A Responsive Approach to Organizational Misconduct: Rehabilitation, Reintegration, and the Reduction of Reoffense

Stephanie Bertels
Simon Fraser University

Michael Cody
University of British Columbia

Simon Pek
Simon Fraser University

ABSTRACT: In this article, we examine how regulators, prosecutors, and courts might support and encourage the efforts of organizations to not only reintegrate after misconduct but also to improve their conduct in a way that reduces their likelihood of re-offense (rehabilitation). We explore a novel experiment in creative sentencing in Alberta Canada that aimed to try to change the behaviour of an industry by publicly airing the root causes of a failure of one the industry's leaders. Drawing on this case and prior work, we articulate a model for a responsive and restorative approach to organizational misconduct that balances the punitive role of regulators and courts with new roles in supporting and overseeing rehabilitation.

KEY WORDS: misconduct; rehabilitation; reintegration; restorative justice; regulators; responsive regulation

INTRODUCTION

WHAT KINDS OF ACTIONS can regulators, prosecutors, and courts take to encourage the efforts of an organization to be reintegrated after a transgression as well as help to prevent further misconduct? Over the past few years, regulators and other government bodies have assessed increasingly large fines for corporate transgressions ranging from the inappropriate marketing of pharmaceuticals to environmental catastrophes to misleading investors. Recent examples include GlaxoSmithKline's $3 billion penalty for inappropriate marketing (Blackden, 2012), UBS's $1.5 billion fine to U.S., U.K., and Swiss regulators for attempting to manipulate the Libor lending rate (BBC, 2012), and Barclays' $453 million fine by U.S. regulators for manipulating power prices (*MSN Money*, 2013). Yet, despite these record setting fines, even the *Economist* (*Economist*, 2012), *Forbes* (Waters, 2012) and the *Financial Times* (Vincent, 2013) can be found questioning their efficacy. The call for this special issue seeks to shine more light on the issue of reintegra-

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tion after transgressions, and we contribute to this effort by exploring how a more responsive and restorative approach to dealing with misconduct (Braithwaite, 2002) might help companies reintegrate by emphasizing rehabilitation (a demonstrated pattern of action), thus ensuring companies undertake the changes needed to prevent future transgressions.

Drawing upon prior models of reintegration at the organizational level (Pfarrer, Decelles, Smith, & Taylor, 2008) and work on responsive regulation and restorative justice at both the individual and organizational level (Ayres & Braithwaite, 1992; Braithwaite, 2002; Goodstein & Butterfield, 2010), we leverage insights from our access to a unique case study of a more restorative approach to sentencing in Alberta, Canada. Several jurisdictions have begun to experiment with efforts to re-integrate individuals or organizations that move beyond the more traditional (and punitive) enforcement mechanisms of fines and sanctions. Variously called deferred prosecution agreements, reform undertakings, creative sentences, enforceable undertakings, or supplementary orders, these efforts are in effect or under consideration in Canada, Australia, New Zealand, England, the United States, and South Africa. These approaches generally involve agreements between the authority and the offender that focus on restoring relationships and ensuring future compliance, as opposed to defaulting to deterrent-based punishment. Yet, the details of the vast majority of these efforts remain sealed in court records. In contrast, in this article, we are able to leverage a unique case where, in addition to undertaking work to identify the root causes of the infractions, the sentence explicitly included a provision to reflect on best practices in creative sentencing. While this case takes us only partway towards the model that we ultimately theorize, it presents a unique opportunity to examine an early attempt at a more restorative approach to reintegration.

In April of 2009, Alberta's Provincial Court fined Suncor Energy Inc. ('Suncor')—a Canadian energy company and one of Canada's largest corporations—for two environmental infractions at their Firebag in-situ facility. In an unusual move, the Defence and Crown Counsel made a joint submission to the Court for a restorative justice project (called a creative sentencing project in Alberta) to fund a social science research project on the cultural antecedents of regulatory compliance. Most creative sentences and their outcomes are not in the public domain—they are sealed away in court records. The creative sentencing case presented in this article represents a unique research opportunity precisely because the publication of the creative sentencing process and results were part of the court order, and because a study of the creative sentencing process was included within the scope of the research outlined in the judgment. Therefore, this case affords a rare opportunity to get a look inside a creative sentencing process. In this article, we combine an in-depth analysis of this case with insights from prior work on responsive regulatory approaches to help prompt our theorizing on how regulators, prosecutors, and courts can support corporate reintegration in a way that emphasizes assessing rehabilitation in an effort to reduce a company's likelihood of re-offense.

Our article proceeds as follows. To orient our work we leverage three main bodies of literature: prior work on misconduct and reintegration, the legal literature on organizational level restorative justice practices, and work on responsive regulation.

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Next, we provide more background on the case in question and discuss how this case informed our theory building. We then present our key findings from the case and tie these findings back to prior work as an additional source of data. Finally, we draw upon these combined insights to develop a model outlining how regulators and courts could engage in a responsive and restorative process to support organizations in their rehabilitation that retains the ability to punish those offenders that fail to make amends with the goal of reducing instances of re-offense. We conclude with a discussion of the implications of our model for further theorizing and address how our model might be implemented in practice.

THEORETICAL PERSPECTIVE

Misconduct: The Perception of Wrongdoing

We adhere to the definition of reintegration spelled out in the call for this special issue as "a process that involves the repair of relationships damaged by wrongdoing in ways that enable individuals and organizations to regain support (e.g., trust, respect, credibility, legitimacy, reputation) from relevant internal and external stakeholders." Given this emphasis on the repair of relationships, we propose that for our purposes, stakeholders' perception of wrongdoing (no matter whether intentional or accidental) is paramount. The call for this special issue is consistent with this approach and defines a transgression broadly as "any individual or organizational act or behavior that violates legal, ethical, or social boundaries." The call does not specify that those acts must be intentional.

Yet, there has been some debate in the literature on the issue of intent. For instance, Pfarrer and colleagues have previously defined a transgression more narrowly as "a corrupt or unethical act by an organization that places its stakeholders at risk"(2008: 730). Similar to the notion of transgression is the notion of organizational misconduct, which has a long history in management research. While some authors, such as Perrow (1984), distinguish between misconduct and accidents on the basis of intention, others, including Vaughan (1999) propose that misconduct can occur by accident when organizational members intend to carry out one behaviour but unintentionally perpetrate another. This accidental behaviour can then be labeled as misconduct by social control agents, whom Greve and colleagues define as "actor[s] that represent a collectivity and that can impose sanctions on that collectivity's behalf" (Greve, Palmer, & Pozner, 2010: 56). For any given company, there are a broad range of agents that have the capacity to impose sanctions, and may choose to do so, on the basis that they have perceived a transgression or misconduct to have occurred. When this happens, companies are placed in the position of seeking reintegration. For the purposes of this article, we take this latter view and adopt the definition of organizational misconduct proposed by Greve and colleagues that misconduct is "behaviour in or by an organization that a social control agent judges to transgress a line separating right from wrong where such a line can separate legal, ethical, and socially responsible behavior from their antitheses" (Greve et al., 2010: 56). We do this knowingly, for this definition of misconduct permits us to develop a model that addresses a full spectrum of activities that range from accidental and/or

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isolated acts, through more systemic forms of routine misconduct, up to intentional and more severe forms of misconduct or corrupt behaviours.

