

1998

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Recommended Citation

Bodapati, Madhava and Hoffman, Harry (1998) "Criminal Justice: In Search of a Human Face," *Great Plains Sociologist*. Vol. 11 : Iss. 1 , Article 3.

Available at: <https://openprairie.sdstate.edu/greatplainssociologist/vol11/iss1/3>

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Criminal Justice: In Search of a Human Face

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Abstract

In this paper, we view the unfolding discourse of what is referred to as the Peacemaking and Peacekeeping approach. It is a discourse purporting to examine the fundamental assumptions, practices, and truth claims of both criminology and the criminal justice system. The paper begins by providing an overview of what we take to be a central concern currently confronting the CJS and the remedies proposed by peacemaking. We conclude by posing a series of questions which this approach must confront if it is to retain its integrity as a viable alternative to the contemporary approaches it seeks to critique.

Precisely because the criminal justice system (CJS) circumscribes our actions, each generation has the right, if not the obligation, to question the legitimacy of the system's practices. Such questioning has produced various responses ranging from the divestment movement of the 1960s and 1970s to the contemporary camcorder detective, *COPS, America's Most Wanted*, and, at a more light-hearted level, *America's Dumbest Criminals*. The CJS, very much accustomed to such questioning, again finds itself in the position of having to justify its practices and ultimately its existence due in part to the legitimacy demands placed on it by the developing peacemaking and peacekeeping (PMPK) approach. As with previous demands for legitimacy, the very concepts steering

the system, e.g., control, justice, security, safety, order, fairness, etc., stand to be indicted. Also at issue is whether the demands for legitimacy currently promulgated by this approach and the system's responses to these demands can be met in such a way as to minimize the potential impact on previous justifications. Clearly, any attempt the CJS makes at re-defining and/or re-designing its position relative to the state, the community, the individual, and itself will be no easy task, primarily because the steering mechanism previously guiding the system stands to be eroded.

The process of re-defining and/or redesigning any system including the CJS has long been recognized as enhancing the potential for creating disorientation and confusion. In this context, re-legitimation almost always demands a new or modified way of thinking. Bartky (1990), for example, has shown that during such times formerly binding frameworks are not only questioned, but previous interpretations are rendered problematic precisely because of the unavailability of benchmarks. The question nonetheless remains, "Will or can the system meet the task?" If so, what obstacles must it overcome, reconstruct, or completely jettison? These and other questions lie at the core of the PMPK approach.

The prospects for PMPK seem difficult to comprehend in an environment rightly characterized by its ferocious tendency towards consumption (not only of eatables, art, and culture, but of each other and ourselves). Yet, as Benjamin (1965) was so fond of noting, it is in the end the hopelessness of the situation that holds out the possibility for hope. It is perhaps the hopelessness of the situation that lies behind proposals advocating a reconstitution of the CJS along PMPK dimensions. Notwithstanding the ever popular mantra, "Yes, it has problems, but it's the best in the world," that such a reconstitution is necessary seems almost frighteningly self-evident and long overdue. That a rather large dose of intellectual and practical Geritol is needed to infuse new life into a system bending under the weight of the very bureaucratic

divisions initially put in place to avert an impending motivation crisis too seems self-evident. Yet, it is precisely because they are self-evident that they have remained, to borrow from Hebdige (1989), so well hidden in the light.

Crime Control and Due Process: An Unhappy Alliance

The proverbial arm of the law is, contrary to popular hope and expectation, not infinite. Contin, and distribution through juvenile ultra-violence, failures of the CJS, and disparities in justice administration drive home just how limited this arm truly is. Consequently, the inability of the legal arm to extend and penetrate the now oft cited "violent society" has heightened an already extreme preoccupation with crime, justice administration, and the newly discovered socio-psychological harm produced. This brings into sharp relief the idea of control; specifically, what it means, what it is to accomplish, and whether or not this concept lends itself to what is now commonly referred to as peacemaking and peacekeeping. The centrality of the issue becomes painfully clear when we acknowledge that ideas and perceptions play key roles in shaping our social reality by framing the very cultural, social, political, etc., priorities and practices that influence our action.

By any standard of comparison, i.e., official statistics, public opinions, correctional overcrowding, ever-increasing budget demands, practitioners' attitudes, and old-guard comparisons of "now vs. then," the CJS in its current configuration emphasizing crime control philosophy and an agenda expressed in repeated (albeit metaphorical) calls to war is failing. Some might even suggest that the lofty, often conflicting goals set by the system in the first instance preclude success. But what is problematic with the crime control model?

