

John Braithwaite

Scaling Up Crime Prevention and Justice

ABSTRACT

Criminal justice is afflicted with enforcement swamping crises. Is a bigger criminal justice system the only answer? Are there better ways to scale up prevention and justice? Literatures on four system-capacity crises, selected for how different they are, show that there are collective efficacy strategies that can move from institution to institution to scale up justice and prevention. Substance abuse, corporate crime, war crime, and gendered violence are problems that the criminal justice system pretends to solve but barely touches. To subdue system-capacity crises, community participation in crime control must grow to become more than just an adjunct to state enforcement and in a way that transforms democratic citizenship. Gifts of scaled-up volunteerism are needed, but institutional responsibility for collective efficacy is more critical than individualized responsibility for self-efficacy. To tackle system capacity deficits, businesses, armies, schools, and social movements that include feminism, LGBTIQ rights, Indigenous rights, environmentalism, and restorative justice can be empowered to mobilize collective efficacy for domination reduction. A long march through societies' institutions led by such movements can achieve macro transformation in the scale of justice and prevention. Concrete collective efficacy strategies can be developed.

Is it a good idea to have a better funded criminal justice system? Probably not. "Jailing is failing," as the Justice Reform Initiative puts it.¹ But lessons from the Black Lives Matter movement give reason to pause with

John Braithwaite is a professor at the University of Maryland and an emeritus professor at Australian National University. My thanks to Michael Tonry and his editorial process. He always challenges me and has been the sagest editor of my experience. Thanks also to Yan Zhang for research assistance.

¹ Slogan of the Australian Justice Reform Initiative: <https://www.justicereforminitiative.org.au/jailingisfailing>.

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advocacy of “less prison, more police” (Neyroud 2011). Most criminologists perceive the right kinds of investment in health, education, and housing as more effective ways to reduce crime than investment in criminal justice. Justice reinvestment, shifting funds from the justice system to make better investments, is a valuable approach (Brown et al. 2016). Justice reinvestment can be described theoretically as a shift from Selznick’s (1992) coercive law to his responsive law (which is more purposive about delivering justice and prevention). Little depends on buying into this theoretical reading for purposes of this essay, although much does in my wider body of work.

Enthusiasm for justice reinvestment must be qualified by the reality that public investments in health, education, and housing programs are so expensive that their cost-benefit ratios for crime reduction may be weak. Yet these investments are mostly virtuous, worth making anyway, because better health, education, and housing are so important for their own sakes, regardless of crime control effectiveness. Unlike most criminal justice interventions, they mostly have positive benefit-cost ratios in a narrow economic sense. For example, throughout the 2010s and into the 2020s, states have been able to borrow for investment in higher education and achieve at least three times the return on investment in increased GDP than the interest paid on borrowing for education spending (Psacharopoulos and Patrinos 2018). That is not true of spending on prisons.

Even with the wisest justice reinvestment, is it possible to scale up crime prevention and justice without massive public spending? This question is continually in focus in this essay. Four disparate criminological problems are considered—substance abuse, corporate crime, war crime, and sexual assault—that are vast and challenging. They motivate six strategies for scaling up prevention and justice that are much cheaper and have greater promise than building more prisons:

Wounded healer collective efficacy. The idea here is scaling up the crucial idea embodied in step 12 in the Alcoholics Anonymous strategy for building a movement against substance abuse—helping others, passing on healing by those who have been wounded by the social problem.

Enforced organizational self-incapacitation. Incapacitation works better in addressing corporate crime than deterrence does. Deferred corporate prosecutions can give opportunities to corporate leaders to transform organizations and tie their hands against future offending, while increasing individual executive accountability.

Multilevel justice. When enforcement strategies are thin reeds that snap, tie disparate reeds of justice together.

Colombian macrotransitional justice. Seek to persuade all members of the high commands of military organizations to accept responsibility for collective criminal decisions; commit each individual to “restorative sanctions.” More generally, enforce responsibility for organizational crimes of members of the high command of any powerful organization (be it church, corporation, or state), followed by collective and several accountability for a piece of that responsibility, and a piece of the healing.

Schoolchildren scaling up truth and healing. When victims refuse to testify to the state, ask them to testify to their grandchildren or nieces to scale up truth and healing.

Schools and the life cycle: youth development circles. Universally provide a circle of community support for every child until a job or a place in higher education is found for them.

In the conclusion, I weave a unified fabric of transformation from these four-by-six strands. My demonstration of the macro concept necessarily thinly treats many strands of diverse character. I hope the scans of each strand are not too tedious; please jump ahead when you are getting more detail than you need to grasp the big picture that matters. The weaving of micro strands acquires a macro character when it accomplishes the macro vision of a long march through a society’s institutions. I show below how former Australian Prime Minister Julia Gillard began to glimpse this beginning in 2012. I move from the particularities of the four-by-six strands to a radical reset of political institutions. The reset goes to democratically active collective efficacy that cascades agency. A vital part of this is a society with stronger, more democratic institutions that support children. Children are not born democratic; the fabric of the essay is about their learning to become democratic by participating in solving intractable problems. Ink spots of collective efficacy can connect up holistically across a societal canvas. This requires patient, interwoven, social movement politics. Albert Bandura (2000, p. 75) conceives collective efficacy as “shared beliefs in the power to produce effects through collective action.” Robert Sampson and his colleagues (1997, p. 918) give collective efficacy a more specific focus on social cohesion combined with willingness to intervene on behalf of the common good. In criminology, collective efficacy has tended to focus on preventing crime neighborhood by neighborhood.

My fabric of problem-solving strategies multiplies the concrete and practical focuses of collective efficacy:

- Heal institutions, one after another, as a path to healing people.
- Provide collective support for recovery in ways that cascade recovery.
- Build social movement support for the efficacy of survivors of sexual assault, war crimes, and corporate crimes to heal themselves in ways that prevent future atrocities.
- Enable radical separations of justice for victims and justice for perpetrators (restorative justice for victims alone; institutional transformation that embeds perpetrators). Yet when it is possible, enable their more radical integration (e.g., classic restorative justice for victims and offenders meeting in a circle). This means formally accepting “plausible” allegations of survivors, healing by believing, in cases in which it is also wrong to conclude there is proof beyond reasonable doubt against rape defendants or defendants for other crimes of domination who are well protected by that domination.²
- Multiply the levels of justice on which societies rely for crimes of domination, in recognition that most forms of justice deliver impunity for crimes of the powerful.
- Widen use of deferred prosecutions of organizations and their top management while they collectively put preventive measures in place to incapacitate their future offending.
- Establish universal programs that build both collective efficacy and self-efficacy of every child in the transition from school to work. When all adult institutions continue to deliver impunity, turn to schoolchildren to record and acknowledge the truths from stories of suffering of family elders, in the first instance only for the eyes of those elders.

Each of these mechanisms involves innovative forms of collective efficacy for crimes of vast magnitude. While they are very different and apply to variable degrees to the different crime problems I discuss, they all depend on the shared glue of collective efficacy. Together they connect a bold suite of innovative tactics for unpacking impunity and empowering citizens to reconfigure uncreative forms of justice and prevention into creative ones. If we cannot know complexity in the warp and woof of justice, if we cannot

² These are crimes that reduce freedom conceived as nondomination (Pettit 1997).

see emergent possibilities for coherence, we cannot know justice. The job of legal formalism is to protect people with legal guarantees. Yet simplistic formalism must not crush the more complex ways ordinary people think about the kind of justice that would be good enough for them when they face crimes of a magnitude that a broken neck could never requite.³ The weaving strategy can be described more abstractly: When justice can be improved by pulling its elements apart, pull them apart; when justice can be improved by pushing fragmented parts back together, push them together. Collective efficacy is ties, social glue that can enable productive disassembly and reassembly of fragments of justice. Spread justice purposively by being a catalyst of cascades of justice across many levels. If I get a spoonful of justice-healing-prevention, I do well to pass on a spoonful. Educate children in how to cascade social capital in these ways. The structure of the essay considers substance abuse first, then corporate crime, followed by war crime, and sexual assault, which is developed first by considering sexual assault in the military, then in universities.

I. Substance Abuse: Wounded Healer Collective Efficacy

The literature on preventing substance abuse is vast. What I am interested in assessing is not that literature but the less examined question of how to scale up prevention and recovery. A strategy that draws my attention because it has a novel approach to scaling up is Alcoholics Anonymous (AA). Alcohol abuse has only been criminalized in a minority of contexts (public drunkenness, youth consumption); adult use is banned in a minority of mostly Muslim societies, or in unique historical periods (e.g., US Prohibition). My interest is not in how criminal substance abuse is or should be but in accomplishments of scaling up a strategy that has some claims on effectiveness.

The effectiveness of AA for recovery in accomplishing abstinence is contested, yet encouraging (Kaskutas 2009; Humphreys, Blodgett, and Wagner 2014; Kelly 2017). One line of criticism is that its Christian character raises questions about its relevance to non-Christians in multicultural societies. Yet it is perhaps Christian features of bearing witness that hold the key to efficacy for scaling up prevention, as they did for spreading

³ The broken neck metaphor comes from a conversation with Nils Christie about his sense of the meaninglessness of pretending to secure justice by hanging Nazi war criminals. The metaphor of the “spoonful of justice” in the next paragraph also came from this conversation.

Christianity itself as different kinds of crusades and proselytizing scaled up. It is this scaling up that is my interest rather than debates about comparative effectiveness.

Addiction is a problem on a scale so large that, if we adopt a broad enough conception of addiction, includes phenomena like overeating (yes, there is an Overeaters Anonymous); perhaps most of the population has suffered some unhealthy addiction in part of their lives. That is one reason why understanding of the effectiveness of drug treatment changed when addiction became recognized as one of many chronic, relapsing conditions, like smoking or overeating. Addiction is so large a problem that the criminal justice system has proved poorly equipped to tackle it. President Nixon's War on Drugs became a war on minorities that widened the gap between US imprisonment rates and those of the rest of the world without making inroads into illicit drug use (Baum 1996; Coyne and Hall 2017). Strategies like decapitation of Mexican drug gangs has been demonstrated by sophisticated research to have greatly increased violence in Mexico as successor gang bosses rebuilt control (Ríos 2013; Calderón et al. 2015; Dell 2015; Phillips 2015; Atuesta and Pérez-Dávila 2018; Lessing 2018).

Shadd Maruna (2001) opened an alternative pathway that emphasized the importance of redemption scripts to desistance from crime. Offenders who made good had to find a new way to make sense of their lives. They restored their life histories. Desisters defined a new ethical identity for themselves that meant that they were able to look back at their former criminal selves and believe they were "not like that anymore" (Maruna 2001, p. 7). Members of Maruna's persistent reoffender sample, in contrast, were locked into "condemnation scripts"; they saw themselves as irrevocably condemned to their criminal self-story.

Another feature of Maruna's desister "generative scripts" was a desire to help others as part of defining a renewed positive identity. LeBel, Richie, and Maruna (2015) updated progress with implementing the wounded healer strategy. There is some encouraging research (Perrin et al. 2017). Heidemann et al.'s (2016) mixed methods study of wounded healers among formerly incarcerated women is one encouraging work. Another by Lee et al. (2017) of drug offenders found that two "spiritual virtues"—service to others and the spiritual experience of love—contributed to reduced recidivism and improved "character development" through greater humility. These results were interpreted as support for founder claims that AA's 12-step process boiled down to two core principles: love and service. The

twelfth step of recovery explicitly involves helping to heal the suffering of fellow alcoholics.