Reintegration and the Role of Rehabilitation

Recently a number of reintegration models have been offered at the individual and organizational levels. These models have explored several different aspects of reintegration, including the processes that lead to moral repair (Dirks, Lewicki, & Zaheer, 2009), the normative foundations of moral repair (Walker, 2006), making amends (Radzik, 2009), forgiveness in the aftermath of inter-personal offences (Aquino, Tripp, & Bies, 2006), the stages of individual reintegration into an organization (Goodstein & Butterfield, 2010), the factors that may make re-building reputation difficult (Rhee & Valdez, 2009), and the stages for organizational reintegration (Pfarrer et al., 2008).

In particular, we leverage the Pfarrer et al. (2008) four-stage model of organizational reintegration. This model argues that when an organization is perceived to have engaged in misconduct, an organization can reintegrate by restoring its legitimacy among its multiple stakeholder groups. This is accomplished when its key stakeholders come to a level of concurrence about what happened, why it happened, what punishment is appropriate, and what organizational changes have been made to ensure it will not happen again. Pfarrer et al. (2008) propose four sequential stages: discovery, explanation, penance, and rehabilitation. It is important to note that the Pfarrer et al. (2008) model is theorized from the perspective of what organizations should do to reintegrate, and in particular, that the process is stakeholder-driven. In their model, regulators are contemplated only in that they form one of several potential stakeholders.

In this current article, we seek to build on the model developed by Pfarrer et al. (2008) by bringing in work on responsive regulation and restorative justice (Ayres & Braithwaite, 1992; Braithwaite, 2002; Goodstein & Butterfield, 2010) to theorize a potential role for regulators, prosecutors, and courts in supporting an organization's re-integration. Also important to note from the Pfarrer et al. (2008) model was their key insight about the need for rehabilitation and the importance of demonstrating what organizational changes have been made to prevent future misconduct. We build on this point in our theorizing by making a clear distinction between reintegration (reacceptance by stakeholders) and rehabilitation (a demonstrated pattern of action that suggests that changes have been made to prevent re-offense).

As our opening paragraph notes, the dominant approach to corporate misconduct has been deterrence through fines. Deterrence through fines is meant to motivate changes in behaviour, yet most regulatory and legal structures do not have provisions in place to support and/or enforce rehabilitation. Our aim in this article is to seek out a different approach more suited to these aims. Assumptions about the value of deterrence and sanctions have been challenged by a number of new regulatory theories, including responsive regulation (Ayres & Braithwaite, 1992), smart regulation (Gunningham, Grabosky, & Sinclair, 1998), self-regulation combined with meta-regulation (Parker, 2002), and the learning approach to regulation (Hughes &

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Reynolds, 2009; Wright & Head, 2009). These new learning approaches to regulation focus on regulating corporations by building regular and flexible interaction between regulators and corporations where both sides are working together to continuously improve the processes and culture of the corporation. Given that reintegration involves the repair of relationships, it may be fruitful to explore the emerging body of work on restorative justice—a conception of justice that is focused on repairing relationships.

Restorative Justice

Australian regulation scholar John Braithwaite has defined restorative justice as "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." (Braithwaite, 2002: 10). The restorative justice approach acknowledges that offenders need to re-integrate into the community and therefore, that the community needs to be involved in the process. Democratic, deliberative empowerment is one of the core values of restorative justice. In this approach, the stakeholders include not only the victim and the offender but also the broader community.

While restorative justice approaches have most frequently been employed for individual offenders (Goodstein & Butterfield, 2010), the approach has also begun to be used in the context of corporate wrongdoing or misconduct. Several jurisdictions are experimenting with restorative approaches. In the United States, the Department of Justice (DOJ) has been using deferred prosecution agreements and the Securities and Exchange Commission (SEC) has been using Reform Undertakings as negotiated settlements with businesses focused on preventing future misconduct (Hess & Ford, 2008). Restorative approaches have also been used in relation to business regulation in a number of different ways in Australia, most notably as enforceable undertakings (Nehme, 2005). An enforceable undertaking is basically a promise by the offender that is enforceable in Court, allowing the court to make agreements with an offender without resorting to full-blown prosecution or litigation. Enforceable undertakings aim to "protect the public, prevent similar breaches from occurring in the future, and implement corrective action" (Nehme, 2010: 108). Enforceable undertakings have been used for restorative justice purposes by allowing affected stakeholders and communities into the sentencing process (Nehme, 2010). Studies of the enforceable undertaking process at *ASIC* (Nehme, 2007) and the Australian Competition and Consumer Commission (Parker, 2004) show promising results for the involvement of stakeholders.

A final approach, and the one used in the case we outline here, is creative sentencing.[1] The notion of creative sentencing was developed in the 1980's, arising from the realization that traditional deterrence, compliance, and criminal approaches to offences often did not work with organizations because the people who "learned" the lesson ended up leaving the organization (Hughes & Reynolds, 2009). Creative sentencing is an innovative approach to sentencing where, among other things, funds from the sentence can be dedicated to non-traditional projects, including:

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remediation, education, support of existing community environmental projects, or improvements in industry standards or research (McRory & Jenkins, 2003a). In the US, creative sentences are also called supplemental orders (McRory & Jenkins, 2003a), which are the preferred method of settlement for the Environmental Protection Agency in the United States. As part of a supplemental order, an alleged violator may voluntarily agree to undertake an environmentally beneficial project related to the violation in exchange for mitigation of the penalty to be paid.

In Canada, the use of creative sentencing is on the rise. In the Province of Alberta (the jurisdiction in which this case occurred), creative sentencing has been available for environmental offences in since 1993. Alberta uses its *Creative Sentencing Guidelines* to determine creative sentences (McRory & Jenkins, 2003b). The guidelines call for the formation of a team with the lead prosecutor and lead investigator as the

Table 1: Guidelines for Creative Sentences in Alberta
There must be a nexus of connection between the offence and the project
The order must still be punitive in nature
Deterrence should be the primary objective and the yardstick by which the success of such projects is measured
The project must either improve the environment or reduce the level of risk to the public
The main beneficiary of the project must be the public
The public must be the citizens of Alberta
The project must result in a concrete, tangible, and measureable result in the short term and the long term
There must be a value added to the environment
The project must exceed current industry standards
The project must be as local as possible to the area where the offence occurred

core of the team. The team starts by determining the root cause of the offence and builds the creative sentencing projects around that cause. A project is then created based on a number of guidelines, as outlined in Table 1.

At this time, creative sentencing projects in Alberta are primarily proposed either by the creative sentencing team, by the prosecutor, or by the offending organization. There is no process for third parties to propose projects, although some have argued that this could be beneficial (Powell, 2001). Technical expertise is then sought and a special investigator is assigned to ensure that the organization is not receiving a secret benefit, engaged in a conflict, or duplicating work it might have done in any event. A creative sentence can only be applied after a finding of guilt and the judge in the case is the ultimate decision maker with regard to the sentence. Once a judge has agreed to a creative sentence, the amount of money available for the creative sentence is determined using a two-step process: first, the total amount of the fine in the case is determined based on the circumstances of the case;[2] second, the percentage allowed for the creative sentence is determined. In Alberta, that percentage is usually 50 percent but in some federal jurisdictions the percentage can be up to 90 percent (McRory & Jenkins, 2003a). To date, most creative sentences have been used to restore the environment, in technical projects, or to provide scholarships. We were told that this is the first time a creative sentence was used to assess and make recommendations on the internal compliance culture of an organization.

