

JUSTICE

# SEXUAL ASSAULT, CORPORATE CRIME AND RESTORATIVE PRACTICES

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## SEXUAL ASSAULT, CORPORATE CRIME AND RESTORATIVE PRACTICES

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# ABSTRACT

Recognizing that punitive approaches to inappropriate behavior were ineffective in producing desired change, schools employed restorative practices to learn with students how to recognize harmful actions, deal with conflicts effectively and change behavior. Historically, societal responses to criminal behavior also intended to educate and change behavior, but have had limited success in this outcome, often ending only in warehousing offenders. But I argue that learning remains a viable, if unrealized response, that I illustrate in the areas of corporate crime and sexual and gender-based crime. Punitive criminal law certainly has a place in addressing crimes of this kind, but restorative justice responses offer an opportunity to learn with offenders how to change behavior for the future so as to prevent these crimes. Innovative research and development can show us how to integrate punitive criminal law with restorative justice and other completely new justice strategies.



# LEARNING AS AN OUTCOME VARIABLE

The focus of this article is the promise of the science of restorative practices for prevention of two of the most deadly forms of crime: corporate crimes and sexual and gender-based violence.<sup>i</sup> Many scholars of restorative practices say that schools are the most strategic sites for research and development because when children learn to work restoratively in schools, they can apply those skills in all manner of institutions as adults. When restorative practices are rolled out in schools, they are promising approaches for reducing bullying and sexual assault. But additionally, children also learn more in a restorative environment because a restorative environment is a learning environment. And learning is the central purpose of schools, affecting diverse aspects of the lives of all students.

This paper on restorative practices and crime prevention argues that the learning environment that restorative practices produces could help us to address and prevent even the most serious of crimes. All forms of crime require their own distinctive remedies. Selected for focus are the two kinds of crime that I have argued elsewhere do most harm in contemporary societies: corporate crime and sexual and gender-based violence (e.g., Braithwaite, 1995). In addition, I argue that corporate crime and sexual and gender-based violence currently have limited remedies and poor outcomes that could be improved using restorative practices.<sup>i</sup>

## CORPORATE CRIMES AND SEXUAL/GENDER CRIMES

Edwin Sutherland (1949) first identified the harms caused by corporate crime in the United States through his systematic research on the magnitude of white-collar crime. Most countries have had a single corporate criminal who stole more than all the bank robbers in the entire history of their nation.<sup>ii</sup> Corporate criminals of the 2008 global financial crisis made their contribution to over 50 million people losing their jobs worldwide, and a comparable

number losing their homes. The corporate frauds of a single industry in the United States, the pharmaceutical industry, account for more deaths than all the deaths caused by street crime in the United States (Dukes, Braithwaite, & Maloney, 2014, chapter 7). Indeed, research fraud in relation to a single product can cause more than 100,000 deaths, compared to fewer than 20,000 lost to homicide in the United States each year (Gotzsche, 2013; Dukes et al., 2014, chapter 7).

In addition, many corporate crimes go unaddressed, often because they are not seen by their victims in the act of perpetration. Victims die of cancer from corporate pollution without knowing that they have been victims of crime. Companies manage to create a smokescreen of diffused accountability for corporate crime by everyone involved being able to point to someone else as a responsible party. The effect of this is that lawyers representing all of them are able to argue that there is reasonable doubt over whether any of them committed the crime. When corporate crime does lead to conviction, it is often of an innocent junior scapegoat, or even a "Vice President Responsible for Going to Jail" who is paid to take the rap for boardroom criminality (Dukes et al., 2014).

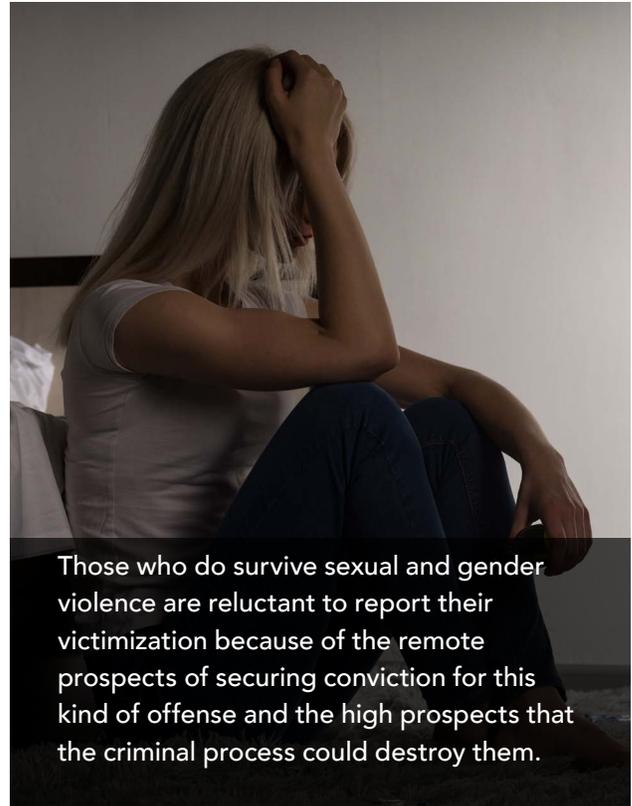
While the benefits of improved learning in preventing death as a result of corporate regulatory offenses are clear, the benefits of increasing the severity of punishment for corporate crimes are less clear. A meta-analysis of 58 studies (Schell-Busey, Simpson, Rorie, & Alper, 2016) showed no tendency for regulatory agencies that imposed higher average punishments to be more effective at corporate crime prevention. *Certainty* of detection, as with all forms of crime, was a form of deterrence that was relevant to prevention, but severity of punishment was not. The other variable that explained effectiveness was the regulator having a variety of regulatory options, punitive and non-punitive, at its disposal (see also Braithwaite, 2016a; Braithwaite, 2016b). What works

is not so much the clang of the jailhouse door but the regulator identifying the problem, learning from failures to control it, and having at its disposal a variety of regulatory options that can be tried one after the other — yes, including imprisonment. A continuum of restorative practices of varying levels of resource intensity could add to the range of options available to corporate regulators.<sup>iii</sup>

Corporate crime can affect large numbers of people without redress, but sexual and gender-based violence is the most undercounted of all major categories of crime. In many countries, gendered violence accounts for more deaths than other forms of homicide. Exceptions are the societies with the highest homicide rates, such as El Salvador. Here, gang murders account for most homicides. This is to speak in relative terms; in absolute terms El Salvador may have the highest rate of femicide in the world (Walsh & Menjívar, 2016). Death as a highly measurable outcome of these crimes is of course only the tip of this iceberg of suffering, pain and trauma.

Those who do survive sexual and gender violence are reluctant to report their victimization because of the remote prospects of securing conviction for this kind of offense and the high prospects that the criminal process could destroy them. More than 98 percent of sexual assault or domestic violence perpetrators are never convicted of the complaint victims report in surveys (e.g., Daly & Bouhours, 2010). The perpetrators of these crimes go unpunished in unusually high proportions of cases because proving guilt beyond reasonable doubt can be difficult. It is hard to rob a bank without many seeing the crime. Most rapes are seen only by the rapist and the survivor. And often a criminal trial discredits the survivor as much as the alleged perpetrator. One person's word against another's is a challenge for proof "beyond reasonable doubt."

