10

Why incapacitation trumps deterrence

Key propositions

- Criminological thought must become more punitive in incapacitation terms. New laws should announce execution dates for entire industries. Dates for the banning of internal combustion engine cars and aircraft and coal, oil and gas-fired power plants establish a renewed relevance for capital punishment in criminology. Companies that were once number one on the *Fortune 500* list—the old General Motors, the old Exxon, the old Boeing must be reborn or die. There are drug pushers of Big Pharma that must be incapacitated. Detroit must be reborn with social support for regenerative capitalism.
- The art of republican regulation is the art of steering self-enforcement democratically, deliberatively and relationally with motivational interviewing.
- An important revision of responsive regulatory theory for crime is that self-incapacitation should normally be sequenced before deterrence in an enforcement pyramid.
- Self-incapacitation generally has more preventive power than deterrence and incapacitation by the state—for organisational crime and for individual crime when individual offenders are responded to through restorative justice.
- Much self-incapacitation can be as simple as the Plimsoll line, which made it impossible for dangerously overloaded ships to leave port without being stopped.

- Self-incapacitation of war crime can be catalysed by a simple letter from an International Criminal Court prosecutor to a military commander warning that if he fails to disarm a militia under his control that begins to ethnically cleanse a region, he is on notice of potential personal war crime culpability.
- Self-incapacitation agreed to in a restorative justice circle can achieve a more global reach with organisational crime prevention. Cosmopolitan collective efficacy can demand global self-incapacitation. Restorative justice can scale up to help prevent global crises this way.
- Self-incapacitation agreed to in restorative justice circles can make contributions to the prevention of crimes that cause financial crises, environmental crises, wars and war crimes. Restorative circles can also help self-incapacitate street offenders from access to gambling if that is a root cause of their offending, from internet access to pornography for child sex offenders released from prison, and more.
- When deferred prosecutions result in restorative self-incapacitation, they can be more effective at corporate crime prevention than actual prosecutions. Self-incapacitation can deliver structural reform that is beyond compliance.
- With corporate crime and war crime, there is a case for nailing the minnows, then offering them effective immunity when they testify against the sharks. Then there is a case for a restorative conference with the sharks to secure their cooperation with self-incapacitation to prevent further corporate crime or war crime. After this organisational crime wave ends, the sharks who committed to self-incapacitation might then be pressured to testify against worse sharks who refused to comply with the self-incapacitation agreement.
- In a prosecution strategy, it can be much more important to be punitive when there is a cover-up of horrifically collective criminality than to prosecute individual participation in crime. Focusing punishment where there is a cover-up can enable structural prevention through collective incapacitation of future horrors and can enable learning cultures about recklessness (as illustrated with child sexual abuse in churches).

Corporate capital punishment laws now

For the world to achieve its Paris Climate Agreement objectives, carbon dioxide emissions must be halved during the current decade. At the time of writing, this appears unlikely. For many parts of the world, Paris was already too late—for example, islands in the Pacific that have already been abandoned by human habitation because of the rising ocean.

Capital punishment is now a crucial criminological remedy to past indecisiveness. It is imperative for each country to enact a law that announces a date when sales of internal combustion engine vehicles will be banned, and a later date when they will be banned from the roads. These dates must not be far into the future. This amounts to corporate capital punishment for the old auto firms that built Detroit. What has been good for General Motors is now bad for America. As discussed in previous chapters, that corporate capital punishment mentality must be accompanied by an escalation of social supports for regenerative economic growth in cities like Detroit, which have comparative advantages in building most of the components for electric vehicles and, for that matter, hydrogen-powered planes—from wheels, tyres and suspension systems to comfortable seats and enclosed vehicle sound systems. Detroit must grow a battery industry of a different kind from the acid batteries of its gas guzzlers. Another date further into the future should be legislated for ending the production of all aircraft fuelled by gasoline, and then a further date for grounding that fleet. The Boeing of the present cannot be closed before new hydrogen-powered competitors (including, hopefully, a renewed Boeing) can realistically emerge. While the dates must be later, the law and the announcement must be now, to steer renewable energy markets at tomorrow's opening of trade on the stock exchanges. Boeing will probably die, but we must not rule out the possibility of a renewed Boeing. Climate policy requires more than killing off the brown and renewing the green; it compels 50 shades of corporate green.

Another law is needed to announce a date when all the highest power-plant emitters of carbon dioxide are closed, another when all coal-fired plants are closed and then a later date when all oil and gas-fired power plants suffer corporate capital punishment. These dates must be attuned to realistic assessments of the differential feasibility for national renewable power programs to come on stream to fill these gaps in supply. A paradox of such command-and-control regulation for corporate capital

punishment is that it will create regenerative markets in virtue. Financial capital will take note of the signal that these draconian laws are required and inevitable if we are to survive. Australian university professors are already taking note of such possible futures, shifting increasing proportions of their UniSuper pension investments into the Global Environmental Opportunities Fund. Between 2013 and 2021, we enjoyed a 330 per cent return on investment in these environmental opportunities.

This is the sense in which markets in virtue will be, and in limited ways already are, the proximate drivers of transformative shapeshifting in the economy towards regenerative growth. Corporate capital punishment is a more distal driver. It only has power because of the signal it gives to markets about where future profits will be made, and future losses (in coal, oil, internal combustion engines). This is the recurrent message of this book that markets in virtue are fundamental to regenerative social democracy and a regenerative version of institutional anomie theory.

This left criminology of renewable markets is of course strangely at odds with the critical criminology of the old left in its emphasis on incapacitation, punitive new capital punishment laws and the virtuous commodification they can drive (of batteries, hydrogen, wind and solar power and environmental futures financial capital).

What is incapacitation?

This chapter on incapacitation and self-incapacitation is devoid of the lists of quantitative studies and systematic reviews of previous chapters. Rather, it relies on many ethnographic studies of crimes of domination that may not seem very criminological. My method is induction from deeply disparate ethnographic sources on a long history of cases of some of the dirtiest polluters, dirty money banks, state murder, nuclear safety offenders, bribery, antitrust, organised crime, armed insurgencies, state military criminals, corporate crime in the pharmaceutical industry, securities fraud, tax fraud, child abuse across diverse religious organisations and indigenous communities, and the self-incapacitation of family violence by families. We start by considering the incapacitation of the safety crimes of airlines and pilots, hospitals, nursing homes and doctors.

The sweep through many specific case studies may be tedious to those with a quantitative bent, so please skip over those of lesser interest to you. Just as meta-analysis is important to quantitative inference, so is the breadth of ethnographic referents for inductive inference imperative to ethnographic macrocriminology. This is especially true for discovering different limitations of incapacitation in different applications of the concept. One aim is case study dot points that create a pointillist portrait of crime across a broad canvas of the planet. This is particularly so for this chapter because the potency of the inference is grounded in the sheer diversity, the strange unfamiliarity, yet the criminal seriousness of the archipelago of cases that underwrites the theory. A big policy inference is that restorative justice can deploy self-incapacitation to prevent banks, economies and environments from collapsing. A policy inference of interest to mainstream criminologists is that these insights can then be applied to restorative self-incapacitation of bread-and-butter youth offending. This is an essence of the conclusions of this chapter that move from the macro back to the micro.

Incapacitation is generally understood in a broad way in criminology as constraining the capacity of an individual to commit crime. The word 'depriving' the offender of the capacity to commit crime is sometimes used. The constraining conception is better because murderers still commit murder in prison, rapists still rape and thieves steal things from others while inside prison, so incapacitation only constrains the capacity to commit these crimes, as opposed to depriving the offender of that capacity. Far from incapacitating drug crime, today's prisons capacitate it; so many prisoners who enter institutions without a drug habit leave them as addicts.

In this chapter, I go just a little broader by defining incapacitation as constraining the capacity of individuals and organisations to commit crime. The tweak is important because much of my focus is on incapacitating organisations. If we wish to incapacitate drug crime in prisons, for example, the key imperative is to use prisons less and incapacitate prison administrations from allowing their employees to take bribes and import drugs into prisons.

While broad in conception, in practice, the discussion of incapacitation in criminology is obsessed with imprisonment of individuals. Execution as a form of incapacitation is usually discussed in the introduction to textbook discussions of incapacitation along with cutting off the hands of

thieves, handcuffs, the stocks and castration of sex offenders as instances of the doctrine from other places and times. Criminological practice has always tended to narrow incapacitation to implementation with extreme punitiveness and physicality. Is it not incapacitation when we ground our child because they have been consuming illicit drugs if the confinement cuts them off from their suppliers and their community of users? This certainly fits the definitions of incapacitation used by most criminologists, and by me.

Then it becomes reasonable to ask whether there is really any point to the concept of incapacitation in criminological theory. Perhaps not, because, broadly conceived, incapacitation is hard to distinguish from the blocking of illegitimate opportunities, as discussed in Chapter 6.¹ This might not matter greatly if what we are concerned about are the practical implications of the ideas. The important thing about this chapter is the idea of enforced self-incapacitation as a strategy for reducing crime and protecting freedom. If critics like that idea but want to call it enforced self-reduction of illegitimate opportunities, that's fine.

One reason incapacitation continues to do useful work for responsive regulatory theorists is that what we want to say theoretically is that while deterrence cannot do the work that many judges and prosecutors would like it to (Chapter 9), incapacitation is a much more useful doctrine of criminal law jurisprudence. It is just that judges, lawmakers and the entire institutional infrastructure of justice backed the wrong institution of incapacitation when they built archipelagos of prisons.

1 Prominent Australian strategic thinkers sometimes make a distinction between containment and 'constraint' (Varghese 2020). The genealogy of containment begins with US diplomat George F. Kennan's influential approach to containment of the Soviet Union and communism. This was the dominant, and ultimately successful, doctrine of a succession of US presidents during the Cold War. Constraint but not containment is how some Australian diplomatic leaders want to interact with China today. They do not see containment of China as being in the interests of the world economy, of ecocide prevention or of a possible future transition to democracy in China. They believe in principled engagement with China, but they do want to constrain it from dominating the Indo-Pacific region. The West wants a regional balance of power with capacity to push back against Chinese demands that weaker states submit to China's will. I do not see great theoretical value in separating incapacitation into containment and constraint, partly because deterrence and engagement are involved in both. Containment of the Soviet Union worked in halting the spread of its domination and worked in ultimately contributing to a transition to democracy in Russia, but it worked only because it was deployed in combination with engagement, especially during Ronald Reagan's tenure, and earlier, as the nuclear nonproliferation regime was developed collaboratively. This is consistent with the theoretical discussion of regulatory pyramids in Chapter 9 that says, as we escalate from deterrence to incapacitation, at every stage engagement is critical.

The macrocriminological project of this chapter is to take the standard conception seriously in the broad sense in which it was drafted. So, we define our key concepts as:

- Incapacitation is an order to constrain the capacity of an individual or an organisation to commit crime.
- Self-incapacitation occurs when an individual or an organisation voluntarily chooses to constrain their own capacity to commit crime. A seven-year-old who agrees to confine himself to his room when he has been hitting his sister engages in self-incapacitation, as does his father if he agrees to move out of the house because he has been hitting his partner.
- Enforced self-incapacitation occurs when the state requires an individual or an organisation to choose between self-incapacitation and escalated state sanctions. The state then sanctions noncompliance with self-incapacitation agreements that have the force of state law.

Chapter 9 concluded that the deterrence benefits of putting an extra person in prison, or even a lot of them, are modest. This chapter argues that incapacitation should be the main reason we strip citizens of their freedom by placing them in prison. Nevertheless, by the lights of republican theory, judges should rarely do so (Braithwaite and Pettit 1990). From the republican viewpoint, prison is for serial rapists, serial killers and serial paedophiles; it is for people who, having attempted to kill someone, are saying: 'I will get you next time.' Prison is for serial domestic violence offenders who are awaiting their rehabilitation and who are unsafe to rehabilitate in the community. Even though rehabilitation and incapacitation in the community will be more effective for mobilising restorative capital in most cases, and therefore better for their families, in small numbers of domestic violence cases, prison becomes, at least for a time, the best way to prevent domination.

Even though republican criminologists see incapacitation as the most common justification for imprisonment, they do not count imprisonment among the more important institutions for the prevention of crime. The previous chapter showed why republicans want to see most of the people currently in the prisons of western societies—even in societies with the lowest imprisonment rates—released to the care and reform that recovery capital and restorative capital can deliver in the community. At the individual level, republicans see crime prevention and rehabilitation as doctrines that do much more work than incapacitation. We saw in the

previous chapter that one reason the republican criminologist is interested in restorative justice as a superior delivery vehicle for rehabilitation and prevention is that, paradoxically, restorative justice might increase deterrence more than punitive justice—because restorative justice sharpens deterrence, while overuse of imprisonment blunts it. In extremis, it has this effect by so imprisoning people that they are reluctant to face the world of freedom. Another reason is that restorative justice might deliver superior incapacitation in the community. For example, a vigilant family might be more effective at incapacitating drug abuse than a vigilant prison officer. That is a big theme of this chapter.

The chapter moves decisively from how to respond to an individual to a macrocriminological frame. In that move, it argues that incapacitation proves a more powerful tool than deterrence. The chapter also argues that, through a macro lens, incapacitation does more macro crime-prevention work proactively than rehabilitation can do reactively. Experience with the incapacitation of organisations is the key that unlocks an understanding of the broader uses of incapacitation in criminology. First, the chapter advances macrocriminological strategies that might have prevented the Global Financial Crisis of 2008, building up to that by showing how incapacitation implausibly made it safer to get from A to B by flying than by travelling on the ground (with mining and nuclear power being other important examples). Then it argues that these strategies are based on a synergy between state incapacitation and the self-incapacitation of criminal organisations. The limits of corporate self-incapacitation and the dangers of ‘rituals of comfort’ (Power 1997) are then considered, as well as responsive regulatory remedies to this problem. A revision is proposed to the conventional responsive regulatory pyramid whereby self-incapacitation comes lower in the pyramid than deterrence, with deterrence then being followed at the highest level of the pyramid by state incapacitation. This a major revision to all previously published responsive regulatory theory. War crimes are then considered as preventable by self-incapacitation catalysed by networked responsive regulation of war crime.

Finally, the chapter returns to individual street crime and the disorganised or semi-organised crime of local gangs. This discussion involves some minor reconceptualisation of the reflections on restorative justice in the previous chapter by applying to it the major rethink of incapacitation theory in this chapter. The chapter reconceptualises Operation Ceasefire as a germinal innovation in the control of gun violence that

is an accomplishment of self-incapacitation. All gun surrenders in crime control and peacekeeping and the nuclear nonproliferation regime are also examples of self-incapacitation.

The focus of the chapter can be well illustrated by policy choices about the location of gambling machines in areas with widespread poverty. There are competing views, but this can be viewed as a market in vice that increases crime, suicide and poverty in Australia, which has the highest level of use of gambling machines in the world.² The ways to tackle this problem as a market in vice are about incapacitation. We can quite significantly incapacitate this sector of the gambling market by withdrawing all licences for gambling machines in working-class communities. Or, we can incapacitate with more moderation and freedom of choice. As state governments in Australia do, there can be campaigns for people suffering a gambling addiction to self-register to be prohibited access to the gambling areas of licensed premises. In turn, it becomes an offence for the gambling provider to fail to self-incapacitate the market in vice in this respect. That is, they can be prosecuted if they fail to prohibit entry to a person who has registered to exclude themselves from their local gambling den. Debates swirl in Australia about whether families whose incomes are being spent by the addicted gambler should be able to apply for exclusion, perhaps after a family group conference, and whether access to gambling areas should require the kind of smartphone technologies used for access to bars during the Covid-19 epidemic. For this market in vice, incapacitation by the state is one option; layering of individual self-incapacitation, corporate self-incapacitation and incapacitation enforced by the state is another.

Self-incapacitation for airline safety, medical malpractice and street crime

Most readers have had painful experiences of airline self-incapacitation. We sit on the aircraft ready to depart. The captain announces an obscure safety imperfection. We stream off as the captain calls in engineers to check if this is a false alarm. Sometimes we experience a shorter delay

2 Non-Australians find it hard to believe that the average Australian adult spends US\$9,200 during one year (2017–18 data) on gambling, most of it in gambling machines.

because a passenger's luggage has been loaded, but they have not occupied their seat. Even in this circumstance, we might miss a connecting flight, as we wait for the luggage to be removed.