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A Responsive Regulatory Approach

We view restorative justice approaches, like those described above, as falling into an overall responsive regulation approach (Ayres & Braithwaite, 1992). The idea is to develop a regulatory strategy that has as an underlying assumption the notion that regulated entities will, in general, seek to rectify their misconduct (Braithwaite, 2003: 163) but also acknowledges that when they do not, it is necessary to escalate up an enforcement pyramid (Ayres & Braithwaite, 1992) to strategies based on deterrence, and then if deterrence fails, to incapacitation or removal. Thus, responsive regulation advocates that enforcement needs to be tailored to the specific situation and its proponents make reference to a pyramid of increasing sanctions (Ayres & Braithwaite, 1992; Nehme, 2007), as depicted in Figure 1. The pyramid is shaped to reflect the fact that the number of transgressors who will deliberately contravene the regulations gets increasingly smaller as the severity of the regulatory reaction increases and, therefore, the most interventionist punishments and incentives need only be used with a few parties.

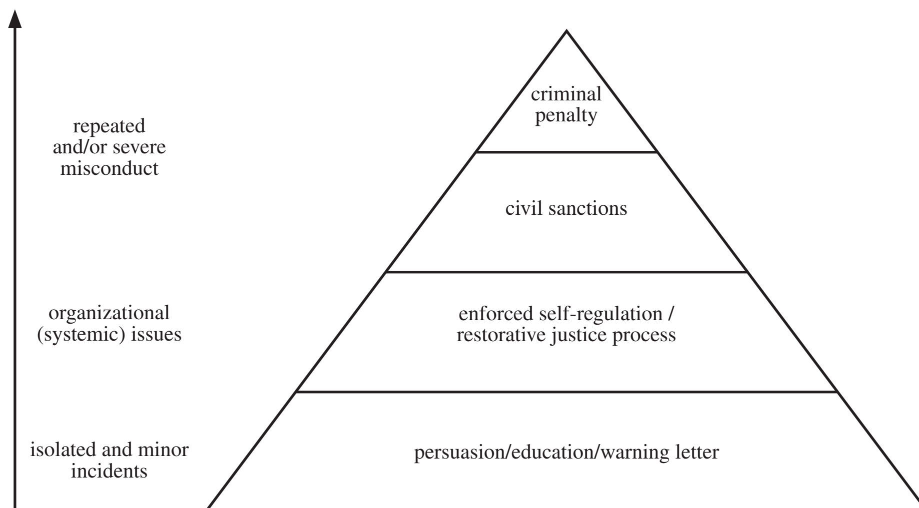

Figure 1: A responsive regulatory approach

The presumption in responsive regulation is that most regulated entities will put their best foot forward if provided with the opportunity and, therefore, regulators should always start at the base of the pyramid and escalate up the pyramid only when more modest forms of intervention or punishment fail (Braithwaite, 2011: 482). The key is for the regulator "to resist categorizing problems into minor matters that should be dealt with at the base of the pyramid, more serious ones that should be in the middle, and the most egregious ones for the peak of the pyramid." (Braithwaite, 2011: 483). In fact, this approach allows more cost effective and less confrontational strategies to be employed first. As less interventionist modes of regulation fail, the regulator escalates up the pyramid to more and more interventionist modes of regulation (Braithwaite, 2011: 482).

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At the point when a regulator perceives the potential for misconduct, a typical pyramid begins with dialogue, persuasion and education and moves upward through restorative justice processes and eventually ends with civil or criminal penalties and sanctions. The theory argues that the stricter the punishments are at the top of the pyramid the more effective the regulator will be at the bottom (Braithwaite, 2011: 489). The intention of the responsive regulation approach was to replace criminal and economic sanctions at the lower part of the pyramid with more responsive approaches consistent with the minimal sufficiency principle (Ayres & Braithwaite, 1992: 49) because empirical evidence supports the contention that the "less salient and powerful the control technique used to secure compliance, the more likely internalization [learning] will result." (Ayres & Braithwaite, 1992: 49). These authors reoriented the debate on government regulation by lucidly outlining how regulations can be a fruitful combination of persuasion and sanctions. They note that the regulation of business by the United States government is often ineffective despite being more adversarial in tone than in other nations. The authors draw on both empirical studies of regulation from around the world and modern game theory to illustrate innovative solutions to this problem. Their ideas include an argument for the empowerment of private and public interest groups in the regulatory process and a provocative discussion of how the government can support and encourage industry self-regulation (Ayres & Braithwaite, 1992: 49). Nevertheless, there are clear situations where a rapid escalation up the pyramid is warranted, for example: when the regulated entity is a repeat offender, previous attempts at regulation have failed, and the dialogues are following the same patterns or clear situations where the regulated entity makes statements about intentionally committing future infractions or crimes (Braithwaite, 2011: 483).

METHODS

Our study is exploratory, intended to generate theory about how regulators, prosecutors and courts can support organizations in their rehabilitation (which may lead to reintegration) with the goal of preventing future misconduct. For this, we adopted an inductive, grounded approach (Charmaz, 2006; Glaser & Strauss, 1967; Glaser, 1978, 1998, 2005; Goulding, 2002; Locke, 2001) in which we systematically derived theory from lived experience, interviews, observations, memos, secondary data and by later iterating back to existing theory as an additional data source to refine our evolving model. Thus, the data employed in this study are two-fold. First, we make use of data from a case study on a creative sentencing process that were collected over a five-year period from 2008 to 2013. Second, we treated the literature as an essential source of "outside comparisons" (Glaser, 1978: 51) to complement our grounded findings with existing theory. We took care, though, to avoid broadly engaging the literature prior to discovering our own framework in order to maintain a close fit with our data and to avoid confounding our data with preconceived concepts and processes (Glaser, 1978).

The final model we develop is thus shaped both by our grounded findings and comparisons with the literature. This comparison between the case and the existing

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literature permits us to identify gaps in the current theory and, in turn, propose a new theoretical model to fill them (Siggelkow, 2007). In later sections, we clearly delineate which components of the model were shaped by which source.

Data Collection

Our secondary data consists of thousands of pages of documents, including prior creative sentencing cases, court transcripts from this case, the statement of facts and the court order, and internal and external reports. Our primary data consists of observations and interviews over a five year period from 2008 through 2013. This includes seventy-two interviews within the company (from the most senior levels down to front line operators) and twenty-one interviews with external stakeholders including regulators, prosecutors, NGOs, and judges. These interviews were recorded and transcribed (with the exception of three interviews in which the participants did not consent to being recorded).

A further source of data was a two-day knowledge forum, consisting of a public report out of the findings and a closed door session between industry and regulators where we solicited feedback on the creative sentencing process. In the period since the knowledge forum (2011–2013), the lead author maintained regular contact with senior managers at the company and was part of ongoing conversations about how to implement the findings of the research project. It is this entire corpus of data and experience that we reflect upon in this article.

Data Analysis

We approached our analysis from a broadly interpretive perspective initially beginning with open coding—line-by-line coding of the data to ascertain its meaning—(Holton, 2007) related to the creative sentencing process, including critical stages and turning points, key events, expectations, efforts and practices, and outcomes and contradictions. We made use of atlas.ti to support our coding process. We also assembled a detailed chronology of events related to Suncor's compliance track-record, the incident in question, the creative sentencing project, and the follow-up to the project.