Higher education offers a microcosm of the difficulties associated with addressing sexual/gender crimes. The most comprehensive U.S. national data suggest that approximately 20 to 25 percent of female students experience sexual assault at



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some stage during their college education (Fisher, Cullen, & Turner, 2001; Brenner, 2013, footnote 6). 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). In these Australian data, transgender and gender-diverse students showed even higher levels of sexual harassment than women (p. 34). The U.S. and Australian evidence show systematically that the worst hotspots of university campus sexual and gender-based violence are student residential halls (Fisher et al., 2001; Karp, 2018; Australian Human Rights Commission, 2017, p. 8). Consider David Karp's account of the challenges which colleges and universities face.

Sexual assault on college campuses is a regulatory nightmare. Sexual assault is pervasive and traumatic and intractably linked to a wider culture of hook-ups, binge drinking, and hegemonic masculinity (Wooten & Mitchell, 2016). Many assaults happen behind closed

doors between individuals who are drunk and whose sexual encounter often begins with some level of mutual consent. Conduct hearing boards often have little evidence to review besides the impaired memories of parties involved. As a result, finding a student in violation of a campus sexual assault policy is a substantial challenge for conduct administrators. Under such conditions of uncertainty, mistakenly exonerating a student can further traumatize a victim and keep a campus at risk. Mistakenly finding a student in violation can deeply stigmatize them with lasting social, educational and professional consequences. No other conduct adjudication outcome is as consequential for the students involved but built on such a shaky platform of evidence. Implementing policies and procedures in response to allegations of sexual assault that leads to positive outcomes is a daunting administrative task. (Karp, 2018, p. 1)

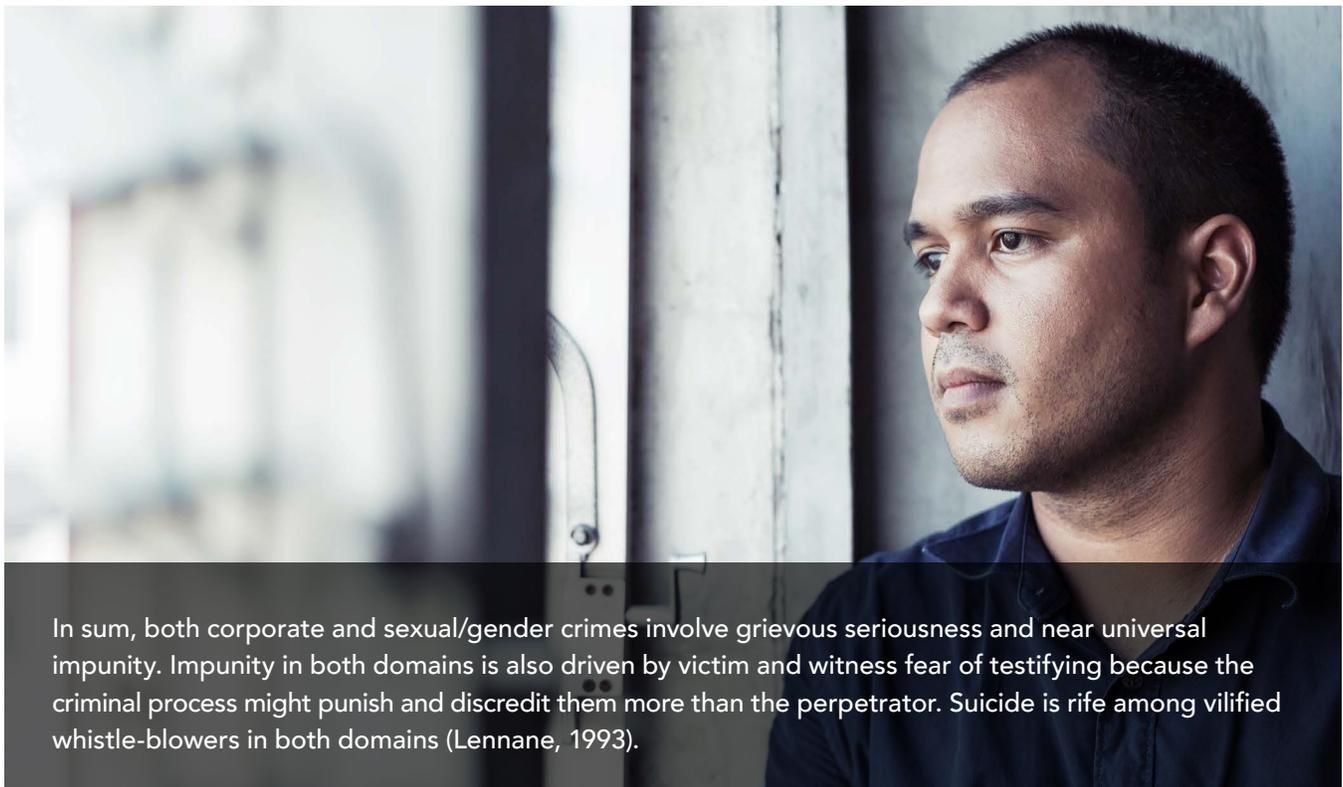
One profound implication is that the priority should be regulation to address sexual assault and domestic violence so that good lessons are learned

that improve safety for the 99 percent of survivors who never see their perpetrator imprisoned. As with corporate crime, increasing the tiny minority of cases where criminal conviction occurs is a good policy objective. Yet improving outcomes for the 99 percent of survivors where this will never happen is even more important.

In sum, both corporate and sexual/gender crimes involve grievous seriousness and near universal impunity. Impunity in both domains is also driven by victim and witness fear of testifying because the criminal process might punish and discredit them more than the perpetrator. Suicide is rife among vilified whistle-blowers in both domains (Lennane, 1993).

#### PATRIARCHY AND STRUCTURAL HYPOCRISY

An additional consideration in understanding corporate crimes and sexual and gender crimes is the structural hypocrisy of the institutions that frame them. The politics is clear for why we are often rather open to learning and restorative approaches to the greatest crimes of human history, which tend



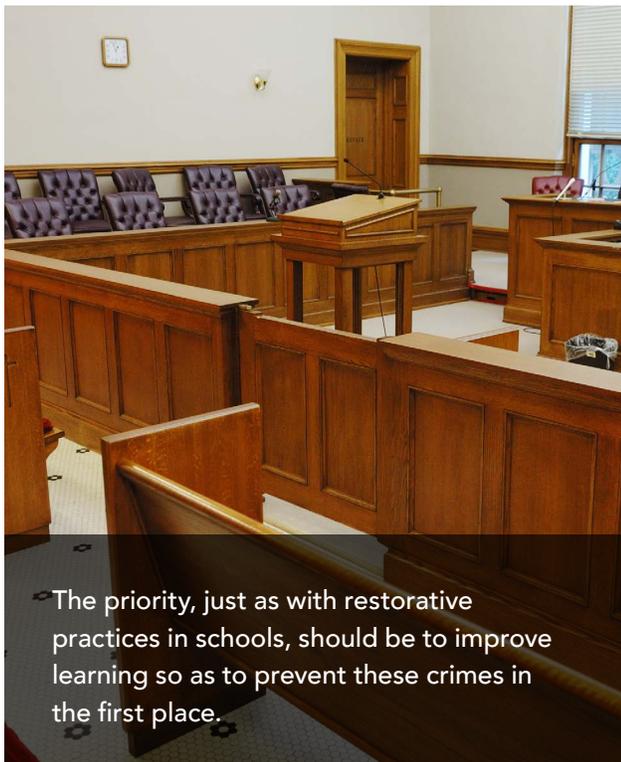
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to be organizational crimes. Probably few of us who own houses in White settler societies like the United States, Canada, Australia or New Zealand believe that criminal law should be reformed so we can be prosecuted for the crime of receiving stolen property, property that rightly belonged to the original Indigenous peoples of that land. Instead, we have good reasons to favor reconciliation processes that lead to a negotiation of treaties (or renegotiation of unjust treaties) for the repair of historic harms. Yet we are morally required to be sensitive as we defend our “right” to the occupied land. If we also defend a prison system full of Indigenous offenders convicted of crimes like sexual assault but empty of convicted executives who allow sexual assault to flourish inside their organizations — indeed empty of any kind of corporate criminal — we indulge in structural hypocrisy.