No regulator has ordered the captain or the engineer to make these decisions that frustrate us but keep us safe. Informed by the self-incapacitation obligations of air safety law, the airline voluntarily decides to abort the flight. Such self-incapacitation is fundamental to understanding why airlines have been so successful in saving lives. Flight moved from being an exceptionally dangerous form of travel in the early and middle decades of the twentieth century to become the safest form of travel—safer than any mode of travelling across the ground or the sea—by the late decades of the twentieth century. This is surprising given the larger number of things that can go wrong and how much more technically demanding it is to travel through the air than across water or land. The safety gap is not small. Driving a car for more than 400 km or a motorbike for 10 km is more dangerous than flying a plane for 10,000 km (Vally 2017).

This is an accomplishment of a regulatory system that refrained from punishing safety breaches by pilots, engineers or air traffic controllers, but is punitive towards cover-ups—particularly the cover-up of near misses. It is important here to note the pivotal role that minimally sufficient deterrence plays in motivating airline self-incapacitation. It is critical to build an airline safety culture of engineering and pilot professionalism such that if a flight gets away with ignoring a safety alert, or if the flight gets away with a separation error (getting too close to another aircraft), and this is covered up, the whistle is blown. Then those who participate in the cover-up are incapacitated by ejection from the industry. Therefore, a related virtue of air safety systems are the self-incapacitating qualities of airlines that are triggered by the voluntary decisions of highly professional staff. Self-incapacitation might be the main driver of safety, but only because of the way it is responsively bundled with deterrence, professionalism and social rewarding of whistleblowers.

Braithwaite (2017b) argued that civil aviation regulation responded more effectively to prevent hijacking following the 11 September 2001 attacks on New York and Washington, DC, than other regulators with responsibility for terrorism prevention. This was a replay of air safety regulation effectiveness through electronic scanning that ended the 1970s epidemic of airline hijacking.

The conclusion of many evidence-based health system designers is that one reason progress in air safety in the twentieth century was even more remarkable than progress in health care was that air safety systems were even more determinedly committed to correcting mistakes, as opposed to punishing them (Wilf-Miron et al. 2003). When a pilot does something wrong that causes a near miss or a separation error, in general, there are no sanctions for reporting this; indeed, there are professional rewards for contributing to a learning culture of air safety by confessing. Airline pilots are rewarded for triggering prevention. Cover-up, in contrast, is punished because it prevents prevention. Cover-up is also hard to do because of the ethic colleagues have of exposing error to analysis.

Healthcare collegiality has learnt from airlines to become more committed to open analysis of poor-quality diagnosis and treatment, especially when there are no consequences visible enough to threaten litigation. Nevertheless, the commitment to error reporting and analysis continues to be more total and more rigorous with air safety than with health. The cover-up of medical error remains endemic on the part of physicians and other professionals who fear acknowledging and apologising for errors that could threaten their licence or reputation. Yet a sea change is occurring in western health-quality institutions because of the empirical evidence that acknowledgement and apology for medical error do more to discourage litigation than to encourage it, reducing litigation costs by one-third (Gallagher et al. 2003). The Australian, British and US health systems are among those that are being transformed by increasingly systematic approaches to recording adverse incidents, quantitatively analysing patterns in such incidents, crafting interventions to attack the risks revealed and researching the impact of those interventions. The momentum in health care is shifting from a blame culture to a learning culture. If my analysis is right, it will assist health systems to build on the formidable record they already have of evidence-based reduction of risk (Braithwaite et al. 2007).

The trouble with criminal justice in this analysis of how health systems have learned from air safety systems is that justice systems encourage cultures of denial. The preventive imperative to tackle an underlying problem of substance abuse is not grasped because offenders and their family and friends cover up the crime and the substance addiction that drives it. The anger-management problem or the patriarchal domination that drives a pattern of violence is a truth covered up instead of discussed and confronted.

My conjecture is that we can arrange these institutions along a continuum according to how committed they are to eliminating the fear of punishment that induces cover-up. Air safety administration is the most committed to learning through errors and non-punitiveness; second is health administration and the last is criminal justice with its commitment to punitiveness. The further conjecture is that this is a reason air safety administration has made the greatest strides in safety improvement, followed by health administration and criminal justice administration in the rear, with the most dismal record of accomplishment.

Christopher Hodges (2015: 326–29) considers another possible reason for the remarkable effectiveness of British civil aviation in making air travel so safe. This is that it has been so responsive. He refers to the pyramid model from the flexible enforcement policy of the British Civil Aviation Authority (Figure 10.1).

Figure 10.1 British Civil Aviation Authority responsive regulatory pyramid

Source: Hodges (2015: 326–29).

Figure 10.2 British Civil Aviation Authority responsive 'Spectrum of Enforcement'

Source: Hodges (2015: 326–29).

In addition, the British Civil Aviation Authority used the interesting diagram in Figure 10.2 for its rather responsive 'Spectrum of Enforcement'.

Hence, it is possible that civil aviation regulators, even in the poorest countries,³ are comparatively effective in securing our safety not only because they are less captured than other kinds of regulators like financial regulators, but also because they are more responsive than financial regulators. They do use punishment, even the corporate capital punishment of licence revocation, when they must, but as a last resort. And they tend to be careful to reward confession of error, while being sharp in punishing the cover-up of recklessness. This seems plausible also because of the evidence that when financial regulators do become more responsive, they also become more effective in controlling financial crime (Choi et al. 2016; Braithwaite 2005b, 2008).

³ There are developing countries in which we are a hundred times more likely to be murdered than in some western countries and more than 10 times more likely to suffer sepsis if we are hospitalised. But there are no poor countries where we are 10 times more likely to die in an aircraft accident than in developed economies.

Self-incapacitation in coalmines, nuclear plants and Operation Ceasefire

Coalmines counted among the most-deadly workplaces in the history of capitalism. At the beginning of the twentieth century in both the United Kingdom and the United States, there were single years when 1,000 coalminers lost their lives to accidents—often big ones in which methane gas blew up an entire mine (Braithwaite 1985). Even more lives were lost to the occupational health disaster of black lung disease. By the later decades of the twentieth century, the US and UK were no longer leading coal exporters; Australia was by far the largest coal exporter. It produces far more coal than the UK and US did in those years when they were killing 1,000 coalminers in one year of accidents and thousands more because of black lung. But after the mid-twentieth century, black lung was almost eliminated as a cause of death among Australian coalminers. For many years in the twenty-first century in Australia, there have been zero deaths from coalmine accidents as well.⁴ How was this accomplished?

Many of the health and safety reforms that accomplished this result were self-incapacitating. Modern mining machines vacuum up dust at the coalface where the coal is cut. The miners who operate and check the machine are seated in protected environments back from the coalface. Even so, if the geology or the poor maintenance of the mining machine is such that significant dust does escape from the coalface, dust detectors automatically shut the machine down. Miner safety from black lung was secured by this self-incapacitation technology of automated shutdown. Other self-incapacitating mechanisms are more social than technological. Since the nineteenth century in Australia, miners' unions enjoyed the right under mine safety law to elect full-time employee safety inspectors from among the miners at each mine. In Queensland, these union salaries were paid by the state. Before every shift, the miner-elected safety inspector

4 When I launched Neil Gunningham and Darren Sinclair's (2012) book on coalmine safety, I gently goaded them to be more upbeat about these long-run safety accomplishments as they pointed to so many weaknesses in contemporary Australian coalmine safety systems. Their reply was that one reason they had written the book was that the industry was becoming complacent about these safety improvements, the regulatory pressure was relaxing as a result and they believed this created a risk of older health and safety concerns returning. Sure enough, in the years immediately after the release of their book, the first major cascade of new cases of black lung disease among Australian coalminers for many decades was recorded and there were some bad fatality years in which as many as seven miners lost their lives in accidents. Gunningham and Sinclair's point proved right: when regulatory inspectors cease kicking the tyres, safety risks return.

checks the mine shaft for levels of coal dust, tests for methane in the mine and checks unsafe roof conditions. If the miner-elected safety inspector finds that the shaft fails any test, they forbid the next shift from entering. The mine owner incapacitates itself from taking any action against miners who then refuse to go in. This is another part of the self-incapacitating architecture of mine safety law. The logic is similar to the logic of air safety law that makes the pilot accountable for the lives of passengers on their flight, as opposed to some faceless bureaucrat safe at corporate headquarters. Because the captain loses their life as well if the plane goes down—just as the miner-elected safety inspectors may lose their lives if the mine explodes during their shift—the incentives for self-incapacitation are assured by this self-enforcing aspect of the regulatory architecture.

The Chernobyl incident in the Soviet Union in 1986 showed that nuclear power plant disasters are potentially far more dangerous than mine disasters, killing many thousands in that case, and potentially millions in a worst-case nuclear reactor meltdown. Luckily, Chernobyl occurred after President Mikhail Gorbachev started to open the Soviet Union to transparency and accountability. Though there were cover-ups that cost uncounted lives in the early stages of managing Chernobyl, they were less pernicious than would have happened under the domination of Gorbachev's predecessors. The openness that did ultimately prevail allowed formidable international technical assistance to pour in.

Many of the safety systems that were strengthened after the Three Mile Island disaster in the United States (in 1979) and after Chernobyl rely on the same genre of self-incapacitation logic that we saw in coalmines and air safety. 'SCRAMS'—automatic shutdowns of nuclear reactors after the reactor passes one of a number of thresholds—became more central to nuclear safety self-incapacitation. Most interestingly, SCRAMS became widely reported and an important part of the accountability architecture. In the decades immediately after Three Mile Island, SCRAMS were reduced to less than 1 per cent of what they had been in the United States and then worldwide (Braithwaite and Drahos 2000: Ch. 13). Joseph Rees (2009), a scholar in the Philip Selznick tradition of responsive and relational regulation, diagnosed the problem of the old nuclear industry as being that it put too much faith in doctrines like deterrence and a rule-bound 'autonomous law'. Rule-bound nuclear safety law meant that if the regulator saw a new problem, they wrote more rules. Because the risks were catastrophic, they were inclined to be punitive with swift and certain regulatory punishment of any infraction, however minor.

The problem this induced at the moment of crisis was that as Three Mile Island approached reactor meltdown, staff were running around covering themselves by ensuring they had complied with all of these thousands of rules instead of reflecting on the systemic wisdom they had of their nuclear safety system so they could craft a redundant strategy for trying one solution after another to steer the system to safety. Rees (2009) and the commission of inquiry into Three Mile Island became champions of shifting regulatory strategy towards taking self-regulation more seriously. This is redescribed here as a plea for enforced self-incapacitation. After lessons learned from major disasters on offshore oil rigs, the self-incapacitation learnings of Three Mile Island morphed into the 'safety case' regulatory reform movement that extended to multiple regulatory domains. For example, an oil rig would prepare a safety case based on a particularistic analysis of how the '100-year wave' in its region of the ocean was sometimes much bigger than the peak wave threat for other rigs. This demanded that it write its own distinctive set of self-regulatory rules. It would then seek the approval of the regulator for the systemic wisdom of this safety case and this set of self-regulatory rules. The operative rules would be privately written but publicly ratified. And the state could then publicly enforce them; the oil rig operator could be prosecuted criminally for failing to comply with its privately written rules.

The communitarian mechanism that Joseph Rees saw in play here was that the nuclear industry became a community of shared fate. It came to believe that if another Three Mile Island occurred, the whole industry would be shut down in the United States. Globally, after Chernobyl, the industry came to believe that another Chernobyl, and nuclear energy would end worldwide. The same German social capital and collective efficacy that delivered it a low rate of crime and a high degree of freedom post war came to the rescue of the former Soviet nuclear industry. Every nuclear power plant in the Soviet Union was twinned with the superior safety engineering team of a German nuclear plant. All manner of specialist safety staff moved back and forth between a plant in Belarus and their twin in Bavaria. This was a rather formalised collective efficacy of the community of shared fate among nuclear power producers. It worked in making the world a hundred times safer from a nuclear power disaster than it was four decades ago (Braithwaite and Drahos 2000: 297–319).

While the offshore oil and nuclear power industries saw the safety case as innovative in the 1980s and 1990s, it was actually applying old ideas from coalmine safety. Braithwaite (1982) called them enforced

self-regulation—privately written, but publicly ratified and publicly enforced rules—which became part of responsive regulation (Ayres and Braithwaite 1992). Today, enforced self-incapacitation seems more apt because self-incapacitation is the conceptual driver of the safety outcome.

Let me be less abstract about how enforced self-incapacitation has worked for more than half a century in coalmine safety law. Roof falls that kill one or two miners at a time are worldwide the major cause of modern underground mine fatalities, much more so than the methane gas explosions that were the devastating killers a century ago. The problem is that the geological conditions in the roofs of all mines are radically variable and even differ in some parts of old mines dug a century ago from those in tunnels dug into newer seams. The responsive regulatory ideal is for mines to draft their own particularistic roof-control rules, sit down with their union and their mine-level safety committee, with the coalmine safety inspectors who know that mine best and with independent engineering consultants to receive critical feedback on their draft rules. Then management, with the support of the local miners' safety committee, submits the roof-control rules for that mine to the regulator, who ratifies or strengthens them. If a state inspector subsequently detects a breach of those roof-control rules, a court can uphold a criminal prosecution even if they are rules that constrain no other mine in the country. Responsive regulation argues for this approach because it encourages collective efficacy (Sampson et al. 1997) in the cause of a locally, contextually grounded systemic wisdom that combats legal cynicism (Sampson and Bartusch 1998) about the rules. Cynicism is suppressed through the collaboration in these rules being drafted together by local miners and local managers. The rules suffer less from cynicism and less from the compliance trap (Parker 2006) because they are designed outside-in rather than written inside-out (from inside the regulator to the industry outside) (Braithwaite 2005b: 156).

Even though Operation Ceasefire (see Chapter 9) has never been theorised as enforced self-incapacitation, it can be retheorised as fertile with enforced self-incapacitation insight. Consider what happens when local gangs agree to new rules (new for them) about desisting from ever firing a gun as they go about their business. Whether it is in domestic crime control or international peacekeeping, when the police subsequently raise the bar to rules about gangs actually surrendering their weapons and attending local ritual events at which their weapons are destroyed or melted into a sculpture by a local artist, these are rules written in a process

that gave them local voice. If Operation Ceasefire builds local collective efficacy of which the gangs themselves are a part in this way, the program is more likely to have a large impact according to the theory of enforced self-incapacitation. The regulatory pyramid character of Operation Ceasefire, as discussed in Chapter 9, means that pyramidal escalation makes it rational for the gang to incapacitate itself. The police delegate this regulatory enforcement work to the gang because the state has made it rational for the gang to control its own members should some of them become trigger-happy.

Averting global financial crises by preventing crime

The next two sections develop an argument that, with the wisdom of hindsight, we can see how the crimes that fuelled major economic crises in the first decade of this century might have been prevented by enforced self-incapacitation of financial crime.

In the immediate aftermath of the Global Financial Crisis that spun out of control in 2008, Wall Street sought to persuade Main Street that the crisis was caused not by crime, but by forces that were difficult for anyone to control or even understand. Main Street never believed Wall Street's narrative. In retrospect, with the vast evidence we now have on the criminal conduct by banks and nonbank financial institutions that contributed to the crisis, we can say that Main Street had reason to reject Wall Street's narratives about the crisis. In an era of cynicism about democracy, this fact, and the surge of visible resistance to Wall Street narratives in the 'Occupy Wall Street' movement, was a credit to the American demos. This was especially so when the political elite of the Clinton–Bush–Obama eras and the regulatory elite, who did not want to be blamed for allowing a wave of macrocriminality, endorsed Wall Street's narratives. This drew countless gullible journalists and intellectuals into those elite narratives. It was a glorious democratic moment when the proletariat got it right and sophisticates like Alan Greenspan,⁵ other gurus of the Federal Reserve and

5 Greenspan was the Federal Reserve chairman from 1987 to 2006. He had been perhaps the most revered financial regulator in recent American history until the crisis. Greenspan said in 2008 that he erred in not insisting on more regulatory distrust in banks: 'I made a mistake in presuming that the self-interests of organisations, specifically banks and others, were such that they were best capable of protecting their own shareholders and their equity in the firms' (Greenspan 2008).

financial regulatory agencies, Nobel Laureate economists like Robert C. Merton and current and former presidents and prime ministers of Anglo-Celtic countries were proven wrong. Years later, Greenspan was not alone among these sophisticated commentators in admitting he had erred.

