
INTRODUCTION: POSTMODERNISM AND CONSTITUTIVE THEORY

In *Constitutive Criminology* (Henry and Milovanovic, 1996) we developed a holistic, integrated criminological theory informed by the postmodernist critique. *Constitutive Criminology* was the first full and systematic exposition of an affirmative postmodernist criminology whose early statements (Henry, 1989; Henry and Milovanovic, 1991; 1993; 1994; Milovanovic, 1992; Milovanovic and Henry, 1991) generated considerable interest among theorists, practitioners and a range of other students of criminology, from high school to graduate level. Some initial reaction came from noted criminologists, sociologists and social theorists, who drew on constitutive ideas to inform the development of their own theories, including: a constitutive theory of law (Harrington, 1988; Hunt, 1993); integral legal pluralism (Fitzpatrick, 1984, 1992); cultural theory of law (Silbey, 1992); autopoietic theory of law (Teubner, 1992, 1993); and reflexive criminology (Nelken, 1994). Our later statements also influenced Barak's (1998) holistic integrated criminology. But the reach of constitutive criminology was not to be confined to the ivory tower.

At another level, constitutive theory's ideas and insights served students such as Zack Early and Amir Ghavi from Milton High School in Georgia, Loren Dent from the Georgetown High School in Georgetown, Texas, and Scott Junior of The Woodlands High School in Houston, Texas. With encouragement from their forensics coaches (not least Brad Byrd of The Woodlands), these students used constitutive ideas on the national circuit of the 1997 National Forensics' debate, which was focused on juvenile crime. It was very encouraging to learn that these students had spent the time to grapple with issues such

as modernity versus postmodernity, praxis versus transpraxis, and replacement discourse—concepts which many seasoned criminologists have found difficult!

High school students notwithstanding, the major development came from within the field of criminology. Among leading criminologists the constitutive idea has now been accepted into the corpus of criminological knowledge as a significant theoretical contribution, and one of the few criminologies illustrative of the postmodernist perspective. The initial statement (Henry and Milovanovic, 1991) was cited among nine key works that “have added to the richness of criminological theory,” and which “extend the bounds of traditional criminology” (Stitt and Giacomassi, 1992: 6). In a substantial review Gibbons (1994: 164) discusses the theory as one of the “new criminologies” that warrants attention, not least for its valid contention that “crime is both in and of society.” Most recently, in his attempt to locate the roots and intellectual influences on constitutive criminology, Arrigo (1997: 392–93) proclaimed that, “constitutive thought is now firmly established as a leading conceptual orientation in the sociology of law and in criminology,” but he admits that it is “relatively new and not yet fully legitimized.” And Ruller (1997: 497) predicts that “we can expect a slow and steady infiltration of postmodern elements into the discipline. Indeed, this infiltration is already well underway.”

In this introduction, we want to take a few steps back to briefly define and describe, in as simple terms as possible, the roots of constitutive theory as it developed from an affirmative version of postmodernism.

Postmodernism

Postmodernism refers to a school of thought that has emerged out of a period of intense skepticism with science. Scientific method and rational thought were outcomes of the eighteenth-century Enlightenment and prevailed until the late twentieth century. They assume that rational and objective scientific methods can be used to discover knowledge and truth which can then be used to solve society's problems and to control nature. The concept of scientific “progress” has characterized the “modern era.” Disenchantment with modernism (linked to the suffering that its hierarchies, divisions and exclusions have brought to many through imperialism, sexism and racism and

class oppression), together with its increasing inability to solve society's problems (e.g., pollution, poverty, crime), have led many to question the value of scientific analysis and rational thought (Hunt, 1991; Best and Kellner, 1991; Borgmann, 1992). Postmodernists see rational thought as a form of elite power through which those who claim to have special knowledge earn the right to decide the fate of those who do not share this knowledge.

Postmodernists fundamentally disagree that there is such a thing as objective truth. Instead all knowledge is seen as subjective, and is shaped by personal, cultural and political views. Postmodernists argue that all knowledge is made up simply of "*claims to truth*" (Foucault, 1977, 1981). They believe that knowledge and truth are "*socially constructed*." This means that they have no independent reality other than in the minds and practices of those who create them and recreate them. Knowledge is artificial, an outcome of humans making distinctions and judging one part of any distinction as superior to another; one set of ideas as superior to another, and so on. Moreover, these distinctions are conceptual and are made through communication, particularly but not exclusively written or spoken language, referred to by postmodernists as "*discourse*" (Manning, 1988).

