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# BETWEEN PROPORTIONALITY & IMPUNITY: CONFRONTATION $\Rightarrow$ TRUTH $\Rightarrow$ PREVENTION

JOHN BRAITHWAITE

RegNet, Australian National University\*

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*The ideal of punishment proportionate to wrongdoing creates a criminal justice system that deters prevention. An alternative ideal is that crime should always be confronted with a presumption for mercy that is conditional upon participation in a truth-seeking process that identifies paths to prevention. Informally rewarding reconciliation and prevention is the basis of a more compelling rational choice account of crime control than proportionate formal punishment. A rational and emotionally intelligent criminal justice system might look something like the airline safety system.*

The criminal justice system could be seen as the most dysfunctional of the major institutional accomplishments of the Enlightenment. More efficacious criminal law in its fundamentals might be found in the great Islamic and Confucian civilizations that were more dominant until Europe entered the Enlightenment. Indeed the early Christian "penitential" approaches to crime seem more attuned to prevention than modern criminal law in the foundational sense I want to develop. Please don't read me as arguing that Sharia or Confucian law is more just and decent than contemporary Western justice. There is progress in banning the stoning of evil women and in displacing decapitation with incapacitation. Yet the indecencies of carceral systems are also profound and they fail the fundamental criminal justice purpose of making our persons and property safe. Modern societies throw more and more resources at their criminal justice systems; yet the accomplishments of that spending in improving

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safety are unremarkable.<sup>1</sup> The reason, I hypothesise, is that Western criminal justice institutions deter crime prevention.

Compare now the success of two other institutions in making us safer—airline safety regulation and the health system. Lawrence Sherman's (2003) presidential address two years ago opened up the answer to why the accomplishments of these Western institutions have been so formidable—a thoroughly evidence-based approach—good scientific theory of aeronautics and of the human body tested by rigorous research, randomised controlled trials where possible. My argument will be that we should go one step deeper to understand why Sherman is right—to the observation that while criminal justice institutions deter prevention, air safety and health institutions foster it.

Consider air safety first. Air travel was extremely dangerous during its early decades, as the haunting footage of the Hindenberg disaster reminds us. Insurance companies for a long time refused to cover air travel in many countries and even then only when governments set caps on their liability, while they were always happy to insure what became the objectively much more hazardous activities of road and sea transport (Braithwaite and Drahos, 2000: chapter 19). Even after the rise of terrorist hijacking, air travel remains a safer activity than taking a car on the road or a ship to sea.<sup>2</sup> This is surprising given the larger number of things that can go wrong, how much more technically demanding it is to travel through the air than across water or land.

The hypothesis of some evidence-based health system designers is that a reason progress in air safety in the twentieth century has been even more remarkable than progress in health care is that air safety systems are even more determinedly committed to correcting mistakes, as opposed to punishing failings (Wilf-Miron, Lewenhoff, Benyamini and Aviram, 2003). When a pilot does something wrong that causes a near-miss or a

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1. American criminologists might object this is not true at the end of a decade and a half of reversing the increase in crime that occurred in the three decades before that. Yet it is hard not to see a glass that is half empty and half full here, at least while U.S. crime rates remain so much higher than those of the other wealthy societies of Europe and Asia.
  2. While air travel is safer than travel by road or sea in fatalities per 100 million passenger kilometers, in fatalities per 100 million passenger hours there is not much difference between road and air travel, and sea transport is much safer (Bradbury, 2002). But the latter does not seem the right comparison. It would not be rational to choose to sail from London to New York because the fatality rate per hour at sea is lower than in the air. The relevant comparison is that one is more likely to perish making the same trip at sea than through the air. Faster planes, such as Concorde and military aircraft, are more dangerous, as are faster cars; part of the miracle of air travel is that greater safety is accomplished historically as speed increases.

separation error, in general there are no sanctions for reporting this, indeed there are professional rewards for contributing to a learning culture of air safety by confessing. Airline pilots are rewarded for triggering prevention. Cover-up in contrast is punished because it prevents prevention. Cover-up is also hard to do because of the ethic colleagues have of exposing error to analysis.

Health care collegiality is similarly committed to open analysis of poor quality diagnosis and treatment, especially when there are no consequences visible enough to threaten litigation. But commitment to error reporting and analysis has in the past been more total and more rigorous with air safety than health (Wilf-Miron et al., 2003). And cover-up of medical error remains endemic on the part of physicians and other professionals who fear acknowledging and apologising for catastrophic errors that could threaten their licence. Yet a sea change is occurring in Western health quality institutions because of the empirical evidence that acknowledgement and apology for medical error does more to discourage litigation than to encourage it (see the literature cited in Gallagher, Waterman, Ebers, Fraser and Levinson, 2003). The U.S., Australian and British health systems are among those that are being transformed by increasingly systematic approaches to recording adverse incidents, quantitatively analysing patterns in such incidents, crafting interventions to attack the risks revealed and researching the impact of those interventions (Institute of Medicine, 2000, 2004; Wilson, Runciman and Gibbert, 1995; Runciman, Webb and Helps, 2000; McLoughlin, Leatherman, Fletcher and Owen, 2001; Australian Council for Safety and Quality in Health Care, 2004). The momentum in health care is for shifts from a blame culture to a learning culture. If this analysis is right, it will assist the health system to build on the formidable record it already has of evidence-based reduction of risks from many kinds of diseases and injuries.