Part of the false Wall Street narrative of 2008 was: 'If you were so smart about seeing the dangers in the predatory culture of Wall Street and the City of London, why were you not predicting the crash and warning people about it in 2006 and early 2007?' We now know that there were not only many who were predicting the crash, but also many who made fortunes by acting on this prediction, as popularised in the film and book *The Big Short* (Lewis 2010). It is true that this author, like most scholars of corporate crime, did not predict that a global financial crisis would peak in 2008 to push North America and Europe into recession. Yet prediction of the precise timing and precise form of the unravelling of a financial crisis is not what corporate crime scholars are supposed to be good at.

Consider the wider question of how the best financial minds think about how to make money in markets. Warren Buffett would be a candidate for the most respected and successful long-run investor in American markets. Buffett says he is not smart enough to get the timing right to sell when the market is about to crash and buy when it is about to boom. He thinks those investors who get rich through beating the market by timing bulls and bears tend to be luckier rather than smarter than those who lose money that way. Buffett conceives of the safer path to long-run wealth accumulation as having a good analysis of why particular companies will do well in the long run. Success then lies in investing in those companies, riding out the bulls and bears, holding them for the long haul and reaping the benefits of good analysis of what will be rewarding long-term investments.

Crime is like many complex phenomena that have this quality of root causes being knowable while the timing of their effects is unknowable, even chaotic. Oncologists cannot predict when you will die of cancer. They can advise that if you do not stop doing something, cancer will be more likely to kill you. Motor mechanics cannot predict how long your car will run before a defective part causes a breakdown; they can advise that if you replace that part, it will not break down for that reason. Business regulators are like Warren Buffett, oncologists and mechanics. They are quite capable of diagnosing risks that ought to be fixed and opportunities

to strengthen systemic security that ought to be grasped. They have the tools to demand that these risks be seized and fixed. Prominent among them are the tools of enforced self-incapacitation.

The cynics challenge by asking whether they really have the tools, the competence and the political independence to pick weaknesses and fix them (or to pick strengths and expand them)? No-one says it is easy to be a mechanic, an oncologist or a regulator who gets it right. We can say, however, that competent mechanics, oncologists and financial regulators can make a huge difference to human flourishing. Their jobs are hard but far from pointless. To be effective, oncologists and regulators must be evidence-based in a way that allows them to detect snake oil. Regulators should not have accepted putting numbers into Robert C. Merton's models and receiving a good outcome as evidence that risk was being tamed just because his quantitative risk models had allowed the firm he advised, Long-Term Capital Management, to make stupendous profits during the four years before he won the Nobel Prize in Economics. The company crashed through massive losses the year after he won the prize. In addition to the Nobel Prize for those models, Merton was named Financial Engineer of the Year by the International Association of Financial Engineers in 1993. *Derivatives Strategy* magazine admitted Merton into its Derivatives Hall of Fame and *Risk* magazine to its Risk Hall of Fame. Robert C. Merton was no Warren Buffett.

What we know now about various influential quantitative risk models that legitimated short-term super-profits but endangered a long-term crash is that the regulators did not understand them, but also Wall Street CEOs did not understand them, nor did corporate crime scholars like me master them. The models read as credible legitimation for allowing the beautiful ride of super-profits to continue. They did not pass the test of being evidence-based. They were mathematical models premised on the assumption that behaviour in markets is economically rational. Yet one of the learnings from Keynes' (2018) general theory, as advanced before and after the Great Depression, was that markets are often driven less by rational calculation than by following the herd, by the 'animal spirits' that drive the emotions of charging bulls and retreating bears. In such a complex world, why would we not rid ourselves of regulators who trusted models that are simply untested theories—indeed, theories based on math they did not comprehend and math that does not capture rising confidence, tipping points where confidence crashes and cascades downwards along undulating nonlinear paths? We can and must replace

them with regulators who, like good auto mechanics and alert consumers, kick the tyres. We need banking regulators who refuse to renew the licence of a bank that cannot provide evidence for the empirical validity of a risk model it depends on to place bets with other people's money, regulators who will not renew the licence of a bank with a risk analysis they do not understand. In the theoretical language of criminology, the good regulator will incapacitate a bank through its licensing power until the bank explains how its risk analysis works and provides the evidence for why its claims are right.

Poland was one state that did not have to recapitalise any of its banks, and was the only country in Europe that avoided recession in every year of the Global Financial Crisis: its GDP grew by 6.8 per cent in 2007, 4.8 per cent in 2008, 1.7 per cent in 2009, 3.8 per cent in 2010 and 4.4 per cent in 2011 (Pleitgen and Davies 2010; Strauss-Kahn 2010). There were various factors in this remarkable performance. One was that the prudential regulators in Poland were humble in recognising that they did not understand certain complex financial products to which fellow European banks in countries like the United Kingdom, Ireland, Iceland and Spain were becoming heavily exposed. So, they simply refused to allow their banks to become exposed to them. Dr Stanisław Kluza, then chairman of the Polish Financial Supervision Authority, had some cynicism about whether risk modelling based on assumptions that markets would be driven by rational action could provide assurance because: 'No country can feel safe when a crisis hits, regardless of the fundamentals. Emotions determine investors' behavior.'⁶ Rather, what was needed was 'conservative prudential supervision performed by an integrated and independent authority'. At the top of Dr Kluza's list of the most important anti-crisis measures taken by the Polish authorities during the crisis were: prudential regulation of the Polish Financial Supervision Authority and tight cooperation of the supervisory authority with banks and their foreign owners. Kluza's learning for middling economies is: 'In a crisis, you need to rely on yourself.' Regulatory self-sufficiency means the 'quality of *supervision* at the *local* level determines the stability of the markets' (emphasis in the original). Dr Kluza advocated the old-fashioned principle of street-level responsiveness that is a recurrent theme of this book.

6 All quotes in this paragraph from Dr Kluza were sourced from a World Bank presentation, accessed from: siteresources.worldbank.org/FINANCIALSECTOR/Resources/Day1KluzaFinancialCrisisPanelPoland.pdf [page discontinued].

Polish financial regulators were without hubris; they adopted the view that theirs was not a financially sophisticated economy and their regulatory capacities were less developed than in big economies.⁷ While it possibly made sense in the United Kingdom and the United States for regulators to license banks that traded in complex derivatives, it was more prudent for Poland to tell its banks that it would not renew their licences if they traded significantly in complex financial products that their regulators did not understand. These decisions left Poland's banks less touched by derivatives tainted with sliced and diced US subprime mortgages than those in the rest of Europe.

Many individual banks in Canada, Australia and Asia (where so many had been burnt by the 1998 Asian Financial Crisis) had a humility similar to the Polish regulators. Mark Carney, the Governor of the Bank of Canada during a crisis that Canada weathered so much better than its nearest neighbours, proved himself in his subsequent tenure until 2020 as Governor of the Bank of England to be as sophisticated as a central banker can be, yet still evinced that Polish-style humility during the crisis:

Something I learned early on in my career in finance from a gentleman named Bob Hurst, who was then one of the partners at Goldman Sachs. Bob's rule was if something doesn't make sense, it doesn't make sense. Beneath the sort of Popeye-esque tautology was real wisdom. His point was that if someone explains something to you in finance, such as a flashy new product or why a company's valuation should be orders of magnitude higher than others in their sector and it doesn't make sense, ask the person to repeat the rationale, and if that response still doesn't make sense, you should run. (Carney 2020)

In the case of Australia, there was a high level of securitisation of housing loans by the big banks, but these were overwhelmingly Australian loans that were well-understood and prudent by world standards in 2008. In one critical precursor of the Global Financial Crisis, BNP Paribas froze

7 The Polish financial regulators managed risks instead of shifting them. Godziszewski and Kruska (2013) point out that, unlike more sophisticated European banking systems, Polish banks were required to verify the incomes of those taking out loans. Godziszewski and Kruska (2013: 33) note that '[d]espite weak labour market conditions, the number of non-performing loans did not rise sharply' during and after the crisis, and Polish banks had 'virtually no OTC [over-the-counter] derivatives'. Polish banks remained well capitalised during the crisis; none failed or required recapitalisation using public funds.

three of its funds, indicating it had no way of valuing the complex assets inside them known as collateralised debt obligations (CDOs) or packages of subprime loans.

Even at Lehman Brothers in the 2000s, there were a few prominent humble senior bankers who asserted the firm was becoming too highly leveraged into too many derivatives that were not sufficiently transparent in their relationship to complex risks in real estate markets. These people were marginalised, with their views seen as a danger to short-run profits and bonuses; in some instances, they left the organisation because no-one was listening to their pleas to temper the hubris (Phillips 2018). The most sophisticated, aggressive, bonus-driven and liberal financial markets in New York and London are the ones that are most difficult to temper. They pose the deepest global risks. Yet even within the United States there are more and less aggressive and more and less innovative and risk-taking institutions. In tempering banking power, one size cannot fit all. Responsive regulatory theory suggests that a relational species of regulation with a significant portion of restorative justice and enforced self-incapacitation can be helpful for strengthening the hand of the temperate, ethical insiders who always exist in corporate life, before they are pushed towards the door.

The crisis certainly refined our understanding of what was broken and needed a regulatory fix. But the basics of that understanding were already in place from previous crises such as the Savings and Loans scandal of the 1980s in the United States, the ‘greed is good’ Wall Street crash of 1987, the Asian Financial Crisis in the 1990s, the dotcom (tech-wreck) crash of Enron, WorldCom and Arthur Andersen in the United States and of Australia’s biggest insurer, HIH, and Australian telecommunications corporation One.Tel, also in 2001. Indeed, learnings about the need for financial regulators to tame the ‘animal spirits’ as well as the rationality of markets had long been with us.

Corporate crime scholars have important professional responsibilities in macrocriminology and as public intellectuals. As one of its practitioners, I use myself as an example of failing to meet our collective responsibilities in the mid-2000s in relation to the major contribution of derivatives to the Global Financial Crisis. The US Senate’s Levin–Coburn Report did a reasonable job of summarising the importance of derivatives in a cluster of causes. It concluded that the crisis was the result of ‘high risk, complex financial products; undisclosed conflicts of interest; the failure

of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street' (Permanent Subcommittee on Investigations 2011: 1).

Before the Global Financial Crisis arrived, I finished writing a book that was released at the end of 2007 called *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Braithwaite 2008). As with this volume, I had been publishing working papers from which *Regulatory Capitalism* was compiled for a decade. There was no great originality in the way the book used the work of Frank Partnoy (1997, 2000, 2003) and other scholars to lament the way derivatives were being used to financially engineer firms around all manner of regulatory restraints.

I discussed this aspect of the book at a meeting of the Law and Society Association in Berlin in May 2007. This was nine months before the British Government announced its 'temporary' nationalisation of Northern Rock and 16 months before Lehman Brothers filed for bankruptcy. The session was well attended by many of the brightest and best regulatory scholars. There were great social scientists and great lawyers in the audience who were not regulatory scholars. They are not named for fear of implying that they share my culpability for failing to make a better contribution to crisis prevention. I do name the distinguished Australian securities lawyer Professor Peta Spender. She asked the right question and I gave the wrong answer. Peta responded to the presentation by saying that financial regulatory experts mostly agreed with me that unregulated derivatives were a desperate systemic risk. The challenge was how to write rules that could effectively regulate something whose reason for existence was to cleverly bypass rules. So far, this was proving beyond us. So, inquired Peta Spender, what are your thoughts on how we would rise to that challenge? My weak answer was that however difficult it is to meet the challenge of regulating derivatives that we do not fully understand, we must do so. Unfortunately, I was not smart enough, certainly not as smart as Peta Spender, in her capacity to contribute to that. We needed to bring together those with the best regulatory minds who have the best understanding of the intricacies of derivatives to do so. What was wrong with that answer?

The problem was I failed to add: 'And until we succeed in rising to that regulatory drafting challenge, where regulators do not understand the derivatives trading risks of a particular financial institution, states should decline to renew the licence of that institution.' That was the critical thing that regulators in the United States, the United Kingdom, Ireland and other countries failed to do. And it was what regulators in Poland

did do. There would have been no brilliant insight in adding that to my answer because, as I spoke, prudential regulators in many countries such as Poland were indeed saying to their banks:

You say the most sophisticated regulators in New York and London are allowing financial institutions to trade in these kinds of complex financial products. I say I may not be as smart as them because I don't understand the systemic risks such trading might pose to our banks. So, until you can explain to me in ways I can understand that they do not pose systemic risks, I am not going to allow you to trade in them (or I am going to suspend a decision to renew your banking licence until I can see you have a plan to actively reduce your exposure to them).

This is no different from what we regulatory scholars expect of an occupational health and safety regulator responsible for the safety of workers on an offshore oil rig:

I will not allow production to proceed until you can provide me with a safety case that explains the oceanographic evidence of large-wave risks in this part of the ocean in ways I can understand. Prove to me why this rig can survive the 100-year wave.

Not only were there regulators in many countries like Poland that did not have any banks collapse during the Global Financial Crisis who messaged in this way; but also, worldwide, there were CEOs of many financial institutions who were as close to New York as Toronto and who said to their traders that they were not going to allow trading in major ways in derivatives whose risks they could not comprehend.

My responsibility as a regulatory scholar in the historical moment of the mid-2000s should likewise have been to consistently message in that way. I should never have missed the opportunity to say that the job of the state is to only renew banking licences when its regulators understand the risks its banks are running with the economic security of their nation. I was persistently failing to do that—and not just in Berlin in May 2007. When I later shared this self-criticism with two distinguished regulatory scholars who had been in the audience in Berlin, using the example of the virtuous incapacitation of reckless derivatives trading by Polish banking regulators, one answered in the following way. Yes, the Polish banking regulators did the right things by their economy and the British regulators did the wrong thing. But the British regulators had to survive in an environment in which their political leaders expected 'light-touch' regulation that was

making the financial sector the lifeblood of the British economy. Banks were not the lifeblood of the Polish economy in quite that way. My answer was bank profits are still far from unimportant to the Polish economy, and therefore to Polish politics. But more fundamentally, a criticism of that response is that it allows us in the regulatory scholarly community to excuse something we should not excuse.

In any economy, a prudential regulator's job is to assess prudential risks. If they felt political pressures put them in a position with no choice but to sanction risks they did not understand, they should have resigned for that reason, putting the pressure back on the politicians. Regulators move on quietly more frequently than people think because they feel they are being put under commercial pressures mediated through their political masters. Such resignations help if rumours spread about the reasons for their quiet resignations. It helps more when they make public that they are resigning because they are not able to refuse to renew licences to financial institutions that are taking risks the regulator cannot be assured are prudent. Our role as regulatory scholars is to help create a climate of conversation around systemic risks that pressure regulators in an untenable political position to resign if they cannot do their job, and to give that political untenability as the reason. After all, most top financial regulators can make more money and enjoy a less stressful life by resigning. In the case of the Global Financial Crisis, the regulatory scholarly community was too sympathetic to the difficult position of the regulators during the era of 'light touch', both prospectively and retrospectively.

And we did not do enough to honour the calls made by the humbler Polish regulators. What was the regulatory instrument deployed by the Polish regulators? It was incapacitation. The Polish banks were incapacitated from reckless derivatives trading. And at the firm level, all the major Australian banks and most banks from Canada and many countries across Asia incapacitated themselves (self-incapacitation) from reckless derivatives trading.

