

A FUTURE WHERE PUNISHMENT IS MARGINALIZED: REALISTIC OR UTOPIAN?

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The criminal justice system is thought of as one that decides when and how to punish criminal offenders. But in this Article, Professor John Braithwaite argues that this conventional way of thinking about the system is the main obstacle to its justice and effectiveness in reducing crime. The centrality of punishment is also thought to give the criminal justice system its political appeal. But Braithwaite argues that this situation too could change if restorative justice is found to have more political appeal than punitive justice. One reason is that most citizens find restorative processes more just—procedurally and in terms of outcomes—than criminal trials. Criminal trials invite into the process those who can inflict most damage on the other side, and participants are allowed to speak only in the ways sanctioned by lawyers. Restorative justice invites into the process those who can offer most support to their own side, be it the victim or the offender, and it allows them to express their feelings in the way they choose. As such, restorative justice could be the basis for a more effective, rights-respecting, and politically popular justice system. Punishment was on a downward trajectory in Western civilization between 1820 and 1970. Braithwaite concludes that a return to that trajectory in the next century is quite possible.

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INTRODUCTION

What is the proper punishment for a given type of crime? This question has obsessed the most distinguished philosophers of criminal justice.¹ But it seems a silly question, for why should one assume that any punishment is the proper response to a crime? Why not assume that punishment is rarely the best way to respond to crime? The former assumption seems grounded in a failure of imagination and ignores the practices that citizens of all cultures utilize instead of punishment in responding to wrongdoing. We might do better to follow the lead of many Native American peoples who believe in putting the problem rather than the person at the center of this deliberation.² The "right" punishment of the wrongdoer is rarely going to be the best solution to the problem.

In this Article, I first argue that punishment is a practice people resort to when they are in a position of diminished authority, for lack of a more effective response. Second, I argue that we can better understand the future of punishment by contemplating its past. That past can be divided into three eras: descent into brutal punishment with the rise of the nation-state, increasing civility between 1820 and 1970 as the state consolidated its power, and finally some slipping back toward barbarism since 1970. While we cannot expect a return to the self-confidence of the Keynesian welfare state that it could solve problems like crime, evidence-based crime prevention is finding preventive strategies that work.³ Restorative justice is both a social movement with some political momentum and a promising delivery mechanism for effective crime-prevention strategies. Restorative justice is a process of bringing together the stakeholders (victims, offenders, communities) in search of a justice that heals the hurt of crime, instead of responding

1. See generally ANDREW ASHWORTH, SENTENCING AND PENAL POLICY (1983); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Clarendon Press 3rd ed. 1996) (1823); R.A. DUFF, TRIALS AND PUNISHMENTS (1986); IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., Augustus M. Kelley 1974) (1887); JOHN KLEINIG, PUNISHMENT AND DESERT (1973); JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY (1979); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); WOJCIEH SADURSKI, GIVING DESERT ITS DUE (1985); C.L. TEN, CRIME, GUILT, AND PUNISHMENT (1987); John L. Mackie, *Morality and the Retributive Emotions*, in 1 CRIMINAL JUSTICE ETHICS 3-10 (John Kleinig ed., 1982); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3-13 (1955).

2. See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 126 (1995).

3. Most policing strategies are based on tradition and assumption rather than on empirical research showing that a strategy reduces crime. See LAWRENCE W. SHERMAN ET AL., UNIVERSITY OF MD., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1997).

to hurt with more hurt. My conclusion is that restorative justice is one promising alternative for a future in which punishment is marginalized.

I. PUNISHMENT AS A WEAPON OF THE WEAK

Punishment is a sign of weakness. This I argue is true of parenting, business regulation, state regulation of criminals, and education. Weak parents, those bereft of capacities for socializing their children more civilly, are quick to resort to punishment. For example, the poorest, most struggling parents, those in the weakest position to offer their children a flourishing future, resort to punishment much more than comfortable middle-class parents.⁴ This is a major reason for the higher delinquency rates of children from disadvantaged families.⁵ In Robert Sampson and John Laub's path-breaking analysis of decades of delinquency data collected by Sheldon and Eleanor Glueck, the structural effect of family disadvantage on crime was found to be mediated through "harsh, unreasoning, and punitive discipline combined with a rejection of the child."⁶ That is, family disadvantage increased the punitiveness of parenting, which in turn increased crime.

Ian Ayres, Peter Grabosky, and I have described effective business regulatory agencies as "Benign Big Guns."⁷ They "speak softly while they carry big sticks."⁸ In a study of the ninety-six largest Australian business regulatory agencies, Grabosky and I found that while the Benign Big Guns rarely or never used punishment, agencies with weaker powers⁹ used prosecution much more often.¹⁰ Again, the conclusion of the responsive regulation tradition of research is that Benign Big Guns have capabilities for securing compliance that are superior to those of weak prosecutorial regulatory agencies that consistently pursue administration of punishment.¹¹ One reason is that Benign Big Guns have the authority to encourage compliance that would otherwise be coerced, and their authority is accepted as more legitimate when it is not exercised coercively.

4. See generally Don Weatherburn, *Economic Stress and Crime-Prone Communities* (1998) (unpublished manuscript, on file with author).

5. See *id. passim*.

6. ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE* 122 (1995).

7. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19-53 (1992).

8. PETER GRABOSKY & JOHN BRAITHWAITE, *OF MANNERS GENTLE: ENFORCEMENT STRATEGIES OF AUSTRALIAN BUSINESS REGULATORY AGENCIES* 224 (1986).

9. The most relevant powers here are sanctions, remedies (e.g., the power to stop a business from trading), and the power to demand information and answers to questions.

10. See GRABOSKY & BRAITHWAITE, *supra* note 8, at 225-26.

11. See AYRES & BRAITHWAITE, *supra* note 7, at 19-53.

As mass education spread during the late eighteenth century and the nineteenth century, schools initially had little legitimacy to command children to sit silently in rows rather than frolic in the fields. Commanding so little authority, schools secured it by violence during the first century of mass education. By the twentieth century, schools had become stronger, more legitimate institutions; no one questioned their right to insist on compliance from students. Their strength enabled them to secure order in the classroom without resorting to punishment as often.