So my conjecture is that we can arrange these three institutions along a continuum according to how committed they are to eliminating fears of punishment that induce cover-up (Cohen, 2001). Air safety administration is the most committed to nonpunitiveness, second is health administration, last is criminal justice with its commitment to punitiveness. The further conjecture is that this is a reason why air safety administration has made the greatest strides in safety improvement, followed by health administration and criminal justice administration in the rear with the most dismal record of accomplishment.

The trouble with criminal justice on this analysis is that it encourages cultures of denial (Cohen, 2001). The preventive imperative to tackle an underlying problem of substance abuse is not grasped because both the crime and the substance abuse that drives it are denied. The anger-

management problem or the patriarchal domination that drive a pattern of violence are truths covered up instead of confronted. Of course, the retributivist will say that however reckless an airline pilot or an unprofessional doctor might be, their conduct is in a less morally culpable category than that of the intentional murderer. That is certainly an argument for the criminal justice system being organized around punishment as a morally appropriate response, though there is an alternative philosophical case for punitive parsimony (Braithwaite and Pettit, 1990). The purpose of this paper is not to rejoin that debate, but to put a theoretical case that the choice for a punitive blame culture in justice institutions is a choice for a higher crime society.

### TRANSITIONAL JUSTICE MAKES THE PARADIGM SHIFT

James Gibson's (2004) important book, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, is the most evidence-based analysis we have of the impact of the South African Truth and Reconciliation Commission. Its attitude survey analysis of the acceptance by South African citizens of the commission's "truth" and the relationship of this to reconciliation between races is methodologically limited. While not definitive, Gibson concludes that the best evidence is at least consistent with the theory that:

Amnesty  $\Rightarrow$  Truth  $\Rightarrow$  Reconciliation  $\Rightarrow$  Democratization

Working backwards through this causal chain there is no doubt that South Africa is more democratic than it was before the fall of apartheid; that blacks, whites and coloureds are more reconciled to living peaceably together; that a great deal of truth came out about apartheid as a result of the commission and that amnesty was very widely used in pursuit of that truth by the commission. What we can never be sure of is whether the posited causal associations among the variables in Gibson's model are true. The unsolvable difficulty is that we will never make much progress beyond Gibson's retrospective survey results showing for example that individual acceptance of the commission's "truth" correlates with different reconciliation scales. We can't randomly assign citizens to apartheid or rewind history so we could at least measure satisfactorily pre-transition knowledge of the truth of apartheid or pre-transition commitment to reconciliation.

Nelson Mandela's analysis was that there was no prospect of the truth of his nation's history being confronted and reconciled without amnesties for criminals who were clinging to power in 1990 to 1993. It was a pragmatic analysis by the African National Congress that in retrospect appears correct. Amnesty may have been motivated by a recognition that the alternative was a widening civil war to oust criminals who would cling

to power without amnesty. And it may have been motivated by a recognition that there were too many criminals for the justice system to be able to digest fair trials for all of them. That truth might lead to reconciliation was more a hope than a motivation. But as Gibson argues, it was a hope realised beyond the imaginings of many advocates of the Truth and Reconciliation Commission. Restorative justice theory sees reconciliation as an important path to prevention (Braithwaite, 2002). In this essay, I am wanting to see truth as enabling prevention not only by inducing reconciliation, but more widely by inducing analysis of problems that are swept out from under the carpet.

### INDIGENOUS JUSTICE MAKES THE PARADIGM SHIFT

When I gave talks on restorative justice in the early 1990s I would often say that restorative justice might be a better way of healing the hurts of crime and preventing recurrence, but it was no substitute for a criminal trial for establishing the facts of a crime. These days I think I was probably wrong; I now suspect that restorative processes open up better prospects for the discovery of truth than criminal trials. The reason is that just as a pilot would be less likely to report a near miss if she felt she might go to prison, so a serious street offender will be more likely to confess if the result will be a restorative resolution than if it will be prison.<sup>3</sup>

