

SPECIAL SECTION

*** Penal Abolition and Prison Reform ***

curated by Phil Scraton

Utopian Action and Participatory Disputes

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Primary Challenge

ABOUT FORTY YEARS AFTER THE PUBLICATION OF THE MAJOR ABOLITIONIST TEXTS, now celebrated criminological classics, Angela Davis (2008, 3) suggested that the primary challenge for penal abolitionists might be “to construct a political language and theoretical discourse that disarticulates crime from punishment.” This is exactly what Nils Christie, Louk Hulsman, Thomas Mathiesen, and Herman Bianchi have done since the 1970s, and their work becomes increasingly significant as processes of criminalization gather pace and prison populations grow across the world. In a climate dominated by penal populism, the scapegoating of the “other” (in Europe, normally a migrant), and the tendency to deal with social problems through punishment, abolitionist thought is as refreshing now as it was in the 1970s. Abolitionism continues to pursue the strategy suggested by Angela Davis, and while disarticulating crime from punishment, it elaborates alternative conceptualizations of crime, critical analyses of law, and radical thinking around the very nature, function, and philosophy of punishment. This multipronged theoretical effort has allowed penal abolitionism to survive and continue to develop within contemporary debates. Examples are found in contributions displaying an array of damning evidence against prison institutions, and demanding that it is the defenders of such institutions “who need to make the case for their retention” (Ryan and Sim 2007, 714).

Punitiveness, particularly when associated with the poorly understood concept of dangerousness, has been described as a challenge to traditional notions of human rights, “designed to shame and humiliate offenders” (Bennett 2008, 21). Following an abolitionist stance, it has been suggested that “not only should we be asking questions about dangerous offenders, but we should also be asking whether the state itself is becoming dangerous to its citizens as a result of its penal policy” (ibid., 22). Questions such as this, however, require the use of “social imagination,” which not only challenges official penal orthodoxies, but is also “forever open to debate about

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new conceptions of social relations and justice” (Carlen 2008, xvi). Pain, as analyzed by abolitionism, returns in recent criminological literature in the form of violence and the threat of violence, along with the mechanisms of fear that are embedded in the very fabric of prisoners’ lives (Sim 2008). Punishment as *mourning* and crime control as *cordiality* (Ruggiero 2010) are given novel impetus through the proposal of models and practices of justice based on the idea of “encounters with strangers” and an “ethics of hospitality” (Hudson 2008). Crucial elements of abolitionism are found in the spawning literature on restorative justice (McLaughlin et al. 2003; Jewkes 2007; Wright 2008) and, last but not least, in high-quality postgraduate students’ dissertations: “Abolitionist thinking offers an important critique of criminal justice, one that is particularly relevant in today’s context, and deserves much wider recognition and coverage. Dismissing it because of its radicalism or utopianism underestimates its potential contribution” (Roberts 2007, 23–24).

It has been suggested that the activist ancestors of abolitionism are the men and women who fought against slavery and the death penalty and that its tenets are grounded in a variety of social philosophies that are primarily concerned with discussing processes of social development that can be viewed as pathological. Among these philosophies are those expressing the view that societies should support a rich plurality of activities, each valuable in its own right, and that each person should be treated as an end, not as a mere means to the ends of others. This Aristotelian and Kantian view would deny “that a society can be flourishing as a whole when some members are doing extremely badly” (Nussbaum 2000, 106). Contemporary debate focuses on how to link abolitionist “radicalism and utopianism” with views of crime and the law embedded in the Western cultural tradition and its concrete, reasonable, options aimed at the reduction of pain. But what type of utopianism is legible in the abolitionist stance?

Utopianism of Action

When Homer formed his idea of Chimera, he assembled shapes and items of his daily life, of the surrounding world, and the specific cultural environment in which he was embedded. Thus, Chimera possessed parts belonging to different existing animals: the head of a lion, the body of a goat, and the tail of a serpent. On the social level, this may imply that our creations are hostages to our own material life and to the interactions we entertain with our fellow citizens and the institutions governing us. “Even the wildest imaginings are all collages of experience, constructs made up of bits and pieces of the here and the now” (Jameson 2005, xiii). In this sense, utopias may serve the mere purpose of making us more aware of when, where, and how we live. Thomas More’s *Utopia* is, in this respect, exemplary.

