Book Review

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D Chappell & P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths 2000 344pp

Time for a Quantum Leap?

Crime and the Criminal Justice System in Australia: 2000 and Beyond is the fifth time that Duncan Chappell, now the Deputy President of the Administrative Appeals Tribunal, and Paul Wilson, now the Dean of Humanities and Social Sciences at Bond University, have compiled a selection of writings on aspects of the criminal justice system in Australia, starting in 1972 with the *Australian Criminal Justice System*. In these post-modern times, the implications and claims of such over-arching titles are questionable. Nonetheless the series has provided a useful kaleidoscopic view of the preoccupations of the Australian criminal justice system at given points in time.

The contributors to the current volume are academics and researchers based in Australia, most of whom are well-known and well-regarded in their field. The first three chapters come under the heading '*The Criminal Justice System*' and deal with issues and prospects for the system, the future of restorative justice and the reform of the criminal law. Section B is concerned with '*Trends in Crime Approaching the New Millenium' (sic)* and covers not only general trends but also specific trends in the areas of drugs, violence and juvenile justice. Section C, '*Law Enforcement and Adjudication'* considers policing and crime prevention, the processing of cases, and sentencing trends. '*Critical Issues in Crime and Justice Policy'* deals with indigenous justice, feminist issues, corporate crime and the cleverly titled chapter by Kathy Laster and Edna Erez: '*The Oprah Dilemma: The Use and Abuse of Victims.'* And finally, Section E, *'Criminal Justice and the Future'* contains chapters on crime prevention, the move to privatise prisons, fraud in the digital age, and organised crime in the context of that buzzword 'globalisation.'

In the introduction, Duncan Chappell suggests that:

> There is little doubt that a broad consensus exists that the basic structure of the adversarial system should also remain a predominant feature of the administration of Australian criminal justice. However, a range of

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> alternative or complimentary (sic) approaches may also be utilised within this framework…[1]

It is not clear who Chappell has in mind when he talks of consensus. Is it criminologists? Is it the general public? In any event, I am not sure that he is right. I would suggest that the restorative justice movement is not restricted in its claims to the use of complementary corrective practices, as is indicated by its placement in this volume. I would further suggest that public confidence in the criminal justice system is questionable.

There is a curious reluctance, particularly among lawyers, to submit the conceptual underpinnings of the system to close examination or to call for empirical data on its functioning. A dichotomy has been created between the moral and legal rights of accused persons and of victims of crime, which I suggest is a false one. This dichotomy is perpetuated by the adversarial system. Many of the contributors to this collection make reference to the way that politicians conduct 'law and order' campaigns in the media, playing (or preying) on people's fears, for political gain. They despair of the oversimplification of criminal justice issues in the popular press. The popular press, just like politics, is adversarial in nature. They both thrive on the conflict created by dichotomies. And where else is the conflict between 'good' and 'evil' able to be so righteously constructed as here? A prime example is the terminology of 'the war on drugs'. Maybe a move away from the adversarial system might assist in the reframing of the public discussion of these issues.

It may turn out that the current paradigm is, as Wimshurst and Harrison claim in chapter one, "the best we should expect in a liberal-democratic society".[2]

However, it would be far preferable if this were established other than by iteration and reiteration. It is also a strange conclusion for a chapter which highlights the system's lack of clear goals, its lack of uniformity: in essence, its lack of the features of a 'system'. It is sometimes assumed that the public is more punitive than the criminal justice system currently is. This may be so, although research carried out here and elsewhere suggests otherwise. In any event, moving the focus away from punishment would be of assistance in depolarizing the debate. I wonder whether the public is not in fact more interested in safety than punishment. Strangely enough issues of safety are marginalised in criminal justice, and it is sometimes assumed that safety comes at the cost of freedom, or in any event is too costly. It is ironic that in these times of economic rationalism, those seeking a shrinking of the role of the state are often the strongest supporters of an expanded role for the state in the area of criminal justice: more police, more prisons. I would have liked to see more discussion of these issues in Section A, a bolder approach.