Most of the world's financial institutions proved sufficiently prudent to survive the great shock that washed across from the United States in 2008, as did most financial institutions within the United States itself. While financial institutions and regulators alike around the world learnt that they needed deeper capital reserves for the future than in the past, most did have adequate reserves to survive the years immediately after 2007, though in some cases that was only because their state treasuries stood

behind them as banks that were ‘too big to fail’. Most CEOs of financial institutions had sufficiently constrained their traders from exposing the firm to risks they did not understand from complex financial products. In many countries, this CEO prudence was nurtured by insistence on prudence from regulators who demanded from those firms risk analyses that the regulator could understand. The next section argues that this was enforced self-incapacitation of financial fraud.

If we look at a map of the countries around the world that entered the deepest recession in 2009 as a result of the crisis, we see that while almost every economy in North America and Europe (Poland being the only significant exception) was in recession in 2009, most economies everywhere else in the world were not, including financially dominant economies like China and financially sophisticated economies like Japan, South Korea and Australia.⁸ This included the BRICS (Brazil, Russia, India, China and South Africa) economies and other major G20 economies. These economies—particularly but not only China—kept the world economy pumping and prevented it from plumbing the depths of the 1930s depression. There were only 60 notable financial institutions around the world that failed during the crisis, the overwhelming majority of them from the Anglo economies, where the worst bonus culture of short-termism had taken hold, and only one of these was in Asia, the Philippine American Life and General Insurance Company.

My conclusion here is that the preventability of catastrophic financial crime through enforced self-incapacitation delivered by markets in banking virtue was everywhere to be seen. North Atlantic criminologists were blind to this and learnt no lessons from it.

A second self-incapacitation lesson is about seeing the glass half-full in crisis prevention. As I write, the Covid crisis rages. In Australia, no fewer than 80 per cent of Covid deaths in 2020 have occurred in aged care facilities. Yet 95 per cent of aged care homes have had zero infections among their high-vulnerability residents. All the expert regulatory diagnoses have been that what the 95 per cent were doing right was investing in infection-control protocols and infection-control professionalism. The protocols were forms of self-incapacitation, which included physical forms of incapacitating contact with Covid through

8 ‘Financial Crisis of 2007–2008.’ *Wikipedia*. Available from: en.wikipedia.org/wiki/Financial_crisis_of_2007%E2%80%932008#/media/File:GDP_Real_Growth.svg.

masks, gowns and channelling movement around the institution to accomplish segregation. It was not rocket science; nor was it state incapacitation because, shockingly, many inspectors remained at home because their agency decided it was too hazardous for them to venture into aged care facilities! A Royal Commission into Aged Care concluded that, what was needed for the lawbreaking 5 per cent who were failing to meet their regulatory obligations to mobilise their infection-control committee during an epidemic was an inspector reminding them of their legal obligations under the infection-control standards for aged care facilities. Regulation and self-incapacitation may matter more in contexts that permit reframing the preventive behaviour of banks and aged care facilities as glasses 95 per cent full, rather than just half-full.

Incapacitation lessons from financial crises

The Global Financial Crisis seemed at the time to be an unmitigated global catastrophe, but in fact it was contained because Asia in particular had learned self-incapacitation lessons from the Asian Financial Crisis a decade earlier. Economies like Indonesia and Australia that had some problems with collapsing banks and insurers in the late twentieth century have had no bankruptcies of major financial institutions during the past two decades (Braithwaite 2019). Even within North America and Europe, the glass was far more than half-full because most financial institutions remained solvent. In a comparison of which banks around the world did and did not face solvency problems during the crisis, Beltratti and Stulz (2009: 1) concluded:

Banks in countries with stricter capital requirement regulations and with more independent supervisors performed better ... After accounting for country fixed effects, banks with more loans and more liquid assets performed better during the month following the Lehman bankruptcy, and so did banks from countries with stronger capital supervision and more restrictions on bank activities.

Their results, however, did find that bank-level variables explained more variance than state-level regulatory variables, though not in the way predicted by the conventional wisdom of 'shareholder-friendly' governance. Beltratti and Stulz's (2009) results from 231 financial institutions with assets of more than US\$10 billion in 2006 do not support the conclusion

that financial institutions with ‘good governance’—in the neoliberal sense of institutionalised responsiveness to shareholders—performed better. Quite the reverse:

An OECD report argues that ‘the financial crisis can be to an important extent attributed to failures and weaknesses in corporate governance arrangements’ (Kirkpatrick 2008). We find no evidence supportive of such a statement in our data. There is no evidence that banks with better governance, when governance is measured with data used in the well-known Corporate Governance Quotient (CGQ score) perform better during the crisis. Strikingly, banks with more pro-shareholder boards performed worse during the crisis. Such a result does not mean that good governance is bad. Rather, it is consistent with the view that banks that were pushed by their boards to maximize shareholder wealth before the crisis took risks that were understood to create shareholder wealth, but were costly *ex post* because of outcomes that were not expected when the risks were taken. (Beltratti and Stulz 2009: 2–3)

Responsiveness to shareholder and trader short-termism turned out to be a market in vice (Chapter 7). Good regulators steered this to a market in virtue through measures that relied on incapacitation. That market in virtue was responsive to long-term shareholder interests and to taming the systemic risks of the national economic system that supplied the oxygen without which their bank could not keep breathing. Good regulators incapacitated their banks from exposure to complex financial products whose risks they did not understand. Good bank CEOs self-incapacitated their banks and their traders from exposure to derivatives vulnerable to bad American housing loans.⁹ Beltratti and Stulz’s (2009) research suggests that one reason for such effective private self-incapacitation was the public incapacitation of banks by regulators.

9 Commonwealth Bank of Australia Director Harrison Young expressed caution about the excessive reliance on poorly understood risk models that fuelled the Global Financial Crisis as follows: ‘A potential message people might take from the stream of scholarly papers flowing out of Basel is that a competent bank can *measure* the risk the enterprise as a whole is taking. In my view, it cannot. If you are looking at a single line of business, and you have good data, it is possible to build a model that tells you the probability distribution of outcomes. But risks interact. Credit losses kill a bank because of their impact on liquidity. Operational failures damage reputation. Building a model that accurately reflects the probability of such chain reactions among multiple businesses is impossible. To be clear, banks can and do, through an *ad hoc* mixture of quantitative analysis and common sense, get their arms around the risks they are running. Stress tests and scenario exercises help a board and senior management explore hidden linkages and transmission mechanisms. Most of all, they are a vehicle for discussion, which is the best way to pool experience and refine judgment.’ (Accessed from: www.ethics.org.au/on-ethics/our-articles/may-2015/this-com-bank-board-member-thinks-all-aussie-banks [page discontinued]).

Years earlier, American regulators should have done a better job of managing the expansion of residential housing credit to avert a mid-decade real estate bubble. That macroeconomic mistake having been made, its consequences need not have been so disastrous had the easy credit been withheld from borrowers who made fraudulent claims about their ability to repay loans. Citigroup's Richard M. Bowen testified before the US Financial Crisis Inquiry Commission that, by 2006, 60 per cent of mortgages purchased by Citibank from 1,600 different mortgage companies were 'defective' (not underwritten to policy or did not contain all policy-required documents) and, by 2007, 'defective mortgages (from mortgage originators contractually bound to perform underwriting to Citi's standards) increased ... to over 80% of production' (FCIC 2010). In its testimony to the same commission, Clayton Holdings—the largest residential loan due diligence and securitisation surveillance company in the United States and Europe—testified that its review of more than 900,000 mortgages issued from January 2006 to June 2007 found that only 54 per cent of the loans met their originators' underwriting standards. Clayton's analysis further showed that 39 per cent of the loans that did not meet *any* issuer's minimal underwriting standards were subsequently securitised and sold to investors (Morgenson 2010; The New York Times 2010).

Knowledge of this epidemic of dud loans was not limited to corporate insiders like Clayton and Citibank. A 2006 report by the US federal Financial Crimes Enforcement Network showed a 1,411 per cent increase in mortgage-related suspicious activity reports between 1997 and 2005, 66 per cent of them involving material misrepresentation or false documents. There was a further 44 per cent increase between 2005 and 2006 (Nguyen and Pontell 2010). BasePoint Analytics' (2007) work on 3 million loans suggested 70 per cent of early payment defaults had fraudulent misrepresentations on their original loan applications. The fraudulent loans were five times as likely to go into default (Nguyen and Pontell 2010). There were public warnings from the FBI starting in 2004 that they were seeing a spike in mortgage fraud (Black 2005).

As with the reporting by FBI agents of the suspicious behaviour of Al-Qaeda operatives who wanted to learn how to fly a plane but not how to land it, local FBI agents did their job in detecting the tidal wave of mortgage fraud that was the proximate cause of the Global Financial Crisis. In both cases, the FBI as an institution failed in its macrocriminological imagination. Instead of seeing the suspicious flight training as an opportunity to prevent the macro-disaster of the 9/11 attacks, FBI leaders constrained

by a micro-imagination could not see how this intelligence could lead to the conviction of individuals. Their regulatory imagination in 2001 was focused on individual deterrence rather than preventive incapacitation of Al-Qaeda as a criminal organisation. In 2004, their intelligence on 'liar loans' in which mortgage brokers and local banks encouraged people to misrepresent their financial circumstances was read as evidence of minor criminality for which conviction would be difficult because the borrower of fraudulent loans could blame the bank for the misrepresentations. The bank could blame the borrower or broker.

With the onset of America's two greatest crises of the twenty-first century before Covid-19, the FBI should have connected the dots of systemic risk to physical security (with 9/11) and financial security (with the mortgage fraud epidemic). The FBI in the 2000s should have initiated a dialogue with banking regulators on the need for incapacitation, as opposed to a prosecutorial approach. This could have involved regulators meeting one by one in 2004 with the banks that had the worst incidence of loan defaults in their city or state. Regulators could have required them to demonstrate that their loan portfolios were not infested with fraud. When bank self-investigation reports found in most cases that they were riddled with fraud, the bank could have been required to craft a plan to prevent the issuance of further fraudulent loans and a management plan to regularise as many current dubious loans as possible. Instead of doing that, what banks did was slice and dice their bad loans into securitised financial products that were then sold on to other financial institutions in the United States and Europe, globally diffusing systemic risk. Because regulators allowed them to pass the parcel, banks shifted their risks on to other banks instead of managing that risk. This regulatory failure created a risk-shifting culture that was a systemically devastating cascade of risk. One aim of a self-incapacitation approach to enforcement is a step back from risk-shifting to risk management.

Prosecutions after the event of individuals who assisted with the 9/11 attacks on New York and Washington, DC, contribute little—probably nothing—to deterring future terrorism. Prosecutions after the event of little local bankers, brokers and borrowers for mortgage fraud contribute little to deterring the next financial crisis. Incapacitation before the event rather than deterrence after the event was the remedy a macrocriminological imagination should have inspired. Criminologists can learn to see war (Chapter 11) and mass unemployment (Chapter 4) as crime-prevention challenges. Preventive incapacitation is the most crucial

macrocriminological response required. President Obama repeatedly made the same point following mass murders with automatic weapons. Prosecution of those responsible will do little to prevent the next mass gun murder. More promising are incapacitation strategies to get automatic weapons out of people's hands across the society, as Canada, Australia, New Zealand and the United Kingdom have adopted after mass killings.

This is preventive incapacitation in making it physically difficult for a potential offender to hijack an aircraft, slice and dice fraudulent loans or acquire automatic weapons. Sometimes it is possible to incapacitate terrorists, criminal bankers and potential mass shooters by putting them in prison. That only incapacitates a horse that has already bolted. With the kind of corporate crime that was a proximate cause of the Global Financial Crisis, the regulatory incapacitation that counted was the kind that Polish regulators deployed. It involved regulators signalling to banks that if they were considering increasing their exposure to complex financial products involving bad loans—the effects of which were not clearly understood—think again. To go down that track could jeopardise their banking licence. The licensing power—licence deferral, suspension or qualification—was the decisive tool for motivating self-incapacitation. This is not to say that regulatory threats achieved these outcomes; rather, they were accomplished by regulatory conversations implicitly backed by licensing powers.

The more important lesson from the Global Financial Crisis is that corporate self-incapacitation was more effective still than state incapacitation. Australian, and most Canadian, bank CEOs did not need a regulatory conversation or a threat to their licence to incapacitate their traders from the excesses of exposure to derivatives they did not comprehend. They voluntarily constrained themselves from such exposure because they prioritised the long-run solvency of their banks above the short-term profits delinquent derivatives traders could deliver until late 2007.

Likewise, the self-regulation of mosques can contribute more to the incapacitation of young members of that mosque contemplating terrorism than can prisons that might preventively detain them (Wardak 2018). One reason is that the mosque can communicate restoratively to a whole network to incapacitate its violence; a prosecution targets just one or two members of that network and tends to engender defiance effects that result in the replacement of those arrested. Likewise, an Operation Ceasefire that enrolls gang leaders to the project of incapacitating gang members from using guns can contribute greatly to reducing gun homicide. Operation

Ceasefire is not interpreted by its authors as a macrocriminological insight into incapacitation. A contribution of this book is to so reframe it. According to a macrocriminological imagination, prison is an institution that makes a very small contribution to incapacitation. Incapacitation by nonstate organisations to eschew crooked loans or incomprehensible derivatives, to disarm gang members or to disable terrorist hijacker training has more preventive promise.

In the history of regulation, from Lloyd's of London insisting that ships not be allowed to sail if they were loaded above the Plimsoll line painted around the hull to the New York Stock Exchange rejecting corporations for listing if they had no external auditor, and later a board audit committee with a majority of outside directors, regulation by private organisations often laid down regulatory policies that were later mandated by states (Braithwaite and Drahos 2000). This empirical finding was that the globalisation of self-incapacitation by many self-monitoring techniques like Lloyd's Plimsoll line preceded the globalisation of state laws to require such forms of self-incapacitation.

At the same time, it is naive in the extreme to hope that all mosques, all gangs and all banks will voluntarily opt for self-incapacitation. They sometimes need to be threatened with state incapacitation—closure of the bank, arrest of its terrorist leadership, imprisonment of the gang's leadership—to motivate the softer path of self-incapacitation. This is where the responsive regulatory pyramid has an important insight to offer.

Nevertheless, this chapter's diagnosis of the Global Financial Crisis as being, in part, a macrocriminological challenge implies a new way of thinking about the place of incapacitation in a responsive regulatory pyramid.

In the past, I always placed incapacitation above deterrence in the pyramid. There is something to this insight. If a doctor persists in defrauding Medicare, in prescribing dangerously, in treating patients who have conditions they are not qualified to treat, after a sequence of educative and deterrent regulatory engagements with the doctor, their licence to practice medicine should be threatened. This incapacitates them from all these professional abuses. For a bank that persists in fraudulent conduct, after courts have failed and failed again to deter the fraud with successive criminal convictions, corporate capital punishment is an incapacitating option—revoking its banking licence. For a domestic violence offender too livid with 'righteous rage' to be deterred, it may be necessary to incapacitate him in prison.

The macrocriminological insight of this chapter is that for many well-designed regulatory pyramids for responding to crime problems, organisational self-incapacitation will appear lower in the pyramid than deterrence. Then state incapacitation may come higher in the pyramid as an ultimate sanction (as in Figure 10.3). Figure 10.3 is no more than illustrative of a possible pyramid. State bailout and forced acquisition of bank shares, as the United Kingdom and Germany imposed during the Global Financial Crisis, might be a better option than closing a bank at the peak of the pyramid.

Figure 10.3 One possible responsive incapacitation pyramid

The power and limits of corporate enforced self-incapacitation

Across observations at hundreds of aged care homes, it is clear that a small proportion of the regulatory work is done by government inspectors (Braithwaite et al. 2007). Relatives and friends, or the residents themselves, complaining to management are more common forms of effective regulation than inspectors. Management complaining to staff, or one staff member horizontally tapping another on the shoulder, is more common still when someone is seen not fulfilling some obligation to residents.