It is in Indigenous justice in white settler societies where we are beginning to see the fruits of truth-finding motivated by a restorative process. The opportunity has come from indigenous claims on Western justice to create space for their traditions. An influential case is healing circles in the Manitoba Ojibway community of Hollow Water (Lajeunesse, 1993; Ross, 1996; Aboriginal Corrections Policy Unit, 1997; Bushie, 1999). The circles began to deal with what many at first thought to be an epidemic of alcohol abuse. As citizens sat in these circles discussing the problems of individual cases, they realised in 1986 that there was a deeper

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3. This of course raises the worry of confessions coerced from the innocent with the proffering of a restorative justice conference. In the RISE experiments there is a slight tendency for offenders randomly assigned to court than those assigned to conference to agree that "the police made you confess to something which you did not do in this case" (though this was statistically significant in only one experiment) (Sherman, Strang, Barnes, Braithwaite, Inkpen and Teh, 1998: 123–124). As Dolinko (2003) has pointed out, in the case of an innocent offender coerced into a guilty plea, he will find it impossible "to discuss with the victim what he's done and how to repair the harm he's caused when he knows quite well he has in fact done nothing and has caused no harm. And even if his participation in a conference could somehow be secured, the conference will hardly be a success—the putative offender will simply insist 'I'm innocent; they're framing me; I didn't do anything to you and there is nothing for me to 'restore' or 'repair'!' "

underlying problem, which was that they lived in a community that was sweeping sexual abuse of children under the carpet. Through a complex set of healing circles to help one individual victim and offender after another, in the end it had been discovered that a majority of the citizens were at some time in their lives victims of sexual abuse.<sup>4</sup> Most of the leading roles in this process were taken by women of Hollow Water (Bushie, 1999). Jaccoud (1998) reported fifty-two adults out of a community of 600 formally admitted to criminal responsibility for sexually abusing children, fifty as a result of participating in healing circles, two as a result of being referred to a court of law for failing to do so (Ross, 1996: 29–48; Lajeunesse, 1993). Ross (1996: 36) claimed that the healing circles were a success because there had been only two known cases of reoffending. Five years later Couture (2001: 25) reported that ninety-one offenders had been charged (with 107 processed through the project) with still only two reoffending since 1987 when the first disclosure occurred. Tragically, however, there has been no genuinely systematic outcome evaluation of Hollow Water. Of course dozens of other restorative justice programs have been subjected to evaluations of variable rigour that have been more encouraging than discouraging in finding lower criminal reoffending compared to controls (Braithwaite, 2002: chapter 3).

What is more important than the crime prevention outcome of Hollow Water is its crime detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching fifty-two admissions of criminal responsibility for sexual abuse of children in a community of just 600? In Hollow Water, ex-offenders are not shunned forever, but seen as important resources for getting under the skin of other offenders and disturbing the webs of lies that have sustained their criminality. Better than anyone, ex-offenders understand the patterns, the pressures and the ways to hide. As they tell their personal stories in the circle, they talk about the lies that once shielded them and how it felt to face the truth about the pain they caused. It is done gently but inflexibly, sending signals to offenders that their behaviour has roots that can be understood, but that there are no such things as excuses (Ross, 1996: 183).

Indeed, at Hollow Water, before they met their own victim in a healing circle, sexual abusers met other offenders and other offenders' victims, who would simply tell their stories as a stage in a process toward breaking down the tough guy identity that pervaded the dominating relationship with their own victim. Underpinning all these possibilities for eliciting truth is a willingness to offer the serious criminal offender an alternative path to prison for making things right.

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4. LaPrairie (1994: iii) in a study of this problem in another context found that 46 percent of inner-city native people in Canada had experienced child abuse.

## SCHOOL JUSTICE MAKES THE PARADIGM SHIFT

Restorative antibullying programs in schools, generally referred to as “whole-school” approaches (Rigby, 1996) that combine community deliberation among students, teachers and parents about how to prevent bullying with mediation of specific cases, have been systematically evaluated with positive results (Farrington, 1993; Pitts and Smith, 1995; Pepler, Craig, Ziegler and Charach, 1993; Rigby, 1996; Morrison, 2005) the most impressive being a program in Norway where a 50 percent reduction in bullying has been reported (Olweus, 1993). Gentry and Benenson’s (1993) data further suggests that skills for mediating playground disputes learned and practiced by children in school may transfer to the home setting, resulting in reduced conflict, particularly with siblings. McCold (2002) measured criminal reoffending by 919 delinquent and at-risk youth discharged from six Pennsylvania schools for youth who could not be managed in the mainstream school system. The schools are famous for deploying a top to bottom restorative milieu in their educational program, being run by one of the first families of restorative practices, the Wachtels. Offending during the 6 months following discharge was reduced 58 percent for those who completed the program successfully, a reduction that was significant after controlling for risk. Replication on a second cohort of 858 youth found a slightly stronger dose effect than with the first cohort and also that a significant reduction in reoffending for the first cohort was still evident at two years following discharge (McCold, 2004).