II. PHYSICAL PUNISHMENT AND THE RISE OF THE NATION-STATE

Weak states were responsible for the most horrific physical punishments of their subjects.¹² Beginning in 1200, European princes began to centralize criminal justice under their own control, crushing the restorative justice of local communities and churches.¹³ Making crime an offense against the crown (rather than against a victim) was a crucial element of their centralizing project. Publicly inscribing horrific torture on the bodies of *felons* (those who through their crimes failed to show *fealty* to their ruler) signified the power of the prince. Commanding weak state structures as they did, public spectacles of punishment to inspire awe in their subjects was the best they could manage. They lacked the professional police forces that strong nineteenth-century states could rely upon to secure more credible and civil control. Early modern punitive excess seems not to have worked very well. English crime rates in the middle ages seem to have been extraordinarily high by modern standards.¹⁴ Massive drops in the crime rate occurred as states became stronger from the time of the rise of Napoleon to World War II.¹⁵ These governments were becoming reintegrative welfare states at the end of the Victorian era.¹⁶ It is hard to say whether it was the

12. While Michel Foucault, MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975), and Pieter Spierenburg, PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTIONS AND THE EVOLUTION OF REPRESSION* (1984), disagree on chronology, their analyses of the history of punishment are in agreement.

13. See Elmar G.M. Weitekamp, *The History of Restorative Justice*, in *RESTORING JUVENILE JUSTICE* 75, 102 (Lode Walgrave & Gordon Bazemore eds., 1999). This premodern restorative justice took many forms, from village moots to a variety of forms of victim-offender mediation, mostly with elders or priests acting as mediators. Even homicide was commonly settled by cash compensation to the victim's family. See *id.* at 84.

14. See generally T.R. Gurr, *Historical Trends in Violent Crime: A Critical Review of the Evidence*, in 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 295 (Michael Tonry & Norval Morris eds., 1981); Lawrence Stone, *Interpersonal Violence in English Society, 1300-1980*, 101 *PAST & PRESENT* 23 (1981).

15. See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 111-12 (1989).

16. See *id.* at 113-18.

rise of the reintegrative welfare state or policing with more certain but less brutal punishment that produced results, but we can say that the results were better in terms of crime control than those of early modern spectacles of punitive excess.

III. CIVILITY ON THE RISE 1820–1970

The rise of the centralizing administrative project of the Victorian state¹⁷ was continued in the twentieth century with the rise of the Keynesian welfare state. From 1820 to 1970, punishment of all kinds declined in the West.¹⁸ Corporal punishment disappeared almost completely against women and then men, capital punishment disappeared first as a public spectacle and then altogether, and this happened everywhere in the West. Imprisonment rates also fell dramatically almost everywhere in the West.¹⁹

Nowhere was this more dramatic than in Australia. And nowhere was it more significant, because Australia was a penal colony, a warehouse for England and Ireland's dangerous classes. In 1836, Alexis de Tocqueville described Australia as being "composed of vicious elements which sooner or later form a people difficult to govern and dangerous to free."²⁰ Nowhere in Australia did this seem more true than in the island of Tasmania. It took 42% of Australia's convicts and the worst of them.²¹ And it attracted less free immigration than any other colony. At the end of the nineteenth century, most citizens were still direct descendents from England's dangerous classes.²² Yet this society came to turn its back on punishment as the dominant form of social control and created one of the most peaceful societies humankind has known.

In the 1820s, the majority of the Tasmanian population was under sentence and under the lash in the penal colony. By 1875, just over two decades after convict arrivals had ceased, the lash (flogging) had disappeared

17. The rise of the Victorian administrative state has been documented by Oliver MacDonagh. See OLIVER MACDONAGH, *EARLY VICTORIAN GOVERNMENT* (1977); OLIVER MACDONAGH, *A PATTERN OF GOVERNMENT GROWTH 1800–60: THE PASSENGER ACTS AND THEIR ENFORCEMENT* (1961).

18. See BRAITHWAITE, *supra* note 15, at 111–18.

19. See *id.*; see also John Braithwaite, *The Political Economy of Punishment*, in 4 *ESSAYS IN THE POLITICAL ECONOMY OF AUSTRALIAN CAPITALISM* 192, 203–04 (Edward L. Wheelwright & Ken Buckley eds., 1980).

20. COLIN FORSTER, *FRANCE AND BOTANY BAY: THE LURE OF A PENAL COLONY* 115 (1996). Colin Forster's book is the best source on Alexis de Tocqueville's writings on Australia, which are generally inaccessible and unavailable in English.

21. See Henry Reynolds, 'That Hated Stain': *The Aftermath of Transportation in Tasmania*, 14 *HIST. STUD.* 19, 19 (1969).

22. See *id.*

and the imprisonment rate had fallen to 630 per 100,000 population, below that in the United States today but still higher than any other nation in the world today.²³ By 1911–20, the rate was down to thirty,²⁴ lower than any developed nation today (Japan's is forty).²⁵ The low imprisonment rate partially came about because the crime rate fell continuously and dramatically during the first century of the colony's history. Convictions for homicide in Tasmania fell to only twenty-two between 1875 and 1884. The following thirty-two years saw no homicide convictions, with the next one occurring in 1916!²⁶ There were twenty-five rape convictions from 1875 to 1884, but sixteen years passed before the next conviction in 1900; fifty-nine robbery convictions from 1875 to 1884, three from 1885 to 1894, and none from 1895 to 1904.²⁷ So de Tocqueville could not have been more wrong; this *was* a society that could be trusted to be free by easing the restraints of punishment. Tasmania became a low-crime society because it reintegrated convicts into the community through "assignment" to work for settlers for wages, and through the Australian invention of what today we call "parole."²⁸ Convicts were given generous land grants to start a new life; Tasmania was an early starter with the welfare state.²⁹

IV. PARTIAL AMERICAN EXCEPTIONALISM

The United States partly fits this analysis but is also partly the primary exception to it. Flogging and capital punishment both disappeared totally in America between 1820 and 1970, quite early in some states, late in others. American exceptionalism relates to the institution of the penitentiary. There were some good historical reasons why Americans took pride in their prisons, while other nations were embarrassed by theirs. Britain's insistence on transporting the worst of its criminals to the colonies (apart from those who did not go to the scaffold), against decades of vigorous protest from Virginia and Maryland in particular (the most affected states), was among the grievances that led to the War of Independence.³⁰ The new republic was

23. See ROY WALMSLEY, WORLD PRISON POPULATION LIST (Home Office Research, Development and Statistics Directorate Research Findings No. 88, 1999).

24. See SATYANSHU K. MUKHERJEE ET AL., SOURCE BOOK OF AUSTRALIAN CRIMINAL AND SOCIAL STATISTICS 631 (1989).

25. See WALMSLEY, *supra* note 23.

26. There were some murder trials but no convictions. See MUKHERJEE ET AL., *supra* note 24, at 445.

27. See *id.*

28. See MICHAEL FINNANE, PUNISHMENT IN AUSTRALIAN SOCIETY 162 (1997).

29. See Reynolds, *supra* note 21, at 28–30.

30. See A.G.L. SHAW, CONVICTS AND THE COLONIES 32 (1966).

determined to be more civilized than the mother country in the way it managed criminals. And so the United States became the great laboratory of the penitentiary, attracting admirers like de Tocqueville to visit on fact-finding tours of these new instruments of civilization.³¹ Benjamin Rush juxtaposed the new republican penitentiaries with “capital punishments[,] . . . the natural offspring of monarchical governments.”³² At the very moment in American history when republican freedom was acquiring its deepest meaning, America took pride in institutions of unfreedom.³³ It became permanently attached to the myth that crime was a price of freedom,³⁴ that freedom was so dangerous it had to be checked by remorseless unfreedom.