Notwithstanding the catalytic power of inspectors arriving at the site and of infrequent court cases, the main game of standards improvement includes nursing home self-inspection, informal peer review and consumer complaints that trigger a self-regulatory response. Indeed, this is true of most or all domains of regulation. Government inspectors never have the budgets to be a greater regulatory presence than internal corporate self-regulators. Seung-Hun Hong (2016) has brilliantly developed the theory of indirect reciprocity. He shows that even though direct regulatory inspections by the state are infrequent, firms have reason to care that their responsiveness to other regulators, to consumer complaints, to self-regulatory complaints and to complaints from their own staff matter. The indirect responsiveness matters because it helps to build a reputation for responsiveness that is visible to inspectors on the rare occasions when they do arrive to kick the tyres. Seung-Hun Hong's theory of indirect reciprocity is about the way regulators are responsive not so much to how firms respond to iterated encounters with the regulator itself, as to how firms have been responsive to other parties, including internal self-regulatory parties, in meeting their obligations. In other words, the reputation of the firm for responsiveness to its obligations in interactions with many parties is more important than its iterated responsiveness to the regulator itself. These insights draw on the theory of indirect reciprocity in the natural sciences (Berger 2011; Braithwaite and Hong 2015).

It follows that the art of regulation is the art of steering self-enforcement. In addition, it is the art of responding with state enforcement to self-enforcement weakness that becomes visible to the state. The theory of restorative justice with youth crime is likewise about the idea that the police do little of the direct steering of young people away from crime (Karstedt-Henke and Crammoller 1991; Braithwaite 2002: 116–20).

Rather, their important role is guiding the more iterated forms of steering with which families, peers, neighbours and schools regulate young people every day of their lives. They are the actors 'in the know' about matters unknown to the state.

With corporate crime, this means that a crucial strategy is deferred prosecutions during which corporate integrity agreements or enforceable undertakings are negotiated between the regulator and the firm. While this is true in theory, in practice, these agreements often follow standard templates and are feebly and ritualistically implemented and inadequately followed up by the regulator to remedy such ritualism (Chapter 9). Responsive regulation's remedy to this ritualism is to embed any corporate risk analysis within a pyramid of escalated state and nonstate networked accountabilities (Braithwaite 2008). Within responsive regulation, self-regulation is never totally voluntary as it is enforced and called to account by the prospect of escalation up the pyramid.

John J. McCloy's (1976) report into the pattern of foreign bribery indulged in by executives of the Gulf Oil corporation in the 1970s first provoked policy thinking about self-investigation reports by outside counsel (Coffee 1981; Fisse and Braithwaite 1983; Gruner 1988). Some Australian experiments with self-investigation and self-incapacitation in competition and consumer protection law enforcement did begin to show McCloy-style promise decades ago (Fisse and Braithwaite 1993; Parker 2004). Often, they involved disciplining culpable officers, restructuring of management, compensation of victims and, in some cases, leadership of trade associations and industry-wide leadership for improved corporate social responsibility. At their best, they saw companies transforming their cultures, their policies, their compliance systems and their willingness to take consumer protection to new levels of excellence. In some of these cases, the corporate compliance innovations helped inform law reform. By taking industry standards up through a new ceiling, emerging industry leaders sometimes helped drag the standards of laggards up towards them. Clever regulators in some places and times have latched on to the opportunity in this dynamic to ratchet up standards. John Mikler's (2009) *Greening the Car Industry* showed that Japanese regulators outperformed European and American regulation of automobile fuel efficiency, even though US regulation had tougher rules and was more prosecutorial. The Japanese regulatory accomplishment was delivered by requiring manufacturers to jump over the new bar set by any other Japanese auto maker that invented an improved technology for fuel efficiency. The less

innovative auto makers were encouraged to invent their own even better technology to raise the bar further, but if they could not, they might have to pay to license their competitors' improved fuel efficiency technology.

Over time, self-incapacitation edge and innovation were lost in the United States with corporate integrity agreements (Ford and Hess 2009, 2011), and in Australia, with the spread of enforceable undertakings settled with companies in antitrust, consumer and environmental protection, securities fraud and occupational health and safety. Enforceable undertakings have become routinised in Australian business regulation, templated by compliance practitioners who take clients in trouble with a regulator through hoops to be jumped ritualistically. Part of the problem has been an absence of third parties in the process insisting that it be more demanding in taking self-incapacitation up through new ceilings of innovation. This is a theme re-joined in the final chapter, where we consider the need for the institutionalisation of distrust to be complemented by an active democratic politics, an agonistic politics (Mouffe 2013, 2018) of distrust. Environmental groups have been little involved in the meetings at which enforceable undertakings for environmental offences have been agreed, to consider just one example of truncated contestation. An innovative, continuously improving, networked imaginary of self-incapacitation is still a long way off in Australia and every country.

Notwithstanding these reservations, the previous chapter discussed some evidence suggesting that Spalding (2015) may be right that restorative justice can be a meaningful way of reconceptualising deferred prosecutions. Moreover, this may be about dialogue that leads to agreement with regulators on corporate self-incapacitation more than on self-deterrence (as by voluntarily paying fines). The final sections of Chapter 9 showed that it is common for deferred prosecution agreements to require companies to appoint a chief compliance officer, to supply personnel to new corporate compliance systems and policies, to transform corporate governance in major ways, to remove certain top managers from their positions and to appoint independent monitors approved by the prosecutor to oversee these self-incapacitation reforms.

Further, Chapter 9 argued that independent monitors should provide monitoring reports on a publicly accessible website. All this chapter does is slightly reinterpret Brandon Garrett's (2007) calls for 'structural reform deferred prosecutions' as self-incapacitation reforms aimed at deep governance transformation. Rituals of comfort to placate anger on Main

Street fail to deliver this. In other cases, deferred prosecution works in preventing crime through deep governance reforms. One of the reasons Stanley Sporkin said to Brent Fisse and me that *Fortune 500* companies went along with his voluntary disclosure program on foreign bribery was the dawning realisation that off-books accounts to pay bribes were also slush funds used by the criminals they bred to rip off their own company. More research is needed to explore these synergies.

Cosmopolitan collective efficacy

In making links between the dynamic concentration of deterrence (Chapter 9), enforced self-incapacitation, Operation Ceasefire in Boston and peacekeeping in Congo, this book seeks to catalyse the criminological imagination towards a more cosmopolitan vision of collective efficacy. We take this a step further in the next chapter on the contribution collective efficacy makes to the project of jointly preventing crime and war.

A staple of cynicism about the impossibility of controlling the high crimes of financial capital is the fact that global banks have a coherence in their law-evasion strategies that is international while regulators have only national coherence. Most regulators inhabit a national jurisdiction, a national regulatory mission and a national regulatory imagination even when the problem is global. There is no inevitability about this. In the regulation of epidemics, the best national health regulators in all countries have a global regulatory imagination; especially before a virus first arrives on their shores, their strategies are oriented as much to containing the international as to the national spread of epidemics. The regulation of violence (as discussed in the next chapter)—indeed, of many forms of lawbreaking—can be more effective with a more cosmopolitan regulatory imagination in which enforced self-incapacitation is a fundamental strategy for the global diffusion of regulation.

The preventive potential of cosmopolitanism will be illustrated with examples of how Australian cosmopolitanism might have prevented northern hemisphere catastrophes (only because that is where my experience resides). We have already seen how the enforced self-incapacitation of the Gulf Oil report of John J. McCloy incapacitated bribery in many countries. In Chapter 6, we saw how a similar self-investigation report incapacitated bribery rings that included heads of state and defence ministers, including Prime Minister Tanaka of Japan, who lost their

jobs as a result. Now the chapter illustrates how Australian regulators might have prevented the criminality of Enron and other companies that collapsed in the dotcom crash of 2001. Then it shows how Australian alarm bells about dirty-money banks might have prevented crooked bank scandals that destabilised the governments of Australia's North Atlantic allies. Finally, it returns to the Gulf of Mexico to show how Australian regulators could have prevented the Deepwater Horizon disaster.

Arthur Andersen

Braithwaite (2005a) argued that the collapse of Enron and WorldCom, as well as of major Australian corporations audited by Arthur Andersen, might have been prevented by the Australian Taxation Office (ATO). How? When Arthur Andersen's partners came to senior ATO officials in the 1990s to apologise for the conduct of a 'rogue partner' who had enabled serious tax fraud, that was the time to sit in the restorative circle with the firm's senior partners to discuss the culture of compliance and business integrity within Arthur Andersen. It would have been revealed that the 'rogue partner' was not a rogue partner at all, but in fact manifested the core culture of Arthur Andersen. The 'rogue partner' would have defended themselves by explaining this was what they were trained and expected to do. Some of their friends within the firm might have supported them in this. Perhaps, more importantly, some retired old hand who had mentored the 'rogue partner' could be brought into the restorative circle by that partner as a supporter. They might argue in the process of supporting the rogue partner that the compliance culture at Arthur Andersen had changed for the worse (which it definitely had). The idea is that this might have triggered agreement in the regulatory circle for a thorough internal investigation into the compliance culture of Arthur Andersen conducted by outside counsel, akin to what John J. McCloy did two decades earlier with bribery in the oil industry. This in turn might have caused Arthur Andersen to meet its legal obligations as a gatekeeper to the fraudulent accounting of companies like Enron that crashed some years later. It might have averted the bankruptcy of Arthur Andersen itself because of the criminal prosecution targeting its accounting practices at Enron and other US corporations.

Because what restorative justice does in this circumstance is hold off on a national criminal prosecution in return for a voluntary corporate self-investigation report that recommends effective reforms

for self-incapacitating future crimes by the organisation globally, the cosmopolitan regulator does something of greater moment than a narrowly national prosecution. It does this by inviting a wayward organisation to reform itself globally, as the regulator hangs national punishment over the company's head. Corporate leaders in the United States tend to leave an Australian criminal case to its Australian lawyers and management, but the worldwide report of an outside counsel into patterns of corporate criminality across jurisdictions, triggered in Australia, causes leaders in the United States to sit up and take notice. Hopefully, the outside counsel would also send a copy of their report to the US Securities and Exchange Commission. Australia had early warning of the criminal turn in the corporate culture of Arthur Andersen. One hope is that in future regulatory cultures that are more cosmopolitan, this might force the hand of US regulators to prevent a similar catastrophe. Not every outside counsel is as gifted and gilded with political aura as John J. McCloy in the Gulf Oil case. On the other hand, cases with this global importance are opportunities for leaders with the stature of McCloy to leave another legacy in their retirement years to make the world a better place.

Nugan Hand Bank, to BCCI, to Iran–Contra, to nuclear weapons proliferation

Likewise, Fisse and Braithwaite (1993) argued that the Bank of Credit and Commerce International (BCCI) was a case where regulators in many countries, probably including Australia, could have acted preventively. In many places around the world, criminal cases were launched against the bank for a wide variety of commercial offences. Each of these national cases created an opportunity for regulatory cosmopolitanism. BCCI is remembered by the CIA as the 'Bank of Crooks and Criminals International' (Passas 1997). They should know. The CIA used the London-based bank extensively. By some measures the seventh-largest bank in the world, BCCI had the greatest part of its real banking in London. In the end, the bank destabilised the government of UK Prime Minister John Major, pushing large numbers of British businesses into bankruptcy, when US\$15 billion disappeared.

As it cultivated the bank, the CIA was insistent that mergers of American banks with BCCI and the investment of Bank of America in BCCI be reversed, but the CIA allowed its allies to carry the financial can. Two of the top-four shareholders in BCCI were the former head of Saudi

intelligence and the Sheik of Abu Dhabi (in the United Arab Emirates). White House staffer Oliver North used BCCI for the Iran–Contra deal—as did Manuel Noriega, Saddam Hussein, Colombian cocaine cartels, Syrian gun runners, Palestinian terrorists, the Afghan opium trade, the Afghan Mujahideen and Osama Bin Laden. What the CIA may not have known was that BCCI financed the purchase of illegal US materials for the Pakistan Atomic Energy Commission. Or perhaps when the CIA did get to know this in an era when Pakistan was developing nuclear weapons and refusing to eschew first use of them against India, BCCI was allowed to crash.¹⁰

Australia should have been alert to the regulatory dangers of BCCI to the global financial system because it had hosted the allegedly CIA-sponsored dirty-money predecessor of BCCI, the Nugan Hand Bank. It was much smaller than BCCI, but it caused reputable Australian investors to lose a lot of money when it crashed in 1980. One principal of Nugan Hand, Michael Hand, disappeared after he and other bank employees were indicted for destruction of bank records. The other principal, Frank Nugan, was found with a self-inflicted gunshot wound to the head on a remote dirt track. His body was surrounded by the footprints of other men, leading police to speculate that he had been given an opportunity to shoot himself or suffer a more unpleasant end. A good vehicle of cosmopolitan incapacitation would have been an independent Australian royal commission into drug money, weapons smuggling and dirty-money banks, jointly into Nugan Hand after it collapsed and BCCI, as its successor in this market in vice, before BCCI reached the peak of its criminality. Commission findings could have caused international regulators to incapacitate BCCI in their countries before the Bank of Crooks and Criminals International did more damage.

Nugan Hand and BCCI might have been convenient for the CIA, but creating banks that specialised in dirty money was a deeply dangerous idea that cosmopolitan regulation should have mobilised to end. The sad

10 During the Cold War, Pakistan had been more aligned with the United States, and India more with the Soviet Union. After Pakistan acquired nuclear weapons in dangerous circumstances, India and the United States became more closely aligned. Pakistan's nuclear program carried a high risk of an actual nuclear exchange that could tip the global climate. Its nuclear weapons were designed to be mobile, driven around Pakistan's highways, and therefore vulnerable to capture by the terrorist groups that were plentiful in Pakistan. Western intelligence also suggested that Pakistan discussed renting these weapons to fellow Muslim states, in the event they were to confront a showdown with nuclear-armed Israel.

sequel to their historical contribution is that, four decades on, a larger proportion of the most reputable banks in the world are criminalised in the twenty-first century than was the case in the twentieth century. BCCI showed mainstream banks how much money could be made by moving dirty money around the globe. Many 'reputable' banks, including some in Australia, were enticed by the lure of those profits and wilfully allowed themselves to be used to improve the efficiency of those markets in vice controlled by drug kingpins, weapons traffickers, armed groups, and worse. Nugan Hand and BCCI also taught 'reputable' banks that a good way to secure their impunity from money-laundering excess was to be 'useful' to the most powerful national security states when some of their spookier agents needed to launder money. Huge banks with fine reputations that are criminalised are too big and too dangerous not to fail. When they refuse to shut down criminality that can run to something as dangerous as the flow of cash to secret nuclear weapons programs, huge equity fines could be needed that build up to shift most shares in the bank under public control. That may be the appropriate ultimate outcome at the peak of a regulatory pyramid.

Deepwater Horizon

Australia has had opportunities to prevent foreign environmental catastrophes through restorative environmental justice. A cosmopolitan restorative approach to the Timor Sea oil spill, uncappable for 75 days, could have prevented the Deepwater Horizon spill a year later in the Gulf of Mexico that repeated this problem (for 86 days), caused by the same reason as the Australian spill, at the hands of the same offending contractor, Halliburton.

On 21 August 2009, a drilling platform offshore from Australia in the Timor Sea suffered a blowout and oil spill that could not be capped. The diagnosis was that the defective concrete base of the oil well installed by the Houston-headquartered Halliburton caused the blowout (Bradshaw 2010; Gold and Casselman 2010). This revelation was not publicised internationally at the time. An Australian criminal prosecution was launched that resulted in a conviction and a fine of just US\$380,000 two years after Deepwater Horizon. The Australian regulator could have insisted, as part of its enforcement response, that Halliburton retain independent engineering consultants to investigate whether other offshore wells it had cemented across the oceans of the world posed similar risks.

The historical record shows that the Australian regulator did not do so and the next year a BP deep-sea drilling base cemented by Halliburton also failed, causing a similar environmental catastrophe in the Gulf of Mexico. Given that Halliburton dominates the world's well-cementing business with one other company, the Timor Sea tragedy might have helped connect the dots and drawn attention to the magnitude of the risk flagged by 'a 2007 study by three U.S. Minerals Management Service officials [that] found that cementing was a factor in 18 of 39 well blowouts in the Gulf of Mexico over a 14-year period' (Gold and Casselman 2010). It is a measure of the poverty of our global conversation about how to make business ethics work in contemporary conditions that those living around the Gulf of Mexico did not protest Australia's failure to adopt a more cosmopolitan ethic in its contribution to regulating environmental crime.