White's (2014) view of the evidence is that recovery is contagious and recovery is spread by recovery carriers. If each recovered drug abuser sought to pass on their healing to help a number of others, if each recovering criminal offender imbibed self-efficacy and joined in the collective efficacy to seek to help other troubled youth in the neighborhood where they have street credibility, then there are prospects of a cascade of prevention. The Graterford Lifer's Project illustrates the politics of practical pathways to ex-offender leadership in prevention (Austin 2019). To date, interest of policy makers in mobilizing wounded healer cascades of prevention has been modest, so we await further evidence that such virtuous cascades could scale up.

What can be said is that AA has institutionalized the scaling up of wounded healing with flare for tackling alcoholism. There are 106,000 AA groups in 150 countries. Countless hybrids of AA with distinctive brands have also proliferated (White and Kurtz 2008). AA can be conceived as a massively scaled up NGO that cascades collective efficacy overwhelmingly in the hands of volunteers inspired by its "help others" twelfth step to recovery.

Both self-efficacy and collective efficacy have a key characteristic shared with all forms of social capital and human capital. Unlike financial capital, collective efficacy is not depleted through use. When you spend your money in the bank, you deplete your capital. When you trust or help someone, you do not deplete trust and help; trust and help tend to be reciprocated. This engenders virtuous circles of trust- and help-building. When institutions mobilize collective efficacy to help or heal, they do not reduce help and healing because helping and healing are contagious. People pass on acts of kindness (Tsvetkova and Macy 2014); experimentally, cooperation reproduces itself (Fowler and Christakis 2010). Tian et al. (2017) showed that Chinese classroom collective efficacy helped students become more active and effective learners, better at building their self-efficacy. High classroom collective efficacy combined with small class sizes delivered collaborative, relational learning that simultaneously produced improved learning and reduced delinquency and aggression. There is a wider literature on virtuous circles of collective efficacy and helping behavior in classrooms. Collective efficacy of students encouraging one another not to give up on solving math problems can have strong effects in improving math and other difficult skills (Katz and Stupel 2015). Goddard,

Skrla, and Salloum (2017) found that teacher collective efficacy strongly improved student mathematics and reduced the mathematics achievement gaps suffered by African American students by 50 percent. Kirk (2009) discovered that school-based, family-based, and neighborhood-based collective efficacy when combined substantially reduce arrests and student suspensions from school. This literature can be read as a bridge between the finding that collective efficacy reduces crime (Sampson, Raudenbush, and Earls 1997) and the hypothesis that collective efficacy can cascade between institutions to scale up the enabling of that crime-prevention effect.

AA is an institutionalized contagion of collective efficacy. The Alcoholics Anonymous 12-point strategy has itself cascaded to Narcotics Anonymous, Heroin Anonymous, Cocaine Anonymous, Crystal Meth Anonymous, Gamblers Anonymous, Debtors Anonymous, and many other, more specific addiction anons. Some have proliferated widely. For example, Gamblers Anonymous claims more than 1,000 groups across the United States and operations in at least 13 other countries. The core ideas about scaling up the intervention have themselves diffused strongly, scaling up within and between addiction domains.

An interesting question for helping and healing social movements like restorative justice is whether they could reinforce their gains while simultaneously scaling up by incorporating a “twelfth step” into their strategies. Experiments can be designed to test these joint possibilities. Below, I discuss strategies in which schools, youth development circles, and restorative city networks execute complementary strategies for scaling up healing, prevention, and justice. I have elsewhere (Braithwaite 2020a) argued that crime is a cascade phenomenon. This is an ancient biblical insight that begins with how violence begets violence. The obverse biblical insight is that nonviolence (“turning the other cheek”) begets nonviolence. The most influential practitioner of this insight was Mahatma Gandhi, who was persuaded by this thinking in his Christian socialist friendship circle in Britain a century ago.

Just as crime cascades, crime prevention can cascade when collective efficacy has needed institutional support. Norms of civility and collective efficacy at one locale spread like ink spots that connect up, ink spot to ink spot, covering whole societies with norms of civility. This enables redemption scripts for offenders to help themselves and to grasp the self-efficacy as wounded healers to cascade help to other offenders. Wounded healer strategies like AA may therefore reveal dynamics of a more general model of how to cascade prevention. Is this the regressive form of

“responsibilization” often discussed in the governmentality literature (Miller and Rose 2008; Richards 2017)? Responsibilization usually means making people individually responsible for tasks that were previously duties of the state. What I promote here (and what is described in the restorative justice literature) is collective and empowering responsibility for crime prevention. This is the foundation for a macrocriminology of agency in confronting concentrated disadvantage with social support for transformation from anomie to collective efficacy (Braithwaite 2022).

II. Corporate Crime: Enforced Corporate Self-Incapacitation

Edwin Sutherland ([1949] 1983) first demonstrated that corporate crime is like substance abuse in that it occurs on a wide scale. Single offenses often have huge numbers of victims. Sutherland believed most criminological explanation is fundamentally flawed because it fails to recognize that most of the most serious crime is corporate crime. Convictions for crime in the suites are harder to secure than for crime in the streets because of the complexity of financial records, organizational complexities, and legal complexities, and because of highly paid lawyers who know how to game these complexities. Criminologists ritually call for equal or greater punishment of corporate harms that exceed individual criminal harms. However, they understand that doing that would be so massively expensive that there may be no possible world in which taxpayers will fund equal coercive justice in preference to other forms of spending, regardless of the power dynamics that make it unlikely.

Organizational life can be contrived to create smokescreens of diffused accountability that allow every executive credibly to blame others. This makes proof beyond reasonable doubt difficult. John Coffee (2020, p. 12) has conceived a rationale for corporate criminal responsibility as being to secure cooperation of the corporation with achieving individual executive convictions: “Put simply, in the modern decentralized corporation, the responsible individuals are hard to identify and convict, unless their corporate employer cooperates against them. Only then can evidence and witnesses feasibly be assembled. Thus an underrecognised purpose of corporate criminal liability is to create a threat aimed at the corporate entity that leads it to cooperate in the prosecutions of individuals (and particularly senior executives).” Incapacitation means removing an offender’s capacity to commit further crime. Imprisonment, amputating hands

of pickpockets, and withdrawing licenses of doctors are said to incapacitate. Corporate self-incapacitation occurs when a firm incapacitates itself. An example is an energy company that incapacitates itself from causing a nuclear meltdown by decommissioning its nuclear plants. Deferred prosecutions are often used to leverage corporate self-incapacitation. For any defendant, deferred prosecution means a prosecutor deciding not to proceed with a prosecution but reserving the option to do so later. Deferred corporate prosecutions usually involve formal agreements that the corporation do certain things to prevent recurrence and repair harm to victims. If the corporation fails to deliver, the prosecutor can then prosecute.

Coffee is cynical about the potency of deferred prosecutions. They are Swords of Damocles that hang over corporations to motivate accountability of individuals who are accountable inside the organization (the Fisse and Braithwaite [1993] ideal). Deferred corporate prosecutions routinely fail to honor the restorative principle of earned redemption. Coffee concludes that nonprosecution has mostly not been “truly earned” and proposes a better way. Corporate penalties in the form of equity fines up to 20 percent of outstanding shares would cause deferred prosecutions to cast a large enough shadow to motivate credible internal discipline and reform. With a 20 percent equity fine, one new share would be issued to a victim compensation fund for every five existing shares. This would substantially reduce the value of existing shares without causing job losses to innocent employees; the operating capital of the firm would not be depleted. The shares in the hands of the victim compensation fund could motivate reform by making corporate control contestable (Coffee 2020, p. 145).

Under the status quo, only 1.4 individuals on average are prosecuted in the United States as a result of corporate deferred and nonprosecution agreements (Garrett 2015, p. 1791). Yet criminal prosecution is not the entire reality of deterrence and incapacitation. Many individuals do suffer in their careers by being dismissed, demoted, or losing bonuses. Karpoff, Lee, and Martin (2008a) found in 585 Securities and Exchange (SEC) cases that 92 percent of managers identified by the SEC as responsible for financial misrepresentation lost their jobs, 81 percent before the SEC imposed any formal sanctions. This was corporate self-incapacitation by removing criminal managers from access to levers of corporate power. Fisse and Braithwaite (1983) showed empirically that, independently of financial consequences, corporations and their senior executives care about their reputations.

The discussion so far implies that deterrence is the key to corporate crime control. Incapacitation may be more critical. Even with street offenders, Slothower et al.'s (2017) West Midlands Police experiment, Offender Management by Turning Point (deferred prosecution with a plan), showed that, when compared with prosecuted cases, the Sword of Damocles of a deferred prosecution can be effective, for diverse reasons. Random assignment to deferred prosecution combined with rehabilitation support and monitoring substantially reduced crime harm (34 percent) but not crime incidence, reduced justice system costs, and increased victim satisfaction with outcomes.

There is experimental evidence (Bigoni et al. 2012) that cartel formation can be prevented when the Department of Justice offers “leniency” to the first reporting party (combined with high fines for parties that fail to report breaches voluntarily). Baer (2021) points out that the evidence is strong that voluntary self-reporting of foreign bribery has become relatively common in the United States. Since SEC enforcement director Stanley Sporkin’s Lockheed-inspired threat to prosecute firms that did not voluntarily investigate and self-report bribery (Coffee 1977, 1981), the offer of deferred prosecution or nonprosecution has improved detection. The problem in practice is whether firms that do not meet Department of Justice requirements for corporate leniency are prosecuted. Generally the answer is no. Hence, critics reasonably opine that leniency is a terrible name for the Justice Department’s policy. Its beautiful theory of principled contingency of leniency became an ugly practice of consistent impunity for corporate crime, particularly during the Trump administration (Garrett 2020, p. 116).

Defenders say that even under President Trump the leniency program motivated formidable growth of corporate investment in internal compliance programs. There is little doubt this is true; corporate compliance staff and the compliance consultancy market have accelerated almost exponentially (Baer 2021).

Baer argues, however, that the US corporate compliance market became a market in lemons (Akerlof 1970). The compliance market is one that looks for and “finds loopholes to circumvent obstacles”; it is a market in “schooling executives in cover-up rather than compliance” (Soltes 2021, p. 31). One seemingly impressive regulatory initiative in the United States orchestrated sanctions and incentives to motivate corporations to put internal whistleblower policies in place. Decades on, Soltes (2020) found that regulatory mandates that organizations have whistleblower hotlines

(e.g., under the Sarbanes-Oxley Act) resulted in regulatory ritualism. Soltes made field inquiries regarding alleged misconduct to the whistleblower hotlines of 250 firms. Receipt back of clear and specific answers and action on the inquiries was disappointingly infrequent. Worse, Soltes (2020, p. 429) found that one-fifth of firms had “impediments that hinder reporting” such as disconnected phone lines, email bounce backs, and directions to incorrect websites. These hotlines not only fail to provide a no-wrong-door policy; they shunt complainants to willfully closed doors. In these cases, beautiful paper policies on whistleblowing led to ugly practices of dead-end accountability.

