

RESTORATIVE JUSTICE

PRISON AND THE NATIVE SENSE OF JUSTICE

Samuel C. Damren

Introduction

As an alternative to imprisonment, the Restorative Justice Movement relies on an array of restitutionary remedies, victim participation, and victim/offender mediation to attempt to achieve a more community-inclusive resolution to the problems arising from criminal acts. The implementation of these principles in modern criminal justice systems in the western world has significantly expanded during the last several decades.¹ While the embrace of these principles varies in different countries and jurisdictions, the enthusiasm of proponents of Restorative Justice for its continued expansion is justifiably high.

Daniel VanNess and Karen Heetderks Strong, two leading proponents of Restorative Justice, assert that the Restorative Justice approach is modeled on an 'ancient' approach to crime (VanNess and Strong 1997: 7). In doing so, they offer a chart contrasting key elements of these differing approaches:

	Ancient Pattern	Current Pattern
Crime	Injury to victims and their families in the context of the community.	Violation of the law.
Parties	Victims, offenders, community and government.	Offenders and government.
Goal	Repair damage and reestablish right relationships.	Reduce future lawbreaking through rehabilitation, punishment, deterrence and/or incapacitation.

¹ November 10-16, 2002 was designated International Restorative Justice Week in the United States, Canada, Australia, and 15 other countries.

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This ‘ancient’ approach finds its origin in the so-called ‘primitive law’ of native peoples as identified by, among others, anthropologist E. Adamson Hoebel (1973). While the adoption of these native principles of dispute resolution by the modern criminal justice system offers, in many instances, an appropriate sentencing alternative, these principles were not regarded by indigenous peoples as an alternative to imprisonment for in native culture there were no prisons. For example, in 1772, when the tribes inhabiting North America still far outnumbered European settlers, Benjamin Franklin noted, of the great Indian Nations:

The Indian Men, when young are Hunters and Warriors; when old Counsellors; for all their Government is by the Counsel or Advice of Sages; there is no Force, *there are no Prisons*, no Officers to compel Obedience or inflict Punishment. (Venables 1992: 103)

When introduced by state society into the native world of old, the previously “unknown practice” of imprisonment (Gluckman 1967: 60) was regarded as “absolutely evil” by indigenous peoples (Goldring 1971: 378). In contrast, based on its exceedingly high rate of incarceration, the United States of the current era enjoys the dubious reputation, as “The Great Incarcerator” (Stern 1998: 36).

This article focuses on this striking difference between the modern nation state and indigenous native culture, advancing the thesis that prison is not only the creation, but has become a signature institution of the modern nation state, and that its absence in native culture exposes a fundamental discontinuity between the native world of old and state society. Section I of this article analyzes the construct of native culture and the ‘native sense of justice.’ Section II reviews the manner in which the formalist-substantivist debate diverted ethnojurisprudence from certain fundamental differences between the native culture and state-based society. Section III examines the expansion of the practice of imprisonment in modern state society and contrasts the imperative of punishment in state society with the differing imperatives of native culture. Section IV discusses the wider implications of Restorative Justice in the modern world.

To the citizen of the modern world, the suggestion that a society could exist without prisons is a utopian dream. To the kinsmen of pre-state cultures, however, the existence of a society that premises its order upon the use of prisons would be an unimaginable dystopia. In order to understand these conflicting perspectives, an exposition of the native world of old must be undertaken as well as an examination of the manner in which the differences between native culture and state society were disconnected and marginalized through the formalist-

substantivist debate in ethnojurisprudence. From this dramatic relief, the contrasts between these two perspectives of societal ordering can be more fully considered.

I. The Place Without Prisons

The social order of indigenous native culture does not operate from the same fulcrum as that which levers the rule of law in state-based societies.² In native culture,³ that fulcrum is located in the tension between the need to maintain an often delicate balance between and among kin groups in the face of an ever-shifting societal equilibrium. As a result, in contrast to the popular understanding of crimes committed by individuals in state society, the question of whether an individual kinsman in native culture has committed a wrong depends not only on the act itself, but on the relationship at the time of the particular act between and among the variously affected kin groups, and the extent to which the act in question creates an imbalance in, or interferes with, the overall dynamics of kin group symmetry. It is for this reason that, unlike the prohibitions of criminal law in state-based society, the so-called ‘wrongs’ and ‘remedies’ of native culture are situation-specific (Kluckhohn 1959).

A. *The échange à trois.*

The parable of the Maori *échange à trois* is renowned among anthropologists, and as exemplified in the recent work of Maurice Godelier, *The Enigma of the Gift*, constitutes to this day a renewable and vital touchstone for anthropological theory (Godelier 1999). The *échange à trois* was a keystone to Marcel Mauss’ famous 1925 *Essai sur le Don*. The author of the parable, Tamati Ranapiri, was a native sage who used it in the early 1900s to explain the concept of the Maori *hau* to ethnologist Elsdon Best (Best 1909).

² This distinction was previously discussed in abbreviated form in an analysis of Karl Llewellyn’s views on the so-called rules of precedent (Damren 2000).

³ The reference to ‘native culture’ in this article is not based on an assumption that all indigenous societies that existed before state-based society, and all those existing along side it or in a circumstance of subjugation, are, in any sense, equivalent mechanisms of societal order. Instead, the reference to ‘native culture’ refers to certain perspectives and approaches to societal ordering that are shared by these diverse cultures; and, for this reason, demand critical analysis.

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Now, concerning the *hau* of the forest. This *hau* is not the *hau* that blows (the wind). No. I will explain it carefully to you. Now, you have something valuable which you give to me. We have no agreement about payment. Now, I give it to someone else, and, a long time passes, and that man thinks he has a valuable, he should give some repayment to me, and so he does so. Now that valuable which was given to me, that is the *hau* of the valuable which was given to me before. I must give it to you. It would not be correct for me to keep it for myself, whether it be something very good or bad, that valuable must be given to you from me. Because that valuable is a *hau* of the other valuable. If I should hang onto that valuable for myself, I will become *mate*.⁴ So that is the *hau* - *hau* of valuables, *hau* of the forest. So much for that (Sahlins 1972: 152).