One of the major causes of conflict and harm in societies, say postmodernists, results from people investing energy in these "discursive distinctions," believing in their reality and defending them and imposing them on others. Distinctions made in discourse result in categories that exclude. For example, the gender distinctions "men" and "women" exclude the differences within these categories and preclude connections between them, so too with "black" and "white" distinctions based on race that also exclude others.

Postmodernists reject the self-evident reality of distinctions. They reject that distinctions should be made between different kinds of knowledge, especially between "scientific knowledge" and "common-sense knowledge." One of their principal tools of analysis is to expose the socially constructed nature of privileged knowledge through what is called "*critique*." This is different from criticism. Critique is a continuous process of challenge to those who claim to know or hold the truth. It uses "*deconstruction*" (Derrida, 1970; 1981) to expose the socially constructed rather than the real nature of truth claims.

Deconstruction is a method of analysis that seeks to "undo" constructions, to demolish them, but to do so in a way which exposes how they are built and why they appear to be real (Rosenau, 1992; Cohen,

1990). As T. R. Young explains, “whereas modern science privileges objectivity, rationality, power, control, inequality and hierarchy, postmodernists deconstruct each theory and each social practice by locating it in its larger sociohistorical context in order to reveal the human hand and the group interests which shape the course of self-understanding” (1995: 578–79). Indeed, part of the postmodern critique involves the “resurrection of subjugated knowledges,” the excluded, neglected and marginal knowledges discounted by dominant social constructions.

Although some commentators have claimed there are numerous versions of postmodernism (Schwartz and Friedrichs, 1994), we have found it helpful to distinguish two broad types: *skeptical* and *affirmative* (Rosenau, 1992; Einstadter and Henry, 1995). *Skeptical postmodernism* refers to the work of those who believe there is no basis for objectivity and no way truth either exists or can be discovered. They use deconstruction simply to undermine all claims to truth, revealing its underlying assumptions and disrupting its acceptance as fact. In some cases they imply an extreme relativism that has no standards and accepts anything as valid. They do not believe in suggesting alternatives because to do so would then also be making truth claims and be subject to their own criticism (hence skeptics are also called *nihilists*). Indeed, Matthews and Young (1992: 13) comment that early skeptical postmodernism in criminology focused on “deconstruction rather than reconstruction.” This has parallels with the early preoccupation of critical legal studies theorists in “trashing.” While we think skeptical postmodernism has considerable value as a critical and analytical tool, we believe the affirmative approach has the most to offer those studying crime.

Affirmative postmodernism refers to those who believe deconstruction also implies reconstruction or rebuilding: “exposing how an edifice is built, and how it stands, in spite of opposition, also implies how it can be rebuilt or built differently” (Einstadter and Henry, 1995: 280–281). In deconstruction, affirmative postmodernists show how humans actively build their social world, rather than being passive subjects of external forces. They also show how people could invest their energies to build new social worlds. Building, however, does not also mean that the results are completely foreseen as integrative processes develop. This approach, especially as developed in our constitutive theory, transcended the limits of skeptical postmodernism’s obsession with deconstruction by addressing the possibili-

ties of reconstruction. Like Matthews and Young, our position “refuses to be drawn into the defeatism and pessimism associated with some current strands of ‘radical’ theorizing, particularly in the form of [nihilistic] postmodernism” (Matthews and Young, 1992: 20).

Constitutive Criminology

The core of our constitutive argument is that crime and its control cannot be separated from the totality of the structural and cultural contexts in which it is produced (Henry and Milovanovic, 1994; 1996). It rejects the argument of traditional modernist criminology that crime can be separated from that process and analyzed and corrected apart from it. Crime is an integral part of the total production of society. It is a coproduced outcome of humans and the social and organizational structures that people develop and endlessly rebuild. Analysis of crime must relate crime to the total societal picture, rather than to any single part of it.

A power structure based on inequality is a major feature of our society. Unequal power relations, built on the constructions of difference, provide the conditions that define crime as harm. Thus, constitutive criminology redefines crime as the harm resulting from humans investing energy in harm-producing relations of power. Humans victimized by such “crimes” are in unequal power relations. Crimes are no less than people being disrespected. People are disrespected in numerous ways but all have to do with denying or preventing us becoming fully social beings. What is human is to make a difference to the world, to act on it, to interact with others and together to transform the environment and ourselves. If this process is prevented we become less than human; we are harmed. Thus we define crime as “the power to deny others their ability to make a difference” (Henry and Milovanovic, 1996: 116). We find it helpful to identify two aspects that characterize crime that we call “*crimes of reduction*” and “*crimes of repression*.” These notions refer to power differentials, hierarchical relations and the harms that these relations coproduce.