There are things that can be done to repair the market in compliance lemons by a use of combinations of market and regulatory means. For example, when an Australian aged care compliance consultant pushes regulatory enforcement away with a flawed, tick-box compliance innovation that is poorly evaluated, the regulator should mandate lodging of the evaluation report on My Aged Care (a government public accountability website on aged care quality outcomes). Families and residents in the home can then complain to the regulator that the so-called reform amounted to nothing as soon as the regulatory inspector departed, and long-term compliance atrophied. More importantly in market terms, when compliance monitoring reports are put up on public websites, competitors in the compliance market become informers to the regulator that particular evaluations of compliance improvement are flawed (Braithwaite 2005, pp. 87–89). More often, the reputable compliance practitioner goes to the firm that hired the slipshod compliance professional to suggest that the job could be done better if their existing compliance consultant were replaced. When this is done in the market for compliance services, the firm that bought a compliance lemon sees the risk that this competitor could alert the regulator to the corrupted compliance work. Unfortunately, however, most compliance evaluation reports in contemporary regulatory practice are not transparently posted on accessible websites.

Major punitive prosecutions of firms that corrupt voluntary compliance professionalism and prosecutions of firms that cover up are important remedies. Another remedy is requiring firms to evaluate the effectiveness of their compliance programs, something only 55 of 255 US deferred prosecution and nonprosecution agreements did (Garrett 2014, chap. 3). If that remedy is inexorably executed, restorative justice for genuinely contrite and reforming corporations can save more prosecutorial resources for corporations that game the law. This more strategic use of finite enforcement

resources can make the law more preventive. If restorative justice can genuinely deliver corporate compliance when contrition and reparation are volunteered, because the justice is more genuinely restorative, the sword of corporate deterrence and incapacitation can be sharpened by putting more resources into the cases that need the most punishment. These are the most dangerous corporations because they are the least contrite and most disposed to cover-up.

Corporate deterrence mostly works before sentences are imposed when cases do go to court. This is the empirical foundation for the possibility that more strategically designed deferred prosecutions have better potential to deliver prevention and justice than can prosecutors who are doing the best they can in the face of a system-capacity crisis (Pontell 1978). Waldman's (1978) and Fisse and Braithwaite's (1983) early and recent (Braithwaite 2020c) research shows that the costliest things convicted corporations do in response to a prosecution are done before trials to improve the case for corporate responsibility to be presented at the trial. This is also why the stock market impact of state enforcement tends to come with the announcement of the prosecution or investigation (Carberry, Engelen, and Van Essen 2018), while "the public corporation's stock price usually goes up on the announcement of the sanction" (Coffee 2020, p. 66). Karpoff, Lee, and Martin (2008b) provide evidence demonstrating this pattern of a reputational effect of investigation (rather than a sentencing effect) in SEC cases, finding further that "the expected loss in the present value of future cash flows due to lower sales and higher contracting costs is over 7.5 times the sum of all penalties imposed through the legal and regulatory system" (see also Karpoff 2012, p. 581). This opens the door to creative future use of restorative justice in R&D on deferred prosecutions and enforceable undertakings (Parker 2004). A deferred prosecution process can be designed to sharpen deterrence; overuse of criminal sentences by courts blunts it with surprising frequency (Braithwaite 2018).

The Australian Competition and Consumer Commission (ACCC), in the earliest days of restorative enforceable undertaking innovations, held the view that victim compensation and other remedies agreed in enforceable undertakings often had higher costs for the firm than would have ensued from a prosecution (Parker 2004). The ACCC did not see itself as oppressive in these negotiations but as a firm but fair negotiator in early cases such as consumer frauds in 22 remote Aboriginal communities by global insurance giants. The companies made grossly false representations to Aboriginal people about insurance policy coverage, including culturally

sensitive falsehoods that the policy would cover the return of bodies to traditional homelands upon death. ACCC believed that outcomes were tougher than judges would have imposed because top management, CEOs or board chairs, of some of these companies were genuinely ashamed of what they had done. That was partly because there were also some criminal convictions of individual insurance company executives. Top management was not initially remorseful; that was an accomplishment of restorative elements of a process in which CEOs sat with Aboriginal elders in “yarning circles” (Parker 2004). Defendants often started by trying to neutralize their responsibility by accusing the accusers of oppressive enforcement and blaming Aboriginal victims. The neutralizations fell away quickly when top management sat in the circle with victims and elders.

By the late 2000s, however, the conversations within our ACCC reformers network were about enforceable undertakings becoming a soft option in the hands of many regulators who allowed defendants to get away with saying, “we didn’t do it, but we won’t do it again.” This became a national conversation when the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found in 2019 that enforceable undertakings negotiated by the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority had been consistently limp on bank criminality. Dukes, Braithwaite, and Moloney (2014) directed this critique to US corporate prosecutions concerning our long-standing work on corporate crime by Big Pharma. We found that recidivist Big Pharma giants showed a pattern over four decades of paying bribes both inside the United States and globally and committing other serious corporate crimes, while settling one corporate integrity agreement after another with prosecutors, then scandalously breaching its intent each time without being prosecuted.

Much as we reformers continued to be attracted to restorative corporate justice, the view that many corporations were “too big to fail” or nail became an inescapable conclusion: law enforcement was captured by concern that big banks must survive to protect the stability of the financial system and Big Pharma recidivists like Pfizer must survive because they hold patents in life-saving drugs. Pfizer needed to be and remain a “fit and proper person” to participate in government pharmaceutical benefits programs. During the era when Pfizer was the most financially successful pharmaceutical firm on the planet, it negotiated a “corporate integrity agreement” with a restorative US state, reoffended, and negotiated a new corporate integrity agreement. When further offenses were revealed by senior Pfizer

whistleblowers, US prosecutors negotiated a third corporate integrity agreement (Dukes, Braithwaite, and Moloney 2014, p. 339) and then a deferred prosecution agreement over alleged corrupt practices in eight countries (Hastings 2012). In 2020, the US Department of Justice Foreign Corrupt Practices Unit opened yet another investigation over possible new breaches of this agreement in Russia, then China (FCPA Professor 2020). This followed renewed litigation against Pfizer by US service and civilian personnel killed or wounded in Iraq, and their families, alleging that corrupt payments by Pfizer helped fund the Jaysh al-Mahdhi terrorist group that attacked them (FCPA Professor 2020).

In the United States, a particular political history drove concern about enforcement capture. After Arthur Andersen was convicted for its role as auditor of Enron and other corporations bankrupted during the 2001 stock market crash, and then had this conviction overturned by the US Supreme Court, Arthur Andersen itself effectively collapsed as a result of the adverse publicity. More than 28,000 US employees of Arthur Andersen lost their jobs. This was viewed as unfair to innocent employees. It was also bad for the competitiveness of the economy that the Big Five accounting firms became the Big Four. Deferred corporate prosecutions were rare before the Arthur Andersen collapse. Coffee (2020, p. 38) found that there had been only 18 deferred and nonprosecution agreements in the 10 years before the Arthur Andersen case but 419 between 2002 and 2016.

Now I consider the possibility that deterrence may paradoxically have been enhanced overall, at least in the deterrence terms that matter in this analysis, and at least until the arrival of the Trump administration. Garrett (2007, p. 855) found that prosecutors filed charges in larger numbers of cases in the early twenty-first century than in the twentieth century, but the increase was in deferred rather than completed prosecutions. Alexander and Cohen (2015) concluded empirically that the rise of deferred prosecution agreements did not suppress other forms of corporate liability. Corporate cooperation with individual accountability aspects of expanded deferred prosecutions meant that while convictions of corporations fell, there was a small increase in convictions of individuals for corporate crimes in the United States (Garrett 2015, p. 1791), some increased convictions of foreign corporations in other countries (Garrett 2014), and some leveraging of foreign law reforms that enabled expanded future global enforcement (Garrett 2011, p. 1852). After the global financial crisis of 2007–9, the Obama administration persisted with the shift from corporate crime prosecution to deferred prosecutions combined with compliance

agreements. Governance and compliance reforms mandated by deferred prosecution agreements also shut down other kinds of crime that had nothing to do with the offenses for which the firms were charged.⁴

A final important datum from a restorative justice point of view is that corporations convicted by a judge in the United States pay an average of \$3 million in restitution to victims; in deferred prosecution agreements negotiated by prosecutors, the average is \$94 million, although this is partly because larger corporations are more likely to get deferred prosecution, while smaller companies are more likely to be convicted (Garrett 2014, chap. 5). Victims on average get much more from civil suits arising from corporate crimes than from public enforcement (Garrett 2014).

All this says something shocking about how dismissive existing criminal law is about victims' rights to restorative justice. Integration of restorative victim compensation and prosecutorial punishment is one option for improved healing and sharpened corporate criminal deterrence. Of course, this is not the most important defect of corporate criminal law from a restorative justice point of view. Much more attention to empowering victims with voice, deep listening, apology, healing, and prevention of further harm is needed. The surprise from the time of the Aboriginal insurance cases is that those at the commanding heights of finance capital can be given incentives, then genuinely persuaded in a yarning circle, to listen deeply to the most marginalized and dispossessed citizens of a country.

The largest criminal fine in Garrett's (2014) data set was \$1.26 billion against British Petroleum (BP) for the Deepwater Horizon oil spill. More than \$28 billion was paid in a combination of \$4.5 billion of civil penalties to the Department of Justice and the SEC, civil suits, or voluntary payments in compensation or for cleanup before this was demanded by any prosecutor or judge. Much of this is the effect of corporate self-enforcement to avert conviction or soften public enforcement (Waldman 1978), although we now know from President Obama (2020, p. 572) that he ordered his administration to pressure BP maximally for voluntary compensation. The US courts were stunningly kind and gentle to Halliburton,

⁴ This was an early discovery of Sporkin's voluntary disclosure program after the Lockheed bribery scandals (Coffee 1977, 1981). Outside monitors of companies that had off-books slush funds for paying bribes found that criminal executives also used those accounts to rip off their companies. For example, while Adnan Khashoggi may have persuaded ministers in foreign governments to buy Lockheed aircraft with bribes, he exploited its slush funds to perpetrate massive frauds against Lockheed (Fisse and Braithwaite 1983, 1993).

the cement base contractor, and extremely tough on BP, if not as tough as BP was on itself. More importantly from a restorative point of view, while no great transformation in the corporate conscience of Halliburton occurred, BP says it is transforming itself from a carbon Goliath into a renewables David, committed to carbon neutrality by 2050 (Reed 2020). Preemptive self-punishment is fundamental across all the evidence discussed here and in Braithwaite (2022). This involves investment in new compliance systems, appointing new chief compliance officers, independent monitors of reforms, and firing senior managers. Much of this is done defensively as self-incapacitation in advance of demands that self-punishment be done.

The most important point from an Australian perspective about the Deepwater Horizon and Arthur Andersen cases is that restorative justice in Australia could have prevented these catastrophes before they befell the United States. I make the case in Braithwaite (2022) about the power for global corporate self-incapacitation of Halliburton in particular that was potentially in the hands of Australian law enforcement. The Timor Sea oil spill was uncappable for 75 days a year before the 86-day Deepwater Horizon spill, uncappable for exactly the same reasons by exactly the same cement base contractor, Halliburton. Australian regulation should have produced a cosmopolitan restorative response for justice for future US victims. Australian environmentalists should have demanded that the Australian regulator require corporate monitoring reports from Halliburton of cementing of all oil rigs around the world. The evidence is clear that this would have revealed a worldwide pattern of catastrophic deep water well risks screaming to be fixed. Likewise, in the late 1990s Australian regulators, particularly the Australian Taxation Office, were detecting a catastrophically criminal transformation of Arthur Andersen that might have catalyzed cosmopolitan demands for global compliance and culture change, including at its Chicago headquarters. This is not an argument about making national law more cosmopolitan. It is an argument for harnessing the power of national law to motivate cosmopolitan enforcement under its shadow, in advance of a national legal Sword of Damocles being brought down on the corporation. Stanley Sporkin did the same thing when he insisted with significant success that US companies like Lockheed (now Lockheed Martin) stop bribing power holders like Prime Minister Tanaka of Japan to secure objectives of the military-industrial complex.