It is important to note that at the time that we undertook the data gathering related to this creative sentencing project, we were unfamiliar with the Pfarrer et al. (2008) model of organizational reintegration. However, after returning to the literature as a source of additional data to help us integrate what we were seeing with existing theory, we found several connections between our data and the four stages of the Pfarrer et al. (2008) model of organizational reintegration. We therefore returned to more systematically code our data with regard to these four stages: discovery, explanation, penance, and rehabilitation. This led to the identification of several gaps or inconsistencies. A first theme related to the role of penance and/or punishment. Also, given that our interview data extended beyond this particular case to how other cases had been (or should be) handled, a second theme emerged related to the notion that there may need to be different 'approaches' to different 'types' or 'degrees' of misconduct.

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Again, this led us back to incorporate more literature into our theory building including work on a responsive approach (Ayres & Braithwaite, 1992; Nehme, 2007). Next, we undertook systematic coding of both our case data and prior work related to the four levels of the responsive enforcement pyramid: persuasion; a restorative approach; civil sanctions; and criminal proceedings. We then returned to undertake a more detailed process of 'coding-on' (Richards, 2005) in which we attempted to compare the four stages of the reintegration model to the levels within the enforcement pyramid. Additionally, we coded for events or perspectives that did not neatly fit into these categories. For instance, we coded on the role of the regulator (autonomy vs joint-problem solving); the aims of the creative sentencing project (deterrence vs learning); and we coded for the involvement of various stakeholders at different stages of the process. We also began coding and writing memos about what we were 'not' seeing at each stage (for instance, 'no effort to assess outcomes of rehabilitation').

Theorization

Given that our goal was to theorize more generally about how the legal system might support an organization's rehabilitation and reintegration efforts, we returned to prior work on restorative justice and responsive regulation as a source of data to fill in the gaps in our evolving model of reintegration. Recognizing the need to better explain an escalating process of sanctions (as prescribed by the responsive approach), we began to explore a spectrum of misconduct that ranged from isolated/minor misconduct to organizational (systemic) misconduct and, finally, to repeated and/or severe misconduct. Ultimately, using prior literature as an additional source of data, we developed a model for a responsive and restorative approach to organizational misconduct, which we outline in more detail in the discussion section.

DRAWING LESSONS FROM SUNCOR'S CREATIVE SENTENCING PROJECT

In this section we begin by providing background on the case and then proceed to outline our findings related to the creative sentencing process. As noted above, while the case is a central component of our data it does not inform the entire model ultimately developed in this article. The case helps to illustrate one early attempt at implementing a more restorative approach to reintegration. The case also surfaces gaps in need of further theoretical elaboration.

The Infractions

The infractions in question occurred at Suncor's Firebag facility, which uses steam assisted gravity drainage (SAGD) technology to recover bitumen from deep underground. At the time, the technology was new to the industry and to the regulators. In 2000, Suncor made an application for approval of the project that included vapour recovery units (VRUs) for the produced water tanks to capture hydrocarbon and other air emissions. As the design progressed, these particular pieces of emissions control equipment were removed from the design drawings, having been deemed

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unnecessary. However, these design changes were not effectively communicated to those in the organization responsible for obtaining regulatory approvals and the application for approval was prepared based on the original design. A formal review process was not undertaken by Suncor prior to submission, with the end result that the equipment was a requirement in the application but was not built into the asset.

At the handover of the asset at project completion in 2003, Suncor did not complete a compliance audit to ensure that the project as-built met the conditions of the approval. About two years after startup, Suncor started experiencing odour problems on site, prompting site monitoring, including monitoring of the produced water tanks. Yet, according to the statement of facts, they still did not appreciate that the produced water tanks were obliged to have VRUs installed, pursuant to the approval. In June of 2006, a new Environment, Health and Safety Manager was appointed at the site. On July 20, 2006 in the course of reviewing the approval requirements, the missing equipment was noted. In a letter dated July 27, 2006, the non-compliance was reported to the regulator. Suncor then undertook both internal and independent reviews of its environmental management systems and initiated engineering work to address the missing equipment. Additionally, and most important for this article, rather than simply paying a fine, the company, in cooperation with the prosecutor, proposed a creative sentencing project, seeing it as an opportunity to prompt an industry level discussion on environmental compliance.

Suncor's Creative Sentencing Project

The Suncor Firebag creative sentence presents an excellent opportunity to examine an attempt to undertake a more restorative approach. As noted in our methods, the point of departure for our analysis was in respect to the reintegration model outlined by Pfarrer and colleagues (2008). Thus, we begin our findings section by reflecting on the four stages of the reintegration model (discovery, explanation, penance, and rehabilitation). During this initial phase, we also examined the stages in Ayres and Braithwaite's (1992) responsive compliance pyramid: warnings and education; forced self-regulation; civil process; and criminal process. Thus, we also situate our findings in reference to their position within an escalating enforcement pyramid. In so doing, we make reference at each stage to consistencies with these models and gaps that point to opportunities for further theoretical development. Our initial observations and findings about the case are summarized below.

Discovery

The discovery stage is an information-gathering stage where key stakeholders focus on the question: What happened? In this stage, the most powerful stakeholders reach concurrence (agreement) on the facts of the transgression. According to the model from Pfarrer and colleagues, the organization can facilitate this concurrence by taking supporting actions such as voluntarily disclosing the misconduct, engaging in open internal investigations, and cooperating promptly and openly with regulatory officials and elite (2008: 736). Consistent with these recommendations, Suncor voluntarily disclosed the missing VRU as soon as it became aware of it, launched

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an internal investigation, engaged an external consultant to conduct an independent review of its systems, and attempted to cooperate with the regulators' investigations.

At the time of the infractions, Alberta Environment's approach to regulatory oversight was consistent with a responsive approach in that regulators had an escalating set of tools, as described by one respondent:

> They have jurisdiction to go and get information and ask people about things and collect information or evidence. And if they discover a contravention they have [a range of] enforcement tools. So they can either do nothing (and usually that would be where it's an inadvertent error. It's very minor). In those cases, compliance is easily achieved through education. You know, there's no serious harm. Otherwise, they could send a warning letter. They could do an enforcement order requiring somebody to do something. They could issue an administrative penalty, which is a monetary penalty. Or they could refer the matter for prosecution.

Proponents of responsive regulation suggest that regulators can help in the discovery stage by focusing on joint problem solving. As issues arose on site, the regulators made use of a responsive and escalating set of tools. Initially warning letters were issued; the two parties did not, however, engage in joint-problem solving to establish corrective actions. Instead, the regulators noted that "it was up to companies to ensure that they were operating in a responsible manner." At the time, Suncor had a distant relationship with their regulators and there was even some confusion about which regulatory body they should be reporting to. The regulators were unfamiliar with the technology and, due to the remote location, they were not onsite very frequently.

Vaughan (1990, 1997) has written extensively on the challenges of regulatory oversight. Vaughan (1983, 1990) tells us that the autonomy of regulators hinders the gathering and interpretation of the information needed during discovery, monitoring, and investigation because regulators are only able to 'see' inside the boundaries of the organization through periodic site visits and through the information provided to them. As was the case here, advances in technology along with changes in processes and procedures often create interdependence as regulators come to rely on the regulated organizations to bring them up to speed on these changes.

These tensions were front and center in this case. Over time, through a series of errors, omissions and incidents, the regulators began to perceive patterns of action that led them to believe that the issues at Firebag were systemic in nature. In sentencing Suncor, the court acknowledged that while no significant environmental harm resulted from the infractions, a lack of systems in place at the Firebag facility suggested a potential for environmental impact. From the prosecutor's perspective and in the interest of the public, organizations must demonstrate a pattern of competence and be able to show that they have the necessary processes and controls in place.

