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Hearing the Cries: Conversations with Luther and the USCCB

[1] Hearing the Cries: Faith and Criminal Justice (hereafter HtC) provides an important contribution to theological reflection on the current penal crisis. The ELCA Criminal Justice Task Force deserves considerable praise because their document is theologically robust, pastorally-driven, and instructive for Lutheran congregations as well as all persons concerned about the state of criminal justice in the United States. It is polemical (in its prophetic critique of unjust social policies), but it is also cognizant of competing goods and inexorable tensions within legal and political structures and theological and ethical reflection. HtC develops coherent theological warrants for forging a via media between impunity and vengeance that incorporates retributive and restorative dimensions of justice. It builds upon previous ELCA documents, namely The Death Penalty (1991) and Community Violence (1994), and provides needed pastoral and theological guidance in anticipation of the 2013 ELCA Churchwide Assembly.

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[2] In offering a modest response to the document, I undertake a tri-partite methodological analysis: 1) I move ad intra and place the document in conversation with Martin Luther's theology; 2) I move ad extra and place the document in conversation with the Catholic Church's Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice; and 3) I comment on specific issues in the document and relate them to current debates in criminal justice. My overarching objective is to engage these interlocutors critically and constructively vis-à-vis the structure and content of HtC.

[3] The relationship between Luther and contemporary Lutheran theology assumes many forms,¹ and my purpose here is not to rehearse those forms or to evaluate the efficacy of various retrievals of Luther. Rather, I hope to employ Luther's theology as a dialectical conversation partner with HtC. I see dimensions of Luther's thought that can help illuminate HtC's principal points, whereas other aspects of Luther's theology present challenges. In terms of the former, Luther's emphasis on the individual — whether in the form of the inviolable relationship between the individual standing before God or in the privileging of the neighbor in adjudicating personal and political decisions² — resonates with HtC's concern for the eclipse of the individual³ (e.g., large caseloads in the criminal system prevents treating persons like individuals (17); the emergence of mental health courts that can offer individualized punishments and incentives (35); and attention to the variegated experiences of individuals who are incarcerated (43)). The primacy of the individual in Luther is clearly illustrated in HtC's claim that "we need also to recognize the unique nature of each conflict and the histories of the individuals involved" (47). HtC not only employs a key aspect of Luther's theology, but it provides a vital corrective to the forms of proceduralism that aspire to promote uniformity and equality but can diminish and even eviscerate the individual (49).

[4] This critique relates to other themes in Luther's theology. HtC presupposes the reality of "our fallen nature" (47) and "sin and evil" (49); moreover, similar to Luther, HtC also acknowledges the problem of self-deception. Pride or denial of sinfulness represents for Luther the most pernicious aspect of our fallenness. The theological use of the law works to disabuse us of our self-deception: "Therefore this presumption of righteousness is a huge and a horrible monster. To break and crush it, God needs a large and powerful hammer, that is, the Law, with the hammer of death, the thunder of hell, and the lightning of divine wrath. To what purpose? To attack the presumption of righteousness...."⁴ Forms of self-deception perdure within the present American criminal justice system. For example, determinate sentencing and sentencing guidelines, designed as legal mechanisms to remove all subjective biases and other obstacles to equality, may actually reinscribe ethnic and racial prejudices through disparities in drug laws, procedural variations (involving trial convictions and plea agreements), and the

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race of the victim (see 41). Put simply, HtC deftly harnesses Luther's indefatigable efforts to expose the denial of sinfulness in order to problematize putative claims to equality and immunity from bias found in the present criminal justice system.⁵

[5] Tensions do exist between Luther's theology and some of HtC's aspirations. Numerous interpreters censure Luther's social conservatism (cf. the peasants' revolt) and accuse him of supporting the order of the status quo at the expense of social justice.⁶ Luther's realism regarding our fallen nature informs his vision of socio-political life; texts such as Romans 13 and 1 Peter 2 undergird Luther's position that the secular law and sword exercise God's will. Luther proclaims that one must — always for the good of the neighbor and the world — take all necessary steps to maintain order: "Therefore, should you see that there is a lack of hangmen, beadles, judges, lords, or princes, and find that you are qualified, you should offer your services and seek the place, that necessary government may by no means be despised and become inefficient or perish."⁷ These directives derive from Luther's theory of two kingdoms, where the Christian must negotiate the paradox of living simultaneously in radical trust of God and piety within the heavenly kingdom and in the midst of resisting chaos by restraining the wicked, protecting the innocent, and preserving God's orders of creation in the earthly kingdom.