Harms of reduction occur when offended parties experience a loss in their standing. They could have property stolen from them, or they could have dignity stripped from them by, for example, hate crimes or other acts. Harms of repression occur when people experience a limit or restriction, preventing them from achieving a desired

position or standing. They could be prevented from achieving a career goal because of sexism or racism, or meet a promotional "glass ceiling." Considered along a continuum of deprivation, harms of reduction or repression may be based on any number of constructed differences. At present in Western industrial societies harms cluster around the following constructed differences: economic (class, property), gender (sexism), race and ethnicity (racism, hate), political (power, corruption), morality, human rights, social position (status or prestige, inequality), psychological state (security, well being), self-realization/actualization, biological integrity, and so on. Whatever the construction, actions are harms either because they move an offended party away from a position or state they currently occupy, or because they prevent them from occupying a position or state that they desire, the achievement of which does not deny or deprive another. This of course raises the question of whether it is ever legitimate to reduce or repress another. This important question should be the basis of future inquiry.

Constitutive criminology also has a different definition of criminals and victims. The offender is viewed as an "excessive investor" in the power to dominate others. Such "investors" put energy into creating and magnifying differences between themselves and others. This investment of energy disadvantages, disables and destroys others' human potentialities. The victim is viewed as a "recovering subject," still with untapped human potential but with a damaged faith in humanity. Victims are more entrenched, more disabled, and suffer loss. Victims "suffer the pain of being denied their own humanity, the power to make a difference. The victim of crime is thus rendered a non-person, a non-human, or less complete being" (Henry and Milovanovic, 1996: 116).

This reconception of crime, offender and victim locate criminality not in the person, nor in the structure or culture, but in the ongoing creation of social identities through discourse, which leads to a different notion of crime causation. To the constitutive theorist crime is not so much *caused* as *discursively constructed* through human processes of which it is one. Put simply, crime is the coproduced outcome, not only of humans and their environment, but of human agents and the wider society through its excessive investment, to the point of obsession, in crime, through crime shows, crime drama, crime documentaries, crime news, crime books, crime films, crime precautions, criminal justice agencies, criminal lawyers and crimi-

nologists. All are parasitic of the crime problem, but as constitutive criminology suggests, they also contribute to its ongoing social and cultural production.

Given this interrelated nature of social structures and human agents and their social and cultural productions in the coproduction of crime, constitutive criminology calls for a justice policy of reconstruction. This is achieved through *replacement discourse* which “is directed toward the dual process of deconstructing prevailing structures of meaning and displacing them with new conceptions, distinctions, words and phrases, which convey alternative meanings. . . . Replacement discourse, then, is not simply critical and oppositional, but provides both a critique and an alternative vision” (Henry and Milovanovic, 1996: 204–5). In terms of diminishing the harm experienced from all types of crime (street, corporate, state, hate etc.), constitutive criminology talks of “liberating” discourses that seek to transform both the prevailing political economies and the associated practices of crime and social control.

Replacement discourse can be implemented through attempts by constitutive criminologists to reconstruct popular images of crime in the mass media through engaging in “newsmaking criminology” (Barak, 1988; 1994). It can also be induced through “narrative therapy” (Parry and Doan, 1994), which developed as part of family therapy to enable offenders (excessive investors in power) to construct more liberating life narratives and thereby reconstitute themselves.

The Contributions to this Book

The first chapter of this book, by Andrew Bak, provides a more detailed excursion into the main ideas contained in our previous work, *Constitutive Criminology*. He considers the key elements of the theory, discusses the coproductive relationship between human agency and social structure, and points out how the human subject, the person as social agent, is actively situated both within and outside this structure, investing in and resisting that which they produce. Crime, as harm, is shown to be partly the emerging outcome of the social construction of legal definitions of crime; but is also revised in the everyday interaction of human agents within and outside societal institutions. Bak shows how constitutive criminology’s coproductive assumptions lead to an exploration of the complex, contextually sit-

uated, discursively interrelated configurations of social relationships and reveals how these both shape and are shaped by culturally situated, socially organized human agents to recursively produce crime as a cultural product. Finally, Bak addresses the question of how one invests in alternative “replacement discourses” that are more humanistic and that reconnect the fragmented human subject of the industrial social order with the structural products of daily discourse, toward transformative policy.