Another cornerstone of the restorative process is the inclusion of a range of stakeholders at the discovery stage. Yet in this case, the only stakeholders involved in discovery were the regulators and, eventually, the prosecutors. In this respect, the process was more like a criminal trial. The end result of this phase was concurrence amongst this limited set of stakeholders on *what* happened. What is important to

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note is that the interactions between the regulators and the company (and later the prosecutors and the company) were focused on compliance, not on joint problem-solving as is normally present at start of a responsive regulatory pyramid. This gap and the failure to properly include stakeholders in the discovery process were carried forward into the development of our theoretical model.

Explanation

The explanation stage in the Pfarrer et al. (2008) reintegration model focuses on the question: Why did it happen? The outcome of this stage is concurrence among the stakeholders on the appropriateness of the explanation. The organization can facilitate concurrence at this stage through taking actions such as acknowledging wrongdoing, expressing regret, accepting responsibility, offering amends, or apologizing (Pfarrer et al., 2008: 737).

Our interviews revealed that despite extensive internal investigations and an external investigation as part of the regulators' discovery process, there remained a high degree of uncertainty surrounding the root causes of the transgression. In fact, our interviews seem to suggest that it was the dissatisfaction with the lack of concrete root causes that prompted the senior leadership at Suncor to suggest the creative sentencing project in the first place. Suncor had been participants in writing teaching cases in the past and benefited from the reflective activity. Early in the process, a senior leader at Suncor lamented "the limited amount of peer dialogue on environmental compliance in the industry". Rather than simply pay a fine, the company saw the creative sentence as an opportunity to "prevent future incidents by others and ourselves . . . [and] capture learnings so they get shared more broadly." A manager framed it this way: "a lot of companies would be very embarrassed by what happened and would want to get it behind them as quick as possible. Pay the bill and move on. The simple fact that Suncor is ready to open the kimono here a little bit—I think it's a good thing. And I think we'll learn from it, and I think others will as well."

An agreed upon statement of facts and a guilty plea were both prerequisites for being eligible for a creative sentence in Alberta. In contrast, there is no formal requirement for an explanation of the root causes of the offence. Given that the outcome of the initial discovery process did not appear to answer the question of 'why' to anyone's satisfaction, the creative sentencing project provided Suncor and the prosecutors with an opportunity to engage in a more detailed discovery process and explanation. In this particular case, a novel element was the introduction of a set of outside experts (the research team) that was tasked with helping to identify root causes. Thus, the explanation period extended from the design of the creative sentencing project, right through to the public knowledge forum where the research team offered its 'explanation' and recommendations for industry. Throughout this process Suncor again undertook many of the recommended actions proposed in the Pfarrer et al. (2008) model. It publicly acknowledged wrongdoing through a guilty plea, expressed regret, accepted responsibility, and offered amends both by proposing and participating in the creative sentencing project and the public knowledge forum.

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However, we note that in contrast to a 'textbook' restorative process, it was only late during the explanation phase that other key stakeholders were invited into the discussions, and only in a limited fashion. Stakeholders had access to the statement of facts (a summary of the infractions), and during the public knowledge forum industry peers, the public, and environmental groups were invited to attend a presentation on the key findings, including the root causes and lessons learned identified by the research team, along with a discussion of the relevance of these findings for the rest of the industry and for regulators. Despite this limited access, attendees did comment on the value of this process being "led by a third party" and approved of the "open discussion and analysis of the causes of the incident"; the "straight talk"; and the "high level of candor." From this phase, we took forward the need to explicitly account for stakeholder involvement in a restorative process.

Penance

The penance stage focuses on the question: How should the organization be punished? The outcome of this stage is concurrence on the appropriateness of the punishment. Pfarrer and colleagues note that the organization can facilitate this by accepting the verdict, acknowledging the equity of the verdict, and serving time without resistance (2008: 738). Suncor plead guilty during the trial, participated in a public event to 'air' their misconduct, and helped support the development of a teaching case outlining the details of their compliance failures. Yet, while the senior management in the company were emphasizing that the process was focused on understanding root causes and sharing their learnings with industry peers, and were using language consistent with a restorative justice approach, the prosecutors were using the language of the criminal justice system, which focuses on punishment and deterrence. Referring back to Table 1, we find that creative sentences in Alberta must be punitive in nature and have deterrence as the primary objective.

In Pfarrer and colleagues' reintegration model, it is suggested that the organization should seek to be reintegrated as quickly as possible to minimize negative effects on legitimacy (2008: 734). In contrast, from the start, the prosecutors saw the project as a means to extend the 'shaming' (Skeel, 2001) over time, in terms of reach (through the case study), and, most importantly, within the industry where peer pressure might have more influence. In their conversations with us, the prosecutors emphasized that the maximum fines available to them did not make much of an impact and that there was a sense that large companies could choose to pay them as a cost of doing business. Despite having spent a good part of their career experimenting with creative sentences, the prosecutors reminded us "you've got to remember, we are criminal lawyers and this is a criminal prosecution . . . [W]e started doing regular crime and now we specialize in environmental. But it is a criminal process." For this reason, they put considerable effort into ensuring that the companies did not receive hidden benefits for work that they would have undertaken anyway, noting "we work pretty hard to try and make sure that the corporation doesn't benefit—that it is punitive."

We note that in the Pfarrer et al. (2008) reintegration model it is assumed that penance is required by stakeholders as a necessary part of the organization's path to restoring its legitimacy and that the goal of punishment should be punitive and

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deterrent in nature. While this was certainly consistent with the guidelines and practices for creative sentencing in Alberta, restorative justice models at the individual (Goodstein & Butterfield, 2010) and organizational level (Nehme, 2010) do not explicitly include penance. Instead, the emphasis is on making amends. Aspects of the project did appear to make amends. The knowledge forum provided an opportunity for the public and for Suncor's peers to ask hard questions in order to assess their degree of confidence with regard to whether Suncor was passing into rehabilitation. Again, feedback from the panel session reinforces this: "I was very impressed by the amount of honest disclosure from Suncor"; "this provided a good opportunity to ask questions and gain frank responses"; "a much better use of funds than fines"; "a good opportunity for learning and reflection which could lead to issues being avoided in the future"; and "very valuable and one that industry as a whole can benefit from." Overall, there appeared to be concurrence around the notion that the punishment was appropriate.

Ironically, by deliberately trying to avoid 'benefits' for the accused, there may have been an unintended consequence. By shifting the focus to translating the learnings from the case more broadly in the industry, Suncor's transgression became less 'attached' to them. It was no longer unique to their company, but rather, reflective of issues that the industry faces overall. It turned out that other industry players also had similar problems and it turned out that the regulators were also facing a steep learning curve in terms of how to regulate this industry. By the end of the closed door session on the second day, Suncor was being lauded for having the courage to share their experiences. Perhaps ironically, the prosecutors' requirements to focus on the industry to avoid benefits for Suncor may have facilitated Suncor's reintegration.