The politics of rape has involved even deeper structural hypocrisy than the politics of corporate crime. Some might think it an accomplishment of U.S. justice, for example, that it responded to the huge number of rapes that occurred during the

invasion of Europe in World War II by convicting many GIs of rape and executing them. Unfortunately, none were convicted of raping German women who suffered in the largest numbers and whose rapes were the most sadistic and deadly (compared to those of French women, for example). In addition, most of the executed soldiers were Black (Lilly, 2007). Rape was not punished if it was against the society’s outsiders (German women) or by the society’s insiders (Whites). This recurrent structural pattern is not confined to World War II or the United States.

Readers will be right to think that addressing sexual and gender-based violence involves radically different dilemmas from regulation to address corporate crimes. Patriarchy is structurally a different challenge than money power — yet they have something in common beyond the fact that they are forms of domination that kill more than other kinds of crime. Because they are both so traumatizing and often deadly, political demands for criminal punishment are understandably loud. One might expect that the policy and research priority would be to work out how to put more corporate criminals and sexual and gendered violence offenders behind bars. We might not be against that; it could be helpful in these domains of extreme under-enforcement of the law. Yet I argue that this should not be the top priority. Progressive social movements that clamour for justice are associated with both causes. They have been admirably effective in heightening community concerns about the shameful of these crimes today compared to attitudes of previous generations. My argument is that the essence of a progressive politics of crime prevention is to focus on this accomplishment, the political learning accomplishment, rather than persist with the politics of the failed pursuit of tougher punishment. This political strategy shift involves no denial or questioning of the truth that perpetrators go unpunished because corporate leaders and male patriarchs are the actors with power in criminal offending situations. The priority, just as with restorative practices in schools, should be to improve learning so as to prevent these crimes in the first place.



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# LEARNING FROM AIR SAFETY AND HEALTH ENFORCEMENT

Focusing on improved learning when wrongdoing occurs in the corporate world is not a new idea. We currently have models that we can draw on and to which restorative practices could be integrated to add a range of options and produce better outcomes. Consider the field of civil aviation, for example.

The regulation of civil aviation safety is the field where the case for improved learning rather than punishment is most repeatedly made (Wilf-Miron, Lewenhoff, Benyamini, & Aviram, 2003; Hodges, 2015, pp. 326–329). In the middle decades of the twentieth century, taking a flight through the air was extremely dangerous. By the late twentieth century, however, civil aviation safety regulation had become so effective that it was far safer to take a long trip by flying through the air than by travelling on the ground or by sea. The safety gap is not small. Driving a car for more than 400 kilometers or a motorbike for 10 kilometers is more dangerous than travelling by air (in a commercial jet) for 10,000 kilometers (Vally, 2017). Regulatory science showed that this accomplishment was because civil aviation regulation put aside punishment of those responsible for “near misses” in order to facilitate learning from their mistakes or their recklessness (Wilf-Miron et al., 2003). Airlines, pilots, engineers, control tower personnel and regulators alike have become adept at learning from near misses and tragedies. In aviation safety, punishment is prioritized for those who cover up reckless mistakes.

Hospitals and healthcare policy leaders were impressed by the greater comparative success of civil aviation regulation (Wilf-Miron et al., 2003). They followed its lead by putting punishment aside, for the most part — except in cases of cover-up — to focus instead on diagnosing lessons to be learned from medical errors. My first engagement with what came to be called restorative practices was in the 1980s with participatory conferences that

involved surviving patients, family caregivers, health professionals, and state regulators together seeking to learn from an incident of patient harm (e.g., Braithwaite, Makkai, & Braithwaite, 2007). Innovative examples of new approaches that incorporate or could incorporate restorative justice also exist for addressing sexual/gender violence.

## LESSONS FROM NORTHERN IRELAND

Northern Ireland during “the Troubles” provides a powerful example of a different approach to sexual assault that I began to understand during trips there for my Peacebuilding Compared research. A woman from either side of the conflict who suffered sexual or gender-based violence was in a difficult dilemma. And there were many of them. One thing we know about situations of political violence is that they cascade to unusually high rates of domestic violence and rape. It was unthinkable for a Catholic woman who suffered rape or domestic violence at the hands of an Irish Republican Army (IRA) man to complain to the Royal Ulster Constabulary. Complaint to a hated occupation force was seen as a worse crime by her community than the rape. Everyone knew that terrible things happened to anyone who took a criminal charge against their community to the police.

One of the interesting ways that feminists who became leaders of restorative justice in Northern Ireland improvised in this situation was to approach feminists from the other side and ask them to provide refuge from violent husbands on the opposite side of the barricades. IRA feminists organized protection for abused wives of Loyalist (Protestant) paramilitary members; Loyalist feminists organized shelter in their community for abused wives of IRA members.<sup>iv</sup> By 2015, relationships between former IRA communities and the Northern Ireland Police Service were much improved. Yet habits remained: domestic violence victims from

republican families resisted reporting their men to the police. The response in one case discussed in interviews at Community Restorative Justice Northern Ireland was for the restorative justice conference to identify a group of women who each supported the survivor: they lived within hundreds of yards of her home and could rush at any time of day or night in response to an emergency distress number that would go to all the women. The perpetrator was put on notice at the conference that any future incident of violence would risk a swarm of local women arriving to insist that he get out and find somewhere else to sleep until a further restorative justice circle could be convened to confront his renewed violence and arrange safety planning. The support network of women in this preventative arrangement did not view it as a second-best response compared to reporting to the police. The volunteers could get to the scene more quickly than the police and, unlike state social work

imbibe a feminist consciousness of patriarchy. Families and institutions, more than individual perpetrators, are therefore the most important targets of this feminist learning.

### LESSONS FROM BOUGAINVILLE

Bougainville offers an even more sophisticated example of restorative learning after extraordinary rates of sexual and gender-based violence during and after a civil war. Bougainville was a low-rape society that became a high-rape society as a result of its civil war for independence from Papua-New Guinea, and they also became a society with devastating levels of domestic violence. The Bougainville peace process has been described as a feminist peace that had significant matrilineal leadership in the *Mothers of the Land* (Sirivi & Havini, 2004) and a restorative peace (Braithwaite, Charlesworth, Reddy, & Dunn, 2010).