Mauss asserted that the parable was an example of the universal and all-embracing principle of reciprocity in indigenous native cultures.⁵ Mauss' analysis of the *échange à trois* was criticized in 1972 by Marshall D. Sahlins for its failure to adequately account for the role of the second donee in the parable.

Actually, to suppose Tamati Ranapiri meant to say the gift has a spirit which forces repayment seems to slight the old gentleman's obvious intelligence. To illustrate such a spirit needs only a game of two persons: you give something to me; your spirit (*hau*) in that thing obliges me to reciprocate. Simple

⁴ *Mate* is defined by Best as a "serious evil ... even death."

⁵ As Mauss explains,

[i]t follows clearly from what we have seen that in this system of ideas one gives away what is in reality a part of one's nature and substance, while to receive something is to receive a part of someone's spiritual essence. To keep this thing is dangerous, not only because it is illicit to do so, but also because it comes morally, physically, and spiritually from a person. Whatever it is, food, possessions, women, children, or ritual, it retains a magical and religious hold over the recipient. The thing given is not inert. It is alive and often personified, and strives to bring to its original clan and homeland some equivalent to take its place (Mauss 1967:10).

enough. The introduction of a third party could only unduly complicate and obscure the point. But, if the point is neither spiritual nor reciprocity as such, if it is rather that one man's gift should not be another man's capital, and therefore the fruits of a gift ought to be passed back to the original holder, then the introduction of a third party is necessary. It is necessary precisely to show a *turnover*: the gift has had issue, the recipient has used it to advantage. Ranapiri was careful to prepare this notion of advantage beforehand by stipulating the absence of equivalence in the first instance, as if A had given B a free gift (Sahlins 1972: 160).

Under Sahlins' proposed analysis, the Maori *hau* applies to all 'gifts' and requires that even when a 'free' gift produces a yield, some equivalence of that yield must be returned to the original giver. When this analysis is shorn of the surplusage of Marxist notions of 'capital,'⁶ and restricts itself to intrinsic components of the native world, a more complete explanation of Tamati Ranapiri's *échange à trois* is revealed. Building on Best's observation that "*hau* of land is its vitality, fertility and so forth," Sahlins, in fact, discerns a generalized application of the Maori *hau*:

So, as we had in fact already suspected, the *hau* of the forest is its fecundity, as the *hau* of a gift is its material yield. Just as in the mundane context of exchange *hau* is the return on a good, so as a spiritual quality *hau* is the principle of fertility. In the one equally as in the other, the benefits taken by man ought to be returned to their source, that it may be maintained as a source. Such was the total wisdom of Tamati Ranapiri (Sahlins 1972: 167-8).

The implications of this world view cannot be overemphasized. The cohesive knit of shared renewal exemplified by the Maori *hau* enabled native society to expand relationships between and among kin groups into far more wide-ranging and complex relationships than would otherwise be possible based on the basis of

⁶ In Sahlins' later works, he came to reject the notion that Marxist formulations "could be translated without friction to the comprehension of tribal societies." However, he asserted that Marx, himself, would agree with a reformulation of certain aspects of his theoretical construct to account for "later anthropology" (Kuper 1999:168-9).

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direct reciprocity even where such reciprocity includes “chains of gifts and counter-gifts” (Schott 1982: 50).

This concept of fecundity and shared renewal finds original expression in indigenous native culture in the universal prohibition against incest (Levi-Strauss 1969). The prohibition against incest requires kinsmen to marry women outside their own kin group. Based upon this model, the payment by the husband’s group of bridewealth or brideprice to the wife’s kin group, is *not* conceived as a payment for the wife. Rather, the *hau* of the wife is her fecundity; and, the payment of bridewealth or brideprice by the husband’s kin group is the ‘return’ made on the yield of the gift of the wife: her children. It is a return made to maintain the fecundity of a native social order premised on the practice of exogamy (Levi-Strauss 1969: 466-71). In this respect, the order of indigenous native society mirrors a natural world that is interconnected by cycles of renewal, by the fecundity of living things, and by a constant shifting symmetry in these relationships. Of course, an actual ‘modeling’ of these features was not consciously undertaken by native participants for native culture did not view man as apart from nature, but instead as an integral part of an overall natural system of balance and renewal.

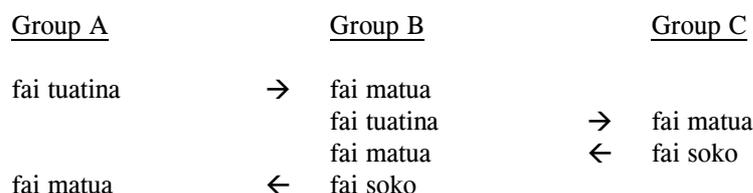
A more complex example of this societal knit is illustrated by the three-party exchange and relationship among *fai tua tina*, *fai soko*, and *fai matua* in the Polynesian community of Tikopia.⁷ Here the relationships established between kin groups upon the marriage of two of their members crystallize an ongoing relationship that is most demonstrative during the *rites de passage* of a child born of this union (Firth 1936: 180). The child is denominated the *tama tapu* of its mother’s kin group. During the *tama tapu*’s birth, adolescence, marriage, sickness and death, the mother’s group performs various personal services for the child⁸

⁷ Native cultures increase this complexity to include four-party relationships and exchanges (see, for example, Leach and Leach 1983: 361-364), and even greater complexities.