Rehabilitation

According to Pfarrer et al. (2008), during the rehabilitation stage stakeholders begin to move beyond the need for punishment and, instead, start to focus on ensuring that the transgression doesn't happen again. They note that this stage is informed by the question: What organizational changes have been made? According to their model, consistency between the organization's internal and external actions is critical to gaining stakeholder acceptance and ultimately, reintegration. The primary focus of internal actions involves rebuilding the human, infrastructural, and social aspects of the organization and the primary focus of the external actions involves outwardly portraying the new image that was presented to internal stakeholders (Pfarrer et al., 2008: 739).

We identified numerous internal and external rehabilitation actions that were taken by Suncor, such as making changes to goals and business processes and systems, developing new systems and processes, developing training programs, and increasing internal site inspections and on-site observation hours. All of these actions are consistent with the actions proposed in the reintegration model. These actions did indeed "connote the same renewal message to all stakeholders" (Pfarrer et al., 2008: 740). However, while the creative sentencing project issued a set of recommendations for how Suncor, other industry players, and regulators might shift their behaviours, there was no requirement for Suncor to demonstrate that they

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had implemented changes that would prevent them from reoffending—there was no *assessment* of rehabilitation. Later that fall, in reflecting on the creative sentencing process, Suncor managers lamented that while the process had been effective at sharing their experience with the pubic and at generating productive discussion among regulators and their industry peers, the results of the project could have been better internalized. There were concerns that amidst the high degree of change at Suncor, these lessons could be difficult to instill. The creative sentencing process had not been designed to support them in making these changes or to assess whether they had done so. Recognizing the potential value that resided in the work that had been done, Suncor expressed interest in translating the findings of the report into further actions internally (something that was not included under the original proposal and could have been seen as a benefit). The effort to limit 'benefit' to Suncor may have hampered the impact and extent of the internal changes that might have otherwise been realized from the project. Thus, the case highlights a further opportunity to build on the reintegration model, which is to incorporate the development of a rehabilitation action plan (a set of corrective actions) and the assessment of rehabilitation into the model of reintegration.

Reflections for the Development of a Model

Our initial analysis of this case revealed several insights and several gaps in need of further investigation if we are to develop a model of a responsive and restorative approach to reintegration. These included the need to develop a response commensurate with the level of misconduct, the need to create a properly aligned process of increasing sanctions aligned with a responsive regulatory pyramid, the need to explicitly account for stakeholder involvement in a restorative process, the need to support the development of a set of corrective actions, and the need to include an assessment of rehabilitation into the model of reintegration.

A final important issue was surfaced in our analysis of the case: questioning the necessity for punishment. Hughes and Reynolds (2009) have argued that there has been a gradual movement in sentencing from compliance based sentencing, to creative sentencing, and finally to restorative justice. At each stage, the sentence relies less on punishment and deterrence and more on learning and reintegration. Yet, the movement from compliance based sentencing towards a restorative approach has been challenging because many of the individuals involved in the regulation and justice system still take for granted the necessity of punishment. For instance, we see that the guidelines for creative sentences in Alberta as listed in Table 1 include the requirement that the sentence must be punitive in nature. Yet, while Hughes and Reynolds (2009) make a distinction between creative sentences and restorative justice, we assert that it need not be necessary to do so. While it is certainly the case in Alberta that to date most creative sentences have not been fully restorative, creative sentences could be restorative if structured to do so. Instead, most creative sentences have focused on deterrence, punishment, and re-dressing wrongs. Linking back to the Pfarrer et al. (2008) four stage reintegration model, we are arguing that most creative sentences to date have been very good at the penance stage. Every of-

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fender must plead guilty and pay their fine. Very few (and this is where the creative sentence featured here begins to be an exception) have focused on rehabilitation processes (including organizational learning) as a mechanism or even requirement to reintegration. Yet, even in the case presented here, in which an attempt was made to understand the cultural antecedents of the transgression, there was still a focus on ensuring that the offender received no benefit. In contrast, in restorative justice models everyone, including the accused, is meant to receive benefits and the role of punishment becomes marginalized (Braithwaite, 1999) until a point where it is determined that the organization is not making sufficient effort to rehabilitate.

SUPPORTING REHABILITATION AND REINTEGRATION AND PREVENTING REOFFENSE

Our article asks: What kinds of actions can regulators, prosecutors, and courts take to reinforce and encourage the efforts of an organization to be reintegrated? In this section, we combine our analysis of this case with insights from prior work to outline a model of how regulators, prosecutors, and courts could support corporate reintegration in a way that reduces a company's likelihood of re-offense. The model that we develop is based on two core assumptions: 1) that rehabilitation is a key element of reintegration and therefore, demonstrating patterns of action that would prevent re-offence is a necessary precursor to reintegration, and 2) that the effort is restorative and therefore, with the exception of extreme circumstances, that the accused can benefit from the process in the spirit of achieving rehabilitation.

Drawing on Goodstein & Butterfield's (2010) work on restorative re-integration at the individual level and Nehme's (2007, 2010) work on restorative enforceable undertakings at the organizational level, we argue that a restorative justice approach to creative sentencing would include the following core elements: Reparation of harm, stakeholder involvement, and community and government cooperation.[3] We highlight that it is imperative that in this process there be an external focus (reintegration into the community) and an internal focus (rehabilitation—that the offender learn how not to re-offend in the future). This means that everyone in the process will benefit, including the offender.

Reparation of harm involves the healing of victims, offenders, and communities. Nehme (2010) has argued that reparation of harm involves four possible sets of actions: changed behaviour—the offender agrees not to re-offend in the future; restitution—compensating the victims and the community for the loss they have suffered; repentance—a genuine apology; and generosity—going beyond simple restitution (Nehme, 2010). While Nehme (2010) notes the need for offenders to agree not to reoffend, we believe that the case illustrated here suggests that the organization must engage in a learning process in which, as an outcome, management is able to *demonstrate* that they have reduced the likelihood of reoffending.

Drawing from Ayres and Braithwaite's (1992) responsive compliance model, our starting point is the premise that all isolated incidents and accidents are best approached initially through persuasion, while more systemic or persistent organizational issues are candidates for quick escalation to restorative processes, and

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incidences of repeated, intentional, and serious misconduct may need to be escalated quickly to a civil or a criminal process. Current regulatory approaches underemphasize the need for rehabilitation in order to support effective reintegration. Based on this, we articulate a model for a responsive and restorative approach to organizational misconduct that balances the punitive role of regulators and courts with new roles in supporting and overseeing rehabilitation.

As outlined in Figure 2, our model depicts a process of escalation of enforcement. In our model all forms of perceived misconduct enter the model on the left. Companies that wish to avoid escalation must demonstrate that they are acting in good faith. Perceived inadequacy on the part of regulators, prosecutors, and other stakeholders regarding the organization's actions during any stage may result in escalation to increasingly punitive consequences. Repeated and/or severe misconduct simply escalates through the model much more quickly than less severe forms of misconduct. In addition to performing more informal assessments at each stage of the model, regulators (or at later stages, courts) also perform or oversee a comprehensive assessment to assess rehabilitation at the culmination of every stream.