The imprisonment rate in America has substantially and consistently increased since the mid-nineteenth century,³⁵ at a time when imprisonment rates elsewhere in the West have been plummeting.³⁶ This was probably connected to a shift from the lash and the noose being used as the instruments for regulating slaves to the prisons that progressively replaced them. Penitentiaries, too good for slaves until after the Civil War, became their greatest privilege of citizenship—the principal labor-market program for unemployed young black men.

I do not want to deny that there was a genuinely civilizing project within prisons. American prison conditions improved; the silent system ended;³⁷ social workers found a place within them; parole expanded along with the rise of the rehabilitative ideal. An important turning point was the 1870 National Congress of Penitentiary and Reformatory Discipline

31. See GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE (Francis Lieber trans., Augustus M. Kelley 1970) (1833).

32. David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 114 (Norval Morris & David J. Rothman eds., 1995) (quoting Benjamin Rush).

33. See DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

34. In referring to this as a myth, I am thinking, inter alia, of the evidence that societies with higher scores on political freedom have lower homicide rates. See John Braithwaite & Valerie Braithwaite, *The Effect of Income Inequality and Social Democracy on Homicide: A Cross-National Comparison*, 20 BRIT. J. CRIMINOLOGY 45, 52 (1980).

35. See Margaret Calahan, *Trends in Incarceration in the United States Since 1880*, 25 CRIME & DELINQ. 9, 10–21 (1979); William Clifford & Richard W. Harding, *Criminal Justice Processes and Perspectives in a Changing World*, in Australian Discussion Papers for the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, at 50 (1985) (on file with author).

36. See BRAITHWAITE, *supra* note 15, at 111–12.

37. The silent system fostered penitence and contemplation by forbidding prisoners to talk.

and its formation of the American Prison Association to institute the principles of humane prison administration agreed to by the Congress.³⁸

V. PUNISHMENT ON THE RISE AGAIN 1970–2000

In the 1970s and 1980s, the United States ceased being so exceptional, as one nation after another opted for law-and-order political campaigns that saw longer prison terms. The United States continues to have the highest incarceration rate of any nation, but the imprisonment rates of almost all Western nations have risen in recent decades.³⁹ My hypothesis is that law-and-order politics have more appeal when the state does not appear to be in control in other more important respects. Since 1970 we have seen the OPEC oil shock, the collapse of the Keynesian welfare state, even the strongest states seeming to be hostage to global capital markets and unable to control periodic deficits and unemployment crises.⁴⁰ There is a Marxist account of the connection between rising imprisonment and rising unemployment—prison as an institution for taming and blaming unwanted labor—that is not totally false.⁴¹ An alternative analysis is that the comparative weakness of the state in the 1970s and 1980s—compared to its apparent command of ever-growing economies in the 1950s and 1960s—increased the appeal of

38. See Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, *supra* note 32, at 169, 173.

39. The chronology here corresponds somewhat with Eric Hobsbawm's dating of what he calls the "rise of barbarism" from 1914 after 150 years of decline. See ERIC HOBSBAWM, *ON HISTORY* 334 (1998). Hobsbawm means a number of things by the increase in barbarism, but particularly torture and the willingness to wage a war by a whole people against a whole people, including its civilian population. Part of this is that to mobilize a whole people, perhaps especially in a democracy, leaders must demonize the enemy, as illustrated by the Cold War and by the demonization of Saddam Hussein, Mu'ammar Qadhafi, or Manuel Noriega. The idea of demonizing an enemy is perhaps then taken into popular culture in a more general way: Hollywood demonizes not only communists but also criminals; mass participation in demonization is found to sell not only in politics but also in commercialized culture, and it thereby reinforces the political propensity to demonize. In interpersonal interactions with criminals, I find ordinary people to be not especially demonizing, just as my colleague Jennifer Balint is finding of the citizens of nations like Rwanda that have been racked by genocide. See Jennifer Balint, [untitled] (1999) (unpublished draft of doctoral dissertation, Australian National University) (on file with author). It is not that citizens in nations where genocide occurs are inherently demonizing of the other; it is more that political opportunists seek to seize political power through ethnically demonizing their opponents. Genocidal criminals have something in common with law-and-order politicians here, who also garner political support by demonizing an outgroup, by creating a stigmatizing, punitive society out of a more inherently forgiving people.

40. This is rather similar to the analysis of Michael Tonry. See Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999).

41. See Braithwaite, *supra* note 19, at 199.

weakened leaders appearing to be strong through the politics of law and order.

At the same time, we must keep this analysis in perspective. The rise in punitiveness did not take criminal justice back to anything like the barbarity of early Victorian punishment, let alone seventeenth- and eighteenth-century spectacles of hot pincers tearing flesh from expiring bodies, of judges sanctioning the use of torture to extract confessions. And the state did not return to anything like the weakness of two centuries ago. All we have seen is the state becoming somewhat weaker in its capacities to tackle the challenges before it than it had been at mid-century and becoming somewhat more attracted to manifesting strength through punitiveness.

VI. STRENGTH THROUGH GOVERNING AT A DISTANCE⁴²

One reading of our conclusions is that because nations are permanently weaker than they were in the heyday of the Keynesian state and because the state will continue to have an underclass that the economy does not really need, get-tough-on-crime policies will continue to be popular. To some degree I suspect this is true. But there are other variables in play. The civilizing century and a half from 1820 had its economic downturns, its periods when citizens lost faith in state capacities. Yet one constant was a belief that however flawed contemporary crime-prevention strategies were, we were on a path to finding better means of combating crime. Indeed, the optimism seemed well placed. In the 1950s, people in most Western nations could look back on a century of falling crime rates. Consequently, they believed that no harm had come from abolishing capital punishment and that rehabilitation worked. When crime rates jumped in much of the West during the 1960s, this faith began to crumble.