⁸ As Firth explains:

The duties of mother’s brothers begin at the birth of the child. One of their representatives must attend, take the babe in his arms, and recite a formula which purports to imprint on its mind the requisite economic and social duties to be observed ... At the initial torchlight fishing of a boy, a mother’s brother takes charge of him in the canoe ... Here, too, (super-incision) it is the obligation of the mother’s brother to take the chief part ... Again

which, just as a group's women are prevented from marrying within the group by the prohibition against incest, the child's own group is prevented by taboo from performing themselves. The mother's group, however, is not the only outside kin group which performs a role during the child's *rites de passage*. The child's father's sister's group undertakes the complementary role of supplying material services to the child which his or her kin group is, likewise, prevented from performing by other taboos.⁹ The mother's group is given the ceremonial name of *fai tuatina*. The father's sister's group is called the *fai soko*, and the child's own group the *fai matua* (Firth 1936: 433). As members of these kin groups pass through the *rites de passage*, however, each group ultimately performs, and is the recipient of, all of these services. From a systemic perspective, this process of 'exchange' and 'return' provides a symmetrical and balanced flow of inter-kin group relationships most easily illustrated in diagrammatic form:



(personal services move →)

(material services move ←)

when a person appears for the first time at the sacred religious dances of Marae, it is the duty of the tuatina to look after the novice ... let sickness, accident, or death overtake their 'sacred child' and they rally round in full force ... In some cases even with the death of the tama tapu material interest in him is not entirely dropped ... (Firth 1936: 213-215).

⁹ As Firth further explains:

On the husband's side an obligation of special weight is to come and assist his wife's relatives when as a group they have to provide food for some ceremonial occasion. Every man who has married a woman of the family should come along with his bundle of firewood on his shoulder and his bunch of coconuts, while his contribution of taro, breadfruit, or bananas is carried by his wife, following behind. If the man cannot come in person he sends as substitute his brother (Firth 1936: 305).

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In *The View From Afar*, Claude Levi-Strauss noted that inter-kin group relationships of this sort constantly overlay one another in indigenous cultures -

Thus, the relation between society as a whole and restricted families is not static, as is a house and the bricks it is built of; it is rather a dynamic process of tensions and oppositions which are always in precarious equilibrium. The point of equilibrium and the chances of its lasting vary endlessly according to time and place....

In this case, the entire field of kinship becomes a kind of chessboard on which a complicated game unfolds. An adequate terminology assigns the members of the group to categories in accordance with these principles: that the category or categories of the parents determines directly or indirectly those to which their children belong; and that, following their respective categories, the members of the group can or cannot intermarry. Peoples who appear ignorant or savage have thus invented codes that we have trouble deciphering without the help of our best logicians and mathematicians (Levi-Strauss 1985: 61).

Maurice Godelier's recent contribution through *The Enigma of the Gift* to the anthropological literature discussing *The Gift* is several fold. Based upon an examination of ethnologies in Polynesia and elsewhere that were compiled subsequently to Mauss' work, it significantly updates Mauss' work by analyzing gift-giving aspects of various native cultures similar to the Tikopian *fai tua tina*, *fai soko*, and *fai matina*. Through his examination of these texts, Godelier also refines many of Mauss' original observations. Pertinent to the instant discussion is Godelier's description of how the gift-giving mechanism of the potlatch is utilized by native cultures to provide an exchange dynamic for changing relations between and among kin groups, rather than simply preserving a static social order that might otherwise occur through a balanced exchange of gifts.¹⁰

¹⁰ As opposed to the balanced exchange identified above, the logic of potlatch exchange requires one to give more than he thinks that the recipient can return (Godelier 1999: 56-58). Godelier discerned two distinct functions for the potlatch gift-giving exchange. First, the potlatch was "to validate the public transmission of ... ranks and privilege" by having the person of rank give away more than those subject to his authority could return and, thereby, balance his rank against a corresponding imbalance in gift giving. This traditional function of the potlatch was consistent with a native system of balanced exchange. In other circumstances,

This article's contribution does not constitute a further refinement of Mauss' work. Instead, it proposes to invert Ranapiri's paradigm of gift giving and return to explicate the workings of the so-called native 'legal' system.

B. The native sense of justice.

When something is wrongfully 'taken,' instead of being 'given' as it is in the *échange à trois*, the societal response from indigenous culture, which I will term the 'native sense of justice,' requires an equal, but inverse, restoration of equilibrium. In contrast to the world view of state-based society, this need to restore balance to the dynamic of inter-kin group symmetry is at the foundation of the native sense of justice. While, as Levi-Strauss noted, native culture is not 'static,' its operational paradigm is, nevertheless, formulated on a continuity of exchange between and among kin groups that places the imperative of preserving and creating balance between and among those groups above all other imperatives.

In contrast to native culture, where the primary constituent members of society are kin groups not individuals, the primary constituents of mature state-based society are individuals. In native culture, a 'wrong' committed by an individual achieves societal recognition and response only to the extent it disrupts the 'dynamic process of tensions and oppositions' existing between and among kin groups at the time of the so-called 'wrong.' From a state-based perspective, 'wrongs' of this magnitude may be few and far between, but, in native culture, because of the close and constant knit of kin group relationships in the indigenous world, they are not. Notwithstanding this difference, the principal contention here is that, whether the matter under consideration is minor or grievous, the native sense of justice proceeds from a different focal point from that of state administered justice. This is not to suggest that tensions in relationships between and among individuals within kin groups do not exist in native culture or do not constitute their own subset of societal tensions and oppositions (Moore 1978: 111-126). Rather, the distinction at issue is that between the focal points of state society and native culture occasioned by the primacy of kin group relationships in native culture, and the primacy of the rule of law in state-based society.

however, for example, where 75% of a native group had died as a result of "diseases and epidemics," the potlatch was utilized to reorder the previous social order between and among kin groups and kinsmen into a workable newly balanced social order that accounted for this calamitous loss of population (Godelier 1999: 76-8).