With deferred prosecution agreements and restorative corporate justice, the justice principles remain the same as Brent Fisse and I articulated

in 1993. Most fundamentally, all who are responsible should be held accountable, be they individuals, firms, or subunits of firms. That does not mean judges should sentence all of them to prison. We had a lot to say about how to guard against scapegoating by powerful CEOs and how to hold them individually accountable in appropriate ways while giving them credit for cooperation. CEO fault is almost always something that societal collective efficacy demands as a remedy under Fisse's and my accountability model, at least as managerial fault for failings of operating procedures in a corporation they lead. Often there will also be criminal or civil CEO fault.

Hence it may still be that restorative corporate justice can advance prevention, particularly through enforced self-incapacitation, in a just way at the same time as it advances restorative values about repairing harm to victims, the environment, and the economy. That said, much that was accomplished after Arthur Andersen in terms of increased corporate crime self-incapacitation and deterrence, albeit with reduced resort to corporate convictions, was wound down under President Trump. In the 15 years before 2017 aggregate corporate criminal fines increased from less than \$1 billion a year to \$10 billion but fell off a cliff in the next two years to \$2 billion (Garrett 2020, p. 116). Corporate convictions, convictions of individuals for corporate crimes, and deferred prosecutions all declined during the Trump administration. Under Biden, America might do worse than return to building on the progress that was being achieved through deferred prosecutions until 2017. What a huge, complex debate that is for the present American moment.

This could be further strengthened by enforcement with Coffee's (2020) ideas on equity fines and strategic privatizations of corporate criminal enforcement but informed by a more restorative and responsive philosophy of prevention and punishment. Baer (2016) may be right that the challenge of prosecuting every guilty corporate criminal to fix the crisis of too big to fail, too big to jail is a mission too vast to prevail. Yes, we can spend a good bit more on corporate prosecutors, but the biggest returns may depend on how well those prosecutions leverage more potent self-incapacitation. Regulatory reform can also deliver beyond compliance structural reform. One reason corporate deterrence works weakly (Schell-Busey et al. 2016) is that low penalties and low probabilities of detection are outweighed by certain and high benefits of the bonus culture of finance capitalism that drives criminality (Coffee 2020). Former Bank of England Governor Carney (2020) expressed the required reform: "To better align

incentives with the long-term interests of their firm and society, financial institutions in the United Kingdom now must defer a significant proportion of pay for up to seven years. Employees won't get these delayed bonuses if evidence emerges in the future of misconduct, or failures of risk management, or unexpectedly poor financial performance." Another structural reform to prevent corporate crime before it is attempted is to separate enforcement targeting from identification of the actor who benefits from the abuse of power. Ronald Mitchell (1994*a*, 1994*b*) demonstrated that the International Convention for the Prevention of Pollution from Ships was an utter failure. Signatories were required under the convention to impose penalties for intentional oil spills. Ships simply ensured they discharged pollution outside the territorial waters of the few countries that took the regime seriously. Noncompliance with the regime was the norm.

Then in 1980 the regime was reformed in a way that Mitchell (1994*a*, p. 270) estimated generated 98 percent compliance. This was remarkable given that the costs of compliance with the new regime were high. The key change was moving away from imposition of penalties on ships responsible for spills to an equipment subregime that enforced the installation of segregated ballast tanks and crude oil washing. One reason for the improvement was transparency; it was easy to check whether a tanker had segregated ballast tanks, but hard to catch it discharging at sea. This was an old insight from invention of the Plimsoll line; it was easy to incapacitate overloaded ships from leaving ports when water visibly lapped above the Plimsoll line. The other critical factor was the role of third-party enforcers on whom ship operators were dependent and who had no economic interest in avoiding the considerable costs of the regulation. These third-party enforcers were shipbuilders, classification societies, and insurance companies. Shipbuilders had no interest in building cheaper ships that must be certified by international classification societies nominated by national governments. Classification societies had no interest in corrupting the standards they enforced, which were the basis for generation of their income. Finally, insurers would not insure ships that had not been passed by a classification society acceptable to them because they had an interest in reducing liabilities that might arise from oil spills.

The revised oil spill regime therefore got results by abandoning deterrence of wrongdoers for incapacitation. It achieved 98 percent compliance in large part because the effective target of enforcement shifted from ship operators to shipbuilders, classification societies, and insurance companies.

Because the ship operators and builders were dependent on classification societies and insurers, they had no choice but to insist on regime-compliant ships, which the classification societies had an interest in ensuring were the only ones that got through their gatekeeper's gate.

The best-known example of separating enforcement targeting from the actor who benefits from the abuse is requiring employers to withhold tax from the taxable income of their employees and banks to withhold or report tax payments on interest earned by their customers. Little enforcement is needed against the employers and banks because they do not benefit from underreporting of income. This is the part of the tax system that works best in developed economies (Braithwaite 2005). Tax cheating is only a really major problem in domains in which it is impossible to harness disinterested gatekeepers. These withholding policies are among the most successful crime control policies of modernity.

The Australian tax office campaign against profit shifting by multinationals broadened this corporate self-incapacitation strategy to raise a billion in extra tax for every million spent on the program. It accomplished this by targeting major accounting firms as gatekeepers rather than the offending firms themselves (Braithwaite 2005, pp. 89–100). Deterrence repeatedly is shown to work well by moving the corporate targeting from a tough nut corporate deterrence target to a soft but strategic gatekeeper or other third party with the capacity to prevent. This is true because the capacity to prevent in corporate life is overdetermined and is not primarily in the hands of individual offenders. As Cumming, Dannhauser, and Johan (2021) and Dyck, Morse, and Zingales (2010) argue, it takes a whole village to detect financial crime; it includes auditors, compliance and ethics staff, analysts, short sellers, and institutional investors.

Peter Grabosky (2017) pursued a program of work that continually discovered new species of third-party enforcers of regulatory regimes—from volunteer divers who check compliance with South Australia's historic shipwrecks legislation to elected worker health and safety representatives. Grabosky showed just how disparate are the possibilities for shifting enforcement targeting from actors who benefit from the cheating to actors who do not but on whom the cheater depends for something critical to their welfare. This simple shift is capable of making headway with some of our seemingly most intractable enforcement challenges.

Grabosky's coauthor Neil Gunningham (Gunningham and Grabosky 1998) long despaired about the way hazardous chemicals regulation succeeds in changing the practices of the top 20 global chemical corporations

but barely touches thousands of little chemical firms that are too numerous, too unsophisticated, and too dispersed to be effectively supervised by state inspectors. Worse, chemical majors often spin off their most hazardous activities upstream or downstream to fungible contractors. Gunningham realized that most small chemical companies are vitally dependent on global chemical giants as suppliers, distributors, customers, or all three. This led to the insight that a private or public regulatory regime that requires major companies to ensure not only that its own employees comply with the regulations but also that upstream and downstream users and suppliers of its products comply may massively increase the effectiveness of the regime (Gunningham 1995). The reason is that a global firm that supplies a little chemical company has much more regular contact with them than any government inspector, more intimate and technically sophisticated knowledge of where their bodies are buried, greater technical capacity to help them fix the problems, and more leverage over them than the state. Often, they get to know what is going on as a result of explicit auditing practices that put them in a better position to regulate malpractice than any government regulator. For example, in analyzing the implications of the chemical industry's "responsible care" program, Gunningham (1996) explained that Dow insisted on an audit before it agreed to supply a new customer with hazardous material and routinely audited its distributors. The audit involved a Dow team visiting the distributor's operations to examine environmental stewardship across a chemical's life cycle. Dow and other majors prescribed improvements aimed at achieving environmental standards far in advance of extant regulatory requirements.

What we have therefore is a diverse array of strategies that do what critical criminologists call *responsibilization* for crime prevention when the state is unwilling to invest in it (Miller and Rose 2008; Richards 2017). Yet my lens has been on *responsibilization* of corporations for prevention of white-collar crime. More than that, the examples go inductively to possibilities for *responsibilizing* corporations to transform the structural drivers of corporate crime, as in the examples of firms being required to defer bonuses for up to seven years to ensure they are not rewarding criminalized short-termism in profit taking, or of insurers and classification organizations being required to take responsibility for incapacitating oil spills at sea that profit ship owners but not their own organizations. These are structurally profound forms of *responsibilization* that touch the commanding heights of capitalism.

III. War Crimes

Mechanisms that bear strong similarities to corporate deferred prosecution agreements can be deployed to prevent, heal, repair harm from, and incapacitate war crimes. I first argue that multiple levels of war crime justice are required to achieve these results. I then describe the profound innovation currently unfolding with Colombian restorative sanctions in cases that involve exceptionally large numbers of offenders and victims. This is such a bold effort to scale up transitional justice that it might fail because of the sheer magnitude of its boldness. Finally, I suggest a spoonful of justice that children might give when adults fail on all these fronts. They are learnings of South African children from their civil war over apartheid. The tiny kinds of contributions children can make to requiting the injustice of war may hardly seem like justice at all to adult eyes. Suffer the little children as they fumble at injustices that adults fail to subdue.

A. Multilevel Justice

Marsavelski and Braithwaite (2020) advanced an analysis of how to respond to the war crime enforcement swamping challenge. I don't develop the analysis in the detailed way just done with multilevel justice for corporate crime. In both domains, if reforms are not scaled up, formal justice becomes a sprinkler system that switches off when the fire gets hottest. The structure of our argument about hybrid multilevel justice is similar to the last section. It argues for prosecution of the worst and most senior war crime offenders at the International Criminal Court when national courts are too timid or too politically captured to prosecute. International prosecutorial capacity is used to leverage expanded war crimes prosecution of big cases by national courts as the preferred path. That national court threat in turn is used to leverage subnational, lower court, and military court prosecutions or deferred prosecution agreements and, more widely still, local restorative justice for lower-level offenders. At the local level, transitional justice is often more about truth and healing than about punitive justice. Mothers plead for the return of the bones of their murdered children. Fathers beg that an alleged local perpetrator cease upsetting his family by wearing a watch taken from his murdered child. The aim is that the offender return the watch, apologize to the family, and share the truth of what happened to their child. A rationale of this local restorative justice is to interrupt the politics of denial at its local roots. We argue for a Reparations and Reconciliation Support Unit to support logistics and training for local restorative justice.

As with corporate crime, preventive self-incapacitation of criminal armies is an underused transitional justice capability. Advisory letters to military commanders and political leaders were issued by an international prosecutor, Justice Arbour, in Bosnia. An example is a warning that if you deploy force to drive these people from this valley, that may be prosecutable as a war crime. These were referred to as “Are you aware of your obligations?” letters. When some Serbian officials refused to receive the letters, Justice Arbour made them public and named the persons to whom they were sent, which included President Milosevic. Marsavelski and I saw this as the beginnings of a brilliant transitional justice innovation in putting a Sword of Damocles over the heads of potential war criminals. Such prosecutor warning letters were complemented by NGO work closer to the ground, particularly by the organization that became Geneva Call.

Geneva Call started with dialogue engaging nonstate armed groups to persuade them to comply with international humanitarian law for anti-personnel mines (Geneva Call 2020). By 2019 Geneva Call had signed 65 “deeds of commitment” (self-incapacitation agreements) with nonstate armed groups around the world banning use of antipersonnel mines. Bongard and Somer (2011) found that compliance with these agreements has been good. Monitoring found widespread mine action activities in areas under the control of signatory armed groups. The 54 groups had destroyed stockpiled antipersonnel mines and improvised explosive devices (IEDs).