More’s notion that thieves should be spared capital punishment reflects the ascendant humanism of the sixteenth century, which afterwards culminated in Cesare Beccaria’s enlightened penal reformism. Discussing the “strict and rigorous justice” of England, More notes that, at times, up to twenty felons are hanged simultaneously

upon one gallows, and that very few thieves escape punishment. However, he also observes that, by “evil luck,” thieves are “nevertheless in every place so rife and so rank.” To destroy their lives is morally wrong, because the very system that denies them the means of living drives them to “this extreme necessity, first to steal, and then to die” (More 1997, 30–31). As in Beccaria, replacing the instruments of torture with the tools of labor is the suggested solution to this demonic cyclical itinerary: from poverty to theft, and from theft to death. In *Utopia*, justice is as swift as the enlightened reformers would postulate, with magistrates convening within a day of the commission of the offense, so that the logical continuity between this and the punishment inflicted is clearly perceived and internalized. Offenders are not eliminated, but become servants of the commonwealth, or they may be employed as soldiers, because the crafts of stealing and fighting “agree together”:

For this kind of men must we make most of. For in them as men of stouter stomachs, bolder spirits, and manlier courage than handicraftsmen and ploughmen be, doth consist the whole power, strength, and puissance of our army, when we must fight in battle. (Ibid., 32)

Finally, the most “heinous faults” are punished with bondage, which brings profits to the commonwealth through forced, cheap labor. Only after being “broken and tamed with long miseries,” and when it is perceived that they are “sorrier for their offence than for their punishment,” may those showing repentance have their bondage mitigated (ibid., 100).

Thomas More’s imagination, in brief, cannot distance itself from the prevailing spirit of conquest of his time: his emphasis on war echoes the eagerness of his contemporary colonial traders, while the punishments he devises reflect the necessity to tame and enslave the peoples of the new world.

There are, however, ambiguous assessments of utopianism, particularly if one leaves aside its common understanding as an impossible ideal project and neglects the undertone of abuse with which the term is utilized against political opponents. Marx and Engels (1975), for instance, while attacking Proudhon as a petty bourgeois utopian, admired the work of Fourier and Owen, where they detected the anticipation and imaginative expression of a new social order. More specifically, Engels suggested that German socialism owed a lot to utopian authors, in his view the most significant minds of all time, who prefigured many matters whose accuracy it remained for scientific socialists to demonstrate (Manuel 1979). From a certain perspective, therefore, utopia may be interpreted as a program that neglects human nature and its frailty, aiming at an improbable uniformity and purity of a perfect system, and lacking agency and overlooking the progressive power of conflict. From another perspective, however, it can be equated with a “trace” of the future, a mixture of being and not-being (Jameson 2005). It is in this mixture that penal abolitionism is situated.

Abolitionism neither pursues a perfect system nor anticipates future uniformity or purity; its stance grants a central role to the notion of conflict. Implicit in the “trace” of the future, the being and not-being, is its challenge to the established penal order, which leads to the discovery of new grounds upon which novel confrontations can be launched. Action and conflict, in the abolitionist stance, do not lead to a final, unchangeable condition, but to unknown social interactions. Thomas Mathiesen (1974, 1990, 2008), for example, theorizes continual abolition, rebuilding, and re-abolition, on permanently new levels: a constant transition to the uncompleted. In this sense, abolitionism must inform each immediate objective, concretely linked to the long-term goal. To strengthen this point, the concepts of positive and negative reforms may help. The former contribute to the perpetuation of established control systems, and the latter to their constant erosion. In order for the long-term abolitionist goal not to be set aside, short-term reforms should therefore be of the negative type. “That is, when working for short-term improvements in the prison, one should in principle work for reforms negating the basic prison structure, thus helping—at least a little bit—in tearing that structure down rather than consolidating it” (Mathiesen 1986, 82). Reforms of an “abolishing type” contain the long-term strategy while dealing with short-term issues. Abolitionism implies that “there is constantly more to abolish, that one looks ahead towards a new and still more long-term objective of abolition, that one constantly moves in a wider circle to new fields of abolition” (ibid., 212).

A functioning public arena has been instrumental in the “utopian” fight against slavery, forced labor, and, in some places, the death penalty. It will also be crucial for the nurturing of an abolitionist stance and, ultimately, will allow us to say “no” to prison. Endorsing the Max Weber (1948) of *Politics as a Vocation*, Mathiesen (2008) concludes that political developments may be slow, but experience confirms that we would not have attained the possible unless time and again we had reached out for the impossible (Ruggiero 2010). In this sense, utopian thinking incorporates conflict and action; everyday, it informs attempts to improve and is the mirror image of an “unfinished” desire to change. I refer here to a celebrated notion forged by Mathiesen himself.