[6] HtC notes Luther's doctrines of the two kingdoms (26) and affirms the central role that governments and individuals play in organizing society and securing order and public safety (27). HtC also observes tensions within Luther's two kingdoms doctrine by sketching disparate theological perspectives on it. HtC offers no definitive interpretation but rather a compromise; it holds that "this church expresses its hope for the world to come, when, as Martin Luther believed, God's twofold governing will have served its course and we will be left with the gospel alone" (28). I take HtC's point here, in part, because it preserves the ineluctably paradoxical character of human existence until the next life. However, HtC can still defend governmental legitimacy and authority while acknowledging that social transformation can strengthen communities. I encourage the HtC to declare boldly its own "here stand we" position and submit that theological change is needed (with Luther) with the same urgency that the church can critically confront the status quo in social and legal life (against Luther). HtC can posit this stance and gainsay a naïve optimism about the violence and sin embedded in the human condition. Reminiscent of Martin Luther King in "Letter from Birmingham Jail," HtC insists that one cannot "insulat[e] the status quo from change" (6) by waiting upon good will or emergent consensus to effectuate social transformation. Luther's insistence upon order, connected in present forms of reflection with criminal justice strategies of incapacitation, does not sufficiently allow for the wider restorative sensibilities of HtC's vision of justice.

[7] In November, 2000, the United States Conference of Catholic Bishops issued Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice⁸ (hereafter RRR). Building on the tradition of Catholic Social Teaching established in the late-nineteenth century by Pope Leo XIII's encyclical "Rerum Novarum" and carried forward by the Second Vatican Council (1962–1965), RRR seeks to discern "the signs of the times" and to develop the church's mission of active social justice ministry in the world. My intention here is one of a comparative and constructive nature: in what ways can Catholics and Lutherans learn from reading one another's documents on criminal justice? In terms of structure, HtC explores the dimensions of criminal justice through the cries of the victims, offenders, members of the community, and participants in the criminal justice process (chapter 1), law enforcement (chapter 2), the judicial system (chapter 3), corrections (chapter 4), and life after crime (chapter 5). Each chapter begins with stories of those impacted by crime and concludes with a faith reflection.

[8] The USCCB text is structured by analogous modes of reflection: interpretive questions raised in the introduction (understanding the signs of the times regarding crime and punishment); normative retrievals of Scripture and tradition (particularly Catholic Social Teaching); and concrete advocacy for policy foundations and directions. Similar to HtC, RRR intersperses narratives from various voices within the spectrum of criminal justice and self-reflexively examines crime as a political and legal problem and as a church problem. A fortiori, both documents integrate dialogue as a basic framework for analysis. The Bishops facilitate dialogue by "consult[ing] with Catholics who are involved in every aspect of the criminal justice system: prison chaplains, police officers, prosecutors, defense attorneys, judges, probation and parole officers, wardens, correctional officers, crime victims, offenders, families of both victims and offenders, and treatment personnel." HtC employs a similar strategy, though it also gains access to such dialogical insights through the constitution of its own task force members, who include a defense attorney, prison chaplain, law enforcement official, and a retired member of the judiciary. HtC has perhaps the advantage of providing for lay audiences an "on the ground" account versus the potentially derivative and "top down" perspective articulated by the Bishops.

[9] Comparison of the documents discloses additional similarities and differences. Both documents attend considerably to the wider social, economic, and cultural challenges linked causally to crime (15; see RRR's policy recommendation on crime prevention and poverty reduction). More pointedly, HtC and RRR isolate the particular challenges experienced by racial and ethnic minorities (see 33–34 and 45 as examples; RRR refers to the disproportionately high rates of victimization and incarceration among African and Hispanic Americans). HtC notes the immense growth of people jailed for immigration violations (43), yet, perhaps attributable to the "long

history of [bishops] supporting the rights of immigrants," RRR attends more substantively to the increasingly punitive methods used to detain immigrants. One of RRR's specific policy recommendations is to treat immigrants justly, and HtC might benefit from expanded discussion of immigration policies and criminal justice.