Bongard and Somer (2011) concluded that signatory nonstate armed groups had been quite responsive to investigations of allegations of non-compliance with deeds of commitment that they had voluntarily signed, conducting their own investigations and allowing field visits by third-party monitors, and agreeing to recommendations of third-party investigations for coming into compliance. With the core Geneva Call business of destroying antipersonnel mines and IEDs, an important part of a pitch to motivate signing a deed of commitment was that if they sign, a competing group had undertaken to Geneva Call that they would sign. War zones often cascade from a situation in which one or two groups are using IEDs to one in which many are. In this escalation environment, combatants’ own children can become as endangered as the enemy’s children. In the Weapon Free Village Program in Solomon Islands, churches likewise signed agreements with village elders to surrender all village guns on the basis of agreements signed with neighboring villages they feared (Braithwaite, Charlesworth, and Soares 2012). Even at Great Power level, we see this dynamic that international law negotiations can nurture to reverse cascades

of violence. In World War II, Hitler, Stalin, and all European powers persuaded one another to hold the line on compliance with the Geneva Protocols concerning chemical and biological weapons. These were the very powers that had cascaded into their use in World War I.

With Geneva Call, an NGO achieves the enforced self-incapacitation that was mainly an accomplishment of state leverage with corporate crime in the last section. Geneva Call requires all signatory armed groups to establish self-monitoring mechanisms for their deeds of commitment and to report to Geneva Call on measures put in place to implement them. Geneva Call's independent monitoring of compliance works by gathering information from a range of third-party actors on the ground, including media and international and local organizations, and through field missions by Geneva Call to follow up on implementation or verify compliance in the event of allegations of noncompliance. Geneva Call claims that in Iraq, Sudan, and other war zones the commitments made by nonstate armed groups were instrumental in the accession of the concerned states to the Anti-Personnel Mine Ban Convention.

While Geneva Call started with a focus on antipersonnel mine commitments, recent years have seen a broadening in the coverage of 576 commitments and agreements, their self-enforcement and NGO enforcement, and international enforcement in the context of cease-fire and peace agreements. Geneva Call's more recent priorities have expanded to protecting children from the effects of armed conflict and prohibiting sexual violence in conflicts. Nonstate armed groups have engaged in dialogue with Geneva Call on what they might do in their circumstances to protect children from the effects of war. Twenty-nine have signed a deed of commitment on protecting children and implemented measures to enforce these obligations (Geneva Call 2020). Twenty-five have signed a deed prohibiting sexual violence and gender discrimination and have taken specific measures to enforce these obligations. This specificity can be illustrated by a deed of commitment for a protected space for 60 girls at risk from armed violence with local partner Nashet Association in Palestinian refugee camps in Lebanon (Geneva Call 2012).

In the fog of war, there are no simple mechanics of getting self-incapacitation right. Many past agreements with armed groups have not been honored or have been tragically counterproductive. Examples were the agreements with armed groups operating in the former Yugoslavia in the 1990s to respect safe havens for civilians. These agreements facilitated the passive herding of civilians into concentrated slaughter in UN-sanctioned

safe havens in Bosnia. UN-sanctioned safe havens in Syria can also be interpreted as having prolonged that war (Cerkez 2012). Safe havens were used as bait to enable the mass slaughter of civilians in Democratic Republic of Congo (Braithwaite and D'Costa 2018, pp. 138–40). Humanitarian aid to starving people lured them into killing zones. Once humanitarian agencies discovered the whereabouts of refugees, they sought permission from military units to let them in to provide aid. “Facilitators” who advised refugees where to go to receive aid were repeatedly agents of their murderers. They lured the vulnerable to their slaughter (Reyntjens 2009, pp. 96–97). These were preventable disasters of faux self-incapacitation that should have resulted in the criminal conviction of those responsible for gaming safe havens to commit war crimes. The international community should have been more insistent on disciplining military leaders of international peace enforcement whose weakness allowed such catastrophes.

Both the disasters and the successes of self-incapacitation direct our attention to the need to reform international law on the positive side to give credit to combatants who sign meaningful agreements to incapacitate themselves from engaging in specific kinds of war crimes and for genuinely engaging in self-enforcement against their own troops to deliver compliance. On the negative side, loss of life or rape that arises from failing to honor specificities in deeds of commitment with organizations like Geneva Call can be given legal consequences. Judicial leadership in appellate courts is needed to evolve a case law that harnesses the potential of international criminal law to promote forms of self-incapacitation that save lives when there is compliance.

Contemporary international criminal law is obsessed with retributive justice and insufficiently responsive to the potential of self-incapacitation. There is a need to make an example of military commanders who game agreements to protect safe havens. The international community should send clear signals that certain generals have not been targeted for prosecution because they went the extra mile to attempt to incapacitate their forces from committing war crimes, while others are targeted for prosecution because they failed to do so. The incentive for POW camp commanders to kill all POWs to destroy evidence of mistreatment can be reversed with enough investment in investigation to track down escapees, identify local civilian witnesses, elicit cooperation from insiders at lower levels of the murderous command, and prioritize POW mass murderers for tough international law enforcement. This means reversing the victors’ justice of the Pacific War of the 1930s and 1940s, where this principle was enforced

against executed Japanese POW commanders but not against Allied POW murderers.

B. Colombian Macro Cases for Aggregated Transitional Justice

Colombia's civil war was like many contemporary conflicts in that it started during the Cold War, in 1964, when more than a dozen far-right paramilitary groups were supported by a state military that in turn was supported by the US CIA (Steele 2017). They fought a dozen left-wing insurgent groups, the most important of which was known as the FARC (the Revolutionary Armed Force of Colombia). Some fighting was arguably genocidal, aimed at ethnic cleansing of entire communities or purging entire political parties. The war persisted for decades beyond the Cold War (until 2016, and still simmering) during which armed groups morphed into cocaine trafficking organizations fighting an intercontinental war on drugs in which only hardened, and heavily armed, fighting units could survive. Civil war killing significantly exceeded 200,000.

Colombia's 2016 peace agreement has barely begun to bear transitional justice fruit. Colombia scaled transitional justice up in a novel way (Burnyeat et al. 2020). A Special Jurisdiction for Peace has been established with a 15-year mandate and a large group of Colombian judges who have received special training in transitional and restorative justice. While they are Colombian, the judges and the chief prosecutor for the Special Jurisdiction for Peace were selected by an international selection committee, as provided for in the 2016 Peace Agreement. It has started hearing crimes of the civil war that had many thousands of alleged perpetrators and 8 million with plausible claims to being war victims. Burnyeat et al. (2020) reported that by early 2020 the Special Jurisdiction for Peace was examining the cases of 12,481 defendants: 9,734 former FARC members, 2,640 members of the armed forces, and 95 of them other state officials, with many others in waiting as future potential cases.

One innovation for scale was to aggregate almost all members of the FARC central high command into one process (Lievano 2020). In this "macro case," 25 members of the FARC high command (all except a few who opted for denial) have indicated willingness to confess to criminal responsibility for decisions of the FARC central committee to kidnap victims, some of whom perished as a result. Initially the prosecutor identified 8,163 kidnap victims in this first macro case, although not all of these are being accepted as accredited victims by the court (Advocacy for Human Rights in the Americas 2020). Another 350 former FARC rebels

cooperated with prosecutors to provide collective written testimony on these abductions, with 187 of them also presenting exhaustive individual accounts orally. Several thousand other FARC foot soldiers were released from prison with amnesties conditional on their cooperation with justice as required. A separate aggregated macro case for multiple senior FARC defendants will relate to 5,252 child soldiers identified by the prosecutor's office as having been recruited into FARC (Advocacy for Human Rights in the Americas 2020).

Many Colombian generals and colonels were aggregated into macro state war crimes trials for murders of large numbers of political opponents of the regime. Seventy-two military officers, for example, by October 2019 had formally applied to be included as defendants in the aggregated trial related to the (arguably genocidal) alleged mass murder of thousands of members, including virtually all of the leadership group (67) of the Patriotic Union Party (Advocacy for Human Rights in the Americas 2020). Another important case among the seven initial macro cases is "Gender based violence by state agents" against 281 women (International Criminal Court 2019, p. 30). Other macro cases have a more regional character that are driven forward with a macropolitical character by Indigenous rights and Campesino (peasant rights) movements in the impoverished regions of the country that energized the inspiring, but so far unenforced, land reform and forest protection provisions of the Colombia Peace Agreement (Murillo-Sandoval et al. 2020).

A second aggregation innovation was to engage large numbers of victims to express views on what might be good "restorative sanctions" as provided for in the laws implementing the peace agreement. This occurred during the COVID-19 crisis by innovation into bringing survivors and survivors' organizations into the process through virtual hearings on the internet (Sandoval, Cruz, and Segovia 2020). The peace agreement privileged certain forms of restorative remedies such as demining. Victims often advocated this choice because combatants were the ones who knew where the mines that continued to maim children and keep farmland unusable were buried. It was risky and technically challenging work. Survivors often felt that military perpetrators were the right actors to take on the challenges. The restorative sanctions were not minor impositions; the period of service provided for in the law for restorative sanctions was 5–8 years on a "restorative project" in activities like mine clearance that were agreed to by victims. This, combined with perpetrator restrictions of liberty to enter the regions of the country where their atrocities had

been perpetrated, helped persuade the International Criminal Court to endorse the approach as a “penal” substitute in international law for conventionally punitive criminal law.

The judges oversee a dialogic process that progresses cases on a pathway away from prison through a Chamber for Recognition of Responsibility. Access to this chamber requires fulfilment of four requirements: contribution to truth-telling, recognition of responsibility for crimes committed, compliance with provision of reparations to victims, and commitment to future prevention. This opens the path to victims participating in the process, engaging directly with perpetrators through restorative justice and leads to restorative sanctions for the unusually long period of 5–8 years during which a long prison term is an option for breach of undertakings.

It is far too early to evaluate this innovation in Colombia. Early evidence of effectiveness is Peña and Dorussen’s (2021) finding that areas with large numbers of reintegrated fighters do not have higher homicide rates, although they do have higher robbery rates. Furthermore, municipalities where investment in ex-combatant reintegration is higher have reduced crime. Future research will undoubtedly uncover terrible instances where survivors bundled into macro cases get little satisfaction and feel that their personal rights abuses and grievances received short shrift under pressure for macro solutions. Credit to the Colombians nevertheless for taking a principled crack at the magnitude of war crime injustice. The impunity and denial of states like the United States and Britain for two decades of war crimes in Afghanistan and Iraq are hardly superior exemplars of justice. Likewise, how much edgier is the work of NGOs like Geneva Call in demanding improved accountability of the Taliban than doing nothing to scale up a more just response.⁵ All we can conclude is that the literature and my own fieldwork in Colombia and beyond demonstrate that Colombia’s scaling-up strategies involve considerable innovation and promise in ratcheting up transitional justice to thousands of alleged perpetrators and much higher numbers of victims. Colombia, Afghanistan, Iraq, and the former Yugoslavia have not done as well as some others in my Peacebuilding Compared data, however, such as Timor-Leste (Braithwaite,

⁵ The Taliban code of conduct, the *layba*, evolved as a list of rules on military discipline (Jackson 2018, pp. 8–19). It evolved in conversation with peace groups and religious scholars who helped them see Shari’a justifications for the international laws of war. The Taliban operate a court system with stationary and mobile judges and two stages of appeal that are less corrupt than state courts, enjoy higher citizen satisfaction than state courts according to US-funded Asia Foundation surveys, and do find against Taliban fighters who commit war crimes (Braithwaite and Wardak 2013).