Abolitionist utopian action is epitomized by the unfinished, the sketch, the embryo of what is not yet in full existence. Mathiesen’s (1974, 13) premise is that “any attempt to change the existing order into something completely finished, a fully formed entity, is destined to fail.” The process of finishing, in other words, will lead back to the social order one wants to change. Oracles are given as examples, as they provide sketches, not fully formed answers. The first problem, therefore, is how a sketch can take shape and how it should be mobilized. If the existing social order changes while assuming a new structure, the second problem is how the sketch can be maintained as such or how, at least, its life can be prolonged. “An enormous political pressure exists in the direction of completing the sketch into a finished drawing, and thereby ending the growth of the product. How can this be

avoided, or at least postponed?" (ibid.). The solution to these problems is the core concern of penal abolition as action.

Treatment experiments are also unfinished while they are being carried out. They have no boundaries with respect to outcomes, and offer potential alternatives to the state of things, for example, in hospitals or prisons. As the pioneering aspects of the experiments are incorporated into the structure in which they take place, and as the outcomes are precisely inscribed in that structure, the establishment appropriates them. Finally, the notion of the unfinished can be applied to the building of alternative societies. Such societies, presumably, contradict and compete with the societies they intend to replace. Their being alternative, however, lies in the never-ending process through which they attempt to establish themselves, constantly experimenting with new features and values, rather than in bringing change to completion. "Completion, or the process of finishing, implies full take-over, and thereby there is no longer any contradiction. Neither is there competition" (ibid., 17).

Penal abolitionism merges utopian action with alternative conceptualizations of crime, critical analyses of law, and radical thinking concerning the nature, function, and philosophy of punishment. Such a multipronged theoretical effort may avoid the pitfalls that Bianchi (1986, 1991) identifies in the history of abolition. For example, abolitionists of torture favored prison construction. European philanthropists and benefactors studied the US prison system, admiring its humanity: "the gentle eye of the new middle class no longer accepted confrontation with visible cruelty, and preferred the indoor cruelty of imprisonment" (ibid., 149). But the expected benefits of imprisonment failed to materialize, as inmates were not turned into law-abiding, productive, or respectable citizens.

The very construction and type of building used for imprisonment produced an annual output of wretched and destitute people, criminalized and stigmatized, who apart from a few exceptions, were no longer fit for normal civil life. (Ibid., 150)

As de Tocqueville (1956) noted, after serving a sentence offenders remained among humans, but they lost their rights to humanity; people fled from them as impure, and even those who believed in their innocence abandoned them. Once released, they could go in peace, with their lives generously left to them, but that life was worth less than death.

It took abolitionists almost three generations to recover and muster the energy for new utopian action. A propitious chance presented itself toward the end of the nineteenth century. With the emergence of the medical model, psychiatry and psychology seemed to offer an alternative to imprisonment and all other forms of punishment. Prisons could be turned into therapeutic communities. However, this model of treatment entailed the suppression of prisoner's rights and the corresponding expansion of the power of scientists of the mind.

In the old days, before the medical model, a prison sentence was a prison sentence, and the inmate knew his fate exactly. In many countries, though, the enthusiasm for prison as a therapeutic community had produced the indeterminate sentence, making it possible for a delinquent who behaved badly in prison to face the possibility of a much longer stay in prison than the seriousness of his crime warranted. (Bianchi 1986, 150)

During the course of the twentieth century, after the initial enthusiasm for what appeared to be a process of decarceration, abolitionists realized that alternatives to custody were destined to become alternatives to freedom.

There is nothing utopian in attempts to redress “remediable injustices”: abolitionists do not pursue perfect justice; rather, they aim to enhance justice. Their focus on social interactions rather than institutions, on precise settings in which people live rather than official norms and extraneous professionals, locates them in a specific political and philosophical tradition. According to a distinction suggested by Amartya Sen (2009), there are contractarian approaches and comparative approaches to the idea of justice. The former establish general or universal principles of justice and are concerned with setting up “just institutions.” Total compliance of people’s behavior is required for such institutions to function. The latter approaches assess the different ways in which people lead their lives, actually behave, and interact. Sen describes a contractarian approach as “transcendental institutionalism,” in that it searches for the ideal institutions capable of forging a perfectly just society. By contrast, a comparative approach entails the search for social arrangements that satisfy people in their concrete collective lives.