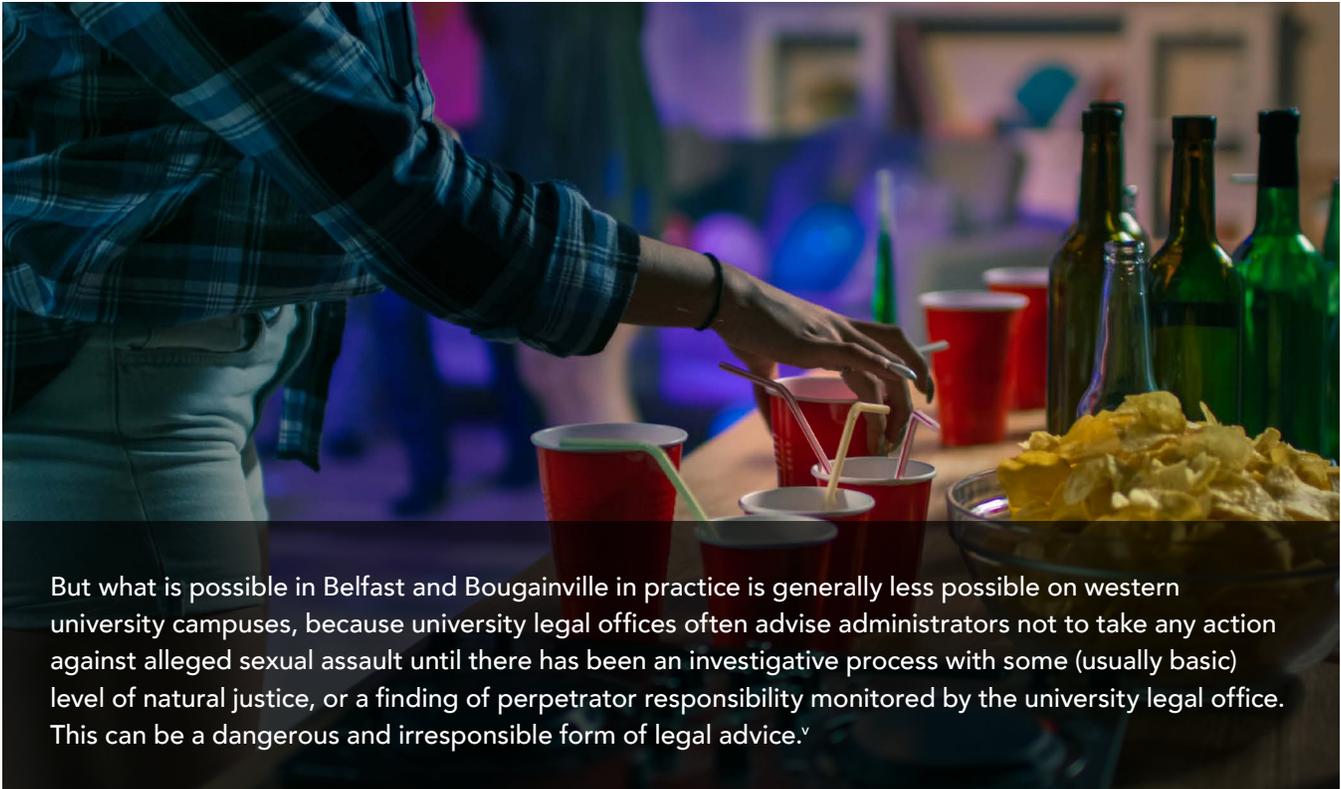


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employees, they could deliver their service on the weekend or the middle of the night.

The most important work of these Northern Ireland responses to sexual and gender-based violence is about learning how to make safety planning more practically effective for the 99 percent of survivors who do not see their perpetrator locked up, or do not want them locked up. Of vital importance, they also educated violent men that their communities will not tolerate their violence and they would be homeless if it persisted. Additionally, they educate boys in these families that their father's conduct is deeply wrong patriarchal domination. The Northern Ireland experience shows a community learning how to educate the next generation of men to

Unusually high levels of confession to rape were secured by the restorative processes which Peace Foundation Melanesia helped develop with training in New Zealand style restorative conferencing, some consultation with the author, and by drawing lessons from Indigenous justice in *Hollow Water* for child sexual assault and from the work of Burford and Pennell (1998) in Canada. But most fundamentally, the Bougainville approach involved a hybrid of ancient Indigenous traditions of reconciliatory justice, Christian teaching about forgiveness with considerable leadership of female parishioners, and the innovation of part-time community police who lived in their villages. In a village context, it can be difficult for the community police officer not to hear the screams, not to experience an imperative



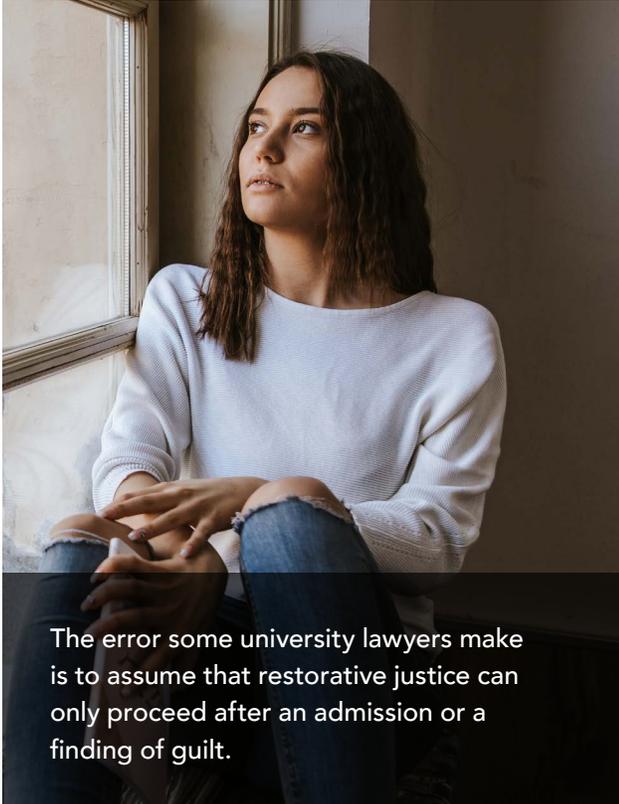
But what is possible in Belfast and Bougainville in practice is generally less possible on western university campuses, because university legal offices often advise administrators not to take any action against alleged sexual assault until there has been an investigative process with some (usually basic) level of natural justice, or a finding of perpetrator responsibility monitored by the university legal office. This can be a dangerous and irresponsible form of legal advice.<sup>v</sup>

to intervene and implement safety planning with the support of community meetings, where the justice tends to be restorative, yet involves a lot of community monitoring to check reoffending, and then more community meetings if reoffending occurs. Prison is not really an option; the leader of the restorative justice program burnt down the prison during the civil war! In post-conflict Solomon Islands, too, policing has picked up the lesson of the part-time community police officer as a way of regulating village-level sexual and gender-based violence, bringing a Bougainville police officer to the island of Guadalcanal to provide training in this innovation.