Charlesworth, and Soares 2012) and Bougainville (Braithwaite et al. 2010), in scaling up victim healing and deep listening to victim truths. Hence the next section discusses a fifth strategy that focuses on truth and healing as the most neglected dimensions of transitional justice.

C. Schoolchildren Scaling Up Truth and Healing

Westerners mostly view the South African Truth and Reconciliation Commission (TRC) as an inspiring example of listening to victims. In South Africa, however, most victims feel that no one listened to them; they perceive that there was listening only to small numbers of victims who suited the projection of the TRC's favored messages (e.g., Kesselring 2016). One creative program of South African civil society's Institute for Justice and Reconciliation has been to engage schools by encouraging their students to create videos of the testimony of their loved ones. A granddaughter might approach her grandmother, a victim who did not want to testify before the TRC to enable the collective memory of the family concerning her suffering under apartheid. The granddaughter's appeal might be to encourage the grandmother simply to do for her granddaughter what she would not do for the TRC, if she now felt ready and strong enough to do that much. One possibility from such family reconciliation initiatives (children-up rather than judiciary- or TRC-down) is that a person who did not wish to disclose the atrocity she suffered as a younger person discovers in her later years that she benefits from telling her granddaughter the story—so much so in some cases that she can change her mind about a permanent TRC and then lodge her video in their archive for the collective memory of the nation, and for the collective memory of future generations of her family (Nickson and Braithwaite 2014, pp. 456–57). One possibility is that this kind of initiative could be catalyzed in civil society by a commission and a support unit that were in the business of reconciliation for the *longue durée* (Marsavelski and Braithwaite 2020).

It seems possible to scale up such an ambition to all the schoolchildren of an entire war-torn country. When they reach a certain age their school can ask them to complete a video that tells the story of a relative, neighbor, or friend in their own words of how they suffered in the war. What lessons do they draw from their truth on what kind of future peace, prevention of future war, justice, healing, and reconciliation should occur locally and nationally? Teachers could prepare these videos for analysis by artificial intelligence (AI) to aggregate up to codes of how many people in this locale, and nationally, said they wanted this versus that kind of healing, this

versus that kind of high integrity truth-seeking, justice, or policy change for a better future.

A problem with all past TRCs is that they have managed to empower the voices of only tiny fractions of war victims. In contrast, after a decade or so of annual cohorts of child video-makers, surely most severe victims could have had their stories documented, their narratives recorded for family archives, with opt-in or opt-out lodgment with the national narrative archive for future historians and museums. When they signed their agreement to participate in this national listening project, they would mostly also agree to their testimony being anonymously coded for analysis by contemporary policy makers and social scientists of transitional justice and reconciliation. Put another way, AI could help scale up tens of thousands of these videos to empower victim demands for justice, reform, and reparations that courts could never scale to, not even the courts of the Colombian Special Jurisdiction for Peace. A Truth and Healing Commission could, however, digest the AI outputs from victim narratives and make recommendations to the executive government, prosecutors, and courts to act on them.

This is not exactly schoolchildren as volunteers who get the work done that Truth Commissions have not had the resources to complete in the past. This is because it would be a school assignment that was part of learning lived histories. No, it is schools volunteering because it is good for schools to educate children about lived history, in how to listen deeply to those children love, and learn how to produce evocative videos. It is the most meaningful and realistic strategy I can think of for scaling up victim voice and democratic deliberation of learning from voices of the next generation through classroom conversations about what should be done with their elders' stories and policy preferences for more justice as a better future (Froestad and Shearing 2012).

IV. Sexual Assault

Sexual assault, like substance abuse, corporate crime, and war crime, is a form of crime of unusually high incidence and unusually low frequency of punishment. As a form of crime, it is more serious than substance abuse because of the way it dominates others. Sexual assault may not kill as many people as the worst acts of corporate and war crime, but it tends to involve a more personalized form of direct individual criminal intent, even as it is embedded in structures of patriarchy. Some individual men destroy many

lives through serial sexual assault across decades. It can make sense to speak of minor corporate offenses. It is much less acceptable to conceive of minor sexual assaults, even if there are degrees of seriousness.

Beyond deferred prosecution, which might be applied to sexual assault, dual criminal-civil tracks are a more attractive aid to scaling up corporate crime enforcement than they are with sexual assault. Pollution into a stream might be minor or murderous. Hence, there is appeal in regulators choosing between criminal conviction proved beyond reasonable doubt when many are killed, and civil penalties proved on the balance of probability when more minor infractions attract softer sanctions. This approach to scaling up is less attractive with sexual assault because it is best for the law not to acknowledge any concept of a minor sexual assault. Therefore, even if imprisonment were not available as a punishment for a particular kind of sexual assault, the risk of stigma remains extreme. Hence proof beyond reasonable doubt seems the right safeguard for the defendant. Even so, there should be more debate than there is about dual-track civil-criminal scaling up as an option. I turn first to Australian military experience to consider a more restorative alternative of this kind. It involves breaking the unity between victim and offender getting the same standard of proof, be it beyond reasonable doubt or balance of probability. I then consider radically different, yet also instructive, trajectories taken by Australian inquiries into sexual assault on university campuses.

A. Military Scaling Up

Through a series of sexual abuse scandals across the past decade, it became clear that sexual assault and harassment against women and men was widespread in the Australian military. Public inquiries into the nature and extent of military sexual assault was the beginning of a long march through many institutions in which sexual assault was rife (Vernon 2017; Moore 2019). The next scandal inquiry was the Royal Commission into Institutional Responses to Child Sexual Abuse (2017) that dealt with sexual abuse in churches, schools, and state and private institutions for the care of children. The Royal Commission into Aged Care Safety and Quality (2020) that addressed the scale and character of massive sexual abuse in aged care was then debated and established. There was also the high-impact Australian Human Rights Commission (2017) report into sexual assault in Australian universities, followed at the time of writing by a kindling debate on sexual assault in high schools. Finally, at the time of writing, the crescendo has ratcheted up to another royal commission into disability care and sexual

assault and harassment in the parliament, which previously had been limited to multiple public inquiries under the control of the parliament. This is an ironic new wave because 2012 was both the year of Julia Gillard's famous misogyny speech in the parliament (Harmon 2020) and the year when she initiated this long march through the key institutions starting with the defense establishment. This march occurred ship by ship across the navy, unit by unit of the army, church by church, reaching Buddhism and other religions, parish by parish, religious order by order, home by home, and chain by chain through aged care, college by college through the universities, school by school through secondary education, and now party by party through the parliament. This character of an institutional long march lent a healthy macrostructural character to the way Australia began to scale up the integrity of its response to sexual assault. In the final years of the last decade, a Me Too movement that began among the glitterati in the United States cascaded to many humble spaces in Australia. Media corporation by corporation and beyond, it was able to cascade in ways that built on the more systematic inquiries of this long march through the institutions.

The brute fact stands that more remains unchanged than changed. Nevertheless, institution-by-institution macrostructural scaling up began to lay a platform that helps empower individual victims of individual rapists. The slightly more detailed scaling-up discussion that follows is limited to lessons from the military in this section and in universities in the next. The leadership of the military was much more proactive than leaders of other institutions such as the Catholic Church, the Salvation Army, or aged care. This was particularly true of General Hurley, the chief of the Defence Force. He commissioned the law firm DLA Piper to document the extent of credible cases of sexual abuse in the military. When their report found more than 2,000, a Defence Abuse Response Taskforce was assembled.

The defense minister appointed a retired Supreme Court judge to chair the task force, sitting with a former head of the Attorney-General's Department, a former sex discrimination commissioner, and a senior police commander who was a champion of restorative justice. The Defence Abuse Response Taskforce considered 2,439 complaints of abuse (many including multiple allegations) and accepted that 1,751 reached its novel "plausibility" standard of proof that was sufficient for Defence to act and issue reparation payments (Roberts-Smith 2016, p. 2). Plausibility was a slightly lower standard of proof than "balance of probability." It involved recognition that most cases were not reported at the time, evidence trails were stale (sometimes decades old), and if there were witnesses, they were usually

silenced by their unit. From more than 205 cases, 133 complaints were referred to police and 132 cases involving 180 alleged abusers and 41 alleged mismanagers of cases were referred to the commander of the Defence Force to consider disciplinary or administrative action. Trauma support and counselling were provided by well-trained people, and 715 restorative engagement conferences were held between Defence leaders and the survivor and their supporter (Roberts-Smith 2016, p. 2).

Because it was fighting wars in Afghanistan, Iraq, and Syria at the time, the high command argued that pulling people back from their units in these theaters may have had consequences for the safety of others. It did not want legal battles to disintegrate the unity of operational units. A weakness was, nevertheless, that even when perpetrators did want to accept full responsibility and apologize face-to-face, and the victim wanted this too, it was not permitted. The better principle than the one that was actually applied would have been: when you can provide integrated victim and offender restorative justice to stakeholders who want that, provide it; when you cannot, and in that majority of cases where they do not want that, offer them restoration and disciplinary justice separately.

The core innovation in the Australian Defence response was a radical separation of proof of guilt of the defendant and believing complainants. On the survivor track, the suffering of complainants was genuinely acknowledged by their local commander and by the high command. They felt believed; they were believed. General Hurley, his vice chief, and the chiefs of the army, navy, and air force all attended restorative engagement conferences with complainants starting in 2013. These commanders issued contrite apologies to service personnel judged to be survivors of sexual assault or abuse to the “plausibility” standard established by the inquiry chaired by the retired Supreme Court judge (Vernon 2017). All in the high command accepted command responsibility for the abusive culture of the military and committed to change that culture. Most of the top 300 commanders in a comparatively small military participated actively in restorative engagement conferences. Many were shocked and deeply moved by the experience and said it caused them to rethink domination within military hierarchies. The final report of the Defence Abuse Taskforce (2016, p. 20) found the beginnings of a “lasting contribution to cultural change in Defence” because “the Restorative Engagement Program has clearly had a great impact on the Defence representatives, many of whom will comprise the next one or even two generations of Defence leaders.” Participant satisfaction levels in the conferences were high partly for this reason

(Vernon 2017; Moore 2019). Culture change also continued after these 2,439 cases were finalized by Defence Restorative Engagement under the independent aegis of the Commonwealth Ombudsman (Moore 2019).

Many in the Australian restorative justice movement and many feminist activists concluded that cultural change was greater and speedier in the military than in the Catholic Church, the aged care industry, and universities, as I discuss further below. Our restorative justice advocacy network and I personally put it to General Hurley that he should sit in the circle with survivors, acknowledging specific wrongdoing to them, discussing restorative justice for them, and accepting institutional responsibility for a culture of abuse. He agreed. We made the same pitch to presidents of some of Australia's leading universities; they did not. Unlike Australian generals and admirals, Australian university presidents tended to shy away from getting their hands dirty apologizing for individual cases of victim suffering, limiting their restorative engagement to fine speeches.

So there were three tracks of military response. One was unusually widespread believing of survivors, apology to them, the restorative engagement conferences, and payment of individual reparations. The second was referral of significant numbers of cases to the civilian police after the military legal system digested the evidence. A third was discipline by enforced retirement, demotion, or movement to a different post in cases in which the military justice system determined that proof of responsibility for sexual assault or sexual harassment on the balance of probability was established. There was blurring of the boundaries between sexual assault and harassment, between sexual and physical assault, and between sexual assault and bullying in these military disciplinary proceedings. In many cases on all three tracks, there were findings of just one or two of these forms of frequently intertwined abuse.

