

6 A Practical Alternative

This is where the need for Positive-Cooperative Justice becomes apparent. We could define PCJ as: a paradigm for justice which exemplifies the social behavior it seeks to instill, bringing all aspects of justice in-line with contemporary scientific methodology and democratic mores. PCJ would among other things, be largely capitalizing on the findings of the model of mental health know as *positive* psychology (humanistic psychology, 2014) (Positive Psychology, n.d.). This would be coupled with the understanding of the human brain and how behaviors arise from it, as discovered in the field of cognitive neuroscience, and the many other more nuanced understandings of behavior that have arisen through careful observation and experimentation in the various relevant fields of research over the past several decades.¹

The Healthy Brain

Positive psychology works on something along the lines of preventative medicine. The basic notion that it operates under is that a healthy mind does fewer destructive things than an unhealthy mind. In this model, the *patient* is helped to

¹ While it should be noted that this is an area of ongoing research, the level of current scientific understanding is already far beyond sufficient to allow for the proposals outlined in this paper. In truth, though much of the detail was lacking on the neurological level until the last few decades, most of the ideas proposed here under the heading of PCJ on the treatment end of things as well as the societal have been well understood and agreed upon by our best and brightest minds at least since the 1960s (see for example works in behaviorism, and positive psychology) and have already in many important ways been adopted in Germany and the Scandinavian Countries (Lessons From European Prisons, 2013) since around that time period.

improve her or his overall outlook and perhaps even develop a sense of meaning to his or her life and actions, as it is the absence of this kind of healthy engagement with the stuff of life, which is most often at the root of destructive behaviors. Alongside this, the PCJ model would set aside the ineffective strategy of attempting to delete the behaviors which arise when a person acts on a given impulse through pure abstinence (which is currently what we are attempting, or pretending to attempt to promote via the poorly considered and non-finite *conditioned stimuli* of punishment or fear of punishment), which leaves the initial impulse frustrated or suppressed. In place of this, the PCJ model would call for thoughtful behavioral modification efforts toward developing more constructive, or socially acceptable behavioral responses to stimuli. Research in various relevant areas has shown time and again that to change behaviors you must change the routine, but not the cue and the reward (Duhig, 2012). In other words, one must eliminate the association between a given urge, a particular behavior and a desired result, by replacing the middle part (the behavior). Impulses and the need to satisfy them do not go away, but the routine is malleable.

Specifically, treatments might include teaching patients to apply skills such as mindfulness, which has proven lasting benefits for brain health and towards developing overall happiness (Hanson, 20xx), cognitive therapy techniques, and might utilize proven varieties of various technological aids in areas such as biofeedback of immersive virtual reality situational training scenarios and so forth. In conjunction with treatments, real neurological evaluations should be taking place at regular intervals alongside any other sorts of behavioral or psychological testing or observation. Patients would also be able to participate in

an array of research vetted social and emotional intelligence skills building programs and the like on an ongoing basis, learning things ranging from how to handle their own difficult emotions to nonviolent ways of successfully navigating conflict with others.

The key point here is that we should use what works but temper that with what is ethical to use. As has been a key factor in the trends underlying the so-called treatment-oriented portion of the current system, cognitive therapy based regimes as well as educational programs aimed at motivating changes in how an incarcerated person makes future decisions or fits themselves into the fabric of society, have shown relatively promising results. Mindfulness mediation has also shown some promise in the handful of formal studies where it has been tested on inmate populations. However, it appears that most of the experiments in this area have been centered on running study participants through a fairly brief period of supervised practice, perhaps not sufficient to establish the kinds of neurological changes observed in other studies of this practice whose outcomes gave rise to the expectation that this kind of treatment could have a significant and lasting impact. Similarly, Hatha Yoga practice has been demonstrated to reduce recidivism in prison populations, and some of the studies have centered on those who have received supervised instruction for longer periods than those of the mindfulness studies. The obvious problem with all of these sorts of treatments is that they require the active participation and engagement of the person in treatment, this may be just fine for those who are eager to make a change in their live, but for those who are not, there is a problem here. One solution might be to make the environment more amenable to encouraging the potential participant

to take an interest in such activities, and in fact, this is what has emerged from behavioral economics. Essentially, if a person finds themselves immersed in an environment where people are doing this, that or the other, they are likely to adopt what those around them are doing. We are inescapably social beings, we tend to copy those around us and participate in whatever is readily available.