So, a positive side of the globalising tendencies for crises to cascade from one country to another is that when corporate enforcement fails in one country, there are opportunities for ethically entrepreneurial enforcement to cascade from other countries that might be less captured by firms like Halliburton, Enron or BCCI.

Rudolf Giuliani and the macrocriminological imagination

Rudolf Giuliani, the former mayor of New York, is a vivid figure in the public imagination because of his role as Donald Trump's lawyer. He is discussed in criminology primarily because of the apparent success of New York in reducing crime in the 1990s and early 2000s, particularly its homicide rate, during his mayoralty. This discussion is about whether this was accomplished by hotspot policing that reduced gun carrying (Sherman 1995; Fagan et al. 1998; Wintemute 2000), the CompStat methodology of mapping risk patterns and accountability for police leaders to get improved crime outcomes on their patch or 'broken-windows' policing and the ethos of 'zero tolerance' (Harcourt 2001; Karmen 2000; Eck and Maguire 2000; Taylor 2001). These are important debates because it seems likely that at least some of New York's policing innovations were positive (Zimring 2011), even if others may have resulted in discrimination against minorities, and even if some other cities may have more successfully implemented the positives than New York itself.

Giuliani is inclined to see the policing of incivilities such as graffiti in subways as a 'broken-windows' policing accomplishment, but we do not know whether the undoubted accomplishment of the subways becoming safer was not simply a hotspot policing accomplishment of greater police presence at subway locales that were crime hotspots. In recent years, Giuliani has advanced projects of crude transplantation of some of the worst aspects of the New York innovations to contexts like El Salvador. These aspects of the contest for credit over the contribution of Giuliani and his police chiefs to crime prevention are not the focus here. It is important to be open-minded about Giuliani and New York criminal justice, so we can see his administration as innovative in contributing some very positive things and others that were very negative.

Here the focus is on James Jacobs' important book with Coleen Friel and Robert Raddick (2001), *Gotham Unbound: How New York City was Liberated from the Grip of Organized Crime*. This is about clearing the Mafia out of a variety of markets in New York City under Giuliani's watch as mayor. After decades of failed punitive law enforcement against members of organised crime groups who were simply replaced when imprisoned, the strategy that Jacobs et al. describe as finally working was in substantial part a business regulation strategy, particularly one that targeted licences, though still a strategy with an important place for criminal punishment. One way to stop the Mob from fixing prices in the New York garbage collection cartel was to withdraw the waste collection licences of Mob associates. In some markets corrupted by the Mob, suppliers were required to hire an auditing firm that specialised in certifying that the business was Mob-free. The court appointment of trustees to clean up (restore workers' democratic control of) Mob-controlled unions was another important strategy. The effectiveness of such preventive organisational incapacitation compared with purely retributive enforcement came as no surprise to those who worked on business regulation. Jacobs et al.'s findings are reminiscent of the placement in US coalmines of resident inspectors at the least-safe mines in the country to reform their management practices and thereby improve safety dramatically (Braithwaite 1985: 82–83). One reason is that they refused to allow miners to enter the mine on days when methane gas levels were too high or enter areas where the geology was too unstable. On these days and in these tunnels, the resident inspector was incapacitating the mine owner from murdering its miners.

Jacobs et al.'s research showed that a responsive regulatory approach with business regulatory licensing, monitoring, auditing and restructuring, moving up from the base of an enforcement pyramid that has stiff terms of imprisonment at its peak, can work against the most entrenched, sophisticated and ruthless organised crime groups in the world. Jacobs et al. argued that political will and enforcement imagination were required to accomplish this. The strategy was, first, to prevent the Mafia from taking over new markets, then closing their control of the markets they were already in, one by one. Incapacitation that crippled the influence of the Mafia in New York City was no small enforcement accomplishment. It was a macrocriminological accomplishment of decriminalising markets.

Another area of Giuliani's innovation was in the 1980s when he was a federal prosecutor in New York. After the Wall Street crash of 1987, Giuliani led criminal enforcement against some of the greatest corporate criminals of that era—a story told in the movie *Wall Street* in which Michael Douglas utters the famous words of one of those mega-criminals: 'Greed is good.' After Giuliani's prosecutions on Wall Street three decades ago, there was reason to be hopeful that public prosecution was on an upward trajectory for corporate crime. Some of Giuliani's techniques were crude but effective. His team would come across evidence of the crime of some comparatively minor malefactor within a targeted corporation. They would sit him down, say gotcha, you are in deep trouble and promise immunity if he could provide testimony against a bigger fish; then that bigger fish would turn on an even bigger fish, who would be turned against a shark. This approach led Giuliani's team up to Ivan Boesky, Donald Levine and Michael Milken. Milken was the inventor of the junk bond, perhaps the greatest genius of his time on Wall Street and still one of the richest people in the world today. Moving up from protecting minnows to netting sharks was also used with less stunning, but significant, success against organised crime.

We glimpse a remarkable failure to follow this approach after the Global Financial Crisis peaked in 2008 in the documentary *Inside Story*, in which the madam of a Wall Street brothel disclosed that she had credit card authorisations from major Wall Street firms to record prostitution services as 'payments to compliance consultants'! She goes on to reveal that no law enforcement authorities had asked to examine these credit card records. If law enforcement was serious about putting Wall Street criminals behind bars, it would have used Giuliani's strategy. A comparatively minor credit card fraud of this kind is ideal for sitting someone down to say you will

be going to jail for the fraud unless you help with evidence of more major fraud against a bigger fish in your organisation (then hopefully moving up to a genuinely major predator). During the first Obama administration, the Justice Department was simply not interested in such Giuliani-style tactics.

Australia tended to reject the Giuliani approach to corporate crime enforcement after its corporate mega-crimes of the 1980s because it viewed the method as crude, unprincipled and unsophisticated. It certainly comes with risks that small fish in the hot seat will fabricate or exaggerate evidence against others to secure their freedom. What Australia did instead was to set up royal commissions and crime commissions populated with teams of top lawyers. These produced sophisticated synoptic analyses of the nature of Australia's corporate crime and organised crime problems, with some recommendations for where prosecutions might occur. This did not convict big fish on major charges with anything like the success rate of the crude Giuliani strategy.

The accomplishment of Giuliani's strategy was not so much that the likes of Michael Milken were convicted to prison and paid billions of dollars in fines. The key thing was an incapacitation accomplishment. This was more than the fact that the doors were closed at the powerful criminal organisations they controlled; the junk bond was dead, as were the firms that invented them. Traders were incapacitated from buying junk bonds because there were none to buy. Milken's firm, Drexel Burnham Lambert, was also bankrupted. Killing off criminogenic kinds of markets, at least for a while, was the important incapacitation accomplishment.

The other aspect of the incapacitation of Milken as a Wall Street criminal is that he has kept himself out of trouble since completing his prison sentence by shifting his considerable and growing capital from the promotion of fraud to the formation with his brother of the Knowledge Learning Corporation. It is the largest for-profit provider of childcare in the United States and a provider of online learning. He has redeemed himself by philanthropy that turned his financial genius to assisting developing countries avert banking and debt crises—a rejected community service offer he had proposed as a plea agreement to avoid prison in 1989, but that he went on to do anyway. Milken also applied his innovative mind to venture philanthropy. *Fortune* magazine had him on its cover as 'The man who changed medicine' (Daniels 2004):

Michael Milken ‘changed the culture of [medical] research,’ says Andrew von Eschenbach, director of the National Cancer Institute. He created a sense of urgency that focused on results and shortened the timeline. It took a business mindset to shake things up. What he’s done is now the model.

Few could have made a more catalytic or financially larger contribution than Milken to the 53 per cent reduction in prostate cancer deaths in the United States between 1993 and 2017. It is disappointing that criminology does not hold up Milken’s transformation and self-incapacitation more than it does in its research on organisational crime control.

The quantitative evidence is now very strong that the decapitation of drug cartels has made a huge contribution to increasing the Mexican homicide rate in the past 15 years (Calderón et al. 2015; Dell 2015; Phillips 2015; Ríos 2013; Atuesta and Pérez-Dávila 2018; Lessing 2018). As battles cascaded among successor leaders to take over the markets of decapitated leaders, so many innocent citizens suffered from escalating levels of homicide. A better solution may prove in future to be an enforcement-driven self-incapacitation pitch:

Do you want to bequeath to your children an empire they can only defend by a life dodging bullets? Divest from drug markets and extortion and reinvest your capital in something really secure, profitable and worthwhile for your country.

Drug cartel bosses are capable of the same smarts that Milken showed in chairing the Knowledge Learning Corporation, becoming a respected philanthropist who can look back from his deathbed on how he turned around a life of crime. We have seen unsophisticated experimentation with this kind of strategy in Latin America led by Catholic priests, but not sophisticated experiments led by criminologists with strong political support.

Averting the Global Financial Crisis with self-incapacitation enforced by restorative justice

Let us turn our criminological imagination to how the Global Financial Crisis might have been prevented in 2004, 2005 or even later. We have argued already that the FBI failed to show a macrocriminological

imagination with the evidence it had about both 9/11 and the subprime mortgage fraud that were preventable proximate causes of the major crises of the presidency of George W. Bush.

What could have been made of all that FBI evidence that banks across America were allowing mortgage brokers to write fraudulent loans? How could the banks be so stupid, the forensic minds of 2004 might have asked? The answer was they were not stupid, of course. They could make more money by shifting risks than by managing them. Wall Street invented complex financial instruments that sliced and diced bad loans for banks. Bits of those bad loans were then sold across the financial system by hedge funds and others to players who usually did not understand that they were buying bad debts. So, this always had the whiff of Wall Street fraud driving it. High-level culpability is hard to nail, however, as so many players are just slicing and dicing the risk they buy themselves and then passing it on to others. Such figures do not make great collars because many of the fraudsters might turn out to be also victims of fraud themselves. But surely such widespread mortgage fraud as we see in the FBI data means that the proliferating game of pass the parcel was pumping up systemic risk. So why were the ratings agencies not calling some of these hedge funds for the junk they were? Why weren't Moody's and Standard & Poor's calling some of their bank and insurance companies for the large exposures they were building up to these bad loans through CDOs? Go and find out why not, prosecutors should have been saying to their staff. They would have returned with the news that the creation of so many new financial entities and businesses in this game of passing the parcel was creating a lot of business for Moody's and Standard & Poor's, the two ratings agencies that do most of the ratings on Wall Street and globally. The prosecutor might have said, sniff around on the street and see if you can pick up any evidence of significant business irregularities of any kind by anyone working for Moody's or Standard & Poor's.

That task would have been no harder than it was for New York prosecutor Rudolf Giuliani with the 'greed is good' Wall Street frauds of the 1980s. The success of his team in the Southern District of New York in locking up Wall Street's greed-is-good brigade of 1987 was what made Giuliani's reputation and laid his pathway to becoming the Mayor of New York. From 2005, putting criminally culpable small fish under the bright lights with the choice of going to jail or revealing how sharks were misrepresenting the realities of systemic risk on Wall Street would have exposed what subsequently appeared on the public record and in enforcement actions

many years after the Global Financial Crisis. Standard & Poor's and Moody's were proved to have made an appalling contribution to the onset of the crisis. Standard & Poor's was afflicted with an executive who could say: 'Let's hope we are all wealthy and retired by the time this house of cards falters'; another who said: 'We rate every deal. It could be structured by cows and we would rate it'; and yet another, who said: 'Profits were running the show' (O'Brien 2009: 75).

This might have led regulators to demand urgent repair work to stabilise Wall Street's house of cards before it collapsed. Luckily, the junk bond house of cards was incapacitated before it caused massive damage to the real American economy, which recovered extremely quickly from the 1987 stock market crash. Tragically, more than 50 million people across the North Atlantic lost their jobs in the more savage consequences of the 2008 crash. A similar number lost their homes.

Incapacitation steps could have transformed ratings from a market in vice back to its historical role as a market in virtue. The European Commission might have established a public ratings agency to compete with Moody's and Standards & Poor's. A Wall Street market in ratings vice could have been incapacitated from ever emerging again in a new world in which a European public ratings competitor was on the street watching their abuses and competing with them.

This chapter argued earlier that regulators could have met one by one in a restorative circle in 2004 with the banks that had the worst incidence of loan defaults in their city or state. Regulators could have required them to demonstrate that their loan portfolios were not infested with fraud. When bank self-investigation reports found in most cases that they were riddled with fraud, the restorative conference could have required the bank to craft a plan to prevent the issuance of further fraudulent loans and a management plan to regularise as many current dubious loans as possible. As these restorative conferences revealed the scale of the problem, they would have revealed the imperative to scale up a macro-regulatory transformation.

Giuliani in Belgrade

Structural incapacitation is as important with war crime as it is with corporate crime. It cannot be delivered by prosecutions of small fish. In 2015, Aleksandar Marsavelski and I interviewed longstanding Serbian

war crimes prosecutor Vladimir Vukčević, who had prosecuted 170 war crimes cases—probably more than any other prosecutor, living or dead.¹¹ We explained to him Giuliani’s strategy on Wall Street and the Australian strategy of a commission with special investigative powers that synoptically reviews all possible targets and recommends the highest priorities for state prosecution. As a war crimes prosecutor who has had a lot of success in convicting serious Serbian war criminals, Vukčević quickly replied that Giuliani’s strategy ‘is the only strategy that can work’. Having said that, he and other war crimes prosecutors we have interviewed point out that it is more complex to make the Giuliani strategy work in war crimes cases and in civil law jurisdictions (Marsavelski and Braithwaite 2020).

The history of the mother institution to the national Serbian war crimes prosecutor, the office of the prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), reveals the greater complexity with war crimes than with corporate crime prosecution. The ICTY and its prosecutor were much criticised in their early years, during the mid-1990s, for prosecuting relatively minor war criminals. The reason they started small was so they could build confidence in international justice with quick impacts. It is doubtful whether this worked because all sides in Yugoslavia ended up believing that The Hague was prosecuting their little fish and letting off their enemy’s big fish (Nickson and Neikirk 2018). One advantage, nevertheless, of these lower-level cases early on was that many of the lower-level war criminals who were targeted sought to save themselves or to soften their sentences by providing evidence to prosecutors against bigger fish. This allowed the ICTY to move up to middle-level and top-level targets. Over a long period, and at great cost, the ICTY was successful in moving right up to prosecutions of President Slobodan Milošević and top-level political, military and militia leaders of most of the armed factions of the former Yugoslavia.

One reason national prosecutors’ offices were established in the successor states of the former Yugoslavia was that the states funding the ICTY through the United Nations began to signal that they would not finance many more prosecutions. Finally, donors insisted that only the prosecutions currently under way could be completed. The pressure this created for the institution of national war crimes prosecutors to complement the

11 I am in deep debt to Aleksandar Marsavelski for the development of some of the thinking in this chapter, and in Chapter 5, during our richly rewarding Peacebuilding Compared fieldwork together (Marsavelski and Braithwaite 2018, 2020).

work of the international tribunal was a good thing. Once prosecutors in The Hague moved up to prosecuting figures as senior as Milošević and the commander-in-chief of the Croatian armed forces, little fish who were being tapped on the shoulder for questioning by prosecutors were being advised by their lawyers not to worry because the ICTY was no longer in the business of prosecuting little fish like them. The advent, in particular, of the Serbian national war crimes prosecutor's office in 2003 again made it unwise for legal advisers to tell low-level war criminals not to worry; the national war crimes prosecutor might get them. So, if international justice can learn how to get the synergy right between the justice of national, international and hybrid (national/international) war crimes courts, the Giuliani strategy can be more or less delivered (Marsavelski and Braithwaite 2020).