The collapse of popular faith in the possibility of effective crime prevention was greatly abetted by a collapse in professional belief in it among lawyers and criminologists. In the United States, this was especially acute in the aftermath of what was seen as the failure of President Johnson's War on Poverty. Looking back, we can now see that many of these programs were well conceived to address strategic problems—Head Start for child development, developing disadvantaged schools, community organization,

42. "Governing at a distance" is a theme of the writing on neoliberal governmentalities of the late Foucault. See the text at *infra* note 50 for a concrete discussion of what government at a distance can involve. The early writings of Foucault are about disciplinary and punitive forms of regulation and their origins in centuries past. See generally FOUCAULT, *supra* note 12. The later writings of Foucault are about historically later forms of regulation that are less brutal and less direct. See generally THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY, *infra* note 50.

reintegration of offenders into work, and communities of care on release. Admittedly, implementation was often weak, but these programs went to the root of social ills that we now know can be tackled in ways that prevent crime.⁴³

Another problem was that many of the evaluation studies failed to detect crime reduction, even when modest reductions may have occurred, because expectations were too high and sample sizes too small for the statistical power needed to detect modest effects. Criminologists came to the view that "nothing works."⁴⁴ They were wrong.⁴⁵

Many influential criminologists moved to advocacy of criminal justice policies that would simply define on normative grounds the just deserts that should be imposed as a sentence for a particular kind of wrongdoing.⁴⁶ Unfortunately, this was a green light for law-and-order politicians. The experts seemed to have no idea what to do about reducing the problem. They were saying "Give offenders no more nor less than their just deserts." It is not surprising that politicians agreed, but they interpreted "just deserts" as meaning that molycoddled criminals should be given tougher treatment. The result: Jails filled and overflowed.

So the decline in the civility of the justice system is in considerable measure the fault of us criminologists. We limited the crime debate to one about getting the punishment right and just. Prior to the 1970s, the crime debate had been much more about finding constructive prevention strategies than about punishment. But by the late 1970s, our nihilism had left punishment the central question. To our pleas, "But capital punishment doesn't work in reducing crime," the answer was "So what does?" This left us professionally speechless.

Criminologists are no longer short of answers, albeit cautious ones, as evidenced by the University of Maryland report to the U.S. Congress, *Pre-*

43. See generally SHERMAN ET AL., *supra* note 3.

44. The most influential review fueling this shift was DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF EVALUATION STUDIES* (1975). Its review of hundreds of studies on the effectiveness of correctional programs was not so gloomy as to justify the "nothing works" slogan. Coauthor Robert Martinson's suicide soon after completing it seemed to add to its mystique.

45. See FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (1982); David A. Andrews et al., *Does Correctional Treatment Work? Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 *CRIMINOLOGY* 369 (1990); see also Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* 313 (Rolf Loeber & David P. Farrington eds., 1998).

46. Perhaps the most influential was ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

venting Crime: *What Works, What Doesn't, What's Promising*.⁴⁷ Certain types of family-, school-, and neighborhood-based delinquency prevention programs, as well as labor-market and policing programs, were found to hold more than a little promise. The Maryland report marks a turning point, no less than Douglas Lipton, Robert Martinson, and Judith Wilks's "Nothing Works" review in 1975 marked a turning point in the opposite direction.⁴⁸ My suspicion is that we are on the threshold of an era of evidence-based crime prevention and that the fruit of that era will be knowledge of a suite of measures that together will be capable of substantially reducing crime. I would not suggest this fruit will be ripe in five years or ten, but I am optimistic about twenty.

When it is ripe, politicians may find that actually reducing crime is better politics than thumping the table as the crime rate goes up. They will conclude that spending more and more money on prisons and other expensive measures that can make things worse is worth less votes than diverting those resources to programs that actually help people to feel and be safer.

Once the crime debate becomes consequentialist again, deontological traditions like retributivism may falter. Evidence will show that giving punishment a more central role than it deserves has disastrous consequences. While I cannot imagine an effective criminal justice system without some measure of punishment, punishment would have a quite limited place in a crime-prevention package that actually works.

I return to that claim in the next part. But before doing that it is worth making the point that it is not particularly good politics for leaders to attempt to outbid each other with promises of tougher sentences. A determined law-and-order auction leads to fairly comparable final bids, with the authenticity of each bid suffering comparable denigration from the other side. Winning the auction does not have a huge payoff because the currency of inflationary punitiveness devalues fast. Pandering to punitive emotions does not satiate them: It accelerates a lust for vengeance. Promise to deliver tougher prison terms and you engender outrage that the devils are not being hung. Hang them and the political criticism will be that not enough are being hung. Hang them all and there will be political condemnation that they are not being boiled in oil or drawn and quartered.

The research literature of victimology instructs us that it is incorrect to expect that tougher sentences will leave crime victims, the police, or citizens any more satisfied with the justice system.⁴⁹ To accomplish this important

47. SHERMAN ET AL., *supra* note 3.

48. LIPTON ET AL., *supra* note 44.

49. See Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 31, 47-50 (Michael Tonry ed., 1998).

goal, we need to do something radically different from continuing the status quo. Restorative justice, I argue, has the political genius needed to effect the radical change.

Presiding over a real and sustained reduction in the crime rate would make good politics. To accomplish this will involve a recognition that direct displays of coercive power by the state will rarely be more effective than what Michel Foucault characterized as governing at a distance⁵⁰—a state strong in its assurance that it can secure a more decent society by enabling and trusting families, schools, businesses, and nongovernmental organizations to develop their self-regulatory capabilities. Ross Homel's research on reducing violence around pubs and clubs in Australia is a good example of a policy that works.⁵¹ Community organizing rather than the criminal law was the key instrument of regulation there. Community meetings of concerned local citizens and pub and club owners came up with a package of self-regulatory measures. These included requirements for training bar staff in how to defuse violence peaceably rather than through strong-arm tactics, responsible serving practices to prevent excessive drunkenness, and so on. The police did not patrol these pubs and clubs during the self-regulatory project. As a result of this program, assaults per 100 hours of observation were reduced by 53% by the self-regulatory programs of licensed premises.⁵² But when funding for the project ended and the police moved back in with standard criminal law enforcement, violence returned to the old levels.

VII. WHY PUNISHMENT CAN HAVE BAD CONSEQUENCES

It would be tedious to retrace the familiar arguments on why resort to imprisonment may backfire. Prisons are schools for crime; offenders learn new skills for the illegitimate labor market in prison and become more deeply enmeshed in criminal subcultures. Prison can be an embittering experience that leaves offenders more angry at the world than when they went in. The interruption to a career in the legitimate labor market and the stigma of being an ex-con can reduce prospects of legitimate work on completion of the sentence, and so on.⁵³

50. See Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87, 102 (Graham Burchell et al. eds., 1991).

51. See Ross Homel et al., *Preventing Alcohol-Related Crime Through Community Action: The Surfers Paradise Safety Action Project*, in *7 CRIME PREVENTION STUDIES* 35 (Ronald V. Clarke ed., 1997).