The above considerations call for greater inclusion of the community and family at the location of treatment or confinement (in the case of those who are deemed to be an active and ongoing threat to the wellbeing of others). They also call for a different kind of physical environment than the punitive institution as well as a different kind of staffing. In order to wind up with a situation where those who have been the most destructive in need of treatment from the social perspective wind up actually wanting to change or at least are willing participants in activities which are likely to lead to such change, the environment—both physical and social—has to be conducive to such participation. Without this, we should expect high recidivism rates along the lines of what we see presently.

If the most egocentric, least socially engaged individuals are those who present the most threat to those they come in contact with, it should be assumed that forcing them to participate in programs against their will (as is often the situation today in punitive institutions) might not just fail, but also potentially backfire. It is for this reason that treatment programs in any place where a person might be forcibly confined should always be optional and that non-participation should not be punished. The question of what should be done to discourage non-participation, or conversely encourage or incentivize participation is an open ended one. There are various methods which might be employed which could

work within the ethical framework of PCJ. For now, I would say that if confinement or restrictions are based strictly on demonstrable necessity for safety concerns—rather than the satisfaction of some party that a person is being sufficiently deprived of freedom to somehow evoke justice—then the most likely scenario is that the person who refuses to participate in treatment oriented activities will deny herself the possibility for lifting restrictions wherein they are unable to demonstrate that they do not need such restrictions. To be clear, I am not saying that restrictions should be imposed on those who do not participate in rehabilitative activities, rather that they should be imposed strictly on demonstrable need, and that by participating in activities which help one get along better with others (or on his or her own), a given person is more likely to overcome the measurable indicators of such a need. It has been verified through experimentation that encouraging a person to do something which requires willpower to do (which any good treatment program would require), if they are onboard helps them, but telling them that they have to do it actually makes it more like that they will fail (Duhig, 2012).

Taking the above into consideration, it can be assumed that in spite of any incentives, some people will not choose to participate in any kind of programming or voluntary treatment. This is where environmental factors can make all the difference. Whether we choose to or not, people are naturally inclined to imitate, both each other, and things in their environment. So, even the person who refuses to go along with any kind of treatment regimen can, in effect, be treated in certain in non-invasive, nonforceful ways, simply by virtue of making that person's environment more amenable to the kind of behaviors needed to

navigate the social order. Conversely, a cold institutional environment can wreak all sorts of havoc and reinforce the kinds of thought process which lead people to be destructive. It is now known for instance that a person in a box shaped room will actually do less well than a person in an organically shaped room in thinking up creative solutions to a given problem [this was discussed in an article in Scientific American Mind within the past few years]. Bearing these things in mind, spaces could be designed and activities arranged so that people residing in these spaces are constantly surrounded by positive and engaging stimuli that might draw them out. Spaces could be intentionally built to provoke creative thinking and social activity.

In addition to the kinds of treatment where a person puts in a lot of participatory effort, or the kinds of things which might help nudge a person in a positive direction, there is also the possibility of direct neurological stimulation. In the recent PBS documentary, the Violence Paradox on Nova, a method was shown wherein researcher Adriane Raine demonstrated something called upregulation of the prefrontal cortex, wherein this area of the brain is given a low level of electrical stimulation, essentially making it work better. In his experiments he found that participants showed a 30 to 40% decrease in criminal intent. In other words, that when confronted with a given situation wherein a person might be tempted to do some wrong, this kind of stimulation reduces the impulse.

Whether or not this type of treatment produces lasting effects was not discussed, but by Hebb's law (neuron's that fire together wire together) (Hanson, 20xx), this might be what could be expected. Provided this is the case, there is the possibility that a treatment of this sort could have a place in something like PCJ, but it would

have to be strictly voluntary. Similarly, there are forms of bio-feedback wherein a person might be exposed to given sets of stimuli and encouraged to evoke certain kinds of emotional responses which in turn might correspond to certain brain activities which can be measured and built up like a muscle. As Rick Hanson points out in his book *The Buddha's Brain*, which discusses the lasting effects of meditation on the brain "When your mind changes, your brain changes too".