To begin with, although the crime control model predominantly influences the CJS's modus operandi, it is in

constant contention with its allegedly more humane counterpart, the due process model. Theoretically, ideologically, and practically these two models of operation are antithetical to each other. The former is rooted in an administrative outlook and attempts to manage and dispose of cases without delay. Both efficiency and internal effectiveness steer it. The latter, adversarial by nature, guarantees -- ideally -- processual rights without regard for time and expense. The crime control model, assuming a high degree of organizational confidence, seeks to repress and suppress crime at the cost of individual rights, while the due process model upholds individual rights and guarantees by relegating crime control to a secondary position.

It is not surprising that these two models influence the operations of the CJS since the system per se attempts to balance societal safety with the rights of the accused. To a remarkable degree, this dual role is characteristic of the national psyche in that complete trust, power, and authority are not vested in a single person or organization without filtering it through the trust, power, and authority vested in another person or organization. Is it any wonder that both the crime control and due process models have fallen short in their quest for successfully meeting the expectations of their respective supporters?

That these two models are unable to meet expectations is more a factor of the times and circumstances within which the CJS operates. Conceivably, given reduced societal pressures and realistic expectations, both models working in conjunction can fulfill their respective roles as well as make the system less dysfunctional than at present. This conception naturally supposes that there are factors inherent in the present societal structure (naturally since the CJS operates within it) that generally contribute to its problems and specifically make the crime control model ineffective. These structural factors lead us to the remaining problems underlying the crime control model's ineffectiveness.

Prison and Reform

We have long taken pride in the fact that we have moved away from punishing crimes and instead place culpability on criminal intent (read the criminal). As a corollary, we also have replaced the body as the site of punishment with the soul (Foucault 1979). Each, of course, has placed restrictions upon the system and its crime control model's ability to fulfill expectations. On a very obvious level, it has transformed the crime control model into a criminal containment model. Not only are we no longer chastising actions irrespective of intent, we also have become very predictable and unspectacular with our punishments. The worst punishment we have to offer short of a very scientific, rational, and presumably painless ritual of life-taking is life in prison. We have (or so it is proposed) achieved what we set out to do with our punishment system; we have caught up with the evolving standards of decency of a maturing society.

Given the sedentary nature of the most stringent punishment that is now available (life without parole), it can be argued that the net deterrent effect of punishments has been minimized, if not negated. The most severe form of punishment that society presently offers is accompanied by three square meals a day, clothing allotments, increased opportunities for vocational training and education, (participation in which earns good time in many states), conjugal visitation rights, entertainment, cable TV, and fitness facilities. There are plans afoot to provide air-conditioned facilities in regions where summers are intolerably warm for inmates. Philosophically, correctional officers may rightly argue that these provisions increase offenders' chances for rehabilitation while at the same time occupying those who will always remain incarcerated since civil death need not necessarily be accompanied by socio-cultural death. Practically, it is undeniable that they reduce or displace inmate unrest and violence.

From a societal perspective, where many live well below the standard of living now provided in correctional facilities, the opposite may be true.

But such conditions of incarceration, it is argued, take the teeth out of the correctional bite (an integral component of crime or criminal control logic) by bringing a homey atmosphere into the prisons. The worst fear of incoming prisoners is not the misery of prison life (an important factor as to why law-abiding citizens remain so) but the fear of attacks from other inmates. This has caused a dramatic increase in prison gang membership, another issue altogether.

Along with the congenial atmosphere in correctional units is the problem of limited holding capacity. The revolving door phenomenon whereby inmates serve portions of their sentences, is another factor mitigating the deterrent effect of punishment. The limited stay of inmates has tremendously affected all four correctional goals of rehabilitation, retribution, deterrence, and, most certainly, incapacitation. Although some writers have argued that the net effect of the revolving door phenomenon has not decreased the average sentences served, the perception still exists (justifiably in many jurisdictions) that correctional units cannot hold inmates as long as the law dictates.

