistent with the changed thinking would be acceptable, but there are those situations.

“…however much we might welcome restorative justice, as a refreshing and in many ways, heartening challenge to the drift towards a strategy of punitive segregation, we must never forget that it involves the exercise of power by some people over others, and that there is an urgent need for critical investigation of the nature, limits, problems and dangers of such exercise of power” (Johnstone, 2005, p. 171).

The use of coercive power to simply punish or cause pain is inconsistent with the principles of restorative justice. On the other hand the secondary goals that are propounded to justify causing pain, such as deterrence of others, exalt the worthiness of the legal maxim and cause the offender to cease such misconduct are not inconsistent with restorative justice (Johnstone, 2005, pp.
The analysis, to some degree must focus not on why something was done, but the method chosen to accomplish it.

In this respect the use of the prison is probably the most antithetical and pernicious feature of the adversarial/retributive system’s utilization of coercive power from a restorative justice perspective. It isolates offenders from the community and the community has little involvement in the life of the offender. Indeed an artificial world is created for the offender to live in characterized by subcultural values, suspicious staff, a lack of intimacy and criminal thinking. The punishment relieves any notion that the offender owes something more such as contrition and restitution. Coincidentally, Foucault noted as the prison became popular the despair of the reformers for several of the above-stated reasons (Foucault, 1995, p. 114, 232).

CONCLUSIONS

My interest in writing this paper was generated by the observation that a number of reasonable assumption as to the causes of crime had developed over the years and correctional approaches designed to redress these situations had ended in failure. Their common denominator was their reliance upon coercive, nation state power to accomplish the desired ends. I also recognized that, in spite of the fact that restorative justice championed voluntariness and informal justice, a total elimination of coercive power is impossible.
I believe that restorative justice is a paradigm shift from adversarial/retributive justice. I am not satisfied that restorative processes as appendages constitute or standing alone, will ever lead to a paradigm shift.

The project of this paper is to explore the extent to which within certain limits, the presence of coercive, nation state power, poisons the paradigm shift well.

If we accept that the present system must always remain to deal with cases involving those wrongfully accused and to deal with people who are genetically or otherwise incorrigible and dangerous, then complete relinquishment of coercive nation state power is not possible.

If we accept that restorative justice is needs-based justice and that offenders have needs, then coercive power may become necessary. In fact, a recent study shows a much greater completion rate in treatment by criminal justice referrals (58%) over other referrals (Powitzky, 2009).

The goals described by Foucault of observation, determining background environmental factors, risks and needs, so that a correctional plan can be individualized is not incompatible with restorative justice. The use of pain as punishment, such as prison is divergent from restorative principles.

The paradigm shift of restorative justice resides first and foremost in a new way of thinking, a new attitude, a new way of seeing the world. As it becomes incarnate there will be focus and magnification on different elements, values and goals. Voluntariness and informality are just two of
many. The utilization and degree of coercive power is only one aspect to be examined. To borrow a phrase from legal cases, perhaps the final analysis should be that of examining a preponderance of the evidence in determining whether or not the level of coercive power involved is fatal to the description of paradigm shift. Beyond a reasonable doubt may be too high a standard. The analysis must necessarily be ongoing and case to case.

On the one hand when the authorities refer a case to a restorative process post conviction such as a VORP, before or after sentence is imposed, this seems to me to represent no paradigm shift. The application of coercive power has been wielded arising from a retributive adversarial setting. The mediation is relegated to one more step in the retributive lens. A victim offender process with imprisoned offenders and victims of crime seems equally no more than a process, at best, an appendage.

On the other hand when cases are referred by the authorities to drug courts or reparative boards and no charges are filed, but rather withheld pending the outcome of the process, I can accept the withheld penal power as insignificantly harming the process. Likewise when charges are not filed and referral is made to VORP or a circle, it seems to me the paradigm shift is more intact than not.

These are only a couple of examples along the continuum of power from converse, reason, influence, persuade, manipulate, coerce, force. No restorative process can be off the continuum. The question, which I have
attempted to answer, is where is the point where the coercive power application does not change the lens? The examination leading to the discovery of the preponderance of the evidence should ask the following questions. Where is the focus? What is being magnified? Where is the presence of state centered coercive power? What is the purpose of the power, last resort, primary in gaining conviction, primary for punishment, encouragement for addressing offender needs, refer to community, victim and offender for resolution? What is the attitude? What is the degree of changed thinking? Is inclusion of key stakeholders being sought? Is the level of harm the focus? Is it designed to encourage accountability? Is there a reasonably non-coercive atmosphere within which apology and forgiveness become options. On balance, does it seem like a different lens is employed? The analysis must be case to case (Minor & Morrison, 1996).

Finally, what about the history of failure in corrections with the reliance upon coercive power to transform a deviant into a norm? Perhaps the attitudinal change mentioned above, along with a changed thinking, a new lens with minimal reliance upon the coercive power will at least lead to a greater rate in satisfaction. Restorative Justice certainly provides a number of different measurements besides recidivism. Many of those have to do with morals and values whose acceptance by the culture might lead in the long run, if not the short run, to reduced recidivism.
WORKS CITED


Latessa, Edward. Lecture, 4th Annual Reentry Conference, Oklahoma Department of Corrections, December 9, 2008, University of Oklahoma Norman, OK


Powitzky, Robert. Oklahoma Department of Corrections, electronic message March 5, 2009 citing SAMHSA “Treatment Episode Data Set (TEDS)


Zehr, Howard. Lecture. National Conference on Restorative Justice, Kerrville, TX, June 2007

Zehr, Howard. Lecture. Restorative Justice Conference, General Board of Church and Society, United Methodist Church, Ft. Worth, TX, April 4, 2003