When people across the world agitate for *more* global justice—and I emphasize here the comparative word “more”—they are not clamouring for some kind of “minimal humanitarianism.” Nor are they agitating for a “perfectly just” world society, but merely for the elimination of some outrageously unjust arrangements to enhance global justice. (Ibid., 26)

Comparison requires information, which in turn presupposes proximity to the actors involved in the process of forging ideas of justice. Abolitionists propend for this type of approach and action.

Abolitionism is a counter-idea offered by cultural workers who feel that “the delivery of pain, to whom, and for what, contains an endless line of deep moral questions.” Philosophers, Nils Christie says, should address these questions, even those who, faced by the complexity of problems, may conclude that not action but thinking is the only available possibility: “That may not be the worst alternative when the other option is delivery of pain” (Christie 1993, 184–85). Action and thinking, however, are simultaneous, as exemplified by Mathiesen’s concurrent work as an academic and an activist.

Thomas Mathiesen, like other abolitionists, looks at conflict not as the expression of an inescapable power arrangement, but as a possibility for the release of counter-power energies. His approach to conflict in prison is not led by pedagogical purposes, in the sense that his involvement is not aimed at raising “consciousness” among prisoners. Mathiesen’s praxis does not entail a rigid division of roles between researchers and the subjects studied, nor does it start with the assumption that the former will feed oppositional identity to the latter. Action is inherent in the research method adopted and those researched are the prime subjects involved in research as well as in action. Mathiesen’s is a different type of radical thinking, one that constantly translates knowledge about conflict into collective praxis for those producing it.

In an attempt to revitalize social research, echoes of this debate have emerged, specifically addressed to fieldwork surveys and ethnographic work. Problems of representativeness and translation have been highlighted, including the possibility that the subjects studied may conceal their views and acts, and researchers may misconstrue the vocabulary and meanings of those acting. Transformative research, we are told, “traces the concealed links between observer and observed, makes visible the invisible, seeks to break down the barriers between the social scientist and their objects of study” (Young 2011, 173). Utopian action, however, does not limit its task to bringing the narratives of its subjects closer to its own metanarrative; rather, it shares ample parts of those narratives *ab initio*. Unlike controversial “public” sociology and criminology, which attempt to align the interpretative frame of scholars with that of the “public” (Loader and Sparks 2010), utopian action implies that such alignment has already been achieved (Ruggiero 2012).

The utopianism of action described so far is based on a range of counter-ideas. Its origin is worth explicating.

Foundations

Abolitionism does not possess a single theoretical or political source of inspiration. Instead, it has a composite backdrop from which it, wittingly or otherwise, draws its arguments and proposals for action. The intellectual biography of Louk Hulsman reveals how his views took shape through the reading of some crucial biblical passages, where mercy is advocated while judgment and retribution are rejected. The Gospels of Mark, Luke, and Paul seem to provide an apposite theological underpinning for Hulsman’s abolitionism, which can also be assimilated to Saint Francis’ ecumenism and his view that thieves are not those who steal, but those who do not give enough to the needy. Radical theology, or the theology of liberation, provides additional sources of inspiration that are connected with the abolitionist arguments found in some giants of Western literature. With Bakunin’s anarchism, Hulsman shares the belief that the realization of freedom requires that political action be conducted religiously. In certain pages of Marx, Engels, Tolstoy, and Hugo, there are echoes of Hulsman’s concepts of redemption of punishment, self-

government, mercy, and pietas (Ruggiero 2010). Hulsman's system of thought, in brief, displays a high degree of syncretism.

An equal if not a higher degree of syncretism shows the intellectual trajectory of Thomas Mathiesen. His initial materialist approach develops into arguments for a pluralistic, interdisciplinary sociology of law. The writings of Marx and Engels constitute an ideal background for understanding Mathiesen's work, which also draws on a variety of other theoretical sources. Because Mathiesen focuses on offenders and prisons, as well as on social movements traditionally excluded from orthodox notions of class struggle, his stance is an implicit critique of classical Marxism. His strategy of action, as we have seen, revolving around the idea of "the unfinished," also distances him from orthodox revolutionary ideas. The originality of Mathiesen's work resides in the coalescence of research, action, and theorizing, which characterize his entire career as an academic and activist. His long involvement with KROM, an organization for penal reform, runs parallel with his relentless engagement in action research.