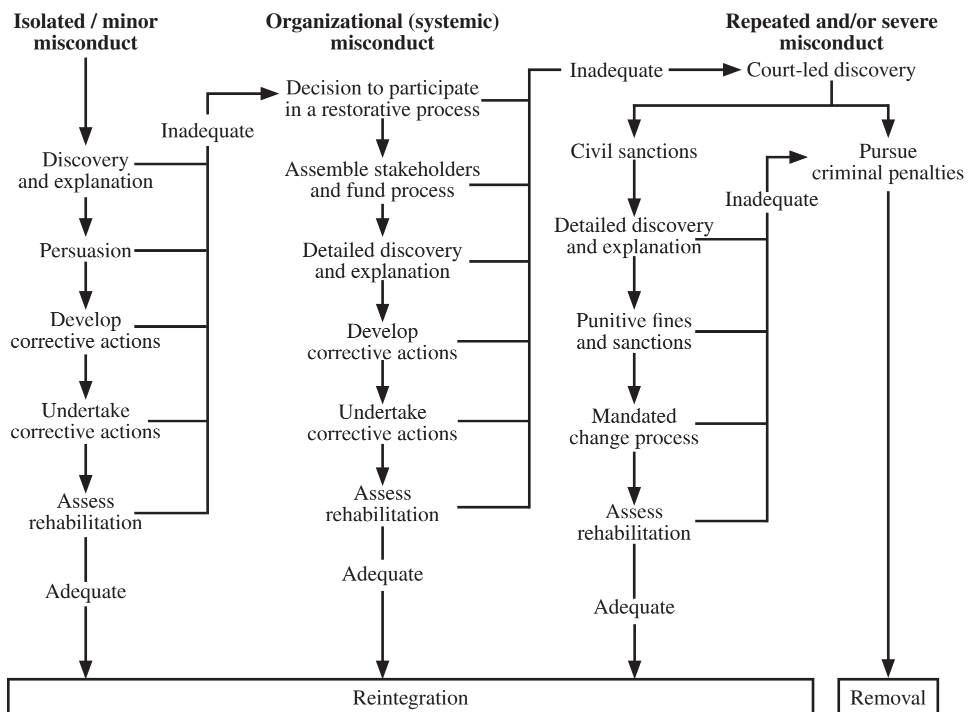

Figure 2: A responsive and restorative approach to organizational misconduct

A Pathway Typical of Isolated/Minor Misconduct

The left side of the model depicted in Figure 2 outlines the starting point for our process, regardless of the offence. In our proposed model, consistent with a restorative approach, the emphasis at this early stage is on joint problem solving rather than on regulatory autonomy. In situations where the organization engages or is perceived to have engaged in minor and/or isolated incidents of misconduct, includ-

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ing accidents, the regulator will engage the company in a *discovery and explanation* stage in which regulators attempt to guide the regulated firm through a process of joint sensemaking in order to understand the problems at hand (Braithwaite, 2011: 476–77). Following discovery and explanation, regulators engage in *persuasion*, beginning with education and escalating, if needed, to warning letters. If the process has been collaborative up to this point, the two parties would jointly *develop corrective actions*. It then falls to the organization to *undertake* these corrective actions (Braithwaite, 2011: 497). An important final step is to *assess rehabilitation* in order to determine whether a pattern of action has been established that would prevent future misconduct. At this stage, this assessment would be undertaken by regulators but it would fall to the organization to demonstrate their compliance with the corrective actions. As noted earlier, perceptions of inadequacy at any stage are grounds for moving to the next phase of our model—organizational (systemic) misconduct. In our proposed model, there is no penance or punishment at this early stage; however, organizations must demonstrate a willingness to improve.

A Pathway Typical of Organizational (Systemic) Misconduct

While all forms of misconduct begin at the left of our model, the second column depicted in Figure 2 addresses a pathway more typical of systemic issues of misconduct. Organizations may find themselves in this pathway as a result of escalation from an incident of isolated or minor misconduct or as a result of the misconduct having been identified as a systemic issue at the outset. In either case, the organization could make the *decision to participate in a restorative process*. Under the traditional legal framework, organizations would be subject to fines. Yet, should the company be willing to admit to the wrongdoing in question, and should they be interested in working with stakeholders to support and guide their rehabilitation, they may elect to agree to participate in restorative process. The process consists of the following steps: assemble stakeholders and fund process; detailed discovery and explanation; develop corrective actions; undertake corrective actions; and assess rehabilitation.

A critical first step is to *assemble stakeholders* and to *fund the process*. Provisions for stakeholder involvement at an early stage provide the opportunity for victims, offenders, and communities to be involved in the justice process (Ayres & Braithwaite, 1992). This differs from a traditional legal proceeding in that it includes not only the government and the offender but also the victim and communities. The stakeholder list needs to include at a minimum the following four groups: the offender, the government, the victim(s), and the community or communities affected (in the case of environmental offences, other parties such as environmental NGOs may represent the 'victim'). The determination of affected communities can be a court or regulator supervised process—in so doing, the court or regulator needs to be open minded about who and what was affected by the offender's actions. Another critical task in this stage is to arm the stakeholders with an understanding of the goals of the process; how the process will proceed; and how the parties will interact (this may include guidelines for holding the meeting and guidelines for generating a solution).

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In addition to assembling stakeholders, arrangements need to be made to fund the process. These funds should primarily be provided by the organization and paid into the court to be dispersed by the court. Current practice in creative sentencing situations has these fines being paid into the court *in lieu* of the fines that would normally be paid; the amount is predetermined. In effect, the project focus becomes: what can we accomplish with this budget? In the future, the budget could be determined by what is required to be accomplished and the source of funds could come from the organization and any other stakeholder who wishes to participate financially (for instance industry associations, NGOs, or governments).

Detailed discovery and explanation is again a process of joint sensemaking. The offending organization and the stakeholders must agree upon a process of discovery and explanation. The endeavour is intended to be generative rather than focused on assigning blame. The discovery and explanation stage is meant to inform the next stage of the process, which is to *develop corrective actions.* Nehme (2007) has argued that there is a suite of possible corrective actions but that a core focus must be on stopping the behaviour from reoccurring. That means that the number one priority of an organizational level restorative justice creative sentence process needs to be having the organization demonstrate that they have learned how not to re-offend. This can be accomplished through compliance programs and education together with third party assisted evaluations of procedures and culture. The decision about what would constitute appropriate corrective actions and how those actions should be assessed should be a collective one amongst all stakeholders. This stage will yield a set of prescriptions / promises and a process. This set of prescriptions/promises and the process are then proposed to the judge (or other official overseeing the process) for approval. Nehme (2010) advises that the judge should make their decision based on a set of decision criteria that include whether it is suitable and whether it is enforceable. If the proposed agreement is suitable and enforceable then it should be approved.

It now falls to the organization to *undertake corrective actions* (Braithewaite, 2011: 497). A critical component of ensuring public benefit involves monitoring the process and determining whether the prescriptions and promises outlined have been honoured. Some enforceable undertakings in Australia have experienced problems because of self-regulation and improper structuring of the monitoring provisions (Nehme, 2007: 122). Nehme has suggested that both these issues can be overcome if the undertakings structure the monitoring as a collaboration between the regulator and the offender and involve an independent expert to write a report (Nehme, 2009). Therefore, we propose that the process should be overseen by an expert monitor and/or a court or regulator. Also, it should be noted that this stage in the process will take some time to come to fruition, and so we note that the recommendation in the Pfarrer et al. (2008) reintegration model for haste is not consistent with a restorative approach to reintegration.

The final critically important step is to *assess rehabilitation*. There needs to be a formal assessment of the outcomes of the organization's efforts to rehabilitate. Did the organization demonstrate that it made changes that would significantly decrease its likelihood to re-offend? Did it undertake the full set of corrective actions as out-

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lined? Can it provide evidence that these changes are well embedded? The presence of third party monitors can assist greatly in this process. In the United States, the Department of Justice (DOJ) has been using deferred prosecution agreements and the Securities and Exchange Commission (SEC) has been using reform undertakings as negotiated settlements with businesses focused on preventing future misconduct (Hess & Ford, 2008). Often these agreements and settlements call for the appointment of an independent monitor to oversee the implementation of a compliance program aimed at preventing future misconduct.