In the chapters that form Parts 2 and 3 of the book, contributors take up the constitutive challenge, applying its concepts to their own research on crime and criminal justice. Lisa Sanchez (chapter 2) first grounds us with her constitutive analysis of prostitution. She examines agency and resistance through an exploration of ongoing dialogues with women about their initial involvement and daily practices in the local sex trade in a Northwestern city. Drawing upon constitutive theory, she analyzes the relationship between subjectivity, discourse, and local practice. She draws on women’s narratives to illustrate how social and legal norms and local practices shape subjectivity, and how voices that resist oppression within these contexts can appear conflicted and contradictory. Sanchez interprets the multi-faceted voices of women in the sex trade as both challenging and reproducing dominant and local discourses of sexual-economic exchange. Furthermore, she shows how they shed light on contradictions and constraints in the local sexual economy as voice, consciousness and social practices play a constitutive role in the social world. Sanchez shows that while the ongoing assertion of agency helps women to negotiate within the rigid confines of their social space, it presents little challenge to the power and authority of sex and law. She concludes with a discussion of the transformative limitations of agency and resistance within these contexts, and the implications this has for constitutive criminology.

In his study of the production of homeless identity Bruce Arrigo (chapter 3) draws on empirical data about how homeless citizens live and recomunalize in shelters and similar housing facilities. Utilizing the interpretive tools of constitutive theory, Arrigo’s chapter examines how the discursive meanings embedded in the structural arrangements of one single-room-occupancy (SRO) community, such as rent collection practices, leisure activities, meal rituals, both shape the identity of and are shaped by the tenants residing in the community. Arrigo’s article focuses on the relationship between the SRO milieu and definitions of residents as community deviants or criminals.

In chapter 4, Gregg Barak applies his constitutive “newsmaking criminology” to the criminal trial of O.J. Simpson. He provides a case study of the elements that were integrated into the coproduction of this “trial of the century” such as the relationship between high-profile and low-profile disputes, First and Sixth Amendments, modes of newsmaking criminology, and the use of experts. Taking an ethnographic or biographic perspective Barak also reflects on his own radio commentary throughout the trial where he participated as an expert criminologist, in contrast to other legal commentators on O.J., most of whom were either prosecutors or defense attorneys. Through his analysis the variation in mass-mediated legal, social, and political discourses surrounding the O.J. case is revealed. Barak concludes with an optimistic assessment of the prospects of social transformation through replacement discourse.

In contrast, Dion Dennis (chapter 5) shows that replacement discourse is not only a positive force for change but that it can also have a harm-producing, destructive vitality. His analysis of the cultural production of “monsters” shows how icons of monstrosity reflect and refract a number of contemporary social and political issues on genocide, human-machine boundary issues and especially the commodification of consciousness. He argues that the digitalization of social interactions has constituted new forms of identity. It has also generated novel communicative, organizational and criminal practices. To understand how these modes of risk and dangerousness are constructed, argues Dennis, we cannot turn to present law, which often draws on and imposes inappropriate nineteenth-century categories. Rather, we need to examine popular cultural products. Doing so allows us to perceive how dangerousness and criminality are constituted in those extralegal cultural and social worlds that shape political and legal fields. Through the analysis of relevant films and novels, Dennis suggests that we may begin to anticipate and assess constructions of dangerousness and criminality that may be part of our digital future.

Like Dennis’ exploration of the constitutive construction of “bodies,” in chapter 6, John Brigham provides an interesting extension of Foucault’s critique of “bodies” to consider how the personal issue of death and their own tenure may have affected the U.S. Supreme Court Justices’ positions on capital punishment. He focuses on the metamorphosis at the Court from 1972–1987, from *Furman* to *McCleskey* and from Douglas to Scalia, with a nod to the significance of the death penalty at the time of Blackmun’s retirement. Brigham

draws attention to the reconstitution of the Court such that appeal for stays of execution are all but fruitless. The chapter explores a changing institution where jurisprudence features continuity.

The constitutive project's response to the social construction and cultural production of crime is the concern of the contributors to Part 3 of the book. In chapter 7 James Williams argues that, while the constitutive paradigm has devoted substantial attention to the dialectics of reproduction and resistance within the legal context, such as in the courts and the penal system, there has been a paucity of constitutive work on the police and the policing function. He argues that this void is especially apparent given that policing is a major site for the creation, use and legitimation of the distinctions (e.g. offender/victim, order/control) on which the criminal justice system is based. Williams addresses this oversight through a critical analysis of policing as a mode of practical and practiced negotiation between the discursive categorizations of the sociolegal order, and the contextual ambiguity of lived experience. He argues that the officer's role as arbiter of this relation is best expressed through the notion of a "constitutive phenomenology" which highlights both the constitutive functions of the daily judgments and interpretations of the police and the limitations of these efforts, given the inherently ambiguous and negotiated character of police knowledge. Elaborated through the everyday practices of suspicion, discretion and interrogation, the ultimate outcome of this cross-fertilization between policing and constitutive criminology, says Williams, is an appreciation of the phenomenological mediation of the power-knowledge nexus, and hence an understanding of the potential for resistance and transpraxis inhering within the contextuality and ambiguity of local knowledges.