Nils Christie's work exemplifies simplicity and intelligibility. When we write, he says, we should keep our favorite aunt in mind. Similarly, Peter Kropotkin argued that anarchist literature had to keep in mind the workers to whom it was addressed. Christie's system of thought draws constant parallels between his abolitionism and anarchist theories of law and authority. The similarities are astounding: his critique of legal professionalism echoes the anarchist arguments against the proliferation of laws, while his appreciation of conflict as a resource brings to mind the anarchist idea that problems within communities can only be resolved if those involved possess sufficient autonomous resources to do so. One of Christie's arguments is that communities and groups, regardless of their size, may find abolitionist experimentation possible only if the interactions within them are frequent and highly intense. In this sense, he expresses the purest of anarchist notions, namely, social life is improved when communities develop social feelings and, particularly, a collective sense of justice that grows until it becomes a habit. Christie's abolitionism, in brief, can be located alongside an anarchist libertarian analyses of law and society, in total harmony with Emma Goldman's views on the arbitrariness of punishment, Errico Malatesta's argument that penal reforms will never erase the principle of revenge inscribed in prison systems, and Proudhon's idea that principles of justice are constructed through experiences of interaction (Ruggiero 2010). This should provide a sufficiently precise understanding of an abolitionist view of restorative justice, the topic of the final section of this article.

Participatory Disputes

Restorative justice is essentially a process that brings the actors and communities affected by a problematic situation back into the condition in which the problem arose. In this model of justice, the parties involved decide how to deal with a conflict and how to neutralize its collective impact. Restorative justice presents itself as

an international network or movement, giving the impression that its tenets are diametrically opposed to those that inspire conventional retributive justice (Casey 1999; McLaughlin et al. 2003). It is important to maintain a critical stance against such claims (Williams 2005).

In Wright's (2008) classificatory scheme, *restitution* implies the return of stolen property, *individual compensation* consists of funds or services given to victims, and *reparation* comes about from constructive acts performed for the benefit of communities or state organizations. Restorative justice shuns the notion of "deterrence through severity," a notion whose effectiveness and morality are dubious. It is also an attempt to "separate society's efforts to prevent crime from its reaction to crimes when they occur" (ibid., 240). The philosophy inspiring restorative justice is that the harm caused by offenders should not be matched with an equivalent harm inflicted on them. Rather, the harm should be counterbalanced by "putting it right or making up for it": this would "not merely denounce the offense, but affirm society's values" (ibid.). In practice, offenders are required to make amends as one of the consequences of their act. Mediation and arbitration schemes in operation are based on the awareness that, in most cases, conflicts involve people who are known to one another. Criminal courts are deemed to be badly equipped to deal with such cases, since their procedures tend to concentrate on the incident in isolation, which "does not give people an opportunity to explain the ramifications which lie behind it" (ibid., 247). Most important, such schemes imply that communities make amends for their own deficiencies in the upbringing of some of their members, by offering offenders opportunities for training, education, and developing social skills and self-confidence. The respective amends made by offenders and communities are entwined, although "the emphasis is not on what is done to the offender but on what he does himself, and this principle may therefore be called making amends through self-rehabilitation" (ibid., 255).

One controversy surrounding restorative justice centers on the reluctance of victims to participate in schemes that they suspect are geared to the interests of other parties rather than their own. Once they realize that an offender-approach is predominant, they again embrace the view that the police force is the only agency able to deal with offenders. Abolitionists attempt to outflank this controversy by adopting a different informal justice philosophy and practice. Hulsman (1986), for example, believes the offender-victim dichotomy should be superseded by a view of crime as a "natural disaster," namely, an event that requires solidarity mobilization for those affected and efforts to prevent similar events from reoccurring. The controversy about offender-led or victim-led restorative justice is also examined against the background of other considerations. For example, it is stressed that some "alternative" justice practices extend rather than reduce the prevailing justice system. In an overview offered by Shonholtz (1986), agency-mediation implies specific institutional actors, such as prosecutors or the police, who apply specific mediation programs and procedures.

This model is built around the power and interests of institutional agencies: case referrals are generally coerced, disputant participation is often involuntary, and in the absence of the agency's pressure, parties would not attend mediation sessions. In brief, agency-mediation programs are promoted not because they handle criminal referrals, but because those referrals are not seen as legitimate criminal cases. Such programs represent a direct extension of the justice system into the noncriminal, or civil, arenas, and stem from the recognition that traditional sources of social control (the family, the church, the neighborhood) are declining: the state enters nonstate areas. In this sense, programs of restorative justice may become new punitive tools rather than alternatives to punishment.

Mediation promoted by community boards follows a voluntary referral model and is characterized by a community-centered rationale. The model urges the commitment of social resources and the revival of collective responsibility. It aims less to suppress conflict itself than its early expression, while seeking its potential resolution. It links the justice process to community forums led by the need of residents to organize local conflict-resolution mechanisms. It sees the development and maintenance of community justice forums as a democratic right and responsibility of citizens. Moreover, this model relies on residents trained in value-building, communication, and conciliation skills; panel sessions are open so that all are given the opportunity to develop such skills.