52. See *id.*

53. See generally DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1984).

But Lawrence Sherman has pulled together some evidence for a more general claim about punishment of all types: It can engender defiance.⁵⁴ The cognitive mechanisms that produce defiance to threats have now been the subject of an enormous experimental research effort. This work shows how foolish it can be to follow the institutional design advice of Hobbes⁵⁵ and Hume⁵⁶ of preparing for the worst based on the assumption that people are morally suspect by nature. Unfortunately, when we treat people as knaves they are more likely to become knaves. The less salient and powerful the control technique used to secure compliance, the more likely that internalization of the virtue of compliance will occur. Conversely, experimental research on children and college students demonstrates the counterproductive effect salient rewards and punishments can have: Long-term internalization of values like altruism and resistance to temptation are inhibited when they view their action as caused by a reward or punishment.⁵⁷

Over fifty studies examining the effect of extrinsic incentives on later intrinsic motivation indicate that inducements that are often perceived as controlling (e.g., tangible rewards, surveillance, deadlines), depending on the manner in which they are administered, reduce feelings of self-determination and undermine subsequent motivation in a wide variety of achievement-related activities after the reward is removed.⁵⁸

These findings seem to be of fairly general import, being supported in contexts including moral behavior, altruism, personal interaction, aggressive behavior, and resistance to temptation.⁵⁹

Just as strong external incentives retard internalization, using reasoning in preference to power-assertion tends to promote it.⁶⁰ Good parents

54. See generally Lawrence W. Sherman, *Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 448–56, 459–67 (1993).

55. See THOMAS HOBBS, *DE CIVI* (Sterling P. Lamprecht ed., Greenwood Press 1982) (1647).

56. See DAVID HUME, *Of the Independency of Parliament*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 117 (Oxford Univ. Press 1971) (1741).

57. See Mark R. Lepper, *Dissonance, Self-Perception and Honesty in Children*, 25 J. PERSONALITY & SOC. PSYCHOL. 65 (1973); see also MARK R. LEPPER & DAVID GREENE, *THE HIDDEN COSTS OF REWARD* (1978); Theodore Dix & Joan E. Grusec, *Parental Influence Techniques: An Attributional Analysis*, 54 CHILD DEV. 645 (1983); Martin L. Hoffman, *Affective and Cognitive Processes in Moral Internalization*, in *SOCIAL COGNITION AND SOCIAL DEVELOPMENT* 236 (E. Tory Higgins et al. eds., 1983).

58. See Ann K. Boggiano et al., *Use of the Maximal-Operant Principle to Motivate Children's Intrinsic Interest*, 53 J. PERSONALITY & SOC. PSYCHOL. 866, 867 (1987).

59. See Boggiano et al., *supra* note 58; Richard A. Dienstbier et al., *An Emotion-Attribution Approach to Moral Behavior: Interfacing Cognitive and Avoidance Theories of Moral Development*, 82 PSYCHOL. REV. 299 (1975); Dix & Grusec, *supra* note 57; Lepper, *supra* note 57.

60. See Diane Baumrind, *The Development of Instrumental Competence Through Socialization*, in 7 MINNESOTA SYMPOSIUM ON CHILD PSYCHOLOGY 3 (Anne D. Pick ed., 1973); J. Allan

know this: Persuading people why they should not harm others works better than issuing threats.

Such findings are an important part of an empirical grounding for why we should have a first preference for restorative justice dialogue over coercion for dealing with crime. Sharon S. Brehm and Jack W. Brehm⁶¹ constructed a theory of psychological reactance on the basis of the kinds of studies we have been discussing. Figure 1⁶² shows that the net effect of deterrent threats⁶³ is the sum of a deterrence effect and a reactance effect. According to this theory, intentions to control are reacted to as attempts to limit our freedom, which lead us to reassert that freedom by acting contrary to the direction of control. Figure 1 also shows that reactance is least when we seek to restrict freedom to do something that is not very important to us, and greatest when the freedom subjected to control is something the regulated actor deeply cares about. Hence, if freedom to park our car where we want is not an especially important freedom, the way we react to the size of parking fines will be rather like the left hand panel in Figure 1. The net effect of threat on compliance will be close to the prediction of a crude rational-actor model. If freedom of religion is a vitally important freedom to Christians, then throwing more Christians to the lions may only strengthen their commitment to martyrdom, adding to rather than detracting from the growth of Christianity, as in the right hand panel of Figure 1.

Cheyne & Richard H. Walters, *Intensity of Punishment, Timing of Punishment, and Cognitive Structure as Determinants of Response Inhibition*, 7 J. EXPERIMENTAL CHILD PSYCHOL. 231, 242-44 (1969); Martin L. Hoffman, *Moral Development*, in CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY 261 (Paul H. Mussen ed., 1970); Ross D. Parke, *Effectiveness of Punishment as an Interaction of Intensity, Timing, Agent Nurturance and Cognitive Structuring*, 40 CHILD DEV. 213 (1969); Carolyn Zahn-Waxler et al., *Child Rearing and Children's Prosocial Initiations Towards Victims of Distress*, 50 CHILD DEV. 319 (1979).

61. SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* (1981).

62. *Id.* at 60 fig.4-1.

63. The theory posits the same form of relationship as in Figure 1 for reactance to rewards as to punishments. However, the data suggest that reactance to punishment is stronger than to rewards. *See id.* at 229.