In chapter eight, David Brereton looks at issues more laterally and discusses the role police can play not in reacting to crime but in crime prevention. He points to more targeted patrolling, better first responses to victims and better follow-up with repeat victims, enhancing police problem identification and solution skills, and cooperation with other agencies. However, this will only be effective with a change of mindset,

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1 D Chappell & P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond*, Butterworths Sydney 2000 at xi.

2 *Ibid* at 14.

"...police organizations need to nurture a culture which is prepared to experiment with new approaches and focus on 'what works'".[3]

Brereton suggests that politicians and the public too will need to be educated about the rationale for the new approaches. However this rationale is revolutionary, and whilst I totally endorse it, I suggest that to be effective, change has to occur on a wider scale. Why should our courts remain immune from a crime prevention role? I know that this is legal heresy but courts could play the role of monitor of crime prevention. Surely with their understanding of due process protections, they would well-equipped for this role. As with the police, the main difference would be a change in emphasis from punishment to prevention. The reality is, however, that for our criminal justice system to genuinely focus on crime prevention would raise issues about addressing disadvantage with an allocation of resources that governments are not prepared to make.

The current main contender for an alternative approach to criminal justice is not crime prevention but restorative justice. Interestingly, John Braithwaite is of the view that restorative justice is not a viable alternative to retributive justice unless it reduces crime. In chapter two, Heather Strang considers the future of restorative justice. She makes the important point that:

> Over the past decade, the restorative justice movement has been embraced around the world as a remedy for all the imperfections of the traditional criminal justice system. Already we know that it is an incomplete model of justice needing safeguards to protect offenders and victims alike from the perils of informal justice.[4]

Restorative justice is politically appealing as a low-cost alternative to the current system. It is claimed to restore the position of the victim in the system. Whilst I am in support of such a move, I am not sure that restorative justice as it is currently conceptualised will provide it. Van Ness suggests that it is a tenet of restorative justice that, "The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by the crime".[5]

If reconciling the parties is the main aim, we have here a movement similar to 'family values, keep the family intact' which has been critiqued by a considerable body of feminist literature. The safety of the victim is inherently at risk of being sacrificed to a 'greater good', in this case, the reconciliation of the parties. Further, justice is dispensed in private, a known site of violence for women and children, and where there is no opportunity for the public denunciation of the unacceptable. This is not to deny that restorative practices have their usefulness. Strang's caution is however timely.

Paul Fairall's chapter on the reform of the criminal law displays a worrying lack of gender analysis. He describes as hysterical the negative reaction of the press to the Canberra case where a footballer was acquitted of assault in 'king-hitting' his wife and two other women at a nightclub because he had been on a drinking binge.[6] He places this case in the context of the 'drug problem' rather than in the context of violence

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3 *Ibid* at 134.
4 *Ibid* at 31.
5 *Ibid* at 23.
6 *Ibid* at 41.

against women. As Ken Polk makes apparent in his chapter on 'Changing Patterns of Violence', gender issues are central to an understanding of criminal behaviour, and "where other sources of support for masculine identity might be lacking, violence provides a ready option for a young male to assert their worth and standing".[7]

I would suggest that one of the reasons that the public lack confidence in the criminal justice system is its failure to consider the gendered dimension of much crime. We know that female crime victims of violent crime are reluctant to report those crimes. Indeed, as Satyanshu Muckherjee points out in his chapter on national crime trends, "large-scale victimization (crime and safety) surveys since [the early 1970s] have consistently revealed that a majority of crimes that occur in the community are never reported to the police".[8]

The Australian Bureau of Statistics 1999 survey showed that 2/3 of assault victims knew their offender.