Divestment as Re-legitimation

During the 1960s and early 1970s, the legal sphere, particularly the CJS, had expanded both its legal (and by some accounts) its political boundaries. Due in part to increasing demands for legitimacy and accountability, the CJS absorbed issues formerly beyond its purview, e.g., gender equity, disparity based upon racial and ethnic lines, and mental health. As a consequence, in an effort to accommodate these new issues, the system expanded its level of bureaucracy to such an extent that by

the mid 1970s, all distinctions which formerly served to identify the newly incorporated issues were dissolved. Incorporating these issues had, in a manner of speaking, become counterproductive primarily because the system was never able to produce a consensus nor sense of obligation which extended beyond simple cost/benefit equations. That over-bureaucratization tends to manifest itself in irrationality, inefficiency, and in other pathological expressions is well documented (Piccone & Ulmen 1993).

This situation led, according to Kittrie (1971), to wholesale divestment. Divestment, as generally conceptualized, denotes relinquishing control or jurisdiction over various subjects or spheres formerly in need of surveillance. As a process, divestment also involves moving an individual, a behavior, or an entire issue from one realm of control to another. Regarding the CJS, the psychopath, the mentally ill, and the drug addict are examples of where the system divested itself of a certain class of individual. Similarly, the system has also divested itself of the policing function of behaviors, e.g., drug addiction and chronic alcoholism. Two points need to be emphasized. First, regardless of who the individuals are or what their behavior, they nonetheless continue to be subject to some form of control. In other words, divestment does not occur unless some controlling agency exists which can take up jurisdiction. Second, divestment is typically not permanent, i.e., it can be retracted at any time if new forms of control are found to be ineffective or exhaust themselves.

Camcorder Crime Control

To overcome the limitations of a defunct correctional component and perhaps a premature divestment strategy, alternatives were designed to revitalize an exhausted justice system leading to the now infamous net-widening syndrome. The

resultant surveillance widening has led to an unprecedented number of behaviors deemed inappropriate. Consequently, the net often invoked to characterize the CJS continues to widen. As it widens, stress factors formerly unimportant take on an increasing amount of importance. The larger the net, the more fish caught; the more strain placed on the net, the more likely the net is to break. Inevitably, as the net widens and encompasses a greater variety of fish, its fiber becomes less stable while the tendency toward expanding the area of surveillance becomes greater. Though we can continue this analogy ad infinitum, the point is this: Today's CJS is indeed spread rather thin due to the increasing impact of integrity demands usually turning on the crime control versus due process model premise. Consequently, to counter demands upon its legitimacy and integrity, the system shifts its concentration toward certain segments proven to be fruitful while other areas and behaviors normally hidden in the light are turned over to the quasi-policing arm. In other words, the system enlists, much like Santa Claus, additional elves to aid in surveillance in an effort to prevent, displace, contain, and/or eliminate activities deemed inappropriate. Giddens (1991) recently suggested that "expansion of surveillance capabilities is the main medium of the control of social activity by social means." Under contemporary conditions, the expansion of surveillance capabilities has generated what Giddens refers to as "particular asymmetries of power" which allow some groups to consolidate and rule others.

Last year alone, the CJS inadvertently enlisted approximately fourteen million additional elves to the cause, i.e., to assist in determining who is good, bad, or at a pre-stage of badness. Armed with the latest crime fighting equipment, the video camera, the camcorder community crime control model developed. No longer confined to documenting the birthday party, weddings, barbecues, or America's most funniest, the camcorder detective (both professional and amateur alike) now patrols and subjects to

celluloid more and more behavior. Though by no means full-proof as evidenced recently by an L.A. group of peers, this new appendage of the CJS raises some rather serious questions and poses even more serious implications for a system in the midst of a crisis.

In summary, crime control has essentially become criminal control via containment under congenial conditions, divestment, and self-mobilizing in the case of surveillance. But even these forms of control are limited by the system's own carrying capacity. Despite these restrictions, if any deterrent effect is still left in the crime control system, it is more than negated by the profits facilitated by the state-sponsored war against drugs. With the monetary incentives that drugs and other criminal opportunities offer, what deterrence can be expected (particularly a deterrence model which has yet to incorporate a proper understanding of the quality-of-life thesis) from an overly friendly punishment system that is collapsing under its own weight? It is not surprising that offenders might prefer prison terms to probation and possibly other forms of punishments. For most, punishments have been reduced to one of many unavoidable but temporary jolts that most businesses expect and accept as risks of the trade -- a slow season.