Eliza Ahmed’s research on school and workplace bullying in Australia and Bangladesh shows that shame acknowledgment (feeling shame, taking responsibility, making amends) is negatively associated with bullying whereas shame displacement (hitting out at others, blaming others) is positively related to bullying (Ahmed, 2001; Ahmed and Braithwaite, 2004, in press a, in press b; Morrison, 2005). Humble pride (respecting self and others) correlates negatively with bullying whereas narcissistic pride (feeling dominant and arrogant) correlates positively (Ahmed and Braithwaite, in press b). This work gives us important clues to understanding what is required for emotionally intelligent justice (Sherman, 2003) that delivers reconciliation and prevention. It may require that criminal offenders confront their shame (perhaps as a consequence of being confronted by victims and community stakeholders), acknowledge responsibility for any wrong they have done and take pride in a new identity as someone who “makes good” (Maruna, 2001).

Quintessentially, these programs involve a shift from a blame culture to a learning culture that confronts bullying compassionately rather than punitively. As with the healing circles at Hollow Water and the South African Truth and Reconciliation Commission, the ideal is to end impunity, to stop sweeping the problem under the carpet. Truth and



responsible citizenship are pursued through rituals of reconciliation. In the process it is intended that schools become more deliberatively democratic as they become safer (Morrison, 2005).

### ELABORATING THE THEORY: BEYOND TRUTH & AMNESTY

Gibson's theory of (Amnesty  $\Rightarrow$  Truth  $\Rightarrow$  Reconciliation  $\Rightarrow$  Democratization) will now be subjected to a process of elaboration into the model in Figure 1. A first problem with Gibson's theory is that "Amnesty" might be read as doing nothing, simply not prosecuting. For amnesty to lead to the uncovering of truth, there must also be some forcing of a truth-finding process, as we saw in South Africa, at Hollow Water and in whole school restorative justice programs. Hence a more precise formulation as the trigger for the posited dynamic is that a combination of confrontation of the injustice, and mercy for the perpetrators of the injustice, are what motivate the pursuit of truth—active confrontation rather than impunity, active offering of conditional mercy rather than just doing nothing. The power of mercy is the power of a gift to evoke compassion and right-making (justice), as in the impact of the priest in *Les Misérables* after Jean Valjean steals from him.

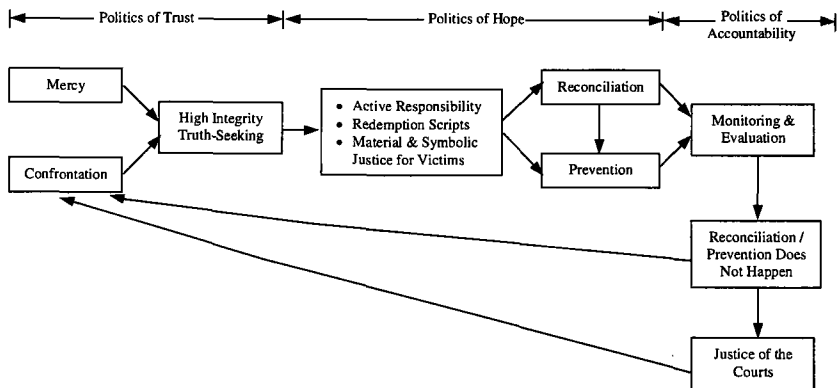


Figure 1. An elaborated theory of truth and prevention

Confrontation by others is of course only necessary if a wrongdoer fails to confront the wrong themselves. The desired outcome is for the pilot, the school bully, the warlord to step forward without prompting from others and own responsibility for suffering they caused or risked. The dignity and honour of self-confrontation makes for more profound affirmation of violated norms than accusations from others. But if self-confrontation is

not proffered, others must do the confronting to avert the dire risk of impunity to a normative order.

The second theoretical problem is that “truth” seems a misleading shorthand for a process of high-integrity truth seeking. What matters is not so much revealing an objective truth as a process that all the stakeholders in an injustice see as a high-integrity process for revealing what may end up being multiple truths—where the victim’s truth may be different from the perpetrator’s, for example. Tom Tyler’s (Tyler, 1990; Tyler and Blader, 2000; Tyler and Huo, 2001) ideas of procedural justice are constitutive of integrity in truth finding. For Philip Selznick (1992: 336, 465) integrity requires authentic communication that connects reason to emotion, not political or commercial spin that dissociates emotional appeal from reason. Reason connected to emotion through practical experience forges integrity as holistic purposiveness. The purposiveness at issue in this theory is the purpose of discovering the whole truth through the practical experience of the truth for all key stakeholders. For the truth-seeking to be of high integrity it must be deliberative (Roche, 2003), attentive to multiple sources of evidence, and open to public scrutiny and critique.