Robbery appears to be the only violent offence predominantly committed against strangers and research is now being conducted to test the hypothesis that the motive is usually drug-related.[9] In this regard, Toni Makkai's chapter on 'Drug Trends and Policies' reports that drug courts operate in a very different way from conventional courts:

> The objective is to balance public safety with the defendant's rights. This requires two major shifts in the traditional operation of the court:
> 1. the prosecution and the defence team work cooperatively together rather than against each other; and
> 2. the judge is no longer an impartial arbitrator but assumes 'the roles of confessor, taskmaster, cheerleader and mentor. They exhort, threaten, encourage and congratulate participants for their progress or lack thereof' (Inciardi 1996:71).[10]

Maybe all courts would benefit from a cooperative rather than an adversarial approach. It would certainly be worth trialling. The role of the judge in the drug court as captured in Inciardi's very American description would be anathema to most Australian judges and magistrates. However it sounds not unlike the role of a benevolent parent. I am aware that Florida has set up domestic violence courts in which the judges have a similar role. Maybe our society would benefit by treating criminal behaviour as immature behaviour, and having courts act 'in loco parentis'.

George Zdenkowski views initiatives such as drug courts as involving the "embrace of the new rehabilitationism".[11] Commentators have tended to dismiss rehabilitation as a sentencing goal on the basis that it was tried and found wanting. But as Zdenkowski points out, the programs that were implemented were never properly funded, evaluated or targeted. It is more than ironic that at the same time that drug courts are assuming a benevolent parental role, mandatory sentencing regimes are sending young offenders to

7 *Ibid* at 99.
8 *Ibid* at 61-62.
9 *Ibid* at 56.
10 *Ibid* at 81.
11 *Ibid* at 162.

jail. Joy Wundersitz details the negative consequences of the 'get tough' approach to youth justice.[12] It sits oddly too with the simultaneous move to diversion and restorative justice practices such as community conferencing which manage to appeal to the full spectrum of political sensibilities:

> Supporters from the Left of the political spectrum have embraced its ideals of healing and restoration, of empowering offenders, victims and families, of reducing state control over the decision-making process, of conceiving young people as integral members of a family and a community, rather than as social isolates, and its apparent links with traditional notions of justice inherent in indigenous communities. Those from the Right of the political spectrum have also found many elements to their liking. In particular, the notion of returning the victim to a central role in the process and of allowing them to personally confront the young person has found favour with the victim lobby and some politicians, who view conferencing as a way of shaming the young person.[13]

Unsurprisingly, there is little support in this text for 'get tough' approaches. It is hard to resist the conclusion that such policies are an easy call when the targets are not in a position to resist them. Mukherjee points out that such policies are rarely urged for corporate crime, medifraud, white collar crime, and cyber crime.[14] Indeed the criminal justice system is predicated on the basis of individual responsibility, and has proved an unsophisticated tool for dealing with sophisticated crime. As Roman Tomasic points out, "Problems of proof, obstruction, delay, and the complexity of corporate crime cases have presented major challenges for law enforcement officials and regulators".[15]

Globalisation of course exacerbates this problem. We have hierarchies of criminal behaviour with, in this instance, the 'untouchables' at the top.

The need for a rethink of the criminal justice system is addressed by a number of authors in this text. Robyn Lincoln and Paul Wilson talk of the "utter failure of Western criminal justice approaches where indigenous and marginalised peoples are concerned".[16]

Kathy Laster and Edna Erez view current moves aimed at involving victims as participants in the criminal justice system as more symbolic than real. Such initiatives are undermined by negative stereotypes and myths about victims:

> The rationalist model of justice which purports to establish 'objective' and now, efficient systems for the administration of justice, is wary of the 'vengeful', 'insatiable' victim.[17]

It is important that the reform agenda not be driven by economic rationalist considerations. Private prisons, for example, may be successful business enterprises but

12 *Ibid* at 104-112.
13 *Ibid* at 111.
14 *Ibid* at 45.
15 *Ibid* at 266.
16 *Ibid* at 206.
17 *Ibid* at 253.

as Carole McCartney makes clear, we do not know whether they have had a positive effect on recidivism, crime rates, public safety or staff conditions and job satisfactions.[18]

Chappell and Wilson's text captures the variety and complexity of issues comprehended within the notion of our criminal justice system. It highlights the successful programs as well the deficiencies of the current system. It seems to me that the successful programs operate outside the parameters of the retributive model or are artificially forced within it. Whilst the book itself does not call for the theoretical underpinnings of the system to be questioned, it provides some strong arguments for a quantum leap in our thinking about criminal justice.

[18] *Ibid* at 315.