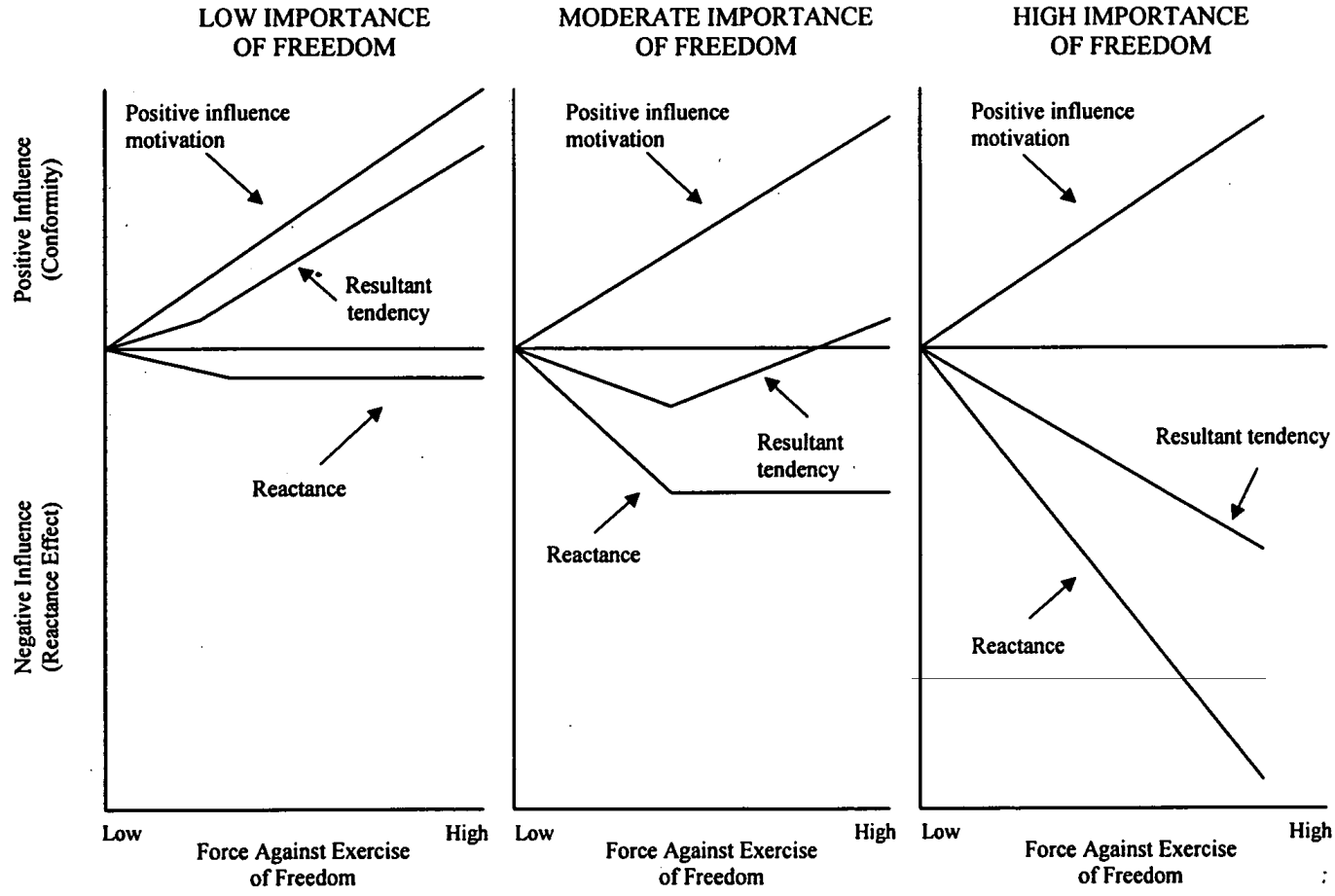


Figure 1: The Interactive Effects of Force and Importance of Freedom

The fact that punishment is very costly, degrading to both its subject and its object, and prone to reactance does not mean we should abandon it altogether as a crime-prevention strategy. We should try restorative justice first because it tends to be cheaper, ennobling, and not prone to reactance. But restorative justice will often fail, and when it does, deterrence and incapacitation may be needed as back-up strategies. Basically, we should try restorative justice, perhaps again and again; when restorative justice fails, try deterrence, and when deterrence fails, try incapacitation. This pattern of responses to crime is represented in Figure 2, together with the psychological assumption underlying each response. Prison is not the only incapacitative strategy. For example, the medical fraud can have her license removed; the company director can be prohibited from ever holding a management or board position in any company; child abusers can have their children taken from them. Taking the car away from a drunk driver can be a partially incapacitative strategy. The ideal enforcement pyramid will be dynamic, countering the weaknesses revealed in the failure of one strategy with the strengths of another.

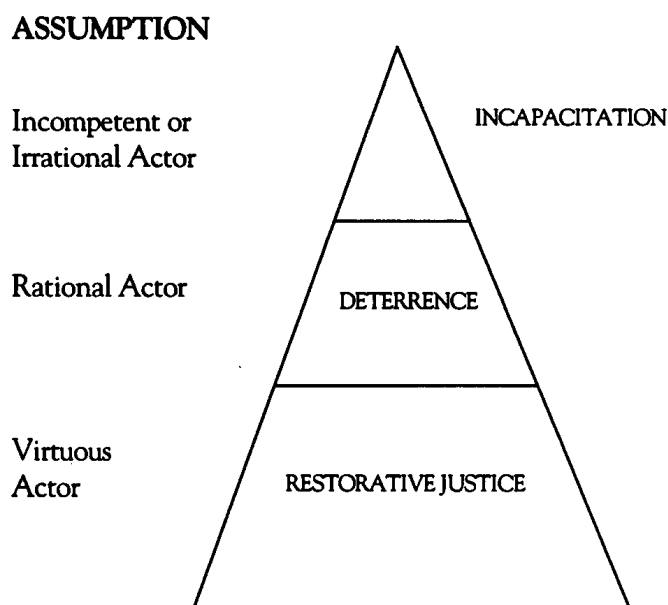


Figure 2: Articulating Restorative Justice to Responsive Regulation

VIII. ESSENTIAL FEATURES OF THE RESTORATIVE JUSTICE ALTERNATIVE

Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just. One value of restorative justice is that we should be reluctant to resort to punishment. Punishment adds to the amount of hurt in the world, but justice has more meaning if it is about healing rather than hurting. "Crime hurts; justice heals": This captures the essence of the paradigm shift. It involves rejection of a justice that balances the hurt of the crime with proportionately hurtful punishment.

The term "restorative justice" was first used in the late 1970s to describe victim-offender mediation programs of various kinds in North America and Europe. These mostly involved a meeting of a single offender with a single victim in the presence of a professional mediator. Initially, they had a pragmatic emphasis, especially in England, on material reparation for victims, which was thought of as a kind of sentencing alternative. While a lot of these programs sprung up, they tended to be tiny, marginalized, and did not inspire a transformative agenda for the criminal justice system during the 1980s.

Restorative justice became a global social movement in the 1990s as a result of learning from indigenous practices of restorative justice the ways in which individualistic Western victim-offender mediation was impoverished. The most influential wisdom was from the oral justice traditions of the New Zealand Maori and North American native peoples. These restorative justice traditions were more radically communitarian. Instead of two individuals mediating a dispute across a table, members of two communities (one supporting a victim, another an offender, with other individuals supporting both) would come together as one community in a circle. This gave rise to the names "sentencing circle" or "healing circle" for the 1990s North American variants of restorative justice.⁶⁴ The southern hemisphere variants were called "conferences." In both the Maori and North American traditions, the supporters in the circle were not limited to parents and siblings. Grandparents, aunts, uncles, cousins, close friends, teachers, sporting coaches, and many other kinds of concerned community members would

64. See RUPERT ROSS, *RETURNING TO THE TEACHINGS: EXPLORING ABORIGINAL JUSTICE* (1996); Carol LaPrairie, *Altering Course: New Directions in Criminal Justice: Sentencing Circles and Family Group Conferences*, *AUSTRALIAN & N.Z. J. CRIMINOLOGY* 78, 78-79 (1995).

often attend. Sometimes there would be more than thirty people in the circle, but more typically fewer than ten. Westerners like those in my own research team who observed a lot of conferences and circles almost universally concluded that it was rarely a problem to have too many people in the circle. This surprised us because we assumed that large numbers, especially of children, would lead to chaos.