Learning from as unfamiliar a context as volunteer community policing of sexual and gender-based violence in Bougainville may seem a stretch for most westerners, so let us return to a context previously considered: sexual and gender-based violence on college campuses. Living in a university residential hall is less like suburban living and surprisingly more like residing in a Bougainville village because people are packed closely together. So, in the student

residence it becomes significantly less likely that no one will hear a screaming victim during the most terrifying incidents. Safety planning where peers respond to an agreed distress call by swarming to a room can be even more rapid in a student residential hall than in suburban Belfast.

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capacity crisis (Pontell, 1978) that means delay, with victims worried or terrified for months that nothing is happening to help them overcome their fear or trauma so they can get back to focusing on their studies.

The error some university lawyers make is to assume that restorative justice can only proceed after an admission or a finding of guilt. However, state restorative justice proceeds in some jurisdictions without an admission or finding of guilt. In New Zealand, for example, the legal test for moving forward into restorative justice is not that the alleged perpetrator admits guilt, but that she or he “declines to deny” an alleged offense. The Australian Capital Territory adopted a functionally similar, though weaker, test in its Crimes (Restorative Justice) Act 2004 by stating that an alleged offender accepting responsibility for an offense in order to enter restorative justice does not prevent the offender from pleading not guilty for the offense (§ 20(1)).

How might we translate this learning from the history of restorative justice in New Zealand and Australia

to transforming campus justice? As the earlier quote from David Karp (2018) illustrates, the dilemma is how do we manifest equal concern for the danger of victim injustice and injustice against defendants? For survivors of sexual assault in residential halls, often the most important imperative of safety planning is getting her perpetrator out of the residence. A restorative process can proceed immediately to deliver this result on the basis of a “decline to deny” standard for initiating the process. A restorative practitioner can engage in instantaneous shuttle diplomacy between survivor and alleged perpetrator on safety planning. The practitioner might say to the alleged perpetrator:

*You do not have to confess any wrongdoing to proceed with this restorative process. You have a right to deny criminal responsibility. Or, you can take the view that harm has been done here, that you were involved in it in some way and that you want to take some responsibility for putting things right. You can do this without confessing that you are guilty of any offense. Our immediate practical problem is that [the survivor] feels trauma whenever she sees you in the corridor. She says she cannot study or concentrate on lectures for the rest of the day after she sees you; she believes these encounters may have deleterious effects on your studies as well. So, it would be a wonderful way for you to show commitment to the restorative process to voluntarily agree to leave your residence, at least temporarily. The university will make it clear that you were not ordered to leave. We would prefer to avoid the further distraction for everyone of a formal hearing next week on whether you should be ordered to leave the residence if [the complainant] also refuses to be the one to leave. If you voluntarily move out until the restorative resolution is settled, the university will provide you maximum assistance in finding alternative accommodation.*

In most cases, alleged perpetrators will take this opportunity to gain credit for responsiveness to the suffering of the survivor. If not, the best path

to the safety planning imperatives may still not be to find guilt or innocence on the part of the defendant. It might be to order a temporary rather than a permanent suspension of the defendant from the residential hall pending a full inquiry or a full restorative justice process. The next question then becomes whether the survivor needs to minimize trauma by refusing to meet face to face with the perpetrator. Often this is best. If it is, restorative justice based on shuttle diplomacy is still possible. New Zealand also uses a hybrid where a survivor can opt to watch a conference through a one-way mirror and call in messages on a phone to correct things. They can also change their mind and join the conference at some point of their choosing. We have learnt from digital restorative practices during the COVID-19 crisis, that Zoom meetings can in a similar way empower survivors to listen, send chat messages, check-in and check-out face-to-face at their own discretion. It might be that the restorative justice process will agree on an outcome where a perpetrator admits some level of responsibility (which may not be criminal responsibility) and agrees to return to the residence with the full support of the survivor to spread the word that it was he, not she, who behaved wrongly in this matter and to lead, with his supporters, a process of transformation of patriarchy in the culture of the student residence.

The possibility to use this model for some cases is suggested by an early Australian high school case 2 years ago. It concerned the sexual assault of a 14-year-old girl by a 14-year-old boy in a swimming pool. The girl was terribly upset that the boy had bragged to his mates about what he regarded as a minor sexual conquest. She was re-victimized by this humiliation and also by being labelled a "dobber" (a "tattle-tale") by boys at the school after she reported the incident. Some classmates gossiped that she "deserved what she got." Dialogue at the restorative conference clarified that this was not the case. It also made it impossible for the offender's father to believe, as he had before the conference, that his son was being vilified by the school for a bit of "horseplay." Participants at the conference affirmed the girl's courage for speaking out in the

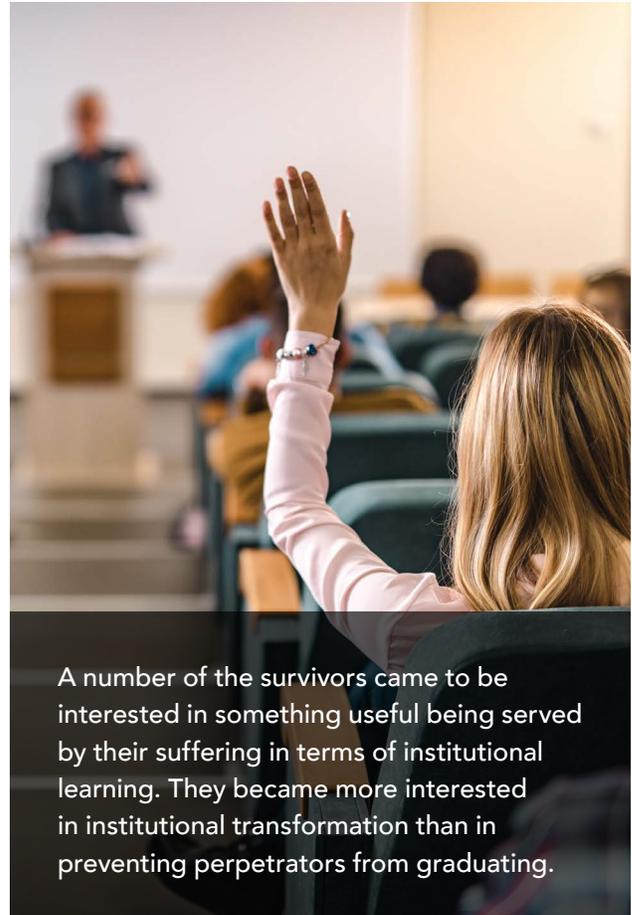
face of these social pressures. The perpetrator not only apologized to her in a meaningful way, but undertook, together with five classmates (one male, four females) who attended the restorative conference, to spread the word among their peers that the girl's conduct had been blameless in every way, while he took responsibility for his totally unacceptable conduct. In this restorative conference, an exploitative masculinity of teenage boys and an excusing "boys will be boys" masculinity of a father was confronted by six students and the parents. This seemed to police Senior Sergeant Terry O'Connell, who in the face of criticism courageously conducted this conference, a better way to confront a misogynist high school culture than a criminal trial years later, especially for the survivor and the perpetrator who would be so distracted from their education during these years of delay. O'Connell's approach accomplished a transformation of the culture of that high school at the same time as it vindicated a survivor.