Although institutional (or agency) mediation may help to dilute the crime control system and to stimulate local neighborhoods, in the abolitionist perspective it may also lead to unwanted developments. For example, it may paradoxically revitalize the penal system, instituting swift punishment without formal protections. It may also weaken social competence, transferring problems to official actors. Individuals are deskilled and made dependent upon external, state-funded, or state-licensed entities.

Within the restorative justice debate, another moot point is relevant. Most state-controlled programs are regarded as suitable for co-option into the criminal justice status quo, while the relevant community takes on a subservient role. State intervention exacerbates the role of institutions as dumping grounds for "people suffering from a wide range of human miseries," while transferring community ownership of miseries and problems to professionals (McKnight 1995). In this way, "the criminal justice system compensates for the failings of economic, political, or social systems, which consequently deters the reform of these systems by removing people from open society who are its products" (Elliott 2009, 156). In this way, the community becomes an amorphous ideal, an acquiescent aggregation of citizens perfectly aligned with state agencies (Pavlich 2005). Restorative justice that is focused on community development "is less concerned with meeting the needs of institutions than it is with meeting the needs of the people involved in, and affected by, conflicts" (Elliott 2009, 164). Conflicts, therefore, should be seen as opportunities for establishing dialogue and seeking solutions, in a process leading to wider relationships and wider mutual knowledge. By subjecting conflict to the

skill and competency of trained community people, many of whom are former disputants, mediation enacted by community forums or boards is able to make disputants responsible for the expression and resolution of the conflict.

In sum, the abolitionist view of restorative justice is shaped by an underlying radical assessment of the existing system: “Criminal justice is perpetrator-oriented, based on blame-allocation and on a last-judgment view on the world” (Hulsman 1991, 32). It therefore neither provides us with the necessary information relating to disputes, nor transforms contexts such that emancipatory ways of dealing with disputes can be identified. First, an abolitionist approach is oriented toward those directly involved—persons or groups who directly experience unpleasant events. This approach leads to the discovery of resources that can be mobilized to deal with such events and situations. Second, abolitionism must radically critique the idea that there is a commonality in extremely diverse situations that are currently criminalized. The label “crime” is attached to very different problems, which should be tackled by a variety of preventive measures. “To use punishment on all of them is comparable to treating all kinds of illness with leeches” (Wright 2008, 242). Each problem or event is characterized by its own contours and features, and information about them is a precondition for different understandings of the acts observed and the practical responses to them. Yet, to design effective strategies of abolition and to project workable alternatives, Hulsman intimates that “we need to agree on what we are opposing.” What we now face is a state-run organization possessing the monopoly to define criminal behavior, to prosecute that behavior, and to keep select individuals in confinement. This organization, which is intended to protect society from those individuals in reality fails to accomplish what it promises.

Several procedures can be used to deal with trouble. *Dumping* is one of them, and is relevant when the issue that gives rise to a disagreement is simply ignored and the relationship with the disagreeing person continues. *Exit* is another, representing an option that consists of withdrawing from the unpleasant situation and terminating the relationship with the other party. *Negotiation* comes into play when the two parties attempt to settle the matter by identifying the rules that should govern their relationship. *Mediation* is yet another option, involving the participation of a third party who is asked to help to find an agreement. With *arbitration*, the parties appoint a third entity and agree in advance to accept her judgment. Finally, in the case of *adjudication* a third authority intervenes whether or not the two parties wish it (Nader and Todd 1978; Hulsman 1986).

The meaning that people who are directly involved attribute to a situation will influence their course of action. Also determining that action is the degree to which different strategies for dealing with trouble are available and accessible to them. Those involved may make a free choice only when not constrained by the requirements of organizations or professionals. In this respect, flexibility is desirable, as it allows common meanings to emerge while offering the parties the possibility to learn about each other. Hulsman argues that flexibility is often lacking

because situations are defined and dealt with in highly formalized contexts. In such contexts, the definitions of issues and responses to them are limited. In addition, they probably would not correspond to the ones the involved parties would elaborate. In brief, “trouble” is to be turned into a participatory dispute by those experiencing it.