Generally speaking, it can be said that once you get past the fundamental desire to change a habitual behavior, impulse control is the key underlying issue where most of the destructive behaviors justice touches on are concerned. To this end, as suggested at the end of the above paragraph, it is important to understand that researchers have shown over and over again that the quality we typically call willpower which is a key component in making any lasting changes in habits is a lot like a muscle. It is something which we only have so much of to use in a given moment, something which fatigues over the course of use throughout the course of daily events, and is something which responds to a workout program. What this means, is that we know enough now to be certain that given the right circumstances, tools, methodologies, and so forth, it is certain that people can change. In fact, whether or not they change in the ways that the social order demands aside, the rule of thumb is that people *do* change from day to day, year to year, sometimes for the better, sometimes for the worse, how we as a society want to position ourselves in relationship to that process is the question. The primary emphasis of PCJ will center on helping people, whether or not they have already caused some significant harm, learn effective and socially responsible

ways of dealing with life's difficulties. That is something we can do. That is something which would be in everyone's best interest.

The Scientific Method

In dealing with destructive behaviors, treatments to address them, meaningful steps to prevent them at the personal and community levels and remedying the underlying causes which foster them, PCJ would also be positive in the sense that it would be founded on the principles of *positivism*, the philosophical term for what science *is*: the requirement that one must be able to point to what is able to be verified before being accepted as fact. In sharp contrast to the kinds of responses to crime which *criminal justice* advocates, PCJ will rest on what can be demonstrated to be true.

The scientific disciplines of psychology, neuroscience, sociology and behavioral economics all point directly to measurable and meaningfully effective ways in which the number of crimes could be dramatically reduced, and that for maximal effect, these need to be the bases for our response to such problems. As these sciences have identified and tested various ways of addressing interpersonal harms with much greater effectiveness and with much lower expense than what law enforcement costs in both human and financial terms, it is these findings that PCJ would act on. The sciences demonstrate, for example, what the underlying mental (largely *physiological and educational*), and social (largely *financial and educational*) motivators for destructive behavior are. They also point to the ways in which we can address these factors most effectively, both within our current means, and those things that we might do to largely *eliminate* these problems in

the long run, as both our means and our understanding improve. PCJ would be *that* form of justice which acknowledges the facts and acts based on them.

Positive Philosophy and Principles

PCJ is the only path we can follow that is truly in line with the professed principles of our nation. All things considered, we need to abandon, not just prisons, but also the entire concept of criminal law. This concept is so laden with ignorance, cruelty, superstition and pseudo-scientific concepts of murky origins that it just has no place in a modern nation. While elements of it have been referred to in the U.S. Constitution, on the whole it is incompatible with the bulk of the principles the Constitution revolves around.² The foundational ideas of criminal

² The opening paragraph of this document reads "We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.". Criminal justice fails to establish true *justice*, as is evident by the disproportionate punishment of impoverished, mentally ill and minority groups, and its repeatedly demonstrated ability to ruin people's lives when it gets the facts wrong-or to add-on the ruin of those lives of the innocent friends, families and communities of those it purports to punish. PCJ would dispense with the inflicted ruination aspects of justice in favor of solutions which could be tolerated even if the findings of proceedings were in error. Criminal justice, beyond a certain level, has been demonstrated to have a negative impact on "domestic Tranquility", and does not do as good a job of promoting this tranquility as things such as education, mental health care and the alleviation of poverty could at much lower overall costs. It also fails to provide the "common defence", as it has been shown that it fails to *protect* people, in preference of *punishing* those who have caused harm, *after* they have been enabled to do so by the shortcomings of this solution. Lastly, as criminal justice brought us from being a country whose founders and majority of citizens believed should have no standing army, or even tolerate the use of soldiers domestically to being one which has repeatedly deployed the National Guard against its citizens (albeit in a few instances *for* their protection from violence), and has militarized its police. The idea of a standing police force anywhere in the U.S. was itself deemed unacceptable by the majority until the mid-

justice simply fall apart under scientific scrutiny, and so they must be abandoned. They should be rightly understood as religious³ in nature and therefore

1800s (police, 2014). To meet the guidelines enshrined in the opening lines of the Constitution, we desperately need a rethink of our approach.