In other Australian high school cases of sexual and gender-based violence, more formal peer education programs have been agreed in restorative justice responses. Sexting cases that cascade to widespread degradation events lend themselves to restorative process in high schools. Schools are reluctant to seize smartphones from students, so they prefer to engage parents to ask them to do that. Students normally go on to live together in the same school after these traumas, so there are few alternatives to processes that lead to apology and other communicative efforts to repair harm relationally between multiple perpetrators and survivors. When sexting passes intimate or pornographic images of peers widely across a school community, one-on-one school justice processes are likely to be inferior to a whole-school culture change process to renew dignity and respect. The evidence for the effectiveness of whole-school transformative processes with bullying is strong as it is for integrating restorative justice into such approaches (Morrison, 2007). Perhaps the most richly documented case of a restorative process that sought to transform a culture of patriarchal

domination in an entire university faculty following an incident of collective sexual violence was that of the Dalhousie University Dentistry School (Llewellyn, MacIsaac, & MacKay, 2015).

A number of the survivors came to be interested in something useful being served by their suffering in terms of institutional learning. They became more interested in institutional transformation than in preventing perpetrators from graduating. Some of the perpetrators were minority students, who are in scarce supply in the dentistry profession. One of the most interesting findings of the Australian Human Rights Commission (2017, p. 141) national survey of sexual and gender-based violence in Australian universities is that an important reason that most survivors report their victimization neither to the police nor to the university is that they do not want to “ruin the life” of the perpetrator.<sup>vii</sup> Less surprisingly, they were also interested in avoiding the reality of criminal justice that the process is the punishment (Feeley, 1979) for themselves as survivors. The Dalhousie process showed that restorative justice is still a painful path, including for the courageous members of the university community who led it. But it shows a more constructive and relational outcome than blanket denial of graduation to a group of final year students.

Through the innovations noted in this paper, our objective should not be to replace the justice of the courts with restorative justice. It should be to increase the effective access of survivors to both the justice of the courts and the justice of restorative practices. By improving access to both, they might be able to choose a path that gives them a chance at a form of justice, safety or healing that they value. In universities, for example, the objective could be to measure the outcome of most complainants and defendants feeling that their rights are better respected than under previous university policies. It should be measurement of continuous improvement in perceived access to justice, in perceived respect of the rights of complainants and defendants, in perceived procedural justice, in reduced fear and



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reduced symptoms of post-traumatic stress disorder (PTSD).<sup>viii</sup> University regulators should demand the collection of such evidence. Corollary of this move is a shift to learning about the criminal prosecution priority that civil aviation showed. In the transformed criminal law jurisprudence needed to reduce sexual assault, the criminal enforcement strategy is similar to the strategy with air safety or rape in war by militaries: it would be to prioritize prosecution of university officials who cover up sexual assault and then fail to take steps to stop future recurrence.

Learning is an important outcome in university cases of gender and sexual violence but not only in terms of learning how better to heal and prevent campus crimes. There is also evidence that restorative justice programs on college campuses accomplish improved student learning at university studies in comparison to more traditional forms of discipline (Karp & Sacks, 2014).

# MORE NUANCED DETERRENCE OF GENDERED VIOLENCE AND CORPORATE CRIME

Many advocates contend that we must reject restorative justice for corporate crime and gender-based violence for two reasons: to show that these crimes are taken seriously and to deter these crimes in the first place. Yet restorative justice can improve on current tendencies of both the university and police to look the other way, when each institution suggests that the other is best placed to respond to it. A good alternative research priority for a science of restorative practices is to study how the sword of Damocles works with these types of crime.

The sword of Damocles is an ancient idea popularized by the Roman republican Cicero. Cicero based it on the story of Dionysius II, a Sicilian king of the fourth and fifth centuries BCE, who hung a sword attached by a horsehair above the head of the courtier Damocles, who envied the king. The ruler wanted to illustrate the insecurity of being king. Today, the sword of Damocles is taken to mean any ever-present peril hanging over the head of a person.

The randomized controlled trials of restorative justice compared to court justice in Canberra, led by Lawrence Sherman and Heather Strang, found a sword of Damocles effect. When defendants were asked how much they feared a future prosecution, those randomly assigned to restorative justice reported more fear of a future prosecution than those randomly assigned to court. Offenders randomly assigned to restorative justice were more fearful of re-arrest after the restorative justice conference, more fearful of family and friends finding out about rearrest, more fearful of a future restorative conference and more fearful of a future court case than those randomly assigned to criminal prosecution (Sherman & Strang, 1997; Sherman et al., 1998). In other words, restorative justice sharpened the sword of Damocles, sharpening perceptions of how deterrent a future arrest would be, while court processing blunted it. Deterrence has an important

role in criminal justice, but these data suggest that its effectiveness is dulled through overuse. The data are suggestive that deterrence can be sharpened by getting the right kind of complementarity between courtroom justice and restorative justice. There is also some preliminary evidence, only suggestive at this stage from the western studies in this systematic review, that the combination of restorative justice and formal justice might be superior for preventing crime than either separately (Strang, Sherman, Mayo-Wilson, Woods, & Ariel, 2013).

Another important illustration of a sword of Damocles effect, in the research of Dunford (1990), is the Omaha and Nebraska randomized controlled trials on police response to domestic violence. The design of these experiments allowed a demonstration that the mere issue of a warrant for the offender's arrest had a greater effect in preventing future offending than actually arresting the offender or taking no action (Sherman, 2012). The sword of Damocles of a warrant hanging over the head of the defendant, without any actual punishment, was substantial and statistically significant. A warrant for arrest that did not proceed to actual arrest for the domestic violence was substantially more effective in deterring future crime than being randomly assigned to arrest.

Similar results are shown with the research on the effectiveness of responsive corporate regulation; deterrence that is infrequent, yet seriously threatening in the background (by being held in reserve in most cases), is more effective than policies to maximize deterrence through punitive means (Braithwaite, 2018). With corporate crime, as with the ultimate deterrent of going to war against other countries that commit mass atrocity crimes, it is best to keep the sword of Damocles sharp by avoiding overuse. It is best to cultivate a science of restorative practices that discovers alternatives to automatically

responding to violence with more violence, to individual or corporate violence with state violence.

Airline presidents, generals and university presidents do not have the power to arrest, but they do have access to the equivalent to issuance of a warrant for arrest. This is to refuse to dither while deciding whether this is a case that should be referred to the police for actual prosecution by immediately announcing an inquiry into the alleged near miss or rape, an inquiry that at the very least hangs a sword of Damocles over the defendant that their tenure in the organization could be terminated by the inquiry.

More recent follow-up on the 1980s program of experiments on domestic violence investigated victim death as an outcome of the policies in the

on the most disadvantaged of families is another reason for caution in bringing down the sword of Damocles. The research on death as a consequence of criminal prosecution is still in its early days. Much remains to be learned about the why of differential death rates. Lawrence Sherman, Heather Strang, Geoffrey Barnes and others are quantitatively following up qualitatively observed patterns of high incidence of death in the Canberra restorative justice experiments violence cases that were randomly assigned to criminal prosecution as opposed to restorative justice.