This three-track approach is not so radically different to a dual civil-criminal track in corporate crime enforcement, where a third option is restorative justice for victims enabled by a deferred prosecution. The only major difference is that the civil penalty adjudication for a corporate regulatory offense is publicly adjudicated (although not necessarily in the courts), while the military disciplinary hearings were a justice process under corporate control (and only in limited circumstances could decisions of military disciplinary justice be contested in the courts).

It was hardly an elegant solution. Media stories alleged that 22 or more officers, some senior, against whom "plausible" allegations of rape resulted in reparation payouts to victims who were formally believed, continued to

serve in the military (Maiden 2015). The price for giving restorative justice to survivors and more searching top-to-bottom cultural transformation was a radical disconnect between justice for victims and impunity for many perpetrators who never moved from being alleged to proven perpetrators. While this unique justice triage was a legitimacy challenge when it inevitably produced these disconnects, it did deliver bigger and more decent spoonfuls of justice than in the military's past, more decent than in the present of Australian universities.

The Australian military initially adopted an approach to war crimes with some similarities through a report to the Inspector-General of Defence by Supreme Court judge Paul Brereton (Australian Government Department of Defence 2021). It was expected to lead to criminal prosecutions of 39 alleged murder cases against civilians or prisoners of war in Afghanistan, plus military disciplinary action against officers involved in cover-up. While these trials have not begun and were expected to take years, military sources told me that the Australian military was immediately getting on with the sad business of sending senior officers to Afghanistan to meet in a restorative way with the families of the killed persons where the officers can (perhaps with some traditional Afghan Jirga elements) accept responsibility for the culture of murder by elements of Australian Special Forces in Afghanistan. Voice and monetary reparation would be offered to the families. Now this restorative process is fraught because of the Taliban military victory in Afghanistan and the reluctance of Australian soldiers to go there unarmed.

B. Campus Scaling Up

Consider something close to home for many criminologists. They work in universities where roughly 6 percent of the female students each year experience sexual assault (at least if they attend Australian or US universities).⁶ Most of this is date rape by fellow students. Australian universities, while not denying its existence, effectively deny its scale by rationing care services for victims through policy settings that hope most survivors will just go away, that count on most survivors lumping it.

I sometimes try to pierce the enormity of university irresponsibility by rhetorically provoking colleagues: "Is it a safe thing to send a daughter to

⁶ The most comprehensive US national data suggest that 20 to 25 percent of female students experience sexual assault at some stage during their college education (Fisher, Cullen, and Turner 2001; Brenner 2013, p. 1). Recent biennial national data, albeit obtained with a very different methodology, suggest that the Australian female student experience may be in a similar range (Australian Human Rights Commission 2017).

university when there is a one in four chance that she will suffer sexual assault while she is here?" When institutions ponder the scale of this crime contagion, they opt to respond with a politics and a psychology of "moving on" and denial, just as military organizations usually do with war crime. Of course, campus sexual assault and military rape are only tiny fractions of the iceberg of denied gendered violence. There is nothing systematic about my approach to redressing the denial of profound criminality of vast scale. The aim is only to illustrate fabrics of justice and prevention that might scale up (see Karstedt [2017] on scaling criminology).

Australian regulators came to Val Braithwaite and me for coffee conversations on this challenge at the Tertiary Education Quality and Standards Agency (TEQSA). The Australian Human Rights Commission (2017) reported on the magnitude of the problems of sexual assault and sexual harassment on university campuses, including for male students, but especially for female students, and even more so for LGBTIQ students. The report was scathing on the failures of universities to provide support services to survivors, to catalyze any satisfactory measure of justice. TEQSA required all universities to write to them in detail about what they planned to do to respond to the problem. Some inadequate responses came back but also a number of innovative and inspiring attempts to better confront the challenge. One empirical pattern universities noted was that most survivors decide against reporting to the police and mostly do not report to anyone who works for the university. Most first responders are fellow students. Some universities were responsive to this empirical pattern by committing to TEQSA to provide first responder training for sexual offending to undergraduate students, which in turn recommended in its practice guidelines that students in residential accommodation should be offered first responder training (TEQSA 2020, p. 22).

Some universities press students to take cases to the police when they well know that the data show that very few wish to take date rape cases to the police.⁷ Especially when female survivors see themselves as feminists,

⁷ This is because they fear they will spend their university years less focused on learning and gaining a good degree than on fighting an emotionally devastating criminal case that might not secure conviction. Often they also said that they wanted the perpetrator to be confronted for what he did but did not want to "ruin his life." Some of the quotes in the report were evocative (Australian Human Rights Commission 2017, p. 141):

"I didn't want to accuse and ruin my rapist's life if I was too drunk to recall giving consent." "I didn't contact the university or residential college I was in at the time. From everything I had heard about the boy, he was a nice guy, probably with a huge sense of

universities can do harm when survivors are badgered by arguments that taking cases to the police is the right thing to do. When feminist survivors feel pressured to complain to the police, this can inflame survivor guilt.

Nevertheless, university support services that assist students who do wish to take their complaint to the police are an important level to a multilevel range of possible responses. At the Australian National University in 2017, the students' association and the university jointly funded a Canberra Rape Crisis Centre office being located on campus, partly for this purpose. When the police decline to act on the complaint, university disciplinary hearings can and do sometimes act on the case.

One recent university case alleged assault and rape of a female student. When the police surprisingly did not move forward with the investigation, a university disciplinary hearing reached adverse conclusions about the alleged perpetrator and suspended him from his course for one year. This seemed a totally unsatisfactory response to the gravity of what was alleged. On the positive side, it is perhaps better than the university contributing to the politics of denial by concluding that there is nothing the university can do when the police decline to act.⁸ Also a one-year suspension can be helpful to a survivor who reports being traumatized by seeing their offender on campus. That is, the survivor might complete her course the next year without encountering the male student responsible for her suffering. Then he returns to campus the year after that to finish his course and make a fresh start on his future.

On the negative side, one might say the degree of vindication of the victim is little better than doing nothing when the sanction is a one-year course suspension. An adversarial process that delivers such a tiny spoonful of justice to the survivor could end up being more retraumatizing than doing nothing.

While a multilevel response should not dispense with formal university disciplinary proceedings any more than it should dispense with criminal trials, cases in which minimal outcomes such as a one-year suspension

entitlement, but didn't deserve his life ruined." "I was too afraid to take the matter much further because the guy was well liked . . . I also knew he had a girlfriend . . . and was terrified what would happen to everyone involved." A woman who was raped by a friend said in her submission, "My friends begged me to not press charges or he'd kill himself." One woman who was sexually assaulted on two separate occasions said: "Both times I consulted with my boyfriend and close friends, but never reported it to anyone. The reasons I didn't was because I did not want to relive what had happened, nor ruin their lives. I believe both of them are just immature men that use the excuse of being under the influence to defend their behaviour."

⁸ That is not true because the university does not face the "beyond reasonable doubt" standard of proof of the criminal law.

are the washup may be procedurally improved under a restorative justice framework. A one-year suspension may not be debated as to whether it is the just punishment. The one-year suspension in the restorative frame may not be interpreted as proportionate to the harm but as one way of respecting the survivor and responding credibly to her need not to be retraumatized. For example, it may be argued that the survivor has two years to go to complete her course, so a two-year suspension is safer.

In other university cases, students have asked for a restorative conference that aims in part at a university apology to the survivor for the university failing to move the alleged perpetrator out of her residential hall, or for asking him to move out, then allowing him to return too soon. In a restorative process, even more minimalist outcomes to limit contact are possible, such as agreement that one student will always sit at the front right in class, the other at the back rear. In cases where prosecutors believe they cannot prove rape, they sometimes manage to succeed by charging a case down to a lesser charge. More often, the consequence of a criminal charge being rape in Kathleen Daly's South Australian youth justice data is that the entire case is dropped. Yet quite often there is charge-down from rape to a considerably lesser offense (Daly 2006; Daly, Bouhours, and Curtis-Frawley 2007). Vindication of victims is endangered when what they allege to be rape is charged down to something less. Daly's data showed that charge-down or dismissal of rape charges was much less likely when rape allegations went to a restorative justice conference.

The restorative opportunity is that there is an alternative in any case in which the defendant is willing to plead guilty to some lesser charge to avoid a trial. The door is open to shuttle mediation in which the alleged rapist says to the mediator that there is no way they are going to roll over to confess rape and go to prison. At the same time, they say to the mediator that they are far from blameless for what happened; they want to apologize for being responsible for the survivor's suffering and they want to agree to reasonable requests to do anything that might assist her healing. The survivor has contempt for him, never wants to see him again, but understands his position and does not want to "ruin his life and mine" through a trial. Apologies appropriate to what the defendant has owned up to can then be transmitted by the mediator along with undertakings that might include an offer to suspend his course for two years so she need not be traumatized by encountering him. This involves no false story that this was not rape but some lesser offense. It keeps a door open to an offender to do more after they get back a survivor response of "that's good enough for me to move on."

A restorative process that leads to such an outcome may be not only a better outcome for the survivor than charge-down by a prosecutor to a lesser charge than rape. It might also be a less traumatizing and less protracted process that leaves her stronger and readier to return to concentrating on her studies.

In Canberra, another possible layer of response is to take university sexual assault cases to the Australian Capital Territory Government's Restorative Justice Unit. It has a program that started only in November 2018 for restorative justice in gendered violence cases. Most of the 191 cases in the first two years were intimate partner violence and other family violence cases rather than sexual assault cases. Demand has been surprisingly strong, with the unit struggling with a waiting list of survivors wanting access to the program. Preliminary evaluation by the Australian Institute of Criminology shows unusually high levels of participant satisfaction with the quality of the justice, which is highest in the small numbers of sexual assault cases (Giannini 2020). A consequence of referring university sexual assault cases to this program is that the statutory framework for the state-run program provides guarantees that admissions made by perpetrators during the restorative dialogue cannot be used against them in a subsequent trial. In the "let's not ruin both our lives" cases discussed above, this statutory assurance can strengthen the willingness of perpetrators to take the risk of making stronger admissions.

What is to be done, however, in most cities in the world where there is no such state restorative justice program for sexual assault cases, where universities are totally unwilling to offer restorative justice as a university layer of justice, where the university simply persists at pushing survivors to complain to the police when that is not something they want to do? Volunteerism is one alternative. Just as some universities recognize that first responders are almost always fellow students, who therefore need first responder training, so can there be a more generalized response that the education system at all stages can use to prepare students to be restorative justice volunteers who can step up in the situations in which state and university justice systems utterly fail survivors. This is the option discussed in the next section.

Before moving to that, here is a summary of the range of layers of a multi-layered response considered so far for campus sexual assault:

1. Police report of a sexual assault—prosecution;
2. University disciplinary sanction in cases in which police do not act;
3. University referral of the case to a statutory restorative justice program for sexual assault such as the ACT Restorative Justice Unit;

4. University restorative justice process as an alternative when the state waiting list is too slow;
5. Student-led restorative volunteerism in the face of state and university failures with adequate response;
6. Student and faculty-led macro cases that can scale up to what was called a restorative inquiry into institutional failures by the Restorative Inquiry into the Nova Scotia Home for Colored Children (Restorative Inquiry 2018).

The identification of these six possible layers of multilevel response is the point of this section. With these six layers, more prevention, more justice, more frequently taking campus sexual assault seriously becomes possible. My hypothesis is that the debate should be less about how to choose which is the best of these possible layers, and more about how to enable all six layers so there will be less impunity, more prevention, and more healing.