Over time, international criminal law has developed a capacity to build evidentiary linkages between bottom-up and top-down cases. The investigation strategy of the International Criminal Court's Office of the Prosecutor (OTP) was revised in its 2012–15 strategic plan:

The required evidentiary standards to prove the criminal responsibility of those bearing the greatest responsibility might result in the OTP changing its approach due to limitations on investigative possibilities and/or a lack of cooperation. A strategy of gradually building upwards might then be needed in which the Office first investigates and prosecutes a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for those most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety. (OTP 2013: Executive Summary, Point 4)

Incapacitating war crime

War crime prosecutions are mainly important to an incapacitation strategy for preventing war crime through the way the threat of prosecutions can help motivate self-incapacitation by parties to conflict. Fear of war crime prosecutions is less important, however, than diplomatic and military pressures. Consider the slaughter of the scorched-earth policy that began to unfold after the people of East Timor voted for independence from Indonesia in the UN-supervised plebiscite of 1999 (Braithwaite et al. 2012). There was a clear root cause of this escalation of armed conflict: the

decision of the Indonesian military to lead and pressure civilian militias loyal to Indonesia to wipe out independence supporters. An effective incapacitation remedy to end this war crime before the killing escalated to genocide was put in place: the removal of the root cause, the Indonesian military, and the removal of its capacity to coerce civilian murders. A UN resolution required all Indonesian troops to leave East Timor. Peacekeeping troops of the International Force East Timor (INTERFET) arrived quickly to monitor the completeness of the Indonesian troop withdrawal. Thanks to a huge amount of international diplomatic and military pressure, 24 years of Indonesian military killings of more than 100,000 East Timorese abruptly ended in that historical moment.

Cantonment is another incapacitation strategy frequently successfully deployed in peacekeeping. When an army cannot leave a war-torn territory in the way the Indonesian Army left East Timor, because that army has no place to go, peacekeepers can negotiate cantonment camps for armed groups. These are in areas where they are well away from their enemies; peacekeepers patrol the cantonments to ensure the former combatant armies do not break out to prey on civilians. In Nepal's peace agreement, the Maoist army insisted that it would not put its troops in cantonment unless the Royal Nepal Army submitted to the same. This became a case where both insurgents and state forces were put in cantonment as a precursor to a security sector reform process through which many Maoist fighters were integrated into the new Nepal Armed Forces.

In the 1990s, cantonment came to be part of a package of policies called DDR: Disarmament, Demobilisation and Reintegration. Later, this was elaborated into variants such as DDRRR (Disarmament, Demobilisation, Repatriation, Rehabilitation and Reintegration) and with other Rs such as Reconciliation, and transformative security sector Reform. Only the two Ds and the first R (Repatriation, as with the Indonesian troops in Timor) are about incapacitation. With Disarmament, the debates bear many similarities to debates over the empirical evidence on gun control and domestic crime in the West. Are gun buybacks the best path to disarmament, for example? Or do buybacks create a moral hazard (as in Afghanistan, where the Taliban received money for an old gun and then used it to buy a new gun)?

Very partial forms of incapacitation of access to guns are often contextually wise elements of peace processes that are riddled with distrust. For example, in the Bougainville secessionist civil war with Papua New Guinea (PNG),

the Bougainville Revolutionary Army (BRA) agreed to lock their weapons in containers to which both their commanders and the United Nations had keys. While this was a relatively weak assurance against the containers being broken into, it succeeded in getting the guns out of the villages. It reduced crime. It has an interesting resonance with the domestic criminology literature on the effectiveness of regulating gun *carrying* at hotspots of crime, as opposed to attempting to end gun *ownership* (Sherman 1995; Fagan et al. 1998; Wintemute 2000). The reason for the Bougainville approach was that the BRA did not trust either the government forces or the forces of a spoiler BRA group that did not join the peace. They worried they would be killed if they completely removed the option of retrieving their guns. Trust-building and commitment were constructed brick by brick through an architecture of commitment in the Bougainville peace process (Regan 2010; Braithwaite et al. 2010b). Staged disarmament commitments, from locking guns in containers through to their ultimate destruction, were only implemented after the PNG Government complied with its milestones in the agreed sequence of the architecture of commitment to peace.

Disarmament of the Irish Republican Army (IRA) was also a partial process with some similarities to Bougainville. The UK Government persuaded the Loyalist side of the conflict that it would ensure the IRA fully disarmed before power-sharing was put in place in the Stormont parliament. Years of wilful duplicity passed in which the British state did not force the IRA (or the Loyalists) to fully disarm (McEvoy and Shirlow 2009: 36–37). This may have been a pro-peace duplicitousness as there is reason to suspect that had the IRA disarmed too quickly they might not have been able to prevent the Real IRA and other spoiler factions from derailing the peace.

The least empirically fraught part of the incapacitation of war through the Disarmament part of DDR is de-mining. All sides, and especially the children of all sides, benefit from de-mining. It is an unsung part of peacebuilding across the globe that always saves lives. It can also contribute greatly to overcoming postwar hunger in devastated agricultural economies by allowing farmland planted with mines to return to production after its fallow years of war. It can open up mined transport routes to the postwar economy. Theoretically, then, de-mining not only contributes to the incapacitation of war, but also delivers through a reward mechanism, by enabling this agricultural peace dividend.

Overall, the evidence that incapacitation through DDR contributes to peace is quite strong, especially when that incapacitation is integrated into a credible, contextually attuned architecture of commitment to peace (Braithwaite et al. 2012; Braithwaite and D’Costa 2018). Even more convincing is the evidence that UN peacekeeping—especially when crucial elements like DDR are integrated into a multidimensional peacebuilding package to support the transformation of a war-torn society—reduces the prospects of another war (Doyle and Sambanis 2000, 2006; Walter et al. 2020).

The nuclear and chemical weapons nonproliferation regimes have also been remarkable accomplishments of war crime incapacitation. Who would have thought after half a million people were gassed in World War I that so few lives would be taken by chemical weapons in the unusually terrible and numerous wars of the next 100 years, when chemical weapons were within the technical capacity of even weak states?

When President Kennedy predicted in a press conference in 1963 that the world could see 15 to 25 new nuclear weapons states by the 1970s,¹² who would have thought he would be proved wrong by the incapacitation accomplishments of the nuclear nonproliferation regime? When the US and UK governments argued at the United Nations in 2003 that weapons inspections had not worked in disarming Saddam Hussein’s weapons of mass destruction, western publics were gullible in believing this, when the truth was what the weapons inspectors themselves perceived: their inspection activities were working.

Through a macrocriminology lens, it is important to see the nuclear attacks on Hiroshima and Nagasaki as war crimes, just as it is to see as crimes the more devastating firebombing of Tokyo and of cities like Dresden in Germany, as well as the devastating bombing campaigns by Germany and Japan in China, the United Kingdom and beyond. As terrible as late twentieth and early twenty-first century bombing campaigns have been, it is also important to understand them as mostly less systematically criminal since the end of the Vietnam War than they were in the mid-twentieth century. It is important to see that if the incapacitation of nuclear, chemical and biological warfare had not worked as well as it has since 1945, many of those reading this book today might have perished from war crime falling from the sky.

12 Reported in *The New York Times*, 23 March 1963.

Self-incapacitation of war crime

The diplomacy of the great powers has been important in persuading lesser states like Australia not to acquire nuclear weapons. After World War II, there was considerable support for the acquisition of nuclear weapons in the wake of French and British acquisition, as a safeguard against feared resurgent Japanese power and rising Chinese communist power in Asia. Equally important in incapacitating the Australian state from the use of nuclear, chemical and biological weapons has been the work of civil society—the peace movement, activist doctors, the Campaign for Nuclear Disarmament—in motivating Australian renunciation of weapons of mass destruction. Any political party that campaigned for the nuclear arming of Australia's military would lose because the polling evidence is clear that Australians have long been opposed to this. Australia is like many countries in the power of its civil society leadership in guaranteeing the incapacitation of nuclear war crime. More remarkable accomplishments of this civil society potency for incapacitation include those in South Africa, which was already effectively a nuclear power when the pro-Apartheid National Party regime made it politically popular with the white electorate to renounce nuclear weapons. South Africa complied with the nuclear nonproliferation regime years before Apartheid was dismantled. Three decades later, it is hard to overstate how profound an accomplishment this was. It has underwritten Africa—the planet's most war-torn continent—becoming a nuclear weapons-free zone. South Africa's renunciation of its ambition to be an African regional nuclear power helped Nelson Mandela in persuading his friend and supporter in his long struggle, Muammar Gaddafi, to dismantle Libya's nuclear weapons program.

The incapacitation record of civil society here is patchy. Nuclear arms are extremely popular in Pakistan. The failure of international diplomacy to solve the festering oppression of Muslims (and other religious groups) in Kashmir from the 1940s not only led to an incapacitation failure of the nuclear nonproliferation regime across the Subcontinent, but also made a substantial contribution to the long-run rise of jihadist terror (Braithwaite and D'Costa 2018).

State self-incapacitation of weapons of mass destruction has, overall, been the most profound contribution of incapacitation to creating a less violent world and one less oppressed by war crime (Chapter 11). At the same time,

this is the most fragile accomplishment of incapacitation in protecting our life and liberty. In more micro ways, let us now also illustrate the power and potential of self-incapacitation.

Self-incapacitation in asymmetric warfare

The odds of any combatant going into a modern war and securing total subjugation of the enemy are low, whether the combatant is an insurgent group or a state. Since World War II, even the most potent combatant, the United States, found in major deployments of air power and masses of ground troops in Korea, Vietnam, Indochina, Afghanistan and Iraq that unconditional victory was less likely than exit with a return to political negotiation of a conflict that continued. That was also true of more minor American military commitments to wars that included those in Libya, Syria, the various conflicts of the former Yugoslavia, Somalia, the war on drug cartels in Latin America and even more limited engagements where military force was aimed more at changing the nature of a negotiated outcome than permanent conquest of an enemy. What is true of the greatest military power in the world is even more true of lesser powers. Realising the limited and expensive gains to be garnered from military deployment in contemporary conditions, the period since World War II has been unique in that the number two and three economic powers—China and Japan in the twenty-first century, Germany and Japan in the twentieth—almost totally eschewed military deployments in favour of diplomacy as the way to advance their objectives.

Whether what is negotiated are the terms of a surrender, a victory, a ceasefire or a compromise peace agreement born of military stalemate, the parties to contemporary conflicts—whether they are as powerful as the United States or a minor insurgent—need the support of the international community for terms around which they can mobilise diplomatic support. This imperative for building international support is the context for all types of combatants to be open to diplomatic entreaties for self-incapacitation. Even warmakers as ruthless as Stalin, Hitler, Mussolini and Tojo, when millions of their citizens were perishing, could still agree to self-incapacitation against the use of chemical weapons and indeed to a variety of other Geneva protocols for self-incapacitation against different kinds of war crimes against civilians, enemy combatants and prisoners of war. Sadly, implementation was often imperfect, yet it was sufficient to be game changing.

The ICTY Prosecutor Louise Arbour in March 1999 showed the way to a potentially important new strategy for triggering the self-incapacitation of war crimes. She wrote to several Serbian leaders, including Deputy Prime Minister of the Federal Republic of Yugoslavia, Nikola Šainović. They were in effect ‘be aware’ warning letters on specific war crime risks. The letters had the intent and effect of putting leaders on notice to take steps to prevent these war crimes from proceeding. In particular, the individual leaders were warned to exercise authority over their subordinates to prevent war crimes and to punish subordinates who committed serious violations of international humanitarian law in Kosovo. The letters may not have overwhelmingly succeeded in motivating self-incapacitation. Later, however, the ICTY Trial Chamber relied on Arbour’s letter to Šainović to find that he was a politician who had received information that crimes were being committed—a reliance affirmed by the Appeals Chamber of the ICTY (Brammertz and Jarvis 2016: 423–24).

Obviously, one reason for sending such letters is to sharpen the Sword of Damocles, which Chapter 9 argued does more deterrence work than the actual imposition of punishments. The potential of such prosecutor warning letters seems greatest in those situations, as in Syria at the time of writing, where it is well to consider the even greater promise of this approach in terms of motivating self-incapacitation. Consider the work of the NGO Geneva Call. It built on earlier one-off initiatives such as the 1981 agreement of the South-West Africa People’s Organization (SWAPO) insurgents with the International Committee of the Red Cross to comply with all Geneva conventions¹³ and the 2002 agreement of the Moro Islamic Liberation Front to end kidnapping in the Philippines.¹⁴

Geneva Call started with dialogue engaging 158 nonstate armed groups to persuade them to comply with international humanitarian law with respect to antipersonnel mines. By 2019, Geneva Call had signed 65 deeds of commitment with nonstate armed groups in Africa, Asia and the Middle East, with 54 of these banning totally the use of antipersonnel mines and committing to cooperation on mine action (Geneva Call 2020). Bongard and Somer (2011) found that compliance with these

13 ‘South West Africa People’s Organisation—SWAPO Declaration to the International Committee of the Red Cross—ICRC’, 15 July 1981, available from: theirwords.org/media/transfer/doc/na_swapo_1981_01-c69993289a437a48ccd467ea42798b25.pdf.

14 ‘Moro Islamic Liberation Front Central Committee Resolution’, 26 February 2002, available from: theirwords.org/media/transfer/doc/ph_milf_biaf_2002_06-6bd99b91fd576e25a44bcd18e43af9d.pdf.

agreements has been good. Only one case revealed conclusive evidence of violation of the prohibition on the use, production, acquisition and transfer of antipersonnel mines. On the positive side, monitoring found widespread mine action activities in areas under the control of signatory armed groups. Between them, the first 49 armed groups had destroyed more than 20,000 stockpiled antipersonnel mines by 2011 along with thousands of improvised explosive devices (IEDs) and abandoned explosive ordnance. The deeds of commitment are signed by the nonstate armed group's leadership and countersigned by Geneva Call and the Government of the Republic and Canton of Geneva—in most cases, in a ceremony in Geneva's City Hall, where the first Geneva Convention was adopted in 1864. The symbolism here is about Geneva Call's work as a remedy to the deficiency in international humanitarian law that enforcement mechanisms and implementation obligations rest in the hands of states.

Bongard and Somer (2011) concluded that signatory nonstate armed groups have been quite responsive to investigations of allegations of noncompliance with deeds of commitment, conducting their own investigations, allowing field visits by third-party monitors and agreeing to recommendations of third-party investigations for coming into compliance. The argument of this chapter as to why nonstate armed groups would do this is that they seek to build international legitimacy if and when the time comes for a diplomacy of negotiated resolution of their grievances or an end to their war. Geneva Call requires all signatory armed groups to establish self-monitoring mechanisms for their deeds of commitment and to report to Geneva Call on the measures put in place to implement them. Geneva Call's independent monitoring of compliance is undertaken by gathering information from a range of third-party actors present on the ground (such as media and international and local organisations) and through field missions by Geneva Call on a routine basis 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 states concerned to the Anti-Personnel Mine Ban Convention.

While Geneva Call started with a focus on antipersonnel mine commitments, recent years have seen a considerable broadening in the coverage of deeds, their self-enforcement and NGO enforcement, and international enforcement in the context of ceasefire and peace

agreements (for example, by the United Nations). Geneva Call's more recent priorities have expanded to protecting children from the effects of armed conflict, prohibiting sexual violence in conflicts and working towards the elimination of gender discrimination. Many nonstate armed groups have engaged in dialogue with Geneva Call on what they might specifically do in their circumstances to protect children from the effects of armed conflict. Twenty-nine have signed a deed of commitment on protecting children and have implemented measures to enforce these obligations (Geneva Call 2020). A deed prohibiting sexual violence and gender discrimination has been signed by 25 groups, which have taken specific measures to enforce these obligations. This specificity can be illustrated by a deed of commitment for a protected space for 60 young girls at risk from armed violence with local partner Nashet Association in Palestinian refugee camps in Lebanon. Since its creation in 2000, Geneva Call has engaged in dialogue, training in local languages and monitoring with nonstate armed groups across this wider range of topics, including in the most challenging of contexts such as Syria. It maintains a directory of 576 commitments and agreements made by nonstate armed groups that occasionally also go to some more specific issues such as protection of health care and cultural heritage and displacement during armed conflict. They also cover commitments to training measures that include specifics like posting key rules in camps.