Both documents voice concerns regarding the rise of prison privatization (44–45) and overly "efficient" procedures of justice such as the social utility of plea agreements (33); RRR abrogates "three strikes" laws" and mandatory sentencing as reductive and oversimplified solutions. These types of concerns derive from an overarching theological concern for the church to advocate for justice on behalf of the dignity of the vulnerable neighbor (37) guided by the model of Jesus (5 and 57; both documents cite Matthew 25).

[10] Indicative of long-standing sensibilities,⁹ HtC bases its model of listening to the particular cries of those impacted by crime, bearing the collective burdens of harm from crime, and advocating for justice for all on biblical claims about the imago dei (18–19) and remembrance of God's deliverance from the vulnerabilities of sin, injustice and death in Christ (37). By contrast (with the caveat that RRR, as noted, engages Scripture thoroughly), RRR appeals to the Catholic sacramental heritage and its practices of penance as a lens for understanding the prospects for reconceptualizing crime and punishment: "The four traditional elements of the sacrament of Penance [contrition; confession; satisfaction; and absolution] have much to teach us about taking responsibility, making amends, and reintegrating into community." In my judgment, these distinct approaches reveal less about the differences between Protestant and Catholic methods (regarding Scripture and tradition) and more about the constructive ways that theological models (interweaving individuals, communities, and God) offer counter-narratives to the current paradigms of retribution and incapacitation as the only privileged strategies of criminal justice. These counter-narratives include sustained calls for restorative justice practices as "full community strategies" (56) that "reflect our values and tradition" (RRR). HtC and RRR should function as catalysts for the growing trends of restorative justice practices within American communities.

[11] Bringing together my earlier comments about Luther's theology and my comparison of HtC and RRR, the theme of paradox deserves specific mention. While synthesis is more commonly found in Catholic perspectives (particularly those informed significantly by Thomas Aquinas), the USCCB notes that its approach to criminal justice can be accurately characterized as a paradox. According to RRR, "We believe in responsibility, accountability, and legitimate punishment.... At the same time, a Catholic approach does not give up on those who violate these laws." Later, in the concluding paragraph of the document, the Bishops connect the paradox to the pursuit of both justice and mercy. HtC explains the dilemmas of approaching crime and punishment in similar terms: "Society needs protection from those who are dangerous, have harmed others, do not take responsibility and lack regret. Yet incarceration, deserved or not, brings its own form of suffering" (14). Despite the shortcomings noted above, the genius of Luther's paradox becomes evident in both Catholic and Lutheran reflection on the complexities of criminal justice. The framework of paradox unsettles static assumptions and monolithic solutions; it allows HtC to observe, for example, that retribution and restoration — traditionally thought to be antithetical — "offer rich possibilities for reflection" (46).

[12] In the concluding section, I want to turn from methodological and thematic considerations to a brief examination of specific issues. HtC rightly addresses the unique ethical and legal concerns related to the juvenile justice system (34–35; 45). HtC offers effective theological reasons for extending hospitality to vulnerable, juvenile offenders, but it neglects a crucial Supreme Court decision. In *Graham v. Florida* (No. 08–7412; decided on May 17, 2010), the Court held that juvenile offenders cannot be sentenced to life imprisonment without parole for non-homicide offenses, thus proscribing certain prison terms for juveniles that functioned as death sentences. Equally important for HtC's interests, twenty religious organizations co-authored an amicus curiae in support of the juvenile offenders.¹⁰ The collaborators included Protestant (but not Lutheran), Catholic, Jewish, Buddhist, Muslim, and Mormon organizations, and the collaborative efforts underscored that religious voices can participate in debates regarding public reason and can proactively appeal to religious grounds for making normative legal recommendations.

