
† CONSTITUTIVE PENOLOGY

Constitutive penology is an extension of postmodernist constitutive criminological theory. Its proponents argue that societal responses to crime are interrelated with the wider society, particularly through “crime and punishment” talk. Discursive distinctions are constructed and continuously reinterpreted (iterated) through penal policy pronouncements, practical actions, discussions in the popular culture, and the proclamations, rules, and practices of institutional structures such as the criminal justice system, correctional institutions, and punishment and rehabilitation. These abstract distinctions obscure the numerous ways in which penological discourse and practices permeate the wider society. They also disguise the connections between the theory and practices of penology and the impacts, costs, and consequences that these have for our societal system. Constitutive penologists call for (1) the integration of prison and related penological practices with society, (2) a demystification of the penological society, and (3) the development of more holistic responses to criminal harm.

Constitutive penologists also argue that conventional penology provides the discursive reference for actions that create, develop, and sustain prison. Discursive structures are embodied with ideological material, which provides the backdrop for socially constructed meaning. Whether penology is taken in its broadest sense to mean the systematic study of penal systems, or the more narrowly focused investigation of the effectiveness of sentencing in preventing reoffending, or even the microscopic examination of penal institutions and their routine practices of violence and discrimination, all research sustains the continued existence of the penological society, dubbed the “incarceration nation.” Thus, debates over being in or out of prison, over building more or less penal institutions, about overcrowding and overspending, about alternatives to and challenges, all continuously assume the taken-for-granted existence of the very structures that need to be questioned and explained. In short, they reinforce the prison as a necessary reality.

‡ CRITIQUE OF CONVENTIONAL PHILOSOPHIES OF PUNISHMENT

Constitutive penologists see penal policy as part of a way of talking about dealing with offenders (discursive process) whereby aspects of existing practice are selected, emphasized, refined, and given linguistic form and formally discussed, while other aspects are ignored, subordinated, dispersed and relegated to the informal, are framed as aberrant, or seen as “noise.” Conventional penologists generally distinguish between six general philosophical approaches that underpin their policies and inform sentencing practice: (1) incapacitation/social defense, (2) punishment/retribution/just deserts, (3) deterrence, (4) rehabilitation/treatment, (5) prevention, and (6) restitution/reparation. For a constitutive penologist, any one of these “philosophies” constructs a false separation between the penal system and society. For example, incapacitation does not separate offenders from society since being in prison is being in society; prison is physically, structurally, and symbolically integrated into the broader community. Rather than “walls of imprisonment,” there is continuity between being “in” or “out.” The incarcerated are not incapacitated, since they do additional and, in many cases, more serious forms of offensive behavior inside prison as a reaction to their confinement. Metaphors for the lawbreakers such as “slime,” “dirt bag,” “asshole,” and “scumbag” often both objectify the humans who perpetrated the harms and provide the very “logical” penal response that encourages the development of a pool of suspects, shielding other more invisible and powerful “excessive investors” in harm production from potential incrimination while maintaining the need for social structures of control.

Constitutive penologists also point out that we pay the economical and social costs of massively expanded prison programs. Socially, the “new
penology” of incapacitation has accentuated the issue of race in American society, since one in three African American males aged 20–29 are in prison, on probation, or on parole. This permeates the minority perspective of those people of color outside prison who withdraw sentiment for, and commitment to, society’s formal institutions, especially from government and law enforcement. It simultaneously corrupts the majority white population’s views on minorities, thereby contaminating day-to-day interaction; through this, the institutions and structures of society reinforce the justification for implicit and institutionalized racism. Thus, argue constitutive penologists, incapacitation has a major impact on the nonwhite and white populations. Once moral sentiment is withdrawn, people feel morally justified in violating all kinds of rules based on the rationalization that “whites” and other dominant groups in general cannot be victims of specific crimes, since their racist violations of minorities make them the aggressors. Minorities are merely taking back what was seen as rightly taken from them, including dignity, self-determination, property, and even life itself.