The Peacemaking Approach

In this context, peacemaking as a new approach for assessing and understanding the CJS was forwarded. What is peacemaking and peacekeeping? To begin with, it is safe to assume that peacemaking necessarily precedes peacekeeping. Hence, to the extent that peacemaking/ peacekeeping can become a reality, the formation of an alliance or coalition with similar or at least somewhat compatible agendas must be devised. In addition, peacemaking involves imposing specific value and/or norm orientations upon those in need of peace. This necessarily

presupposes finding and clarifying the universal character of a norm or value to ground the idea of peacemaking and eventual peacekeeping.

As recently articulated, the PMPK approach takes to task a number of fundamental premises sacred to the contemporary CJS (Pepinsky & Quinney 1991). For example, according to this approach, research has been designed primarily to assist the system in reducing, eliminating, containing, divesting, or preventing crime without incorporating a genuine notion of human rights into its agenda. The site where one can locate such an idea and where the agenda can be established is where peace already exists (or at least where people make a genuine effort to make peace). Not to diminish the seriousness of this claim, but by definition, this will narrow our search considerably. The question, however, remains, "Where does this search lead us?" It leads us to a few isolated or semi-isolated communities and to a direct encounter with Montesquieu and Tocqueville. By their very nature, isolated and/or semi-isolated communities are more conducive for maintaining the peace precisely because the distance which values and norms must travel is reduced and hence less subject to manipulation and reinterpretation. But even here, the question of what and how mechanisms achieve peace and sustain peace, e.g., via authority (legitimate or otherwise), patriarchy, despotism, etc., remains unclear.

Reconsidering the nature of punishment too becomes an agenda item. Formerly directed at insuring safety, punishment is now to be considered in the context of what is safest. In line with Lukas (1951), we can no longer be content with simply repressing crime in the name of prevention. Shifting the focus to what is safest leads to a reexamination directed at understanding the social and cultural contexts of violence and crime, a shift, it should be mentioned, that lays the foundation for an eventual victim/offender reconciliation.

Without denying the role of confrontation in individual, communal, or societal interactions, peacemaking seeks to develop non-violent approaches to dealing with violent confrontations. While violence may have been the primary confrontational force used in the interaction, peacemaking emphasizes the futility of further violence. The spirit of this approach lies in finding a common ground between offenders and victims where the ills of one wrongful act are prevented from spiraling into multiple wrongful acts in the name of retribution, just deserts, justice, or deterrence. Also fundamental to the peacemaking approach, and directly ensuing from the previous observation, is a rejection of the conventional "crime control model" of the CJS with its war rhetoric and curbing force-with-force ideology.

Further, sharing a common ground with the traditional albeit crude humanist Marxist duality of social forces, peacemaking dichotomizes society into the powerless and the powerful with the underlying tenet that crime is caused and promoted by the constant struggle of the powerless to tip the balance in their favor. The solution, according to traditional peacemaking supporters, lies in the powerful sharing (read yielding) some of their power to the powerless. Each confrontation between criminal justice practitioners and their subjects is viewed as a potential peacemaking incident (sharing of power) thereby converting the conflict into a balancing-of-power situation.

As with most new approaches, there are several fundamental problems that may deny peacemaking success in contemporary society. First, the capitalist economic system is based on the core concepts of competition and consumption and a very Ulyssean vision of individualism. In all aspects of our lives, competition and consumption abound, from politicians competing for the electorate's votes to the homeless competing for a warm nook in a cold alley to the trials and tribulations of Tonya and Nancy, and, more recently, to those of Linda, Monica, and Bill.

And power, whether we like it or not, is one indicator of success in this competitive society along with others such as status, wealth, tenure, and fame. Given that more power indicates greater success in competitive capitalist economies, how realistic is it to expect power-holders to share their power (willingly) with the powerless?

The second problem with the traditional peacemaking approach is that we are starting at a late stage. By the time the power brokers in the CJS have reached the confrontational/peacemaking stage, they have already imbibed the capitalistic connection between power and success. The foundation of peacemaking's success lies in the sincerity of the power holders in their power sharing efforts. That apart, peacemaking will also fail if the powerless, upon gaining some shared power from the powerful, fail to recognize when the disparity has been repaired. Such failure will result in a whiplash reaction from the formerly powerful to regain their erstwhile position. Neither of these, sincerity in the peace sharing efforts and recognizing parity achievement, is possible if peacemaking as an operational model is implanted in the system. A recent example of this forced peacemaking effort is the on-going process of parity establishment between pro-socialist and pro-reformist forces in Russia.