The Geneva Call agreements might be criticised in some cases for following a standard template. The mistake was failing to come to terms with the specificities of matters on which armed groups need to self-incapacitate in their theatre of war. In the history of international agreements before the arrival of Geneva Call and kindred NGOs, where there was no specificity of commitment by nonstate armed groups, we can see in retrospect that agreements to comply with international law were not honoured or, worse, were even tragically counterproductive. Examples were the agreements with armed groups operating in the former Yugoslavia in the 1990s to honour safe havens for civilians. These agreements actually facilitated the passive herding of civilians into concentrated slaughter in UN-sanctioned safe havens in Bosnia and may have prolonged the war, which is also one way of interpreting the effect of UN-sanctioned safe havens in Syria (Cerkez 2012). Safe havens were also used as bait to trap civilians for mass slaughter in Democratic Republic of Congo (Braithwaite and D'Costa 2018: 138–40). Humanitarian aid to starving people was used to lure them into killing zones. Once humanitarian agencies discovered the

whereabouts of refugees who had fled their former camps, 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 the agents of their murderers who lured the vulnerable to slaughter (Reyntjens 2009: 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 also have been more insistent on disciplining the military leaders of international peace enforcement whose weakness allowed such catastrophes.

We have seen that the worst cases of failed self-incapacitation by corporate integrity agreements and enforceable undertakings involve 'rituals of comfort' (Power 1997) that are mere symbolism. The worst cases of failed self-incapacitation in peace processes are even worse than that. They involve the amplification of criminality rather than failed containment of it. They involve armed groups in eastern Congo being integrated into the Congolese state army in ways that enable them to rape and pillage the civilian population more effectively than before, and with the legitimacy of acting as part of the state (Vlassenroot and Raeymaekers 2009). Such power-sharing can also induce a moral hazard: nonstate predators stake a claim by causing grief in a region of a country so they can negotiate a power-sharing deal that gives them state sanction for a monopoly over predation across what becomes their patch.

Both the disasters and the successes of self-incapacitation should direct our attention to the need to reform international law in two ways. On the positive side, reform would credit 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 sexual violence that arises from failing to honour specificities in deeds of commitment with organisations like Geneva Call should have legal consequences. Both positive and negative assessments of self-incapacitation could/should inform International Criminal Court decisions on whom to prosecute and whom to decline from prosecuting. It could inform arguments that international criminal law considers in submissions from prosecutors and defence counsel on the degree of criminal culpability. This means reforms to sentencing and prosecution guidelines for international criminal law institutions to give due recognition to self-incapacitation and to its abuse by combatants who game it. Perhaps even more so, it

requires judicial leadership in international appellate courts to evolve a case law that helps harness the potential of international criminal law to promote forms of self-incapacitation that it finds saves lives when there is compliance. All these arguments are developed more fully in Marsavelski and Braithwaite (2020).

We have seen such developments in national regulation of corporate crime in recent decades, with enforced self-regulation meaning that corporations and their executives can be convicted criminally for breaches of privately written rules that have been publicly ratified because such private rules implement the principles in the law in the specific circumstances facing that corporation (Braithwaite 1982; Ayres and Braithwaite 1992). Translating into international criminal law the enforced self-regulation doctrine that we discussed with the regulation of roof control or methane in mines might see the International Criminal Court statute nominate a particular UN agency as responsible for ratifying agreements for securing compliance with international law. These could be negotiated by an organisation like Geneva Call in accordance with the principles of international law. To date, we have an international criminal law excessively obsessed with impunity and deterrence and insufficiently responsive to the potential of self-incapacitation. There is a need to make an example of military commanders who make agreements to protect safe havens that they then abuse through civilian slaughter. 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 war crime, while others are targeted for prosecution because they failed to do that.

Restorative justice and self-incapacitation

One of the important things that happens in restorative justice is the mobilisation of the collective efficacy of the circle to help offenders regulate themselves. That is the idea of motivational interviewing as an evidence-based practice that we have seen can be adapted as a collective restorative and responsive practice as opposed to an individual-on-individual practice. The circle rolls with resistance from the offender until the offender defines a redemptive path along which to re-narrate themselves in nonviolent and nondominating ways. Relational care for victims and offenders and a collective desire of the community of care to

help the victim recover and repair the harm to the victim help the offender to self-discovery of how they can recover. This has complex and variable dynamics. For example, one path occurs for offenders who manage to cut themselves off from allowing themselves to feel remorse, even on hearing about terrible suffering from their victim, when their mother breaks down in the restorative circle on hearing the victim speak of their suffering. The offender's affection for their mother is what gets behind the shield that protects them from shame acknowledgement, remorse and repair. The self-regulation that matters most often has a social cognitive character; it involves re-narrating the self as a good person who has done something bad. This transforms their self-talk from talk of hitting back at people to talk of repairing the harm they have done, repairing themselves and sometimes incapacitating themselves.

Circles of support and accountability are one form of restorative justice with a very particular history. This approach was initiated nationally by Canadian prisons desperate to come up with a solution for the problems of child sex offenders due for release. Sadly, this is a category of offenders with high reoffending rates on release to the community. A political failure of evidence-based penology is one reason for this. With higher-risk parolees from prison, we do best to gradualise their release from prison: allow them a toe in the water of freedom to see how they adjust to it. For example, in the months before full release, we might trust them with day leave to attend a job, an apprenticeship or a university course in the community. If they break and run or commit some new offence during this conditional release, breach conditions may put more time on their sentence. Sometimes highly prisonised offenders near the end of a long sentence have a learned helplessness that leaves them afraid of freedom. They reoffend so they can return to the only world where they have learned to cope with choices because it is a world of someone else making those choices. They suffer *The Fear of Freedom*, as Erich Fromm (1942) titled his book. Such toes in the water of freedom through graduated release are particularly apt for child sex offenders. But the politics of parole is that no-one in a parole system may be willing to take responsibility for the early release of child sex offenders because of their fear of blame should something go wrong. Child sex offenders consequently serve maximum possible terms and are released only when the opportunities for graduated or conditional forms of release are exhausted.

What to do to try to create a journey of release that is safe for the community and for the offender? Enter circles of support and accountability. The journeys of child sex offenders who have been locked up for a long time for horrific crimes are politicised. Journalists get to know their release date, film their exit from prison, find out where they live, film them there and interview the neighbours about how they feel about child safety. This often triggers repeated episodes of discovery by the cameras that torment parolees, then flight from one residence to another, making reintegration fraught.

Instead of community rejection, circles of support and accountability find a community that will accept the child sex offender. In Canada, this was often a volunteer church group that was part of the prison chaplain's religious network. With a First Nations offender, it might be a First Nations community that is best placed to deliver CHIME (Connectedness, Hope, Identity, Meaning and Empowerment) through the leadership of its elders. Like so many restorative justice approaches, circles of support and accountability also build what David Best et al. (2018) call community capital through assertive linking to prosocial groups and activities.

Circles of support and accountability tend to develop self-incapacitation agreements of the following form: in the restorative circle, the child sex offender confesses that certain events tend to be contexts of temptation, such as visiting sex shops, watching internet pornography, hanging around outside schools or drinking alcohol. So, it is agreed that should any of these triggers arise, released offenders will call a member of the circle to go to their home immediately to have a coffee with them until this period of anomie or drift into danger passes. The intervention is resource-intensive in community volunteerism, with daily meetings/monitoring with warm support from at least one volunteer at first. Graduates of the program are successfully volunteering as wounded healers (Wager and Wilson 2017).

The evidence that the regular social support of Canadian circles of support and accountability is effective is encouraging, with Wilson et al. (2009) reporting an 83 per cent reduction in sexual reoffending and more moderately encouraging results in earlier research. A subsequent US randomised controlled trial showed the intervention to be effective and strong in cost-benefit terms (Duwe 2013)—updated on a larger sample with the same conclusion by Duwe (2018). A similar cost-effectiveness result was replicated in the United Kingdom by Elliott and Beech (2013). These studies do have methodological limitations, however; a systematic

review by Clarke et al. (2017) cautiously supports the cost-effectiveness but cautions that sample sizes have usually not been sufficient to be statistically significant. Larger samples are needed to deliver confidence in these generally positive results.

Hollow Water and the prevention of child sexual abuse

Many of the principles that informed circles of support and accountability were pre-dated in Canada by the holistic healing circles for child sexual assault offenders of the Manitoba Ojibway community of Hollow Water (Lajeunesse 1993; Ross 1996; Bushie 1999). In Hollow Water, ex-offenders are not shunned and excluded from the community, even though they may be incapacitated by exclusion from homes where children they have abused and who are afraid of them still live. Ex-offenders are seen as important resources for 'getting under the skin' of new offenders and disturbing the webs of lies that have sustained their criminality. Better than anyone, ex-offenders understand the patterns, the pressures and the ways to hide from the obligations to incapacitate themselves. As they tell their personal stories in the Hollow Water circle, ex-offenders talk about the lies that once shielded them and how it felt to face the truth about the pain they caused. It is done gently but inexorably (Chapter 9). The circles signal to offenders that their behaviour has roots that can be understood, but there are no such things as excuses (Ross 1996: 183). Indeed, at Hollow Water, before they met their own victim in a healing circle, sexual abusers met other offenders and other offenders' victims, who would simply tell their stories as a stage in a process towards breaking down the tough guy identity that pervaded the dominating relationship with their own victim.

Just as a pilot would be less likely to report a near miss if they felt they might go to prison, so a serious street offender will be more likely to confess if the result will be a restorative resolution rather than prison. Hollow Water was also ahead of its time in learning the self-incapacitation lessons that we have already drawn from airline safety regulation: that it is more important to punish cover-up of offending and the refusal to learn how to incapacitate oneself in the aftermath of abuse than it is to punish abuse. The circles began to deal with what many at first thought to be an epidemic of alcohol abuse. As citizens sat in circles discussing

the problems in 1986, they realised there was a deeper underlying problem: they lived in a community that was sweeping child sexual abuse under the carpet. Through a complex set of healing circles to help one individual victim and offender after another, they discovered eventually that most of their citizens were at some time victims of sexual abuse. Most of the leading roles in identifying child abuse were taken by women of Hollow Water (Bushie 1999). Jaccoud (1998) reported that 52 adults in a community of 600 formally admitted to criminal responsibility for sexually abusing children—50 as a result of participating in healing circles and two as a result of being referred to a court of law for failing to do so (Ross 1996: 29–48; Lajeunesse 1993). Ross (1996: 36) claimed that the healing circles succeeded by having only two known cases of reoffending. Five years later, Couture et al. (2001: 23) 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 cost-effectiveness of Hollow Water (Native Counselling Services of Alberta 2001) is its crime-detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching 91 adults confessing criminal responsibility for child sexual abuse in a community of just 600 people?

As we have seen from the systematic exposure of centuries of abuse in the Catholic Church, cover-ups work (Edelman 2020). The imperative in the Catholic Church, just as at Hollow Water, is not so much to put tens of thousands of abusing priests in prison, but to prosecute bishops who persist in covering up the activities or who move abusive priests around, spreading their predation from parish to parish, rather than confronting and incapacitating them into roles separated from children. Criminalising this domination by cover-up effectively may require criminal law reform. Hollow Water perpetrators who refused to participate in the restorative circles did go to prison. Those who apologised to the community and their victims, incapacitated themselves from future offending and worked for the community to help prevent future offending by others were not formally punished.

Conclusion

One implication of macrocriminology is a shift from obsession with convicting individual offenders to the flipping of markets in vice to markets in virtue. This led to the insight of this chapter that incapacitation is more important in criminology than deterrence. Moreover, self-incapacitation is more important than incapacitation by the state.

Macrocriminological theory is a corrective in criminological thought, illustrated by the neglect of a broader vision of incapacitation as a concept that has little to do with incapacitation's conventional focus on imprisonment. It is, however, just a corrective. Prison is an unappealing form of incapacitation because it has such devastating effects on the freedom of families and the confined family member. This chapter proposes the important adaptation of responsive regulatory theory that self-incapacitation will often be more effective in preventing macrocrime when it is used before deterrence, lower in a regulatory pyramid, than with state incapacitation deployed when both self-incapacitation and deterrence fail. There is no purity of distinction between organisational and individual incapacitation in this because organisations are made up of individuals. The regulation of powerful organisations is a micro–macro project.

The pyramid of self-incapacitation and enforced self-incapacitation in Figure 10.3 is worthy of reflection for some common forms of individual offending. Consider a family with an adolescent recurrently in trouble at school for drug use. At the base of the regulatory pyramid, families may pour on a lot of social support and educate the child in how to self-regulate for desistance and recovery. As risks of serious trouble with the police escalate, parents might well apply lessons from business regulatory responsive pyramids, using motivational interviewing with the child after perhaps explaining honestly how they are reacting to other parents being critical of them for failing to totally ground their child. They may explain that what worries them is if something terrible happens to their child because of their drug use, and how they fear they will never forgive themselves for the failure to discipline the child. The aim here in the journey of motivational interviewing is to reach a point where it might be agreed that the child will not be grounded after this infraction and the child undertakes to destroy the drugs and commit to it never happening again. Then the parent asks: 'With my anxiety about being

an uncaring parent for failing to ground you, and my terror of future regret, what do you think would be a fair thing if this happens again?’ As in business regulation, the hope is that the child will actively agree that self-incapacitation, self-grounding, would be fair in the unlikely event that drug use happens again. When it does happen again, grounding and other measures like rehabilitation program attendance agreed to last time are, as in business regulation, likely to seem more legitimate and to be affirmatively supported by the child. All this seems to have more promise than the usual command-and-control drug regulation by families: ‘You’re grounded. Period.’

When internet pornography is a trigger for child sexual abuse or internet gambling is a root cause of street offending and suicidal thoughts, blocking offenders’ access to relevant sites can be the relevant form of self-incapacitation. Self-incapacitation by gambling providers and by problem gamblers themselves then becomes a series of intersecting pathways to crime prevention that must be joined up in societies like Australia that are most widely afflicted with problem gambling. To ponder these concluding micro examples, consider the hypothesis that macrocriminology implies applying lessons from the macro sphere of understanding to the micro. This is a reversal of the normal trajectory of criminology of applying a micro approach like individual prosecution to a more macro strategy like corporate criminal prosecution.

There is no decisiveness in the distinction between the new concepts of self-incapacitation, enforced self-incapacitation and old concepts of self-regulation and enforced self-regulation in responsive regulatory theory. This is because self-incapacitation is simply one form of self-regulation that has more specificity of meaning than the more general term. In practice, however, self-incapacitation will be implemented in combination with other forms of self-regulation, just as macro-regulation will often be implemented in combination with individual regulation. Self-incapacitation is a specific form of crime prevention, just as gun surrenders are an even more specific form of both crime prevention and self-incapacitation.

Conventional criminology has focused considerable research resources on whether sentencing policy could be reformed to better prevent crime through individual incapacitation in prison. It is hard to see how such research could show a way to save lives. This chapter has attempted to show that self-incapacitation of organisational crime may have saved

millions of lives during the decades since Edwin Sutherland first urged us to focus on organisational crime. At the same time, the chapter has argued that the self-incapacitation glass is more than half-empty. So, there are millions more lives macrocriminologists could have been saving from corporate crime in the pharmaceutical industry (Dukes et al. 2014), from future risks of weapons of mass destruction, from war crimes, and more. Many will die on this planet if a nuclear war breaks out between Israel and Iran or Saudi Arabia (with mobile nuclear weapons supplied by Pakistan), or if terrorists purloin a mobile nuclear missile in Pakistan and fire it in a fashion that appears to indicate a US–Russian nuclear exchange. If we do not persuade Pakistan and India to give up their nuclear weapons on the back of a lasting peace in Kashmir, hundreds of millions could die from a Pakistan–India nuclear exchange—more of them in China than in South Asia from mass starvation when crops subsequently fail. The empty space of a half-empty glass of self-incapacitation is an important opportunity for a macrocriminology that makes a difference for humankind. The next chapter re-joins this theme of war crime prevention by coming to an understanding of war and crime as cascade phenomena.

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