Crime itself is a participatory dispute. In abolitionist thought, it must be defined in terms of *tort*. According to Bianchi (1986, 116), abolitionist purposes do not require that an entirely new system of rules be devised. “We already have one, waiting to be applied and adapted.” Lawyers and jurists, in this sense, are natural allies of the abolitionists, since they are capable of, and hopefully willing to “develop new concepts of tort which would be suitable for the regulation of crime conflicts, and rules for the settlement of disputes arising from what we used to call crime.” Bianchi appeals to psychologists, psychiatrists, and social workers, calling upon them to adapt and rewrite their skills in ways suitable for conflict-regulation. “The new system would no longer be called criminal law but *reparative law*,” and would engage offenders in discussions around the harm caused and how it can be repaired (ibid).

He is thus no longer an evil-minded man or woman, but simply a debtor, a liable person whose human duty is to take responsibility for his or her acts, and to assume the duty of repair. Guilt and culpability should be replaced by debt, liability, and responsibility. (Bianchi 1994, xi)

Criminal procedure is based on a false premise of *consensus*: purportedly there is consensus on the interpretation of norms and values. In political trials, a *dissensus* model is used when generalized social conflict is sustained by radically opposed values. Such situations may evolve into a new system and therefore a new consensual order. Abolitionist procedure, in its turn, should pursue an *assensus* model, that is, a model for the resolution of criminalized conflicts, which implies the participation of the parties involved: “to the consensus model I oppose the *assensus* model, which posits an unending, never-accomplished search for interpretations of norms and values” (ibid.).

Opponents of such a model may raise predictable questions. The first is: “What are we going to do with the people who pose an immediate danger to our bodies and our lives?” These individuals, Bianchi suggests, would be placed in quarantine, where they would enjoy “all medical and social help.” The second question is: “What are we going to do when people refuse, and continue to refuse, to negotiate over the injury they have caused?” Those individuals will still be asked to participate, “not seven times, but seventy times seven”—as many times as it takes to persuade them. If it becomes clear that they are the only party responsible for preventing negotiations, the defendants may be kept in custody for debts “and must be released as soon as they are willing to reopen negotiations” (Bianchi 1986, 119). The third question is: “What will happen to judges?” Their help will be solicited only when the parties engaged in the dispute are unable to come to a settlement by themselves.

From the sociology of law we have learned that this is the practice already in civil and administrative cases; so why not in criminal cases? The role of the judge, therefore, would be far more than that of a mediator ... no longer a person who, god-like or father-like, pronounces verdicts of morality. (ibid.)

In a typology of injurious events, Bianchi first addresses cases in which minor harm is caused. In his view, neighborhood centers offer the ideal response to such cases, demanding that offenders repair the damage produced or return the good that was appropriated in an unwarranted way. According to Bianchi, restitution of property and restoration of damage settle the situation as it stood ante-crime, and this constitutes “a lesson in good citizenship.” Unlike Durkheim (1960), who sees *restitutive sanctions* as a means to reestablish relationships between individuals and things, Bianchi regards these sanctions as promoters of solidarity relationships among individuals. Moving on to “slightly more serious cases of injury,” the crucial role of “boards of citizens” in bringing the parties together is advocated. In such cases, the revitalization of civil law alternatives, designed for the resolution of conflicts normally excluded from the remit of civil law, would be necessary. Finally, in “serious cases of injury,” when emotions run high, it is imperative to thwart or neutralize violent public reactions and to avoid revenge.

Immediately after a serious violent act, public reactions can be so violent that the actor needs some protection in order to survive for the later negotiations.... In the old days Sanctuary served as a place of refuge where the perpetrator of a serious offence could go and live for a while in safety until negotiations could begin. (Bianchi 1986, 123)

Bianchi's abolitionism does not imply that all disputes should be handled out of court; some conflicts may still require judiciary intervention. This might be the case when negotiations prove unmanageable, or when one of the parties is still in danger of being victimized. Under some circumstances, therefore, the right of appeal to a court should be maintained. In communities that are still unprepared to deal with their own conflicts or incapable of coping with their own damaging events, the institutions of criminal law will still be present. The criminal law system, in brief, would evolve into the *extrema ratio* solution, addressing the perpetrators of harmful acts who “prefer to go on being called criminal in the criminal law system, rather than being free citizens who declare themselves liable and responsible for their acts.” One must accept the reality that some offenders are just unwilling to make amends for the harm they have committed, for it would seem that for some people “the dull passivity of imprisonment is to be preferred to taking on responsibility” (ibid., 124–25).