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In native culture, the wanton act of murder, which is viewed as one of the most heinous societal transgressions in state society, is customarily remedied through the payment of materials or services from one kin group to another, or through the killing of a kinsman (not necessarily the perpetrator) of the offending kin group. Material transferred from an offending kin group to the victim's kin group deprives the offending group of bridewealth that it could otherwise use to increase the kin group's membership. In turn, the payment of material by the offending kin group to the victim's kin group enables the victim's kin group to secure additional bridewealth to be used for this very same purpose and so permits a societal restoration of kin group equilibrium.¹¹ The impulsive killing of a member of the offending kin group provides a similar, but incomplete, restoration of this balance because it does not include a 'return' to the victim's kin group and, therefore, is not the preferred means of restoration.¹² From this perspective the native sense of

¹¹ As LiPuma explains in discussing the indigenous Maring culture of Highland New Guinea:

[h]omicide is an expression of individual emotion and a crime against society at large; but the salient social fact of murder is that it depletes the reproductive potential of the victim's clan. This view of homicide surfaces in the relationship between an individual's punishment and clan compensation (LiPuma 1988: 73).

¹² A vivid and unvarnished example of this response was recorded in what is now antiquated and politically incorrect terminology by R.F. Barton in 1930 when he was a young government supervising teacher in the Philippines. As a teacher, he was sometimes asked by state authorities to represent natives where they were brought before government magistrates. It was in this capacity that Barton met Wild Raspberry, who was accused of murder.

"About two moons ago, as I was working in the fields," Wild Raspberry said, "a woman came running toward me. 'Our neighbor, Centipede, has gone crazy and killed both your children!' she screamed. I thought she was crazy herself, but still I ran home. There they were. The girl had fled from the man, the baby on her back. She was climbing up the ladder into the house. He killed the boy there - right on her back; I know, because there was blood on the ladder. And then he-

I interposed hastily, "And what did you do?"

justice constitutes a direct inversion of the native gift-giving mechanism of exchange and return illustrated by the *échange à trois*. And, it is for this reason that the award of material compensation for so-called ‘crimes’ in native culture is recognized as “one of the most basic and distinctive principles of customary law,” and, the failure of Western-based courts to make such awards is a source of continual “puzzle[ment]” to, and “criticism” from, native peoples (Epstein 1969: 292-303).

II. *Homo Economicus*

Since the 1960s, theoretical constructs of so-called ‘primitive law’ have been infected by the ‘formalist-substantivist’ debate that raged, more prominently, in the arena of economic anthropology. In brief, the issue posed by this debate was

“I got my war-knife. I didn’t take my shield. I wanted one hand for the knife and the other for a spear. They told me, ‘He ran toward Liguae.’ I followed, I came to a clearing. There *he* was, killed already. He had attacked two women, working in their garden, and they had killed him. He had no brothers - only two sisters. I went back to the village and killed one of them.”

“Why did you kill her? She had no guilt.”

“There were no brothers.”

“You don’t understand me. Why kill anybody?”

He thought I was hard of hearing and raised his voice. “I should rather have killed a man, but there was no man to kill - only women. Yes, I was very angry. ‘Why did you kill him?’ I screamed at those women in the garden. ‘We had to; he was going to kill us,’ they said.”

“He was insane; he was dead. Why kill anybody else?”

“They killed *two* of mine, the boy and the girl. Before I could kill the other sister, the police held me. How can an American know the feelings of men?” Unconsciously he arrogated to his own kind the name “men,” as primitive folk are likely to do all over the world. (Barton 1930)

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whether the models devised by the modern social sciences to describe and analyze social behavior in market-based society could be used to explain the workings of the indigenous native culture. As explained below, the participants in these debates talked by each other. The debate never achieved conclusion and its embers continue to smolder (Wilk 1996).¹³

A. The formalist-substantivist debate in economic anthropology

In economic anthropology, the formalist-substantivist debate began in 1957. In *Trade And Market In Early Empires*, Karl Polanyi drew a distinction between the 'substantive' and the 'formal' meaning of economics.

The substantive meaning of economics derives from man's dependence for his living upon nature and his fellows. It refers to the interchange with his natural and social environment, in so far as this results in supplying him with the means of material want satisfaction.

The formal meaning of economics derives from the logical character of the means-ends relationship, as apparent in such words as 'economical' or 'economizing.' It refers to a definite situation of choice, namely, that between the different uses of means induced by an insufficiency of those means. If we call the rules governing choice of means the logic of retinal action, then we may denote this variant of logic, with an improvised term, as formal economics (Polanyi 1957: 243).

Polanyi contended that these two meanings of economics were completely separate: the laws of formalism pertain to the mind; whereas, the laws of substantivism are of nature. Polanyi argued that economy, in the substantive sense, exists for all societies, but that 'economizing' through a price/market-based mechanism, while one possible adaptation, is not the only method by which cultures might respond to this circumstance. He concluded that, while formalist economics provided an incisive analysis to market-based societies, in societies that were not based on a price/market mechanism, 'formal' economic analysis was inappropriate (Polanyi 1957: 241).

¹³ The debate did translate to ethnojurisprudence, see Section II.B., *infra*, but legal anthropology itself has since undertaken other theoretical paths as well. (See also Riles 1994; Conley & O'Barr 1993.)

Polanyi's argument precipitated great controversy (LeClair 1962; Pospisil 1963; Cook 1966). Perhaps more than any other commentator of the period, Robbins Burling was particularly troubled by Polanyi's assertion that economizing did not occur in indigenous society. Burling viewed Polanyi's definition of substantive economics as ethnocentric (Burling 1962: 810). On the authority of economist Lionel Robbins,¹⁴ Burling asserted that the application of the science of economics was not restricted to material objects and ends, but applied equally to other relationships.

It is possible to look upon a society as a collection of choice-making individuals, whose every action involves conscious or unconscious selections among alternative means to alternative ends. The ends are the goals of the individual colored by the values of his society toward which he tries to make his way. They may include prestige, love, leisure, or even money. The means are the technical skills and knowledge at his disposal, including skill at oratory or endurance at the hunt as well as technical knowledge as such. There are no specifically economic techniques or economic goals. It is only the relationship between ends and means, the way in which a man manipulates his technical resources to achieve his goals, that is economic...