³ The term religious as used here is not in any way meant to denigrate those religious beliefs which the reader might hold in relation to the subject matter of this paper. I do not contend even that the basis of criminal law comes down from any particular religion. Rather, it comes from a hodgepodge of religious and philosophical sources which have come alongside the development of statecraft down through the ages. While there are elements of crime and punishment which appear on the surface to be, for example, of Judea-Christian origin, there are as many or more which stem from Greco-Roman, Norman, and Germanic religious or philosophical beliefs, and yet others which grew of communal sentiments, the views of village chieftains, feudal warlords, emperors, kings, queens and military leaders, and even more recently particular religious sects, as in the case of the Quakers, academicians, politicians and philosophers.

The point which the author aims to communicate here is that because we have a Constitutionally enshrined separation of Church and State, the State has an obligation to adopt a position which is based entirely on empirical evidence and doctrinally neutral. It is true that statements made in the Declaration of Independence suggest some form acceptance of the founders of so-called *Natural Law* (natural law, 2014), as illustrated by the statement "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights". And while there are suggestions of a religious basis for the ideas of the equality and unalienable rights in the use of the word Creator, the language is not religion-specific, in that it could be embraced by members of any religion or even those who believe that an unconscious universe itself is said creator, and has within in its makeup, some essential rules which favor what works out to be ethical behavior.

It is also true that mere adoption of a strictly defined *positive law* system (i.e. that which is law because it is decreed by authority) (see natural law citation, above), can run contrary to the good of people. That said, the simple application of the framework of positivism to the problem of law need not stop at the analysis of what is so, and justification of what is so based on analyzing the elements of how things stand. Rather, positivism, or that is to say the scientific process, can and would best be applied starting from the basic position of natural law, i.e. that what we casually call goodness, kindness, or non-harming behaviors are what we should be encouraging in a civil society, or that at least, we should protect those under our umbrella against the opposite. In other words, "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed", as the Declaration phrases it, which suggests more of a positivistic position on the question of how these rights should be dealt with.

completely out of step with clear constitutional requirements. We can be a democracy, we can even be one that acknowledges a place for certain traditional practices which fall outside of scientific validation, but we cannot sustain the ideas of the 18th and 19th centuries post-colonialism indefinitely with a religious like adherence, without any rational justification for doing so. We have no rational justification for clinging to this outdated and ill-conceived system. Just because the mob demands its pound of flesh, we cannot enshrine that demand in law. As a republic, we have the obligation to ignore popular opinion when it is in direct conflict with the essential principles of responsible governance. We illegalized slavery, not because it was unpopular- the country was deeply divided over their personal feelings about whether or not it was right to continue this

The Constitution, which is the basis for our government, and which supersedes the Declaration of Independence is specific in the exclusion of laws which relate to the "establishment of religion, or prohibiting the free exercise thereof", as stated in the first Amendment. While there have been various interpretations of the meaning of this, the general consensus is that it creates a strict separation of Church and State. The thesis of this paper rests on the fact that the methods employed by our government to deal with crime have no empirical basis and therefore are more akin to religion than any other discipline. To underscore this point, as noted elsewhere in this paper, this branch of law even contains terminology which is distinctly religious in origin and which has no currency in scientific terminology, for example the term victim as discussed above. My contention is that criminal law, and especially the punishment aspect associated to its application is effectively an unconstitutional construct and needs to be scrapped in favor of an approach which is in line with the Constitution. While it is fair to say that there needs to be some ethical systematically philosophical basis which we use to determine what kinds of behaviors should be intervened upon by the community or state, it is clear that this should not be specific to some narrow religious perspective which is not generally shared by the public at large, so democracy seems to be the best way to decide what should and should not be allowed. However, on the question of how to address those behaviors deemed unwanted most effectively, the best toolbox we have is science, and it is the only one which is compatible with the First Amendment. Yes, there needs to be some philosophical a priori basis which keeps the solutions bound to certain guiding principles, i.e. that we do no harm (or as little as possible) in the process of doing good, but the doing of good with an eye to effective results is critical in this.

practice. We abolished slavery (except for the case of prisoners who are excluded from the 13th amendment) because it was in conflict with the overarching principles laid out in the Constitution. We need to start over from what we know, and what contend to hold most indispensable to the bases of the American idea.