## FROM PASSIVE TO ACTIVE RESPONSIBILITY

When combined with an active proffering of mercy, such a deliberative effort to reveal and tell the truth encourages active responsibility (Bovens, 1998). Where there is a crime victim, active responsibility entails material justice for the victim (for example, reparation) and symbolic justice (for example, apology) (Retzinger and Scheff, 1996). If victims do not feel vindicated, not only is this a bad thing in itself, it also stalls the momentum of active responsibility to do crime prevention work. Active responsibility is distinguished from passive responsibility, which is the norm of conventional criminal procedure. Passive responsibility means holding someone responsible for something they have done in the past. Active responsibility means taking responsibility for putting things right into the future. Restorative justice theory has it that conventional criminal punishment discourages active responsibility (Braithwaite and Roche, 2000). Police and prosecutors relish those foolish enough to own responsibility because it gives them a notch on their gun without working for it, though Japanese prosecutors behave differently from American ones in this regard (Johnson, 2002).

Good restorative practice often deals with denial by encouraging those with more minor levels of responsibility to trigger an active responsibility domino effect. The schoolboy who heard the bullied child crying for help and walks away admits during the restorative process that this was wrong.

A teacher then says this is more the teachers' fault for failing to teach children how they can show courage to confront bullying. Another child then admits that when asked to hold the victim while he was being punched, he lacked the courage to refuse. Sometimes the victim will be moved to confess to provoking the attack with insulting language. The hope is that as active responsibility accumulates during the conversation in the circle, the primary perpetrator will accept mercy in return for his truth-telling. The dominos thus often fall from those with lesser responsibility up finally to those with most responsibility. The conventional prosecutor's strategy in contrast is to first knock over the last domino in a way that does not upset the other dominos so that they will all benefit from one suspect taking all the blame. In return, they make themselves available to testify against him.

The domino theory is a second account of why I was wrong in failing to see that restorative justice has a better strategy for discovering truth than conventional criminal process. In schools, airlines and hospitals that eschew scapegoating in favour of learning and mercy, truth and active responsibility become the virtues they should be. The shift from a blame culture to a learning culture means that responsibility is grounded in a forward-looking virtue ethics rather than the backward-looking act ethics of holding offenders responsible under conventional criminal jurisprudence.<sup>5</sup> The approach also comes with a strategy of what to do when active responsibility is not elicited. It is to adjourn the circle and widen it—invite into the circle some new stakeholders with some new active responsibility or preventive resources to contribute (Braithwaite, 2005).

## REDEMPTION SCRIPTS THAT MANAGE SHAME AND PRIDE

One of the important symbolic resources restorative justice has for helping those last dominos of active responsibility to fall is Shadd Maruna's discovery of the importance of "redemption scripts" (Maruna, 2001). Maruna found in his nuanced quantitative-qualitative study of serious Liverpool offenders that a characteristic of those who abandoned their criminal career was that they rejected impositions of passive responsibility upon them while accepting active responsibility for helping to repair harm into the future. Serious female offenders sometimes excuse their behavior because they have been sexually abused. They excuse themselves because they believe they have suffered more as victims of crime than those they have victimized. Our moral intuition is that it would

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5. For a virtue ethics account of a culture of learning in health care, see Oakley and Cocking (2001).

be dangerous to allow them this excuse when they have perpetrated terrible crimes.

But Maruna's redemption script offers a third way between denial and acceptance of passive responsibility. His text is from Jesse Jackson: "You are not responsible for being down, but you are responsible for getting up." (Maruna, 2001: 148). It becomes more morally acceptable for abuse, poverty or drugs to be blamed for past errors if what is said is: "It is not my fault, but it is my responsibility" (Brickman, Rabinowitz, Karuza, Coates, Cohn and Kidder, 1982). So the sexually abused murderess restories her life: "I am not like that anymore. When I did that I had not begun to recover from my own abuse." More mundanely, the redemption script of the heroin abuser is that "I used to do terrible things when I was in the grip of the heroin, but now I am clean and I want to apologise to those I hurt and help others recover from drug abuse." Another of Maruna's (2001) empirical findings was that helping others recover from criminal careers was associated with the recovery of the person helping others. The idea of "making good" comes from Garfinkel (1956: 421-422): "the former identity stands as accidental; the new identity is the basic reality. What he is now is what, after all, he was all along." Restorative justice allows offenders to deny the conventional criminal law's passive responsibility that warrants punishment, but only on condition of a redemption script that has them take active responsibility for putting things right into the future. It must be earned redemption (Bazemore, 1999). More precisely, mercy annuls their passive responsibility so long as their active responsibility runs to telling the truth, doing what they can to repair harm to their victims and to put their own life on a responsible trajectory. If they also, as in Maruna's results, commit to helping others out of their criminal careers, all the better, the more reason for mercy.