[Clearly,] one must allocate his own resources ... [a]ttention, like money or time, must be economized ... [e]ach person has at his disposal a certain amount of love, of admiration, and of power, as well as of labor or money or energy, and these must all be distributed. It is reasonable to suppose that they are distributed with the intention of maximizing one's own satisfactions (Burling 1962: 818).

As a consequence of his expanded concept of economizing, Burling saw no reason why economic analysis could not appropriately apply to indigenous native culture, as it did to market-based society (Burling 1962: 819). Other scholars of the time were quick to agree (Wilk 1996: 157-163).

¹⁴ Polanyi asserted that Robbins's *Essay on the Nature and Significance of Economic Science* "fatefully distorted the problem" posed by the "uncritical" employment of the compound concept [formalist v substantivist economics] and fostered the "economistic fallacy" (Polanyi 1957: 270).

B. The formalist-substantivist debate in ethnojurisprudence.

The dichotomy between the existence of a price/market mechanism in state-based society and its absence in native culture, which was the flash point for the formalist-substantivist debate in economic anthropology, parallels the distinction between the presence in state society of centralized legal authority and its absence in native culture. This parallel permitted the translation of the formalist-substantivist debate into ethnojurisprudence. In 1958, Leopold Pospisil, a pioneer in theories of legal pluralism (Goodale 1998), initiated the formalist analysis in law with a monograph entitled *Kapauku Papuans and Their Law*. In this work, Pospisil asserted that, irrespective of the absence of a centralized legal authority, legal process exists in any society so long as four elements are present: authority, intention of universal application, obligation, and sanction (Pospisil 1963: 258-272). As refined in subsequent works, “the essential feature of legal decision,” under this concept, is that a particular conflict between two adversaries be of such a type “that a third party (authority) possesses the privilege to pass on it” (Pospisil 1971: 125). In Pospisil’s view, the product of such a process is a legal system.

In advancing this argument, Pospisil asserted that state society does not comprise a single legal system, but innumerable sub-systems.

I would like to go even farther and acknowledge the existence of legal systems in any organized group and their subgroups within the state. Consequently and ultimately, even a small grouping such as the American family has a legal system administered by the husband, or wife, or both, as the case may be. Even there, in individual cases, the decisions and rules enforced by the family authorities may be contrary to the law of the state and might be deemed illegal. Indeed, there are ruthlessly enforced legal systems of groups whose existence and *raison d’être* are regarded by the state not only as illegal but even criminal. That criminal gangs such as Cosa Nostra have their rules, judicial bodies and sanctions that are more severe than those of the state, is common knowledge. What is not realized is that their rules and judicial decisions embody the same types of criteria as does the state law (authority’s decision, *obligatio*, intention of universal application, sanction). Therefore the principles contained in the gang leaders’ decisions qualify to be regarded as parts of legal systems... (Pospisil 1971: 112).

The law of the criminal gang is usually provided with sanctions much harsher and infinitely more effective and immediate in application than sanctions of the official law of the country; therefore members of such organizations conform primarily with the legal systems of their illicit organization. Thus, as far as gangsters are concerned, the legal center of power is located in the gang rather than on the level of society as a whole. Consequently, the dogma regarding the law of the state as the most powerful source of social control proves to be a myth in some instances in our western civilization (Pospisil 1971: 116).

In 1971, Stanley Diamond (Diamond 1971), in what is now regarded a “powerful, but neglected essay” (Gordon 1989), first swung the substantivist sword in the field of ethnojurisprudence. Diamond began his essay by criticizing anthropologist Paul Bohannan’s assertion that:

[L]egal rights have their material origins (either overtly or covertly) in the customs of non-legal institutions, but must be overtly restated for the specific purpose of enabling legal institutions to perform their task (Bohannan 1965: 36-7).

While Diamond was quick to point out that custom was not the sole source of law in state society, he argued that Bohannan’s assertions regarding the origins in so-called customary law of ‘legal rights’ improperly assumed a continuity between native culture and state-based society. Diamond posited that there was, in fact, fundamental discontinuity between these two forms of society. He observed that, even where the customs of indigenous peoples acquired the force of law in state society, such as in archaic societies where the sovereign was weak, custom, in those circumstances, was only *given* the force of law. In his view, so-called ‘customary law’ never constituted an independent previously-established system of legal authority. Diamond argued that, for politically expedient reasons, the sovereign in archaic societies gave custom the force of law since it was better for the sovereign to enforce a custom that, as yet, he was powerless, or did not need, to change, than to fail in attempting to change it. Thus, Diamond proposed that Sir Henry Maine’s famous epigram, ‘what the sovereign permits, he commands,’ should realistically read: ‘what he cannot command, the sovereign permits’ (Diamond 1971: 51). Following up on Maine’s perspective, Diamond noted that:

As the state develops, according to Maine, “the individual is steadily substituted for the family as the unit of which civil laws take account.” And in Jhering’s words, “[t]he progress of law consists in the destruction of every natural tie, in a continued

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process of separation and isolation.” That is to say, the family increasingly becomes a reflex of society at large (Diamond 1971: 52).

According to Diamond, through a progressive process of the “radical isolation of the individual” (Diamond 1971: 71), the state establishes an individual’s rights and obligations, and monopolizes the legitimate use of force as a sanction. It taxes, tolls, and conscripts individuals, as well as educating and working for the public weal. In so doing, the state perniciously undercuts the foundation of kinship-based society. In this progressive process, the imperatives of state-based society and the imperatives of native culture are oil and water to one another. They mix together, but remain an emulsion of separate components. In Diamond’s view, the end result of this process reduces indigenous native culture from an integrated body of kinsmen to the sack of pebbles that the Kings of Dahomey passed to their successors with each pebble signifying a citizen and insuring accurate and efficient conscription, taxes, and tolls (Diamond 1971: 55-6).