Of course, we cannot beg the question of whether a restorative justice response can prevent or deliver justice. There is some such evidence. It is strongest with violent offending that is not gendered. And there is incipient encouraging evidence with gendered violence and with restorative justice in universities (Karp and Sacks 2014; Coker 2016, 2018; Karp 2018) that I have argued elsewhere has become stronger in more recent years (Braithwaite 2021). It is important to say that this is a deeply contested literature and it is not my mission to traverse all the issues of contestation. Rather it is to ask whether these six layers have more potential for scaling up than one layer alone.

The Dalhousie restorative process over sexual harassment was a well-documented and thoughtful healing journey, and the most scaled up toward the direction of a Colombian macro case, involving 29 dentistry students plus some faculty (Llewellyn, Macisaac, and MacKay 2015). Then the Restorative Inquiry (2018) into the Nova Scotia Home for Colored Children took those foundations to the more macro level of a restorative inquiry.

C. Embedding Campus Scaling Up in School and Community Scaling Up

The evidence is also encouraging but contested that restorative justice is helpful in schools with unmet challenges such as school bullying (Braithwaite 2022). Restorative justice in education after students have suffered from an act of domination can help students recover and settle in ways that improve learning outcomes (Karp and Sacks 2014; Karp 2018). In all the

school classrooms I have encountered there is a child who is better than me at facilitation of school-based restorative justice. That child might be less well read about restorative justice, but she will be more relationally attuned to the culture and vernacular of that classroom and be uncorrupted by decades of talking at people as a university professor! Many students also enjoy restorative circle participation more than we professors do, sometimes because they are less spiritually shallow. What education systems can do for those students who discover they have gifts at facilitating restorative justice is to put them together in an elective restorative justice course that runs for a term during their middle years in high school. The teacher who facilitates this course would have half the normal teaching load and would be a well-trained facilitator who coordinates the restorative justice program across the school in the other half of his or her time.

In communities with a restorative community or restorative city network, the restorative city elders should work to embrace and support school restorative justice coordinators. More than that, they should encourage these specialist teachers to bring the most gifted restorative thinkers, practitioners, and activists from their restorative justice classes to imbibe the restorative volunteerism gifts of the restorative city elders. If the restorative justice movement in this way created a next generation of students who are better trained than previous generations, better things can happen when a university student first responder supports a friend who has suffered sexual assault. In such a future world they would be able to say, "Mary Smith is an engineering student and she was the best restorative justice facilitator in my school. I can ask if she will help." In the world imagined here, if there is failure in state and university response, the students turn, bottom-up, to support from the volunteerism of Mary facilitating the caring skills of the survivor's network of loving friends, and Mary in turn is embedded in a restorative city network of more experienced elders who would volunteer to support her. Moreover, the university students are all embedded in their old high school restorative justice networks and each has a youth support circle. This is one imaginary for a macro turn for restorative justice that cascades circles, connects them up, and connects circles up to other forms of justice and prevention.

D. Scaling Youth Development Circles to Universality

Another pathway to collective efficacy in a seventh layer of response across a restorative community comes from the idea of youth development circles (Braithwaite 2001). They would replace parent-teacher interviews

in high schools. A universal program is conceived that builds a circle of care and support around every student for their education and vocational development. If a student struggles with math and their parents feel they do not have the skills to help, or with their English expression and their parents speak little English, the idea is to bring an uncle, a neighbor, a parishioner at the church, who will become a member of the youth development circle who works with the child on their math or English.

The youth development circle sticks with the child until they get a job after finishing high school or a place in a university. If no one in the family has been to university and the child is interested in studying pharmacy, the circle might find a retired pharmacist to volunteer to join the circle for the period of transition into university pharmacy networks. Retired volunteers who have good business networks are also invaluable for joining youth development circles to support students who drop out of high school to find a job, an apprenticeship, or a vocational training opportunity.

Because the idea is that youth development circles would be a universal program that would give all elders an opportunity to serve the next generation, and all youth support from elders beyond their nuclear family in transition to a career, it would not be stigmatizing. Youth who are supported by an elder would be asked to visit that elder later in life if they need support as a resident in an aged care home, for example.⁹ The idea is the dignity of mutual care and support that defeats stigma and domination. Hence, if a young person gets into trouble with the police, part of the idea is that the youth development circle would rally around, ask the police if the circle could deal with accountability for the crime instead of prosecution. All these potentialities of youth development circles are discussed in Braithwaite (2001).

The seventh layer of multilevel response to campus sexual assault is thus for a youth development conference that has been meeting in the circle

⁹ Aged care is another underenforcement crisis, possibly the worst, because while victims of mass rape in war or abuses inside prisons can riot, aged care residents lack the voice and muscle to do even that. No criminal enforcement happens when in so many countries, most of those who die from COVID-19 die in long-term care facilities (80 percent in Canada, 75 percent in Australia, even though 90 percent of facilities meet their legal obligation for infection control and have zero deaths; only 34 percent in the US, although that is still 175,000 preventable deaths; COVID Tracking Project 2021). They die in facilities in which there is criminal neglect of compliance with infection control protocols, in which in some countries a majority of residents in a majority of facilities are in chains, deprived of freedom by physical restraints that tie them into chairs and beds and chemical restraints that tie down their brains (Braithwaite, Makkai, and Braithwaite 2007; Burford, Braithwaite, and Braithwaite 2019).

with the student since he or she was 13 years old to rally around if the student suffers sexual assault victimization or is accused of being a perpetrator. Survivors may be less likely to avail themselves of this seventh option than alleged perpetrators. Yet an alleged perpetrator's youth development circle members who have seen him or her through earlier travails of his or her life might have much to offer the survivor too. They might be able to mobilize their greater maturity to persuade a culpable perpetrator that there are many pathways beyond denial, and beyond pleading guilty and going to prison. Their commitment and love for the perpetrator might persuade him or her to be more accountable and explore those pathways in a spirit of putting things as right as can be managed in the difficult circumstances at hand.

V. Conclusion

Is it acceptable to do nothing when the criminal legal system proves incapable of delivering even a spoonful of justice to large numbers of victims that lie beyond what the system conceives as its mainstream? While the legal system has an important role, the multilevel justice discussed in this essay is mainly about new politics—domestic democratic politics, international politics, military politics, business and regulatory politics, university and school politics, feminist politics, and multiple variegations of social movement politics. I conceive the justice system as manifesting a politics of denial of deep dark enforcement swamping crises over serious forms of crime. Debate has been thin on feasible options for scaling up prevention and justice responses. My objective has been to thicken that debate by considering six strategies that can now be redescribed as follows:

- Wounded healer collective efficacy
- Enforced organizational self-incapacitation
- Multilevel justice with at least seven layers¹⁰
- Colombian macrorestorative cases / restorative inquiries

¹⁰ With campus sexual assault, the seven layers were: police report of a sexual assault prosecution; university disciplinary sanction in cases where police do not act; university referral to a statutory restorative justice program for sexual assault, such as the ACT Restorative Justice Unit; university restorative justice as an alternative when the state waiting list is too slow; student-led restorative volunteerism in the face of state failure and university failure with adequate response; student- and faculty-led macro cases that can scale up to restorative inquiry into institutional failures; and call in the Youth Development Circle that supported all children up until their arrival at university.

- Schoolchildren scaling up truth and healing
- Education and the life cycle again: youth development circles, bottom-up restorative justice in universities, militaries, and other organizations as new levels of multilevel justice

I hope I have shown that these are all strategies for catalyzing institutional collective efficacy for prevention and justice—from schools to universities to corporations to armies to social movements. Institutionally embedded volunteerism to mobilize collective efficacy has been suggested as stuff of a more progressive justice politics than state criminal legal monopolies that responsabilize the poor. Collective efficacy that is collective in a broad (Bandura 2000) sense mobilizes agency for the poor and social support from their loved ones, from wealthier individuals, corporations, educational institutions, and social movement actors.

In each of the strategy case studies I discuss, there is an element of energizing social movement politics: bottom-up movements for recovery capital among wounded healers (e.g., ex-addicts, ex-prisoners); social movements such as environmentalism demanding that corporations honor their social license through self-incapacitation; victim rights, transitional justice, peace and nonviolence movements in multilevel war crime justice; Indigenous rights movements and campesinos with Colombian macro cases for aggregated justice; the victim rights movement again with schoolchildren scaling up truth and healing; feminism, LGBTIQ rights, and the restorative justice movement again with multilevel scaling up of prevention and justice for gendered violence on campus, in corporations and in militaries. This leads to the final corollary that there are dim prospects of closing the justice gap with a purely statist strategy. The feasible paths involve energizing democratic politics with participation from below in matters that ordinary people care about deeply enough to want to participate.

The kind of long march through the institutions that former Australian Prime Minister Julia Gillard catalyzed can ultimately become a more deeply embedded strategy for cultural transformation that better protects individual victims of individual perpetrators. There has been nothing systematic about the choice of institutions: it has been reactive to experiences of enforcement swamping from an Australian who travels to lands with even bigger struggles, such as Colombia and South Africa. Nevertheless, my conclusion would be fatally neglectful if it failed to mention one institutional omission. If the priority is healing, institution by institution, through journeys of restorative inquiry into mass crime, institutionally

engendered, then getting started on this long march may make more sense than agonizing over selecting the priority institution for making a start. Even so, founding institutions of societal histories are an exception. For Colombia, the United States, and most societies in the Americas, institutions of slavery were foundational and continue to have windows of the public concern cycle blow wide open through social movement activism such as “Black Lives Matter” or the civil rights movement of the 1960s. For Australia, the foundational neglect is a Makarrata (institutionally a Makarrata Commission to “supervise a process of agreement-making between governments and First Nations and truth-telling about our history” [Brennan and Zillman 2017]), a treaty process, an Indigenous voice in governance through the constitution. Until Australia’s long march through criminogenic institutions heals in the manner of the Uluru Statement from the Heart, it will continue to be a fatally flawed journey of transformation. The Uluru Statement from the Heart of 2017 was a moment of historic opportunity for Australia that so far has been marginalized and suppressed by White Australia (Brennan and Zillman 2017).

State justice cannot possibly scale up to manage problems such as victim recovery after a million killed in a genocide, a million suffering date rape across a nation’s campuses, a million victimized by banker or Big Pharma criminality, a million recovering from drug addiction and a war on drugs, a million enslaved by abuse, neglect, needless death from COVID-19 and noncompliance with legally mandated infection control protocols in the aged care system. Selznick’s (1992) coercive law cannot mobilize the imagination to solve these problems. His autonomous law has an important place in multilevel scaled-up response to system-capacity crises. Fundamentally the purposiveness about justice and prevention that Selznick conceived as an essence of responsive law is required. This abstract depiction of responsive enforcement is not so important. Simply seeing coherent lists of practical strategies of democratic institutional transformation will do. There are forms of civil society collective efficacy that can and already do help scale up justice and prevention with all these challenges.¹¹ It is our justice imaginations that are wanting of sincerity and structural commitment to leave no major injustice an orphan of institutional support.

¹¹ Further examples of securing prevention and justice through citizen empowerment such as the United Nations Development Program Community Empowerment Program in Indonesia and other countries, the Weapon Free Village Program in Solomon Islands, Panchayats and Jirgas in South Asia, the Community Reconciliation Program in Timor-Leste, and citizens’ tribunals for war crimes are discussed in Braithwaite (2016, 2020*b*).

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