The way forward is to apply scientific scrutiny to the problems that we have become accustomed to addressing using criminal justice, and to do so in a way that satisfies our needs *ethically*. This application of science to the problems of justice should adopt both means for making fair and reasonable decisions wherein restitution is needed, and also be infused with (especially as it would include medical elements) the Hippocratic Oath's call to *above all, do no harm*. Prisons do not keep us safer than smarter alternatives would. They incubate crime and leave a vacuum for new people to take over where the last criminal removed from the streets left off (Pertsilia, 2003). Prisons do not even effectively deliver vengeance; they tend to harm the loved ones of the criminal (McLaughlin, et al, 2016) in ways which are as undeserved as any other act of random violence. Furthermore, the adversarial legal process and its aftermath can deepen the resentments that justified harmful actions in the mind of the person who committed them (Pinker, 2013). Add to this the need to defend oneself against the prospective loss of *everything*⁴ (however much or little that may be) one holds dear inherent to being imprisoned, and you have a recipe for generating within a person a defensiveness of bad acts themselves and even denial of responsibility-

⁴ When a person is threatened with potential incarceration, they are often faced with the possibility that they will lose not on their job and residence, but often all of their property, social connections and even their means for self-expression.

further compounding the underlying issues which lead to such harm. If we want people to feel badly about causing harm— something that *is* a worthy goal (though not entirely sufficient for prevention of impulse driven behaviors)—we need to think through how that's best accomplished (Davis, 1998). If we want to *prevent* harms, we need to think a lot bigger than strategies that seek to induce fear of consequences in people who rarely, if ever, consider long-term consequences to begin with. Fear of punishment works best on those who otherwise would still rarely commit crimes (Kahneman, 2011). Moreover, even in those who it does influence, the tendency is that it makes them more sneaky and resentful, *not* more responsible (Kahneman, 2011).

We need to decide what we want philosophically. Ethics, which should be central to discussions of whatever might someday replace criminal justice, is not purely scientific. Nonetheless, it is already employed in the sciences in ways which are perfectly compatible and do not rely upon a shared religious doctrine are already used to guide life and death decisions.

What we should be focused on, is the creation of a new system of justice which meets our needs as an entire society of diverse cultures; a society which is currently comprised of many individuals and groups who go through life feeling alienated and at odds with their fellow citizens and residents; a society which currently sees violence as a normal solution to a wide range of problems. We need a remedy to this. Prisons and the types of solutions employed by criminal justice on the whole are neither remedies nor Band-Aids, they are more like a good old fashioned blood-letting (though the former at least have valid medical applications, where prisons have no such comparable benefit).

When we encounter problems—potential or actual—with one another, or even within ourselves, we need to have effective ways to confront these problems, non-violently and without fear of blowback. Most of us probably do *not* have a full complement of such tools, even though we may be able to navigate the social landscape without winding up in prison. We need institutions which are equipped both to make up for our deficits in these areas in the form of mediation, and to teach these *skills*— which have been identified variously as social and emotional intelligence (Goleman, *Emotional Intelligence*, 199x)—both to anyone with the desire to improve their tactics for handling difficulties with life situations, and for those who have proven through their actions to be dangerously ineffective in these areas. Such facilities need to be properly equipped and staffed to diagnose and treat these problems, including, *especially*, the violent kinds. We need these institutions to be able to allow the people they treat to carry on, or in many cases *develop*, normal healthy personal relationships, especially with those to whom they are already connected. These institutions need to be located *within* the communities they *serve*, not tucked away, out of sight. Such places of healing, safety and service would need to operate openly and transparently as an integral part of their communities. At the same time, the people under their care need to be treated as *patients* in every sense of the word, and in therefore, in need of the strictest confidentiality. Who did what to who needs to be a matter strictly kept between those with a direct concern in knowing. Otherwise, as we have today, there is the problem that a person may never be able to live down their mistakes, and in relation to this, subject to mob or street justice of the very kind that we should be working to eliminate.