Diamond concludes that, in return for their allegiance, each state citizen receives a promise of security from his fellows and from external forces, but it is a double-edged covenant -- for a citizen is only secure to the extent he has a right to be secure.

The struggle for civil rights, then is a response to the imposition of civil law. With the destruction of the primitive base of society, civil rights have been defined and redefined as a reaction to drastic changes in the socioeconomic structure, the rise of caste and class systems ...[t]he rights to socially and economically fruitful work, for example, which did not come into question in a primitive society or in a traditional sector of an early state (and therefore was not conceived to be a stipulated right) becomes an issue under capitalism (Diamond 1971: 69).

In 1980, Judge Richard Posner, in an article entitled, *A Theory of Primitive Society, with Special Reference to Primitive Law*, lent his brush to the canvas of the formalist-substantivist debate. Posner claimed to advance the formalist perspective by “pushing the economic analysis of primitive society further has been done to date” (Posner 1980: 4). In this assertion, he was most certainly correct. Although not explicated in Posner’s text, undoubtedly because he viewed the concept as beyond dispute,¹⁵ Posner premised his thesis on the assumption that

¹⁵ “The rationality of ‘economic man’ is a matter of consequence, not states of mind” (Posner 1980: 5)

primitive man, like modern man, is born into the world with the philosophy of *homo economist*, i.e., the philosophy which teaches on every issue the most important question is ‘what’s in it for me.’

By so doing, Posner was able to definitionally vilipend the force of kin groups in native society into an unseen and seemingly irrelevant dimension. From the blinders of this perspective, Posner concluded that kinship relations merely functioned in native culture as a form of ‘insurance’ that provided security, in an otherwise insecure world, to its individual members. Posner similarly reasoned that ‘gifts’ exchanged in indigenous cultures, which Mauss, Levi-Strauss, Sahlins, and Godelier identified as a rich tapestry of reciprocity and fecundity, were no more than ‘insurance payments.’

Other bedrock principles of the native world suffered a similar reduction in the eyes of Posner’s *homo economicus*.

Polygyny disperses political power in another way, by increasing the opportunity costs of retainers. Wealth is thereby diverted into a politically harmless channel, because women are useless as fighters in primitive societies. (The value of additional wives, it should be noted, is not only or mainly to provide sexual variety; it is also to provide additional insurance, especially by increasing the number of sons to whom, as members of his kin group, the father can look for support in his old age.) (Posner 1980: 22.)

Another way of interpreting brideprice, one also based on the costs of information, is as a device for compensating the wife in advance for her services in the household (Posner 1980: 39).

A cultural explanation of exogamy thus seems indicated. One explanation is that exogamy serves an insurance function in those cases, which are common, where kinship obligations cross the boundary between the inter-marrying kinship groups. Thus, in a patrilineal kinship system, a man is not a member of his mother’s kinship group but he may still have a claim for assistance from her relatives. Exogamy thus broadens the insurance pool. This effect is particularly important where, as is again common, each kinship group resides in a compact area, so that exogamy enables geographical diversification of risk. Exogamy also facilitates trade and alliances by creating personal relationships between families and villages. Finally, it may

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reduce the ferocity of retaliation for wrongs done by a member of one kinship group against a member of another (Posner 1980: 42).

C. A substantivist reformulation of ethnojurisprudence.

Under formalist theory, as expressed by Burling, Pospisil, and Posner, the legal or economic systems in any society are merely products and sub-products of individual 'economizing' or 'decision-making' activities. As a result, the absence of an instituted legal system or price market economy in native culture does not, and cannot, undercut the application of formalist theory. It is for this reason that the formalist economist is able to see a certain sense in the idea of economizing love or similar intangibles - "I see no reason why one should not even speak of the marginal utility of loving care" (Burling 1962: 819), and the formalist legal scholar is able to speak of the existence of a legal system between mother, father, and child that is independent of, and distinct from, that of the state (Pospisil 1971: 112).

What formalist theorists ignored in their formulation of state society and native culture is the fact that in native cultures, *individuals* are exchanged between and among kin groups. In economic parlance, instead of being solely recipients and payers, they are also part of the currency.¹⁶ This distinction is fundamental to the instant discussion and its failure to be observed by formalists, or better articulated by substantivists, is the principal reason why the protagonists of the formalist-substantivist debate never crossed swords. The tools of economic analysis might well have application, in Levi-Strauss's words, to 'decipher' the complex codes of the native world that "we have trouble deciphering without the help of our best logicians and mathematicians." But these tools will only have useful application if they are recalibrated to account for the fact that individuals in the native world are

¹⁶ This observation was previously made by Suzanne Miers and Igor Kopytoff in their comparison of Western concepts of slavery with indigenous models in Africa:

Crucial to an understanding of rights-in-person in Africa is an appreciation of the position of an individual in his kin group. Members of such corporate groups may be said to 'belong' to them in the double sense of the English word - that is, they are members of the group and also part of its wealth, to be disposed of in its best interests (Miers and Kopytoff 1977: 10).

not simply the recipients and providers of exchange, but, at various levels, are part of the medium itself.

III. The Place Of Prisons

In the 700s, King Alfred claimed “that all kings will have a prison” (Pugh 1968: 1). In keeping with this admonition, noblemen in 8th Century England sought to establish their own private jurisdictions of authority. The politics of Alfred’s time are not of concern to the current inquiry, but of interest is the objective of these noblemen. From their perspective, to have and control a prison was a necessary attribute of final authority in state-based society.

In the history of punishment in state-based society, the prison, as a penological principle, is a recent phenomenon (Harding, Hines, Ireland & Rawling 1985: 57). According to Michel Foucault, detention was not utilized, or conceived of, as a distinct form of punishment until after the middle ages.¹⁷ Instead, it was utilized principally to secure miscreants until appropriate punishment could be undertaken. In early times, the principal form of criminal punishment was public torture and execution and served both as a demonstration and affirmation of the incontestable power of the state over the individual (Spierenberg 1995: 55-61). The 18-day torture and execution of ‘Damiens the regicide’ in France in 1757, vividly described by Foucault in the first chapter of *Discipline and Punish*, may well constitute the modern zenith of this approach.