More broadly, criminological research across many different kinds of offenses suggests that arrest and punishment for a criminal offense does not reduce risks of reoffending in the future. For example, Xie



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Milwaukee experiment. Sherman and Harris (2015) counted how many victims had died by their 2012–13 follow-up of cases randomly assigned to mandatory arrest (or away from it) in 1987–88. They found that victims were 64 percent more likely to have died from all causes when their abuser was arrested and jailed compared to cases randomly assigned to a warning and being allowed to stay at home (normally with minimal social support). For African American victims, this heightened risk from the perpetrator being randomly assigned to arrest was particularly high, with 98 percent higher risk of early death among victims when the offender was arrested and went to prison rather than receiving a warning. This was not mainly a result of retributive violence by offenders after release from a prison sentence, but of the deleterious effects of imprisonment on whole family systems for Black families, mediated through outcomes like early death from heart disease. The fact that imprisonment has such terrible effects

and Lynch (2017) showed that arrests for intimate partner violence offenders did not reduce repeat offending. A formal complaint to the police did and victim support services offered within a network of support did reduce repeat reoffending, by 34 per cent and 40 per cent respectively. With intimate partner violence, these networks of victim support that are effective are often feminist relational networks. If arrest leads to stigmatizing and degrading a human being by sending them to prison, this increases rather than reduces their reoffending risk (see the discussion of this evidence by Sherman, 2012). On these various grounds, we suggest that dealing with a greater proportion of gender-based violence offenders through restorative justice and networked relational support for survivors, combined with a variety of organizational equivalents to an arrest warrant and criminal prosecutions for managerial cover-ups, would make survivors safer (compared with increased resort to perpetrator imprisonment).

# THE EFFECTIVENESS OF FEMINIST ADVOCACY

Caution is therefore justified in advocacy of maximum punishment of violence. Feminist advocacy has been effective in reducing sexual and gender-based violence without increasing punishment. The mechanism that has delivered this liberation from domination has been rendering these offenses more shameful (Braithwaite, 1995). Steven Pinker (2012) has taken up this conclusion in *The Better Angels of our Nature*, producing quite a bit of evidence that suggests the rise of feminist advocacy about the evil of rape and domestic violence has been associated with increasing numbers of citizens taking these crimes more seriously, with reduction more broadly in patriarchal attitudes, and with falling rates of rape, domestic violence and homicide.

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western world in securing feminist law reform, this has been ineffective in increasing the number of individuals convicted for rape or sexual assault. Daly and Bouhours (2010) found that, in data combined from the United States, England and Wales, Scotland, Canada and Australia, average conviction rates for rape and sexual assault have declined. Across these countries, an average of only 14 percent of sexual violence cases reported in surveys are reported to the police. Of these only 12.5 percent result in conviction for a sexual offense. This means that fewer than 2 percent of sexual violence cases (12.5 percent of 14 percent) result in a conviction. Almost half of the convictions are for lesser offenses than that originally charged. Some of these chargedowns are devastating for survivors by the extreme undermining of victim vindication. Moreover, a prison term was imposed for only 57 percent of those convicted. Hence, across these Western countries, the probability of sexual violence cases resulting in conviction was under two percent and the probability of conviction for the offense alleged, or of a prison sentence, was under one percent. Daly and Bouhours show that the reasons for this policy failure are different in different countries. Some countries, notably England and Wales, have had considerable success in persuading more survivors to report their sexual victimization to the police, but this has not succeeded in increasing the number of convictions. The United States is unusual in having had success at increasing conviction rates in trials compared to the very low conviction rates it had in the 1970s and 1980s, but this has been offset by a reduced proportion of cases going to trial.

The paradox, however, according to my analysis and Pinker's, has been that campaigning for feminist law reform has succeeded in reducing rates of rape across the western world in recent decades. Feminist advocacy to take sexual and gender-based

violence seriously as criminal behavior has had an impact because of the persuasiveness of feminist campaigns. This has not been achieved by increasing the number of sexual and gender-based violence offenders who are locked up. It has been achieved *ideologically and politically* by challenging patriarchy in ways that have made rape more shameful.

Norbert Elias (2000) described such cultural changes as a civilizing process. Pinker (2012) and Braithwaite (1993) noted many examples of this civilizing process that have progressively pacified western societies compared to the dangerous places they were six hundred years ago. Consider the abolition of duelling. This was not accomplished by deterrence, such as prosecuting people for engaging in duels. Duelling persisted for millennia even though it had formidable deterrence built into it: a fifty-fifty chance of death, even a possibility of both being killed. No, duelling ended because people came to view it as an uncivilized, shameful custom. More generally today when people wrong us, most of us simply do not consider killing the person who caused affront as a solution. It is not that we calculate the probability of being caught and punished. We refrain from murder because it is simply unthinkable to us. The cultivation of this unthinkable is what has driven down homicide rates globally. It can drive them down further still by cultivating the unthinkable of violence against women or LGBTI people.

Education institutions are the right places to start this kind of cultural transformation, as they are already successful in changing behavior in elementary and secondary schools around the world. A science of restorative practices might focus on universities as sites for innovation in how to reduce sexual violence because universities are institutions dedicated to innovation, to being evidence-based, are important sites of feminism and restorative justice as great transformative movements, and because the nature of university life with its rush of freedom away from parents makes universities dangerous hotspots of sexual assault.<sup>ix</sup>

The corporate world could also serve as a site for innovation by incorporating a range of restorative



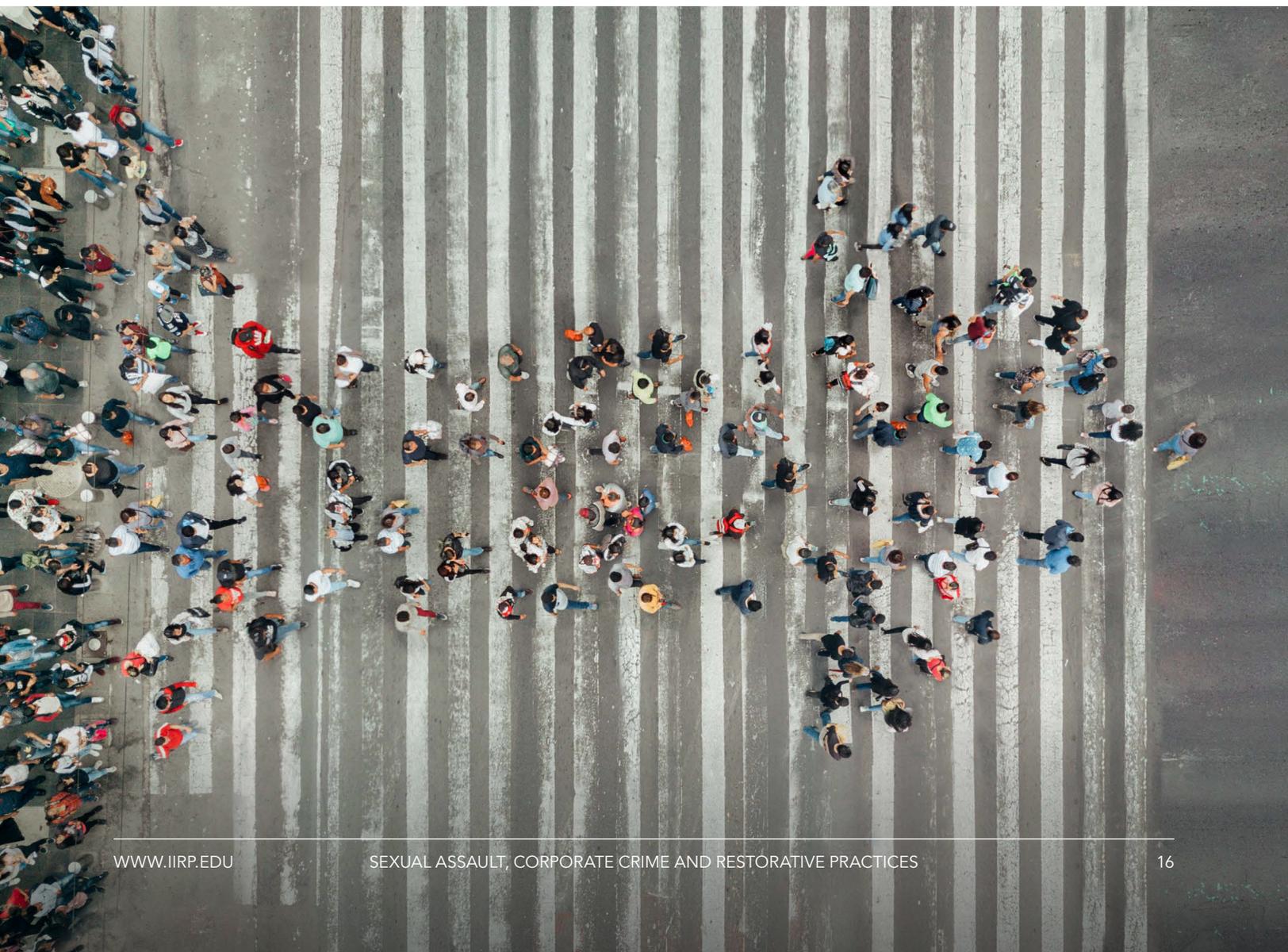
Education institutions are the right places to start this kind of cultural transformation.