Note the identity work of rebiography of lives with redemption scripts involves both shame acknowledgement ("my abused/addicted self and what it did was bad") and humble pride ("while my core self is vulnerable to my abused self, I am a good person who takes responsibility for righting wrongs"). Recall that shame acknowledgement and humble pride are found empirically in Eliza Ahmed's work in schools and workplaces in Australia and Bangladesh to be important to bullying prevention (Ahmed, 2001, Ahmed and Braithwaite, 2004, in press a, in press b; Morrison, 2005). Shame management theory is on this view the micro theory that underpins the restorative justice dynamic, just as the theory of trust and governance (Braithwaite and Levi, 1998) is the macro framework that enables mercy, confrontation and high integrity truth seeking that displaces a blame culture with a learning culture. At the macro level, it is the theory of hope and governance (Braithwaite, 2004) that enables humble pride in redemption scripts that restore personal and national lives. At the most

macro level, we can re-imagine Abraham Lincoln's greatness as a president because in the Gettysburg Address he restoried American identity with a redemption script (Hesse and Post, 1999: 25) as a precursor to the Reconstruction amendments of the great American republican constitutional architecture. America was restoried as a nation that is a victim of an evil institution, slavery. Whether you are black or white, North or South, you are a victim of slavery; to be an American is to be part of a republic that aspires to transcend this evil by creating all as equal. Nelson Mandela is also an architect of hope and governance who restories South Africa, partly through the restorative institution of the Truth and Reconciliation Commission, as a nation of people who, whatever their race, are victims of the institution of apartheid.

### RECONCILIATION & DEMOCRATIZING THE JUDICIAL BRANCH

At the macro level of armed violence, the dynamic in Figure 1 means that there is reconciliation between northern and southern Americans, black and white Americans and South Africans. In the micro criminal law encounter, it is reconciliation between the victim and offender, between a drug abusing offender and her long-suffering family whose collective life has suffered upheaval at the hands of its addicted member. In the meso context of workplace bullying, it is reconciliation among employees whose worklife has been poisoned by a culture of bullying, sexual or other forms of harassment. At the macro level, as Gibson explains, national reconciliation nurtures democratisation. Only reconciled peoples respect one another's democratic rights, trust one another to vote and not take up arms if one's side does not win the election. At the micro and meso levels, young people can learn to be active democratic citizens by participating in a restorative justice conference on how to confront a problem of school bullying (Morrison, 2005; Cameron and Thorsborne, 2000). Democratic learning resides in the fact that the incident is not dealt with by an authority handing down punishment, but by members of the school community being expected to deliberate upon a just solution to the underlying problems. We are not naturally democratic; we are not born democratic. We learn to be democratic through the civility of community conversations about the governance of schools, families and workplaces.

The legislative and executive functions of government have come to be seen as the sites of democratic decisionmaking. Particularly from the eighteenth century, judicial decisionmaking became progressively less democratic and more professionalised (Langbein, 2003). Restorative justice is partly about reversing this revolution by having people speak in their own voice in legal disputes rather than through professional legal mouthpieces. Because legal conflicts are more micro and local than

remote national political decisionmaking, better, more frequent opportunities for our children to learn to be democratic will come from democratising the judicial branch of governance.

### ACTIVE RESPONSIBILITY TO PREVENT

With common crime, as opposed to healing after civil war, preventive measures that flow from active responsibility are possibly more important than reconciliation. The key idea here is not so much that a restorative justice process is in itself a superior rehabilitative intervention than alternatives. It is that because restorative justice involves active responsibility, it can be used as a superior delivery vehicle for the whole gamut of rehabilitative programs that work, in addition to other preventive measures that are not about rehabilitation. Active responsibility in the restorative justice circle might even increase the commitment of burglary victims, for example, to prevent crime by installing alarms and other target hardening measures. Latimer, Dowden and Muise's (2001) meta-analysis found completion of restorative justice agreements was 33 percent higher than completion of agreements or orders in control groups. Hence, if prevention programs are being selected that actually work, there may be a 33-percent greater prospect of that effectiveness being realised. One reason restorative justice achieves better follow through on preventive agreements is that family and close friends of offenders who sign restorative justice agreements are more effective enforcers of them than police who enforce breaches of court orders. A father who agrees to take active responsibility in a restorative circle to ensure his son keeps up his reparation payments to a victim is likely to be more effective than the state in securing that result, even if it means paying it himself and later collecting it back.