In state-based society, the “radical isolation of the individual,” of which Diamond spoke, is accomplished in its most dramatic fashion by punishment. Public execution, mutilation, and torture not only punctuate, but forever imprint on spectators, the fact that no bond of kinship or other societal power is superior to the power of the state. However, as states mature, and potential competition between state authority and other societal powers wanes, less ferocious displays of this state imperative are required; and, indeed, become more effective in legitimizing state authority.

According to Foucault, a second, but less-utilized, societal technique of “organizing the power to punish” (Foucault 1977: 130), was accomplished by stocks, public humiliations, and mutilations that noted the offending citizen’s separation from society (Spierenberg 1995: 51-3).

¹⁷ Edward Peters also dates the rapid expansion of prisons in England as beginning in the late 13th Century (Peters 1995: 34).

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Imprisonment as a form of punishment is the third societal technique identified by Foucault for expressing the absolute power of the state over its citizens. The Rasphuis of Amsterdam, a detention facility of forced labor, which opened in 1596, marked the development of this different expression of punishment. The Rasphuis focused on the causes of antisocial criminal behavior, rather than on the ceremonial reaffirmation of the state's power over its citizens. It was founded on the assumption that "idleness was the general cause of most crimes" (Foucault 1977: 121). According to the *maison de force* at Ghent, work was compulsory and was designed to:

...[r]evive for the lazy individual a liking for work, force him back into a system of interest in which labour would be more advantageous than laziness, form around him a small, miniature, simplified coercive society in which the maxim 'he who wants to live must work,' would be clearly revealed...

This reconstruction of *homo oeconomicus* excluded the use of penalties that were too short - this would prevent the acquisition of habits and skills of work - or too long - which would make any apprenticeships useless (Foucault 1977: 122).

English models of this approach emphasized not only providing a work atmosphere conducive to restoring "interests proper to *homo oeconomicus*," but also relied upon the "terrible shock" of isolation to induce the restoration of "moral imperatives."¹⁸ The Philadelphia model -- the Walnut Street prison -- refined the objectives of 'control' over, and the 'transformation' of, the individual "by the development of a knowledge of the individuals."¹⁹

¹⁸ As Foucault explains:

[t]he cell, that technique of Christian monachism, which had survived only in Catholic countries, becomes in this protestant society the instrument by which one may reconstitute both *homo oeconomicus* and the religious conscience. Between the crime and the return to right and virtue, the prison would constitute the 'space between two worlds' the place for the individual transformation that would restore to the state the subject it had lost (Foucault 1977: 122-3).

¹⁹ As Foucault further explains:

In Foucault's view, all three of these state-based methodologies of punishment share the common objective of "redefining the individual as subject of law" (Foucault 1977: 128). In this regard, Foucault's conclusion is fully consistent with Diamond's views on the "radical isolation of the individual" worked by state-based society upon its citizens. From these complementary perspectives, the separation of individual wrongdoers from society by state punishment becomes, and is in fact, a definitional imperative to the societal order imposed by state-based society.

By contrast, in native culture individuals may be removed from the elaborate 'chessboard' of kin group relations by death, but to cage a kinsman and prevent him from participating in the never-ending dance of kin group equilibrium repudiates the very foundation of the native world. It is as inimical to the order of native culture as would be the refusal of a kinsman to marry outside his own kin group, constituting a violation of the universal prohibition against incest. Thus, just as the prohibition against incest stands as a defining characteristic of native culture, so, too, does the absence of prisons in native culture constitute a defining contrast of its imperatives from those of the modern nation state.

As distinguished from the Philadelphia model of the late 1700s, the modern American prison does not regard as its principal purpose the rehabilitation of criminal offenders. Convicts are in prison today primarily to be punished. This emphasis on punishment and de-emphasis on rehabilitation removes any pretense of benign purpose to the "radical isolation of the individual" worked by state-

[w]hen the new prisoner arrived, the Walnut Street administration received a report concerning his crime, the circumstances in which it was committed, a summary of the examinations of the defendant, notes on his behaviour before and after sentence: indispensable elements if one wished to 'decide what steps will have to be taken to destroy his old habits.' And throughout his detention he would be observed; his conduct would be noted daily and the inspectors - twelve local worthies appointed in 1795 - who, two by two, visited the prison each week, would be kept informed of events, follow the conduct of each prisoner and decide which of them deserved a shortening of his term. This ever-growing knowledge of the individuals made it possible to divide them up in the prison not so much according to their crimes as according to the dispositions that they revealed (Foucault 1977: 125-6).

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based society through imprisonment. The stark contrast between this social imperative and the imperative of native culture to replenish and restore balance between and among kin groups places the fundamental discontinuity between these two forms of societal order in even greater relief today compared to the late 1700s when Benjamin Franklin noted with admiration the complete absence of prisons in the Indian Nations of North America.

IV. Restorative Justice and the Modern World

In reflecting on the adoption of principles of Restorative Justice borrowed from Native American Indian culture into modern criminal justice systems and based upon differences between the 'sacred order' of Indian culture and the secular order of the non-Indian world, some commentators have expressed concern at too broad an extension of these principles into the modern justice system.

Scholars of comparative law have long warned about the futility of transporting legal regimes from one cultural context into another, especially from religious to secular cultures. Enthusiasm within the non-Indian legal establishment for tribal peacemaking seems to reflect dissatisfaction with the financial, social, and emotional costs of adversarial litigation. This newfound praise for tribal justice may also bespeak some wish to show diplomatic or genuine respect for another governmental system. But those who urge us to experiment with tribal peacemaking will fall into the trap of so much romanticizing about indigenous societies if they continue to ignore the real differences between most tribal and non-Indian cultures in contemporary North America.