[13] The inclusion of the issue of life after crime, discussed in chapter five, provides another illustration of HtC's careful attention to all aspects of crime. Restoring offenders to full community participation is often marred by "invisible punishments," such as restrictions on employment, housing,... and loss of voting of rights, for the rest of their lives" (55). Offenders can gain relief from these invisible punishments through the judicious use of pardons and clemency. HtC makes no mentions of pardons, which, as I argue elsewhere,¹¹ can mediate justice and mercy by providing a legal and extralegal (hence paradox is needed, yet again) framework for attending to individual and communal harms and goods. Pardons offer another way for HtC to reconcile retributive and restorative forms of justice.

[14] *Hearing the Cries: Faith and Criminal Justice* exemplifies what a church can achieve as a community of memory and a community of practical reason.¹² Equally prophetic and engaged in debates of public reason, HtC will inform the consciences and enrich the discourse of Lutherans, other Christians, and responsible citizens. I

have noted a few minor areas where HtC could develop points in relation to Luther's theology or the USCCB's RRR, but I firmly support the document and its commitment to listening to the vulnerable cries of victims and offenders and to rectifying the injustices of the criminal justice system.

Endnotes

1. See, for example, Oswald Bayer, *Martin Luther's Theology: A Contemporary Interpretation* (Grand Rapid, MI: William B. Eerdmans Publishing Company, 2008), and Robert Kolb and Charles Arand, *The Genius of Luther's Theology: A Wittenberg Way of Thinking for the Contemporary Church* (Grand Rapids, MI: Baker Academic Press, 2008).
2. As Luther famously asserted in *Freedom of a Christian*, "A man does not live for himself alone in this mortal body to work for it alone, but he lives also for all men on earth; rather, he lives only for others and not for himself." Luther, *Freedom of a Christian* [1520], in *Martin Luther: Selections from His Writings*, edited and with an introduction by John Dillenberger (New York: Anchor Books, 1962) 73.
3. Some commentators have argued that the focus on the individual in Protestant thought has exacerbated punitive impulses within American society; see, for example, T. Richard Snyder, *The Protestant Ethic and the Spirit of Punishment* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2000). I appreciate the concern, but I am more sanguine about reconciling the individual and communal dimensions of sin, grace, and forgiveness through restorative and retributive practices of justice.
4. Luther, *Lectures on Galatians* [1535], in *Luther's Works, Volume 26*, edited by Jaroslav Pelikan (Saint Louis, MO: Concordia Publishing House, 1963), (3:19), 310.
5. For an elaboration of my own perspective, see Jonathan Rothchild, "Recapturing the Good, Not Merely Measuring Harms: Rehabilitation, Restoration, and the Federal Sentencing Guidelines," in *Doing Justice to Mercy: Religion, Law, and Criminal Justice*, edited by Jonathan Rothchild, Matthew Myer Boulton, and Kevin Jung (Charlottesville: University of Virginia Press, 2007) 63-91.
6. See, inter alia, Jürgen Moltmann, *On Human Dignity: Political Theology and Ethics* (Minneapolis: Fortress Press, 1984).
7. Luther, *Secular Authority: To What Extent It Should Be Obeyed*, in *Martin Luther*, edited by Dillenberger (infra note 3) 374-375.
8. All citations of RRR will not include page numbers because I am referencing the online version, which can be found at www.nccbuscc.org/sdwp/criminal.shtml (last accessed on February 3, 2011).
9. I want to be clear here that I am not re-presenting caricatures of Protestant and Catholic theologies. These sensibilities emerge from historical and doctrinal distinctions, but I believe that continued ecumenical dialogue is possible and needed. I would encourage collaborative efforts regarding their shared criticisms of current criminal justice policies.
10. For further analysis, see Judge Joan Gottschall, "Religion-Based Arguments in Juvenile Life Without Parole Cases," November 19, 2009, *Sightings* (on-line publication available through the Martin Marty Center for the Advanced Study of Religion, the University of Chicago, at: http://divinity.uchicago.edu/martycenter/publications/sightings/archive_2009/1112.shtml (last accessed on February 1, 2011).
11. See Rothchild, "Dispenser of the Mercy of the Government: Pardons, the Rule of Law, and Felony Disenfranchisement," *Journal of Religious Ethics* 39:1 (2011) 48-70.
12. I appropriate this description of religious communities from Don S. Browning, *A Fundamental Practical Theology: Descriptive and Strategic Proposals* (Minneapolis: Augsburg Fortress, 1991).

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