Finally, incapacitation feeds the false security of social order and the “safer with them behind bars” mentality. The paradox is that for each constitutive brick of incapacitation we release another swirl of freedom for “accident makers” (Bhopal), “liberators” (Iran-Contra), “job creators” (GM’s Jeffrey Smith), “risk takers” (Boesky, Milken), and “fabricators” (Enron). We feel safer in our homes and workplaces, yet it is often in these routine places that we are most victimized.

Constitutive penologists apply a similar analysis to the other penal policies. For example, they claim that advocates for punishment/retribution/just deserts foster the idea that there are circumstances where it is acceptable to harm others on the basis that harmful acts should be followed by other harmful acts, as though it was self-evident that this equation of proportion and reaction was justified. Likewise, deterrence communicates the idea that we should seek ways to avoid making our own acts appear like those that are punishable for fear that we too will be punished. Ideas of rehabilitation/treatment, argue constitutive penologists, suggest that both the harms committed and the victim who suffers are less important than manipulating aspects of the individual offender’s personal or situational environment to prevent them from harming again. This conceptual separation of victims, offenders, and environments overlooks the interconnected and coproduced nature of social “reality,” failing to see that we are locking the offender into the very social role that the policy intends to expunge.

Finally, constitutive penologists criticize the more radical philosophies of restitution/reparation. They acknowledge that this approach at least brings the victim back in to share their experience of being harmed with the individual/agency that allegedly caused the harm. They also point out that insofar as the community and control institutions have a facilitative role, then less harm is being done by this kind of mediated intervention. However, they argue that the hidden message of restorative justice is that getting together and talking about a problem can fix it, without recognizing that the very structural situations in which folk are enmeshed are not part of the transformational mix. Neglected is an understanding that the emerging “mediation-discourse” is itself the basis of reducing differences into least common denominators, which can mean “equitable” solutions, downplaying the uniqueness of the disputant’s own constructions. In other words, bureaucratic discourse that promotes “mediation” and “resolutions” overlooks differences in discursive practices that privilege some over others and their associated underlying ideologies; rarely is the outcome of restorative justice that institutions of society see themselves as a contributing force.

AN ALTERNATIVE SEMIOTIC APPROACH

Constitutive penologists are concerned with how criminologists may, despite their best intentions, replicate the very system they try to understand and critique. Criminologists do this by constructing ideal typical classifications that disguise how policy makers, practitioners, targeted agents, and theorists de-emphasize some aspects of the reality of prison practice as aberrant, unofficial, informal, or untypical in order to make claims about its operational
identity. To avoid legitimating the prison while analyzing penal policy, constitutive penologists argue that it is necessary to use a semiotic approach that deconstructs the role that language use plays in the construction of the penal system and its attendant philosophies and institutions. Transformation of crime and societal responses to it, they argue, requires a reintegration of crime and societal responses with the whole of which each is a part, and they indicate that a change in the whole is necessary to bring about a change in any of its parts. This is a holistic exercise, in many ways analogous to the hologram where illumination of any part reproduces the whole; the “part” resides in the whole, but each part represents the whole.

An alternative direction would provide an opportunity for the development of a new “replacement discourse.” Replacement discourse is not merely another package of ways to talk and make sense of the world, but a language of “transpraxis.” It connects the way we speak with our social relations and institutions, so that we are continuously aware of the interrelatedness of our agency and the structures it reproduces through the constitutively productive work of our talking, perceiving, conceptualizing, and theorizing. “Transpraxis is a deliberate and affirmative attempt not to reverse hierarchies but, instead, to affirm those who victimize, marginalize and criminalize while renouncing their victimizing, marginalizing and criminalizing practices. Transpraxis is an effort to validate the act of resistance. The key to transpraxis is speech, words, grammar and how we talk about (and then act upon) emancipation” (Arrigo, 2001, p. 220). Constitutive penology asks us to rethink the discursive structures within which we situate our research on the penal question.