Abolitionists contend, among other things, that a completely different system of crime control necessitates entirely new linguistic terms to prevent conventional

reasoning from creeping in. To make a new system of conflict resolution stand out against the conventional punitive system, Bianchi introduces one such term, *eunomic* (referring to good order and workable arrangements). This adjective is opposed to the terms *anomic* and *alienating*, which denote the nature of the official criminal justice system, and which frustrate the main participants in a conflict. The new system would be mainly composed of a set of integrative rules offering opportunities to all participants (Bianchi 1994). This argument takes inspiration from Roman law. Its *eunomic* nature is epitomized by the central role restitution plays in it. The Latin word *poena* (from which the pain and punishment in English derive) refers less to the type or intensity of the punishment to be inflicted than to the obligation to compensate the victim. Before its modern translation into physical pain, *poena* alluded to the penalty to be paid directly to the injured party, rather than to the vengeful sufferance inflicted by the state. Even the original meaning of the Latin verb *punire* is “see to it that the duty of *poena* be fulfilled,” for an offender could usually buy off revengeful punishment by settling the compensation.

Anything which today we would define as “crime” was in Roman law first and foremost classified as belonging to civil law. When Roman lawyers had the concept of crime in their mind, they associated it with the need for compensation, indemnification, amends, satisfaction, remuneration, or acquittal. Their last association might have been to the modern notion of crime as first and foremost an act demanding punishment, in the sense of willful infliction of pain by some authority. (ibid., 11)

Compensation and restitution, however, when taking place in institutional contexts, aim to restore the situation that caused the dispute in the first place. Hence the skepticism for the term “restorative justice” on the part of abolitionists: things must move on rather than back, we are told, toward the creation of new and better relationships, not to the restoration of the previous ones (Ruggiero 2010). In this respect, Christie’s argument offers a clarifying example. Let us imagine a computer deciding on guilt and delivering sentences. If correctly programmed, the computer will reach infallible decisions. “After guilt was decided, nobody would need to attend before the judge to listen to his decisions if they themselves had some mini-computers at their disposal. This means that chance is taken away from court-decisions” (Christie 1982, 54). There is, however, another possibility, namely the reprogramming of the computer, a circumstance that would show how imperfect the decision-making technology might be. What are the variables that would be given priority weight? Most important, who would decide what input would be inserted into the system? The following are some possibilities:

The UN in the General Assembly; the UN in the Crime Committee;
regional bodies such as the European Council or the Union of the Arab

States; national parliaments; regional authorities; a random sample of the population questioned through the telephone or personal interviews; a sample from the municipality of the victim or the offender; a totality of those close to the victim or the offender; or decisions could be made by the victim and the offender in cooperation. (Christie 1982, 55–56)

Proceeding from top to bottom, the various actors listed above, who are hypothetically able to provide input to our sentencing computer, possess increasing familiarity with and proximity to the parties involved in the conflict. With the last option, however, we are faced with the maximum degree of proximity, and it is with this option that our computer would become totally redundant, as the parties concerned could talk directly to each other.

Conclusion

The concrete utopia practiced by penal abolitionists is situated between “being” and “not-being.” It is a “trace of the future” that may develop into full-blown alternatives to punishment, rather than alternative punishments. Their stance does not entail the vision of a final stage where conflict will be redundant and agency an obsolete weapon. Their utopian action presupposes that the process in which they engage cannot reach an end; in other words, it is devoid of a teleology of definitive pacification. Is abolitionism transgressive or subversive? It is if we believe that solidarity, mutual help, mercy, cooperation, social movements, action, resistance, and social change encapsulate a transgressive and seditious nucleus. It is not if we believe that all of these have made our societies what they are.

The abolitionist view of restorative justice is a consequence of the theoretical and philosophical foundations on which it is based (Ruggiero 2011). These posit direct participation of groups and individuals in processes of change, rather than the appointment of specialized personnel imposing notions of justice. Specialized professionals may manage to “restore” the social situation prior to the emergence of a problematic event, but will leave things unchanged, therefore perpetuating the conditions that led to the problematic event in the first place. The utopian action advocated and practiced by abolitionism concerning punishment brings to mind considerations found in anthropology with respect to war. War is an *invention*, and traditional or advanced societies, mild or violent peoples, and assertive or shy communities will go to war if that invention is part of their cultural repertoire: “just like those peoples who have the custom of dueling will have duels and peoples who have the pattern of vendetta will indulge in vendetta” (Mead 1940, 403). Similarly, punishment is an invention, and ultimately, “we need a new social invention” to replace it, because a form of behavior becomes out of date only when something else takes its place, and “in order to invent forms of behavior which will make it obsolete, it is a first requirement to believe that an invention is possible” (ibid., 405).

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