Unfortunately, as Victor Kappeler and Peter Kraska show (chapter 8), when policing is analyzed from the constitutive perspective it is apparent that rather than transpraxis (which seeks to not only negate oppressive powers but offer affirmative vistas for change) replacement discourse can have a stagnating effect. Rather than transforming the structure and organization of policing, community policing discourse is reproducing and even expanding its reach. To illustrate their argument, Kappeler and Kraska focus on the changes in policing discourses that emerged from the community policing movement. They deconstruct the oppositional representation of community policing in various discourses to illustrate the autonomous nature of control ideology that underpins the community policing model.

They explore the use of sensation as a source of ideas and means of reducing resistance to discourse and conclude that policing as reconstituted by metaphoric and sensational replacement enabled the institution to expand targets of control and draw on a wider array of tactics than previously available.

Turning to penal issues, Mary Bosworth (chapter 9) examines agency and choice in women's prisons from a constitutive penological perspective. Based on her research in three British women's prisons, Bosworth explores the problems inherent in representing the contradictory ways by which women resist institutional restrictions and assert their agency in prison. She suggests that while much of women's energy in prison is directed at maintaining their self-identity as active and participating agents, there is inevitable erosion of the women's sense of self by institutional constraints. Bosworth sees such changes to these women's sense of self as related to diffuse "regimes of femininity" operating within the establishment which are re-enforced by the women's life experiences of poverty, violence and abuse. She shows that by exploring the contingent nature of women's agency in the context of broader societal discourses of femininity and gender, it is possible to develop a transformative critique of the role and effect of prisons today. In her conclusion Bosworth finds new directions and possibilities for prison studies within the developing field of constitutive criminology.

Jim Thomas and Dragan Milovanovic (chapter 10) take up a different dimension of constitutive penology in a reexamination of their jailhouse lawyers study, first reported in 1989. Here they explore the coproduction of reality by inmates who have taught themselves law while incarcerated. Jailhouse lawyers increasingly construct reality by using legal concepts they learn and employ. Thomas and Milovanovic identify the problem of the dialectical quality of both struggling against and inadvertently reconstituting forms of domination. They consider the potential for a transformative transpraxis and discuss the question of the possible development of a replacement discourse to the system sustaining legal discourse.

Part 4 explores the possibility for institutional transformation toward a constitutive theory of justice. These two chapters expand the constitutive analysis to include recent developments in chaos theory. Robert Schehr (chapter 11) examines "intentional communities," developing what he calls a fourth perspective in social movement theory that builds on postmodern analysis, particularly chaos and con-

stitutive theory. His approach offers the potential of going beyond conventional theorizing which overlooks important dimensions in emerging forms of social organization. Finally, T. R. Young (chapter 12) states the case for a constitutive theory of justice. He draws on new developments in chaos and complexity theory as a grounding for definitions of crime, limits of control as well as strategies in the construction of both substantive and technical questions of social justice. He argues that, given fractal (non-integral) structures of social organization and nonlinear social dynamics, absolute and universalistic definitions of crime and justice are not possible and certainly not helpful. In light of nonlinear social dynamics, approaches to social control have to be much more nuanced, gentle and timely; formal rational models of social control need to give way to episodic and publicly defined dynamic states for given social processes of health, education, law and justice. Similarly, traditional forms of justice—linear, universal, rational—should give way to nonlinear responses to crime, poverty, illness and other social problems. Young argues that since only chaos theory can manage chaos and since uncertainty and nonlinearity have much value, policy on both crime and justice become much more constitutive, that is, politically informed processes.

We conclude the book with an assessment of six years of evaluations of the constitutive project, that have appeared in various journals and texts. This chapter highlights some differences of interpretation that have engaged commentary. In particular we focus on five issues that have arisen: (1) the issue of complex prose; (2) the issue of integrating disciplinary knowledges; (3) the issue of logic and causality in constitutive theory; (4) the issue of crime as a socially constructed reality; and (5) the issue of policy which confronts how a society can stop investing in structures of oppression, whose manifestation channels and sustains the use of the power to harm, without at the same time exercising power over others.

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