practices in their attempts to address wrongdoing. Eastern thinking about regulatory enforcement is less wedded to punitive solutions as the main game, as we saw with *Greening the Car Industry* (Mikler, 2009). It showed that Japanese enforcement of automobile emission laws was more effective than European enforcement, and European more effective than U.S. enforcement, even though U.S. enforcement was the most punitive and Japanese the least.

Schell-Busey et al.'s (2016) meta-analysis results on the effectiveness of regulatory mix could be about the ability of regulators to escalate to more punitive strategies when more restorative strategies fail. The key to success probably resides in learning how better to use networked restorative strategies with corporate crime to sharpen the sword of Damocles and then use that sword of Damocles with high-profile incorrigible offenders to dramatic educative effect about the danger of corporate crime.

# CONCLUSION

Evidence shows that restorative practices make a bigger difference with more serious crimes and more violent crimes (Strang et al., 2013). My argument is that corporate crime and sexual and gender-based crimes should be priorities in evaluating restorative practices innovation. Networks of restorative learning have proved to be central ingredients for success. We must prioritize the science of restorative practices in relation to the greatest threats to human survival. Most critically, this paper has argued that a science of restorative practices must evaluate different integrated suites of punitive and restorative strategies, rather than restorative or punitive strategies alone.



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# ENDNOTES

- i My thanks for Margaret Murray and anonymous reviewers for very helpful comments on the paper.
- ii Or as Russell Mokhiber (2007) expressed it: “The FBI estimates . . . that burglary and robbery — street crime — costs the nation \$3.8 billion a year . . . Health care fraud alone costs Americans \$100 billion to \$400 billion a year.”
- iii See the International Institute of Restorative Practices website for the development of the continuum idea: <https://www.iirp.edu/what-we-do/what-is-restorative-practices/defining-restorative/15-restorative-practices-continuum>
- iv Source is interviews on three trips to Northern Ireland for the author’s Peacebuilding Compared project.
- v The Manitoba Ojibway community of Hollow Water restorative circles began to deal with what many at first thought to be an epidemic of alcohol abuse (Ross, 1996; Bushie, 1999). As citizens sat in these circles discussing the problems of individual cases, they realized in 1986 that there was a deeper underlying problem, which was that they lived in a community that was sweeping sexual abuse of children under the carpet. Through a complex set of healing circles to help one individual victim and offender after another, in the end it had been discovered that a majority of the citizens were at some time in their lives victims of sexual abuse. Most of the leading roles in this healing process were taken by women of Hollow Water (Bushie, 1999). Jaccoud (1998) reported that 52 adults out of a community of 600 formally admitted to criminal responsibility for sexually abusing children, 50 as a result of participating in healing circles and 2 from referral to a court of law for failing to do so (Ross, 1996, pp. 29–48). Ross (1996, p. 36) claimed that the healing circles were a success because there had been only two known cases of reoffending. Five years later Couture (2001, p. 25) reported that 91 offenders had been charged (with 107 processed through the project) with still only two reoffending since 1987 when the first disclosure occurred. What is more important than the crime prevention outcome of Hollow Water is its crime detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching 91 admissions of criminal responsibility for sexual abuse of children in a community of just 600? Underpinning this success is a philosophy, as in air safety regulation, of punishing cover-up (through criminal prosecution) but not referring to prosecution those who cooperate in the restorative process. In Hollow Water, ex-offenders were not shunned forever, but seen as important resources for getting under the skin of other offenders and disturbing the webs of lies that sustained their criminality. Better than anyone, ex-offenders understand the patterns, the pressures and the ways to hide. As they tell their personal stories in the circle, they talk about the lies that once shielded them and how it felt to face the truth about the pain they caused. It is done gently, sending signals to offenders that their behavior has roots that can be understood, but that there are no such things as excuses. Indeed, at Hollow Water, before they met their own victim in a healing circle, sexual abusers met other offenders and other offenders’ victims, who would simply tell their stories as a stage in a process toward breaking down the tough-guy identity that pervaded the dominating relationship with their own victim. Underpinning all these possibilities for eliciting truth is a willingness to offer the serious criminal offender an alternative path to prison for making things right.

- vi First, there is a worry that the procedurally crude investigations of many colleges can lead to unjust infliction of the stigma of criminality on the basis of adjudication “on the balance of probabilities,” rather than “beyond reasonable doubt” as in the criminal justice system. The widest injustice, however, is that many colleges hide behind the criminal law to shirk their onerous and expensive crime prevention obligations in this domain. For example, some administrators at the author’s university in the past averted effective responses to sexual assaults by hiding behind a policy that states, “The University is not a law enforcement body and does not have the expertise or authority to conduct investigations of criminal offences.” The university has now recognized that it does not use this policy to shirk investigation of other kinds of crime that are common on university campuses, such as financial and scientific fraud; to its credit, it now has a reform process underway to amend the policy.
  
- vii The quotes from survivors in the report (p. 141) were evocative:
  - “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 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.
  
- viii Randomized controlled trials that compared restorative justice to traditional justice on average find reduced PTSD symptoms to be on the list of outcomes improved by restorative justice (Angel et al., 2014).
  
- ix As one survivor reported this complex new freedom to the Australian Human Rights Commission (2017, p. 141):
 

I never reported this as I was so young and didn’t know any better. I always thought this was part of normal university behaviour having to fend guys off...I also didn’t want to lose friends or be seen to be against college culture and traditions by disagreeing with any of the activities. It was a really difficult time for me trying to fit in and make friends.