The moment of family crisis that arrives when a family member hits trouble with the police can supply the missing motivation to confront a problem such as substance abuse that underlies a pattern of offending. The deliberative quality of restorative justice supplies the opportunity, the moment of ritual seriousness in a family crisis, for this motivation to be realised. The mother who for so long has been desperate to plead with her daughter to stop the suffering she is causing through her drug habit finally in the circle gets the captive audience she needs to have this plea attended to. This, however, is more the promise of restorative justice than its reality to date (Braithwaite, 2002: 92–102). It has also been argued that restorative justice supplies an opportunity to remedy the uncoupling of crime prevention and case processing—to take crime prevention to where the resources are to be found in the criminal justice system—where cases are processed (Braithwaite, 2002: 98). Moreover, it is contended that restorative justice reinforces the social cognitive principles that have been

shown to be hallmarks of effective rehabilitation programs (Braithwaite, 2002: 98–99) and that it can foster plural deliberation that delivers “responsivity” (Braithwaite, 2002: 99–100). All these forms of preventive promise have been poorly realised in practice because of the way the social movement for restorative justice has to date turned its face against rehabilitationism and other forms of preventive professionalism (Levrant, Cullen, Fulton and Wozniak, 1999). In this respect the democratic ethos of restorative justice has gone too far in valorizing untutored deliberation of a form that eschews expertise. Deliberative justice can be reconfigured to demand the service of prevention experts in response to the preventive needs identified in the circle by those close to the problem.

Clifford Shearing and Les Johnston (2005; Johnston and Shearing, 2003: chapter 8) show that crime prevention can be deliberatively institutionalised in a way that gives victims a sense of justice having been done. This is “justice as a new future.” In the context of gatherings for the governance of security that Shearing and his colleagues have facilitated in South Africa, he finds that “a sense of justice arises... to the extent that participants believe that credible guarantees for a safer collective future have been realized’ (Shearing and Johnston, 2005). Instead of the victim getting satisfaction by balancing the past encroachment upon their liberty with a proportional encroachment on the liberty of the offender, what they get is “a credible guarantee that one’s own liberty (and that of others) will be respected in future.... Fairness and a sense of right is achieved, not by a balancing of disadvantage, but through the creation of a countervailing advantage accomplished through a credible guarantee of future right-doing” (Shearing and Johnston, 2005: 23–24). This is close to the restorative intuition that because crime hurts, justice should heal. The key thing is that a gathering acquires grounds for believing that participants will be better protected than in the past and “that this protection will be fair and equitable” (Shearing and Johnston, 2005: 24). “Everyone will be more secure including me.” It is justice as the human right of a guarantee of personal security. Empirically Shearing and Johnston claim that it is the deliberative and ritual quality of the justice that brings emotion to bear on the sense of fairness collectively accomplished:

Not only do people leave these gatherings with a sense that the process has been reasonable, fair and equal (that is with a sense of justice broadly understood); they almost always celebrate this achievement with a symbolic gesture at the end of the gathering. This typically involves a holding of hands and a song or a prayer of celebration (Shearing and Johnston, 2005: 20).

Failure to achieve reconciliation and prevention at a first attempt should not normally result in abandonment of a restorative justice process, but reconvening a little later when the conflict might be more ripe for

reconciliation or with new participants in the circle (on the meaning of “ripeness” for reconciling armed conflicts, see Hampson, 1996). But when stakeholders, particularly victims of serious crimes, perceive that a just resolution has not been settled, then it should be possible for those stakeholders to mobilize the justice of the courts. The restorative justice ideal is that the justice of the courts will be more effectively available to those who want it because easy availability of restorative justice would mean that few would want to avail themselves of a trial (Braithwaite, 2002: chapter 8).

### THE RESTORATIVE THEORY OF DETERRENCE

This is not the place to develop a new deterrence theory grounded in restorative justice, something attempted elsewhere (Braithwaite, 2002: 102–122). Yet it is important to state that this theory advances the counterintuitive hypothesis that a systematic presumption in favour of mercy delivers more effective deterrence than proportional punishment. The fear of conventional deterrence theorists is not just that mercy erodes deterrence; it is also that a presumption in favour of trying mercy first (with court enforcement of punishment as a backstop) will cause the rational calculator to behave badly for as long as mercy is on offer, and then switch to responsible behavior only when there is a switch to punishment. It is a “free hit” incentive structure. Why do airline pilots not behave in that seemingly rational way to this incentive structure? The answer is that the foregoing account misspecifies the incentive structure. While the pilot is forgiven her safety sin, she is punished if she covers it up—if she fails to engage energetically with high integrity truth seeking, active responsibility and prevention. The punishment escalates from professional disdain to being driven from the industry and licence revocation. The incentive structure is not only about punishment; it is more fundamentally about reputational rewards (pride more than shame) for advancing the culture of learning and prevention.