The second big lesson we learned from indigenous practice was that material reparation was much less important than emotional or symbolic reparation. Victims often wanted an apology more than compensation. Forgiveness from their families was often more important to the restoration of offenders than anything else. The surprise was that talk about justice could sit so comfortably alongside talk about love.

There were many other lessons from peoples who had not let older restorative traditions die, but these were the key shifts we made from that learning: from dyad to circle, from dialogue about material reparation to symbolic plus material reparation, from justice to justice intertwined with love and caring.

In a typical conference or circle, the consequences of the crime will first be discussed. Who has suffered as a result of the crime: the victim, the family of the offender? How have they suffered? Then the conference considers a plan of action to heal that suffering. Often the plan will include ways of making amends to the victim or the community that many will conceive as punishment. But it may also include apology, forgiveness, ways of helping victims to feel safer and preventing a recurrence of the crime.

There is an overwhelming amount of evidence now that participant (victim, offender, community, police) satisfaction with such restorative justice processes is extremely high, typically 90%–95%, and in some studies even higher.⁶⁵ Participant perceptions of the fairness of conferences is at comparably high levels.⁶⁶ Most, though far from all, victims feel safer after a conference than they did before and experience healing.⁶⁷ Moreover, for cases randomly assigned to conference rather than court, perceptions of fairness and overall satisfaction are higher in conference than in court cases for all types of participants.⁶⁸

65. Evaluation data from 20 sites is presented in John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., forthcoming 1999) (manuscript at 1, 21–26, on file with author).

66. See *id.*

67. See *id.* (manuscript at 21–22).

68. See *id.* at (manuscript at 21–26).

IX. A STRATEGY FOR A LESS PUNITIVE FUTURE

It is the foregoing evidence of citizen satisfaction with restorative justice that holds the key to a political strategy for transforming the criminal justice system. In a city like Canberra, my home town, where more than 10,000 citizens out of a population of 300,000 have attended a conference, most people know someone who has attended one. Because of the high satisfaction levels and strong perceptions that justice is served in conferences, and more so than in court cases, when citizens talk to their friends and relatives about the experience mostly they hear positive things. Over the years this builds popular support for restorative justice if the program grows. Our Canberra program started under a Labor (social democratic) government. At the election after it was introduced, the conservative side of politics considered running a law-and-order campaign attacking conferencing. Their polling suggested this would be a mistake, as restorative justice was popular. The conservative party won the election and became strong supporters of the conferencing program, stoutly defending it when controversial cases hit the media. These little crises also attracted an amazing rallying of public support for the program, where leadership was particularly strong from the victims' movement.⁶⁹

In many nations, we in the social movement for restorative justice assumed that the victims' movement would oppose us, especially in punitive societies like the United States. More often than not our expectation has been proved wrong. After some direct experience with restorative justice processes, many victims report to their associations that they prefer the justice of the conference to the justice of the court. Similarly, we assumed the police would be our opponents, defending law-and-order policies as has been their traditional way. Again, more often than not, there has been less of this opposition than support from converts within police ranks.⁷⁰ And again, conversion was driven by actually experiencing restorative justice conferences. In most sites, initial opposition to restorative justice was strong from the women's movement, at least as it affected violence against women. But this situation is also changing—much of the intellectual leadership of the social movement in support of restorative justice is now feminist,

69. See Heather Strang, *Victims of Crime and the Victim Movement: Retribution, Reform, Restoration* (unpublished paper delivered at the Restorative Justice and Civil Society Conference, Australian National University, Feb. 1999) (manuscript at 16–18, on file with author).

70. Over 80% of police who attend restorative justice conferences leave them satisfied with the outcome. See Braithwaite, *supra* note 65 (manuscript at 35–37).

and much of the very best evaluation research is being done by feminist criminologists.⁷¹

Some of the most conservative governments in the world have become supporters of restorative justice, such as those in New Zealand and Singapore. Restorative justice has proved to have broad appeal because of its emphasis on holding offenders responsible for their actions, giving victims' rights and victims' voices a more central place in the system, strengthening families through "family group conferences," and in New Zealand very substantial savings on beds in juvenile institutions.⁷²

When I do talk-back radio programs in Australia on restorative justice, I suggest to the presenter that callers be invited who have experienced a conference. At first I considered this a high-risk strategy—perhaps the callers who participated would be those who had experienced a disastrous conference (which our research indicates happens often enough). But the experience has been that the overwhelming majority call in with positive and often moving stories, which make for great radio. Activists from the victims' movement are particularly likely to call in with qualified endorsements. With cynical politicians and leading journalists, we adopt the same high-risk strategy. We ask them to suspend judgment until they have sat in on a couple of conferences. This was also how Thames Valley Chief Constable Charles Pollard converted the British Home Secretary to restorative justice. While this strategy can backfire at a bad enough conference, given that we now know from many systematic studies that observer satisfaction with conferences runs over 90%,⁷³ they are good political odds to play.

What I have just outlined is a political-implementation strategy for restorative justice as a competitor to punitive justice. The essence of that strategy is to support innovation with restorative justice wherever the inspiration to innovate arises—that can be from the courts, juvenile justice, corrections, the police, the business community, indigenous or ethnic communities, schools, churches, and other institutions in civil society. Engage the democracy with the innovation. Invite the politicians, the victims' groups, the judges, the media, the women's groups, the aboriginal groups, the critics from academia to see and criticize. That will generate a

71. I am thinking of the work of Allison Morris, Kathy Daly, Joan Pennel, and their colleagues. See generally GABRIELLE MAXWELL & ALLISON MORRIS, FAMILY, VICTIMS AND CULTURE: YOUTH JUSTICE IN NEW ZEALAND (1993); Kathleen Daly & Russell Immarigeon, *The Past, Present, and Future of Restorative Justice: Some Critical Reflections*, 1 CONTEMP. JUST. REV. 1, 21-46 (1998); Joan Pennell & Gale Burford, *Attending to Context: Family Group Decision Making in Canada*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE (Joseph Hudson et al. eds., 1996).

72. See generally MAXWELL & MORRIS, *supra* note 71.

73. See Braithwaite, *supra* note 65 (manuscript at 21-26).

lot of conflict. Here in eastern Australia that conflict has been especially strong around the appropriateness of police facilitating conferences. The conflict is painful; yet we do seem to learn from it. This has been especially possible within the social movement for restorative justice, where respect for the perspective of the other and good-faith efforts to heal wounds are shared values of the movement.

X. RESTORATIVE JUSTICE AND CRIME PREVENTION

Restorative justice can also be used to improve crime prevention. Elsewhere I have argued that there are some good theoretical reasons for predicting that restorative justice programs will outperform punitive justice in terms of crime prevention, but that restorative justice processes in themselves are unlikely to have a major impact on the crime rate.⁷⁴ The reason for the latter is that it is implausible that what happens during a one- or two-hour encounter will often turn around all the other variables operating during all the other hours of a person's life. One hope about restorative justice is that it might be a superior vehicle for implementation of the other crime-prevention strategies that evidence-based criminology shows to work.