Truly dangerous people do need to be kept under effective supervision and in many cases restrictions *but only for as long as they remain an active a danger, or endangered* by angered members of the community, and this needs *not* to be confinement to a cage or a box. Everyone needs to be given ways to remain or become part of and, perhaps most critically *contribute*, to a healthy community (Frankl, 1983 edition).⁵ Whoever is to be considered dangerous needs to be a dynamic and ongoing process. We need to be able to assess these things objectively. We need to stop relying entirely on statistical probabilities that treat a person who has acted in various ways in the past as a threat in perpetuity and instead look to individual assessments.⁶ Restrictions placed on individuals should

⁵ In his ground-breaking book *Man's Search for Meaning*, Victor Frankl both describes his own experience as an inmate in a Nazi concentration camp during World War II, and the motivations which kept him and others who lived through the experience going. He concluded that the most effective strategy for survival (provided one was not arbitrarily selected for execution) was to have some sense of a purpose, *beyond* the confines of the camps for living. In addition to this, he observed, both in the camps and in the aftermath of the war, that those whose purpose was finite and centered around specific people or plans were the most fragile; for example, the person who looked forward only to being reunited with loved ones at war's end ran the risk of losing their reasons for going on upon learning that the object of their affections did not make it through. Those who, like himself, had something they wanted to contribute to the greater good of humanity, proved to be the most resilient. In line with his set of observations, researchers in the various fields of psychological and sociological research which apply most directly to the issues one must consider surrounding the problems related to the harms people do to themselves and others have found that those who are most committed to contributing to things larger than themselves are the ones who prove to be most committed to the avoidance of causing harm to others (Citation information unavailable). Conversely, those who are the most committed to personal goals (which is the majority of what is currently emphasized in what little training and treatment goes on in our prisons) are much more likely to cause harm to others in the process of achieving these or other self-centered goals (Goleman, *Destructive Emotions*, 2008). There is also direct evidence that volunteerism reduces recidivism (Petersilia, 2003).

⁶ It is well understood in research that malleable traits play a much more significant role in recidivism than static ones (Petersilia, 2003). Nonetheless, contemporary parole guidelines in most states give more consideration to the static than the malleable, essentially assuming— in spite of contrary statistical evidence—that certain *types of*

be lifted as quickly as it can be reasonably determined that they are not critical. People can be autonomous in their ability to navigate social situations and day to day living to greater or lesser degree, and need to be able to exercise that autonomy, or they will tend to devolve to dependency upon others to babysit them (Benabou, R. and Tirole, J., 2003). It is paramount that those who have demonstrated a lack of self-regulation that they be taught, or otherwise encouraged to develop the skill sets necessary to keep themselves out of trouble. It is also demonstrably doable.

We have good clinical means already at our disposal for assessing what individually varied people in particular kinds of situations are actually likely to do (Goleman, *Destructive Emotions*, 2008). We have technologies and other practical solutions for ensuring that such individuals keep out of problematic situations. Most importantly, we have treatments that can reduce and even eliminate the underlying causes for concern. In this day and age, these are the things we should be using. What we are doing instead, is simply irresponsible.

None of this is to suggest that people should not be held accountable to their actions. In fact, a system of this nature would be centered on fostering people's abilities to *hold themselves accountable*, and giving them the tools they need to make amends for harms they have caused. Without this, the idea of holding a person who has demonstrated a lack of capacity for consistently responsible

people are more likely to return to destructive behaviors. The reality is that rehabilitation works wherein the habitual types of harms are concerned. These things acknowledged, there are also significant numbers of one-off sorts of harm for which people are often incarcerated (Citation information unavailable). In such cases, the likelihoods for recidivism are often immeasurably small, and the justification for incarceration is strictly retributive.

behavior is a folly. A major component of such a system would be making sure that the needs of harmed parties and effected communities are well addressed in direct relation to the redemption of the person or persons who most directly brought them about. That said, where environment plays such a large role in crime,⁷ it is also *we*, including those of us who reside in impoverished areas *and* who are able to see what could be improved and take action on it, as well as those who reside outside impoverished areas, and have the resources to help those on the inside obtain these, who need to take responsibility for the underlying problems which create this disparity. Or in other words, any and all of us who are able.

⁷ See for example the fact that 70% of all NY state prisoners come from 8 neighborhoods in New York City) (Zinn, 1998).