Restorative justice is not a punishment free zone. What it does is shift the focus from punishing the commission of crime to punishing the failure to engage with the prevention of crime. More fundamentally, restorative justice theory rewards—with praise, pride, help and social support (Cullen, 1994)—engagement with truth and prevention. That is the nub of the restorative theory of deterrence, or more precisely, the rational choice component of a restorative theory of justice. That is why restorative justice advances the counterintuitive claim that mercy deters more than proportionate punishment, provides stronger rational choice grounds for law observance than proportionate punishment (Braithwaite, 2002: 102–122). So it is wrongheaded to say Figure 1 means mercy lets you cash in several free hits before court punishment makes you pay a bill. That is



actually a much better description of how extant criminal law operates. The theory Braithwaite advanced (2002: 102–122) is that restorative justice offers mercy followed by escalation of punishment up an enforcement pyramid if the offender does not engage with reconciliation and prevention (the effectiveness of which is monitored). Deterrence is achieved:

- dynamically (by escalation) rather than statically (Braithwaite, 2002: 29–32, 118);
- by shifting the focus from commissions of crime to omissions of prevention; and
- by systematically providing emotionally intelligent rewards for prevention as the alternative to punishment for denial of responsibility.

The mercy restorative justice offers is not impunity—it involves confrontation that can be emotionally painful, material reparation that can be monetarily painful or costly in time (as in community service for victims or their communities). Empirically, the RISE study found restorative justice to be perceived about as “tough” as court justice (Sherman, Strang, Barnes, Braithwaite, Inkpen and Teh, 1998). In addition, restorative justice can advance deterrence by increasing the certainty of detection, as the Hollow Water case illustrates with the increased certainty of the detection of child abuse. The restorative justice theory is that deterrence is better secured by more certain informal sanctions than by uncertain formal sanctions. It is about the strength of weak sanctions, actually of multiple weak punishments combined with multiple weak rewards. Finally, it is about the idea that deterring bullying is as much about deterring the child who holds the victim, the older child who walks away from helping the victim, the teacher who fails to take bullying seriously as a problem of school culture, as it is about deterring offenders (Braithwaite, 2002: 116–121). It is about understanding that preventive capabilities are overdetermined (Lewis, 1986) in the hands of many different actors, all of whom can be informally punished and rewarded for exercising their power to prevent (Braithwaite, 2002: 116–117). Finally, it is about understanding that deterrence focused on prevention works better because this is emotionally intelligent justice. This flows from Shearing and Johnston’s (2005) insight that prevention that makes the victim more secure, and everyone in the community (“including me”) more secure, is experienced as just.

## CONCLUSION

This essay has made a theoretical case not just for marginal changes to reduce the punitiveness of criminal justice systems. It is a case for radical restructuring toward a system that looks more like the air safety

management system in its fundamentals. This means a system where it is never acceptable to do nothing when dangerous behavior occurs. Doing nothing would leave the message that preventable lapses don't matter until they become serious or repeated. If pilots got this message, the air safety system would be on a slippery slope to recurrent catastrophe. Instead we want them to have the message that without fear of punishment they should voluntarily report even minor slips or lapses. The risks will be recorded so that it is clear they are being taken seriously and used to reinforce a learning culture as opposed to a blame culture. Where the incident reveals serious risks, it triggers widespread deliberation in air safety circles.

The criminal justice system is an institutional disaster because it does the opposite. Most minor crime is ignored by authority and laughed about by peers, giving the message that it does not matter. Serious repeat offending is responded to with heavy punishment, giving the message that this is something we should never admit to. This system also routinely leaves offenders with a sense of injustice based on their perception that they have committed crime repeatedly without being punished, so on the day heavy handedness descends they often feel they are arbitrarily victimized. Like common criminals, war criminals accurately perceive that what they confront is a system that arbitrarily veers between impunity and vigorous proportionality (and that is "victor's justice"). Such a dispensation leaves little hope for truth and collective memory.

The alternative path advanced for critical examination and empirical testing is that more crime prevention is achieved by always confronting crime, but doing so with a presumption of mercy. Offenders who know that they will benefit from that mercy so long as they participate in a high-integrity process of truth-seeking and take active responsibility for the hurts they have caused can help us to learn from the truth they tell. Cynics are justified in saying that restorative justice has a poor track record of triggering major crime prevention initiatives (Braithwaite, 2002: 90–102). But pointing to this empirical fact is not a reason for preferring a system that deters the truth-telling needed as a foundation for learning how to prevent crime nodally—for example, in circles (Johnston and Shearing, 2003: chapter 8; Shearing and Johnston, 2005)—as well as nationally—in Truth and Reconciliation Commissions or enquiries into Enron-style corporate collapses. Institutions that reward revelation of the truth, and diagnosis of lessons learned from it, are bound to be more effective in the long run than institutions that deter truth-telling and learning. Of course mistakes will be made in a learning culture of justice. Often these mistakes will make things worse. But that is where another noble institution called the American Society of Criminology comes in. So long as we do our job, our profession will eventually reveal those mistakes... mostly! Then we

have not done a great job of revealing the mistake of a proportionality principle that deters truth-telling, prevention and “emotionally intelligent justice” (Sherman, 2003).

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