The final and perhaps most formidable obstacle confronting peacemaking under current capitalist conditions, however, is the stage of peacemaking in the human evolutionary scale. Buddhism, probably the most influential of all religions upon the peacemaking approach, begins where pursuits of happiness and pleasure, driven by and through materialistic means, ends. Buddhism opposes catering to the needs of the self and the overwhelming importance of selfish pursuits in the materialistic world that characterizes humankind's quest for individual happiness. The stumbling block here might be the possible preoccupation with human rights. Specifically, the emphasis seems to lean towards a reliance on abstract documents rather than with concrete relations and the

ability to guarantee respect and human dignity.

Desire for happiness is universal, but true and lasting happiness is jeopardized by the reality of suffering. Suffering is caused by lust, anger, desire, arrogance, greed, and jealousy. Annihilation of suffering, thus, becomes the precondition for access to peace in our existence. This requires rejecting (perhaps redefining) the pursuit of self-based happiness through the virtual denial of self and all selfish qualities. This raises an issue best described by Hubscher (1990).

[A]ll attainable happiness stands in an irreversible, reciprocal relationship with suffering; the removal of all wants and suffering always leads to others; and this primary constitution of the state of the world can never and nowhere be repealed. What can be done and achieved is this: that in a wretched and hopeless world, to the extent that this is possible, one tries to struggle for a meaning of the human condition, strengthens the self-assurance of the individual against the collective forces, and consequently also keeps alive 'the longing for the other' in which a residue of human solidarity is manifest. Doing, acting is not rejected; it is being affirmed in its narrowly delimited possibilities.

The capitalistic model, as mentioned earlier, is based on competition obviously driven by the "selfish" nature of accomplishment, success, and victory over competing parties. How then can we accommodate a peacemaking model founded upon denying selfishness within a society driven by an idea of the self?

The answer lies well beyond the scope of social engineering, crime control, and repeated calls to war. Nature's unity is composed of a delicate balance of opposites. It is a

balance maintained, if you will, by the continuous juxtaposing of chaos and order in such a way that each component tempers and is tempered by the other. Without a doubt, our situation is one that forces us to make a choice between one or the other. Given our order trained psyche, it is not surprising that the current position requires that chaos be pushed aside. Unfortunately, such a choice misses the very thing whereby balance can be maintained, i.e., both are inherent in all things. It is part of our nature that cannot be split. Does this constitute a struggle? Yes. Struggle, however, does not necessarily denote a negative quality. We need to recognize that both qualities must be embraced again in order that balance can be reinvested with confidence. We must, to put it quite simply, celebrate difference, and through the celebration realize unity. Societies, likewise, strive to maintain parity between opposites, and one of the parities always trying to establish balance is the importance of self and selflessness in human activities. The history of the United States is perhaps too short to have experienced this process in full, nevertheless, we view the current discussion of peacemaking in an otherwise self-based social system as part of just such a process. Older cultures such as those found in Japan and India have experienced many cycles of this process.

Unfortunately, pursuits of happiness both based on and in denial of the self have limitations difficult for human endurance. Denial of self, history informs us, though leading to economic deprivation, yields emotional and spiritual wealth. Given the fact that "spirit" has become suspect, the pursuit of self-based happiness promotes economic and materialist prosperity yet also legitimizes power and class inequalities. That these dualities will ever find balance may appear as unrealistic as expecting a return to Eden.

We may find an increasing acceptance of the peacemaking approach in dealing with criminal and social disparities to such an extent that it will become a mainstream alternative to the CJS.

Perhaps through finding and maintaining a balance, the CJS will find its human face. A face that maintains the qualities of Janus, and one that celebrates difference by recognizing the unity this implies. Once mainstreamed, however, the problem of instrumentalization may become its next obstacle. That is to say, the peacemaking approach is correct in that institutions, especially the CJS, must be confronted with its own mask and what lies beneath it. This encounter and its reaction to the encounter will determine its future. Peacemaking too must confront itself with the same questions, masks, etc., currently held up to the CJS. In a Foucaultian manner, it too must de-familiarize in order to re-familiarize. Optimism, much like Marx's description of religion as the "opiate of the masses," can cloud our vision and facilitate yet another addiction. To develop a system, a situation of mutuality (communitarianism and compassion with a human face) should be our first priority. But, then again, within the confines of our offices, the distance that this belief has to travel is rather short.

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