Constitutive penologists have suggested several directions and alternative notions for the development of social justice: social judo; replacement discourse; transpraxis; newsmaking criminology; narrative therapy; reconceptualizing crime as “harms of reduction” and “harms of repression”; recovering subjects; an understanding of the social formation more in terms of historically contingent and relatively stabilized configurations of coupled iterative loops (constitutive inter-relational [COREL] sets), which can be seen as the basis of contingent “structures” with effects; and forms of an empowered democracy in a political economy identified by Unger as “superliberalism.”

Social judo responds to the state’s continued investment in violence to counter harms (called criminal justice), which thereby escalates the overall prevalence of violence in society. It argues for creative responses whereby those investors in harm have their power turned against themselves. It is a policy of undermining excessive investors in harms. In its maximal beneficial form, conflict is an occasion to reexamine given societal relations, institutions, and structures and their tendencies toward harm. Reconceptualizing harm in terms of “harms of reduction,” whereby a person is reduced from some standing, and “harms of repression,” whereby a person is denied her or his ability to attain a position sought without it being at the expense of the other, provides a suggestion for an alternative way of perceiving harm. It takes us beyond the restrictions of the legalistic definition of crime.

The notion of COREL sets offers an alternative nonreductionist way of historically conceptualizing the interconnectedness of prison and prison policy with the social formation, and for shedding light in a political economy on the various forms of excessive investment to impose power on others in the form of harms of reduction or repression. Constitutive penology, then, would make as its first priority the development of a social formation, which minimizes harms of reduction and repression. They argue that it is in the very resolution of conflicts that we need creative initiatives that transform the process whereby the conflict reproduces harm that sets in place new conflict. They believe that this cycle of conflict production must end. Constitutive penologists have advocated a multifaceted approach to “criminal” justice policy. Their “radical accusatory” policy implicates the entire society for its contributions to harm; their “reformist remedial” policy is much in accord with Unger’s superliberalism, which advocates an empowered democracy. A social justice approach would implicate the individual, community, and societal levels consistent with “transformative justice.”
CONCLUSION

A genuinely alternative, replacement discourse would envelop not just the declarations of policy but the ways its practitioners and policy makers distinguish their reality from the totality and point toward ways these can be reintegrated. It would require a “bringing back in” of the underemphasized, informal, unofficial, marginalized practices (the unspoken) that are part of the totality of the prison business. Only with such a comprehension of the totality and the contribution of these excluded parts to the reality-making process, argue constitutive penologists, is it possible to provide an alternative understanding of the phenomena of crime and crime control in our society. Only from such an understanding of the total constitutive process is it possible to generate a replacement discourse that begins the deconstruction of penology, the correction of corrections, and the ultimate reconstruction of penal policy that is its own demise.

—Dragan Milovanovic and Stuart Henry

See also Abolition; Activism; Deterrence Theory; Michel Foucault; Incapacitation Theory; Just Deserts Theory; Rehabilitation Theory; Resistance

Further Reading


CONSULAR VISITS

Pursuant to the guidelines established by the Vienna Convention on Consular Relations (VCCR) in 1963, any criminal justice or correctional institution detaining a foreigner must notify him or her of the right to have his or her consulate notified about the confinement. The United States, which ratified the convention in 1969, considers the right to consular visitation within correctional institutions so fundamental that the U.S. State Department requires it for all international detainees (other than those suspected of terrorism), even if an inmate’s country of origin has not signed the VCCR. Following the detainee’s request to have the consulate informed of the arrest and confinement, the custodial criminal justice institution may permit a locally stationed consul to visit the detainee in the institution without hindering access or communication.

WHAT DOES A CONSUL DO?

The consul is an official representative of a particular government who lives in a foreign country to help the home nation’s citizens within that country and to represent the home country’s interests in various affairs. Generally, consuls should provide