Leading British criminologist Ken Pease contends that the big deficiency of our crime-prevention strategies is that they assume motivation to prevent crime. In reality, motivation is more often absent than present.⁷⁵ Criminal justice bureaucracies are not primarily motivated by the goal of preventing crime. They are oriented to detecting wrongdoers to punish and deciding how to punish them. Crime prevention typically has a ghettoized location in criminal justice bureaucracies and no niche at all in other bureaucracies. The key to mainstreaming crime prevention in criminal justice agencies is to make it happen where the action is—not in the back office, but at moments of street-level enforcement. The key to motivating non-criminal-justice bureaucracies (e.g., business corporations, housing departments) to engage in crime prevention is to give them a seat in the circle when the emotional force from a specific crime is confronted. Having both kinds of bureaucracies represented at restorative justice conferences can motivate preventive justice.

Every police officer knows that the best time to motivate a burglary victim to put in an alarm system is after a burglary. Every preventive law practitioner knows the best time to put in place a new corporate compliance system is after a company has got into trouble with a regulatory

74. See generally *id.*

75. See Kenneth Pease, *Crime, Labour and the Wisdom of Solomon*, 19 POL'Y STUD. 255, 257-59 (1998).

agency. Every auditor knows the best time to institutionalize a board audit committee is after some senior managers have been caught with their hands in the till. Some of the more restorative drug courts (most are not restorative) are beginning to grasp that the best time to tackle drug rehabilitation is after an arrest for a crime to support the habit. Restorative justice conferences for convicted drunk drivers are a special opportunity to confront an underlying alcohol problem, though this potential has only been very partially realized in the hundreds of drunk driving conferences we have run in Canberra. With conferences for violent offenses, they appear to me to have been more focused on straightening out the relationship problems underlying the violence. Our conferences have rarely helped offenders to find a job, though conversations with convenors of some circle programs in the United States suggest that some of them may have managed to create a more effective focus on the crime-prevention opportunity that employment represents.⁷⁶

It seems to me we know five things that are important to making crime prevention work:

1. *You need to motivate crime prevention to get it to work.* The emotion of the circle's rituals of remorse-apology-forgiveness, the tears of disappointed and relieved mums and dads, create an environment where motivation to do difficult things becomes possible.

2. *You need community ownership to get crime prevention to work.* It is easier to get citizens to attend a conference to support a victim or an offender they love than it is to get them to a neighborhood watch meeting or a police-community liaison committee.

3. *You need to bring out the perspectives of a plurality of stakeholders for it to work.* With an incident of violence at a pub, there may be a girlfriend who can commit to sorting out a relationship problem that was engendering jealousy. There may be drinking mates who can commit to changing drinking practices. There may be a bar manager who can commit to the kind of self-regulatory program Homel⁷⁷ found to reduce pub violence in Australia. Getting all these actors to turn up and speak up is difficult, but conferences have had remarkable success at accomplishing this.

4. *You need citizens to freely choose to change their behavior rather than being coerced into change by the state.* This is especially true of rehabilitation programs. Offenders must choose them, own them. It follows that state monopolies of therapeutic provision—the state's professionals deciding

76. Robert Sampson and John Laub show that getting a steady job was one of the most important turning points away from crime. Confronting an alcohol problem was also a turning point for many. See SAMPSON & LAUB, *supra* note 6, at 192–94.

77. See Homel et al., *supra* note 51.

what is best for the offender or the victim—are inferior to citizens choosing a rehabilitation program from a diversity of options funded in civil society. Such citizen choice can be discussed and decided in a restorative justice circle.

5. *You need crime prevention to be transacted within bonds of social support.* Rehabilitation programs that an individual commits to alone are less likely to succeed than rehabilitation programs that the offender commits to with the active support of a boyfriend, a mother, a respected schoolteacher or employer.⁷⁸ Citizens are invited to conferences or circles precisely because of their desire to support a victim or an offender. This means that restorative justice allows crime prevention to advance within networks of social support.

In sum, restorative justice processes might have greater potential for orchestrating the conditions to make crime prevention work than any other node for organization in the criminal justice system. Certainly they have more potential than criminal trials controlled by lawyers. To date this potential has not been developed very well in existing restorative justice programs.

Beyond a political-implementation strategy and a crime-prevention strategy, restorative justice also needs a learning strategy, continuous improvement of restorative justice based on learning from its mistakes. Here we return to my optimism that criminology will develop a suite of preventive strategies that can be arranged in a pyramid so that successive conferences can decide to try one technique after the other as prevention failures occur. The lessons of evidence-based criminal justice can be put at the disposal of restorative justice conferences. Criminology is not rocket science. What works is mostly pretty easy to understand. That said, the science of evidence-based crime prevention used to inform restorative justice must be rigorous and strong on statistical power, using randomized controlled trials when possible (combined with rich ethnographic engagement with the phenomenon).

Restorative justice may prove superior to punitive justice because it has a learning strategy not only for crime prevention but also for the prevention of procedural unfairness and violations of human rights. It has a theory of procedure very much influenced by the findings from the social psychology of procedural justice.⁷⁹ That theory is in a process of adaptation in response to a variety of research programs under way. Procedural innovation is rife in restorative justice. Indeed, this is one of the retributivists' criticisms of

78. On the centrality of social support, see Francis T. Cullen, *Social Support as an Organizing Concept for Criminology: Presidential Address to the Academy of Criminal Justice Sciences*, 11 JUST. Q. 527, 528 (1994).

79. See E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115–24 (1990).

it. How can equality before the law be secured in conditions of innovation? The answer is that it cannot, but that more equality before the law might still be achieved than occurs under extant inequitable practices.⁸⁰ The research is underway to explore this. The procedural fairness of the internal workings of criminal trials across large samples of cases is remarkably under-researched. Research of this sort, comparing the equity and procedural fairness of restorative justice processes to control groups of criminal court cases, may teach us how to improve the fairness of criminal trials. Research on how to improve the design of restorative justice processes, how to make them more rights-respecting and procedurally just than courts, is one of the most exciting frontiers in the social sciences today.⁸¹

CONCLUSION

Restorative justice is a social movement that really only achieved a sustainable vitality in the mid-1990s. Yet already we have seen it develop a political-implementation strategy, a crime-prevention strategy, and a learning strategy that might just allow it to transform the criminal justice system by leading to the marginalization of punishment as the primary method of responding to wrongdoing.

80. See Braithwaite, *supra* note 65 (manuscript at 72-76, 105).

81. This dimension of the learning strategy has been the priority of Geoffrey Barnes, one of the Ph.D.s out of our Australian National University/University of Maryland group.