The very concepts that non-Indians use to describe tribal peacemaking have meanings with no ready equivalence in non-Indian social life. Without a sacred order that penetrates every aspect of life and creates broad social obligations, the kind of consensus and personal acceptance that tribal peacemaking presupposes will be very difficult to achieve (Goldberg 1997: 1018-9).

Conversely, American Indian commentators who seek to increase the scope of tribal law beyond its current limits where both the offender and victim are Indian chafe at the restriction of principles of Restorative Justice to non-violent crimes

under federal criminal law (Zion & Yazzie 1997: 84).²⁰ They argue that tribal justice exclusively should apply to Indian offenders in such circumstances (Pommershaim 1999: 448-453). Although not articulated in these terms, the premise of this argument is that to classify persons as native for some purposes and non-native for others, especially where the distinction drawn (such as that between violent versus non-violent crimes) has no relationship to the native sense of justice, does not lead to a richer appreciation of self, community, and society, but instead, composes a world of irreconcilable conflicts and pervasive contradictions for Indian participants.

Given the discontinuity between the imperatives of state-based society and native culture, it is easy to appreciate the differing views of these commentators. At bedrock, however, native culture and state society are fundamentally incompatible on the issue of final authority. State society is intolerant of any authority that claims to be superior to that of the state and will employ whatever force is necessary to 'isolate' the individual and 'redefine' him as 'subject' to the 'law.' In contrast, native culture cannot abide either the primacy of the individual or the state over the imperative of the kin group. For these reasons, the continued expansion of principles of Restorative Justice in a world that is not founded upon the imperative of the kin group will be dependent upon its increasing acceptance as an alternative form of dispute resolution that re-affirms the individual's status as a subject of the law.

These observations are not intended to dampen enthusiasm for the increased adoption of principles of Restorative Justice into the modern criminal justice system. The modern world, and in particular the United States - the 'Great Incarcerator' - should not take pride in its response to the problems posed to society by criminal offenders. Indeed, the fact that the United States finds it necessary, through imprisonment, to separate so many of its citizens from their fellow citizens, must be regarded as, in significant part, a failing of the American community.²¹ In good conscience, American justice cannot continue to turn a

²⁰ Under federal law, Indians are generally subject to tribal law (not state or federal law) where the offender and victims are both Indians. 18 USC §1152. However, under the Indian Major Crimes Act, violent crimes are exempted from this exclusive grant of jurisdiction. 18 USC §1153.

²¹ In 1990, 458 per 100,000 residents of the United States were in prison or jail. In 1999, this rate of incarceration had increased to 690 inmates per 100,000 (Beck 2000: 2, Table 1). By the end of 1998, nearly 3% of the adult population was incarcerated, on probation, or on parole (Bonczar & Glaze 1999: 1).

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blind eye toward the detrimental societal effects and costs of the massive programs of imprisonment. The costs of imprisonment and criminal activity go far beyond the victim and offender. They branch out to dependants, relatives, neighbors, and others whose lives can also be torn apart by the consequences of the criminal offense to the victim and the consequences of imprisonment to the offender. Restorative Justice presents the modern criminal justice system with an additional approach to these problems.

The principles underlying the Restorative Justice Movement also have wider application to the conflicts facing modern society. What the native world of old had in abundance, and what the modern world increasingly lacks, is an inclusive sense of community. In the modern world, the separation from the larger society of citizens who do not meet the standards of responsibility imposed upon *homo economicus* is not limited to criminal offenders. The chronically mentally ill, the sick without health care, children in poverty - to name just a few - are also marginalized by modern society through restrictions on their liberty and the opportunities open to them that, while less dramatic than prison walls, produce an equally effective separation from society. In doing so, modern American society treats its miscreants and underachievers like infected body parts that must be removed from the larger society in order to maintain its health and well-being.

When threatened by the conduct of its miscreants and the burdens of underachievers, the native world of old used a different approach to preserve the health and well being of its community. Reasoning from a systematic perspective that, in order to be a functional community, all members of that community must be included within it, the native world of old sought to restore the offender to the community through an often complex series of exchanges between and among kin groups that were intended to restore the particular imbalance created by the offender's acts. From this perspective, the true question posed by the adoption or rejection of principles of Restorative Justice in the modern criminal justice system is much wider in scope and more fundamental than commentators in the criminal justice field imagine. The wider issue is whether, as modern society distances itself from its past origins, it increasingly ceases to function as an effective overall community. And, if this question is answered in the affirmative, the next question is whether that trend can, or should, be reversed. In other words, we must decide whether modern society can, or should, find a way to include all of its citizens, including its miscreants and underachievers, within an overall community; or whether in the modern world the term 'community' applies only to subgroups within society that share certain beliefs and goals. In this latter instance, the definition of 'citizen' in the context of the overall society will simply demarcate those individuals that share only one thing in common - they are not in prison or otherwise separated from the overall society.

Conclusion

State society freed the individual from the ever-present grip and embrace of kin-group-based exchange in native culture, but did so at a price. The process that permitted the identity of the individual to emerge from kin group imperatives, also suffered the citizen - no longer a kinsman - to be chained (Charbonnier 1970: 30-1). By coercively separating the individual from the protection and intervention of any other component of society, state-administered punishment through execution, torture, mutilation, and imprisonment, institutionalizes the imperative of state society to redefine the individual as subject to the state. Whether the most modern expression of this imperative, the prison, will forever remain a defining characteristic of state society and a necessary consequence of this imperative, cannot be foretold. Likewise, the template to this question -- whether a modern society can be composed that is inclusive of all of its citizens -- cannot be answered either. In reflecting on this circumstance, our descendants might find that the answer to the question of whether modern state society, like the kings of the past, shall always require a prison is as much a paradigm to their understanding state-based civilization as the *échange à trois* has been to our understanding of the native world of old.

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