

*Behavioural economics role in restorative justice is not just to increase referrals it is to nudge agents away from a life of rejection, as this is the ultimate cost of a criminal conviction.*

Gary Becker's rational choice theory of criminal behavior formalises the choice to commit a crime as same as any other choice (Berker, 1968). Thus, the rational self-interested criminal calculates the expected costs and benefits of the illegal activity before choosing to commit or not to commit a crime. Conversely, **optimism bias** would corrupt the rational choice theory i.e. criminals do not think there will be caught. In effect, the individual contemplating the choice to commit a crime would weight a very low probability of being caught. On the basis restorative justice represents a “lower cost<sup>1</sup>” and a higher probability of avoiding a criminal conviction than going to trial, which also carries substantial long-term costs. Then rational choice theory (RCT) predicts that the same rational self-interested criminal would preference restorative justice over going to trial in the event they are caught. However, as the brief outlines there is a preference to go to trial over restorative justice. This deviation from RCT could be the result of hyperbolic discounting<sup>2</sup> and an aversion to ambiguity (The Ellsberg’s paradox). In this case;

- Hyperbolic discounting** is the tendency for the individual to increasingly preference a speedy trial than the slower process involved with restorative justice. Even though the latter represents a lower expected cost. Hyperbolic discounting also suggests the presents of risk seeking behaviour to avoid delay.

- Aversion to ambiguity**, going to trial represents a clearer path to resolve the matter then restorative justice, this could be because the individual is required to be more active to participate in restorative justice, thus this maybe harder to picture themselves being successful. This overlaps with discounting mentioned above<sup>3</sup>.

The notion of ones ‘emotional equilibrium’ or **(Hot-cold) Empathy gap** could explain **risk seeking**, hyperbolic discounting, and aversion to ambiguity. As the individual tries to regain their equilibrium as fast as possible they are moving away from their ‘...more deliberative preferences’ (Oliver, 2017). The trepidation of being caught makes it harder to compartmentalise their criminal behaviour i.e. they criminal behaviour is spilling over into their usual life and causing cognitive dissidents. Put simply they are not in the right frame of mind to make decisions in line with their **long-term intentional goals**. As Richard Thaler and Cass Sunstein put it in *Nudge*: ‘...as judged by ... [the agents] own preferences, not those of some bureaucrat’ (p.24).

Applying RCT to the defense solicitor conduct to refer restorative justice or trial is extreme. It could be argued that it is in the solicitor self-interest to refer trial<sup>4</sup>. As it carries the higher probability of the individual re-offending, that is to say the solicitor will have a higher demand for their services in the long run. This an extreme and abhorrent interpretation of Mandeville’s private vice, public benefit and RCT.

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<sup>1</sup> More investigation would be needed to calculate the cost of benefits but the intangible cost of participating in restorative justice are high i.e. shame and guilt. However, the same cost will occur every time the individual will have to disclose they have a criminal conviction, this would be compounded by the fact that they would have little control over the time and place thus adding to the costs of having a criminal conviction.

<sup>2</sup> Also known as present bias, the immediacy effect, or plain old immediate gratification.

<sup>3</sup> Both present bias and aversion to ambiguity may have an evolutionary explanation i.e. brains may not have caught up with these changing societal circumstances (Oliver, 2017, p.94).

<sup>4</sup> Adam Smith said, "We are not ready to suspect any person of being defective in selfishness" and "it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."

We are not proposing this to be why the defense solicitor are not referring more to restorative justice programs. However, it gives us a technical position to base our intervention on i.e. as it can be argued an intervention that targets the defense lawyer may be pushing them away from a rational position. Any intervention will be externality focused opposed to internalities in regards to the solicitors' behaviour and subsequent advice, thus the intervention would be a budge or a *pigovian nudge*. We are calling it a Pigovian Nudge as classical nudge implies a concerned of the agent's internalities not externality. If we assume that the true motivations of the defence solicitor is to develop the best strategy for dealing with charges in order to minimise their consequences by examining all options. *Then why are they not utilising restorative justice more?* **Conservative bias, Reference dependency, Hassle factors, Overconfidence, Optimism bias, and Outcome bias.**

**Priming and the defendant:** The first impression has an extraordinary impact on how the defendant will perceive restorative justice. It is important to make the defendant feel that restorative justice in the most part is their idea.

**Re-branding:** This intervention aims to reduce inertia the offender and victim may feel from the name "restorative justice". Restorative is not a word used by many people in everyday life and that creates ambiguity around what it means in this context. As such this intervention works to create a fluency heuristic by changing the program name to examples like "offender mediation", "helpful justice" etc. The more fluent examples are those that contain "mediation" as it is approachable in nature and gives the offender and victim clues as to the process they will undertake.

**Boosting/Nudging:** The objective of a boost is to impart a new heuristic and how the agent can use this heuristic. In this intervention we have created a letter to be sent to defence lawyers. At the top of the letter you have the joint logos of the Queensland Government and the United Nations this is an effort to exploit the authority heuristic to encourage the solicitor to engage with the letter. Further down is the boost that encourages lawyers to think of restorative justice when they hear a client say they are sorry for their actions. Finally, there is a peer effect being played out in the graph that shows the lawyer their low referrals against their peers' average and encourages defence lawyers to conform.

**Streamlining and PreCommitment:** This intervention aims to streamline the referral forms used by the prosecutor to complete the application to the restorative justice program. We changed the structure of the form and require the defence team to complete part of it. The inclusion of a message from the defendant to the victim, makes the defendant identifiable which will increase altruistic behaviour from the prosecutor and victim. The use of pre-commitment as a behavioural tool in this form will motivate the defendant and keep them consistent and accountable for participating in the program. We have also nudged the prosecutor by using the Zeigarnik effect, which is the idea that an incomplete task is remembered easier than complete tasks. The defendant and their lawyer will complete half the form before passing it on to the prosecutor to be finalised.

**Limitations:** Firstly, the proposed interventions are efficacious not efficient, so while they may have previously been effective in an environment they have not been proven efficient in our environment. For example, the level of reactants in defence solicitor populations may be higher than the example of the doctor populations in the letter about the superbugs. Second, some of the interventions are symmetric, which means the nudge might affect people it was not intended for (Camerer *et al.* 2003). An example would be if our interventions led to defendants with a criminal record who are interested in participating in restorative justice.

*Real humans are not worse than economic man.*

*We're just different and we deserve policies made for Homo sapiens, not Homo-economicus. – Oliver.*

Jade, Paige, and Paul