If it is deemed that the organization had not undertaken adequate rehabilitative actions, then there needs to be an escalating sanctions process that begins with a warning and can escalate to a new negotiation or court action on the agreement (Nehme, 2007: 122). In the worst cases of breach of the process, the offender will be moved out of the restorative justice level of the regulation pyramid and escalated to the next level of enforcement, which would involve civil or criminal proceedings.

A Pathway Typical of Repeated and/or Severe Misconduct: Civil and Criminal Proceedings

The final two columns in the right-hand side of the model depicted in Figure 2 deal with repeated and/or more severe cases of misconduct. When organizations fail to demonstrate either a willingness or the capacity to rehabilitate, more directive oversight and/or more punitive measures may be required. Any civil or criminal process must begin with a *court led discovery process.* Under the *civil sanctions* column, subsequent to a *detailed discovery and explanation* process, the organization would be subject to *punitive fines and sanctions* yet would still be required to undertake a *mandated change process*, which would be subject to third party oversight to *assess rehabilitation*. In the model proposed here, payment of fines is never a substitute for undertaking rehabilitative action.

When organizations still do not demonstrate sufficient rehabilitation (meaning that they have violated the court mandated change process) or in situations where the misconduct constituted a criminal act, *criminal penalties* would be pursued. In these cases, prosecutors would seek the *removal* of offenders through the suspension of professional licenses, by revoking or suspending operating permits, or in the most egregious situations, through incarceration.

Implementation

The implementation of the model presented here could take several forms and the particular context of each jurisdiction's legal system would naturally constrain or shape the particulars of how this model could be implemented in practice. We propose that isolated/minor misconduct would be addressed by regulators. Existing courts could oversee the process beginning with organizational (systemic) misconduct. The judge would be responsible for overseeing a process of assembling stakeholders, funding the process, discovery and explanation, developing corrective actions, and assessing rehabilitation. The judge would become the third party that makes the decision on the sufficiency of the corrective actions (the judge could also enlist a third party to

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aid in the assessment). However, reflecting on this particular case, judges and prosecutors are trained in the criminal justice system, which has a focus on deterrence and punitive measures. Without additional training, judges and prosecutors may not be best positioned to oversee restorative processes. Consequently, other options for implementation could include establishing separate 'restorative' courts, to create a separate body to oversee restorative processes or to create a separate division of the regulator to oversee restorative processes. In cases of repeated and/or severe misconduct, judges would be required to oversee any civil or criminal proceedings.

Finally, it is important to note that the model that we propose here, and most notably, the restorative process proposed for organizational (systemic) misconduct, requires that organizations agree to pursue and fund a restorative process. Furthermore, as noted above, the process proposed here requires a change in assumption about the necessity for punishment on the part of regulators, prosecutors, judges and possibly other stakeholders.

CONCLUSION

For many years, the standard judicial approach to compliance enforcement in the business context has been underpinned by the belief that deterrence, higher sanctions, or penalties will lead to more compliance. This approach is based on the assumption that businesses act in their own self-interest in a calculative way (Parker & Nielsen, 2011: 4). Yet, studies have shown that while severe sanctions can serve as deterrents, the probability of detection and the probability of enforcement if detected are important moderators of the deterrence effect of sanctions (Makkai & Braithwaite, 1994; Parker & Nielsen, 2011). One of the key elements of reintegration involves the repair of relationships by undertaking rehabilitative efforts; however, current judicial systems in many countries do not include provisions to require and assess these rehabilitative efforts.

Our aim in this article was to understand how the regulatory and judicial process could support the effective reintegration of organizations after misconduct in a manner that would also help to prevent future misconduct. To do so, we have drawn lessons from an experiment in creative sentencing meant to induce changes in behaviour and reflected on the strengths and weaknesses of this particular case. We combine this analysis with prior scholarly work on misconduct, reintegration, and restorative justice to develop a model outlining how regulators, prosecutors, and courts could support and enforce rehabilitation as a condition of reintegration after organizational misconduct. Thus, we contribute to this call and to the literature on organizational reintegration following ethical and legal transgressions by proposing a responsive and restorative model of organizational reintegration after misconduct.

Of particular note in the creative sentencing experiment that we reviewed was the fact that Suncor's transgression became less "attached" to Suncor through the process of generating lessons learned for the industry. We caution that restricting the 'benefit' of the accused and exclusively focusing on public benefit shifted the focus away from whether the company had undertaken proper rehabilitation. For future creative sentencing projects, we would recommend that the primary focus of the

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project be the rehabilitation of the offender: assisting the offender in making changes to ensure that the likelihood of future transgressions has been reduced significantly.

In addition, our model raises significant questions of regulatory capture because it proposes that regulators work closely and co-operatively with offenders. Regulatory capture, the ability of a regulated entity to have undue influence over a regulatory body or process, has long been identified as an issue (Stigler, 1971) that can have negative effects on regulatory processes (Livermore & Revesz, 2012). Some amount of capture and cooperation is inevitable in any arena where there is close and intense interaction between regulators and industry (Baxter 2012: 39). For example, studies have found that regulated entities seek to co-operate with regulators (Reed, 2009) and that regulators co-operate more with regulated entities than they punish them (Ayres & Braithwaite, 1991: 457).

But, not all capture is bad and studies have shown that there may be examples where capture is beneficial (Baxter, 2011; Reiss, 2012). We adopt the more nuanced description of regulatory capture proposed by Reiss and argue that there is a continuum between capture (bad capture) where a regulated entity gains undue influence in a regulatory process to advance its own interests at the expense of the public interest and co-operation (good capture) where regulated entities have influence over the regulatory process but the entity and the public interests both benefit (Reiss, 2012: 573–90). This construction acknowledges that there are situations where regulated entities, regulators, and the public interests can work together co-operatively with some amount of capture and still all benefit (Baxter, 2011: 39). This notion has been has been supported by recent studies of the health care, aviation, and insurance industries (Mills, 2010; Schwarcz, 2013; Thaw, 2014). The question under this construction is not how to eliminate capture but how to mediate it so that we can ensure that it stays in the realm of co-operation.

The restorative approach advocated in this article has inherently built into it many of the techniques that are recommended for moderating regulatory capture, including tripartism, limiting discretion, multi-industry jurisdiction, and rotation of regulators (Ayres & Braithwaite, 1991; Baxter, 2012). Tripartism involves including the participation of third party NGOs representing the public interest that have full access to information, a seat at every meeting, a say in the decision making process, and the ability to escalate if those conditions were not met (Ayres & Braithwaite, 1991: 441). In addition, since the process that we are advocating is "process" oriented as opposed to subject matter oriented (i.e. the regulator and/or judge need not be an expert in the industry instead they are experts in the bringing the stakeholders together in a restorative justice process), the regulatory agency could easily be constructed to allow for multi-industry jurisdiction, and therefore the rotation of regulators. Furthermore, the regulators' discretion is naturally limited because decisions are made by the stakeholders and not just the regulators.

From a practical standpoint, our study suggests that restorative justice may be a promising approach for regulators, prosecutors, and courts to reinforce and encourage the efforts of an organization to be reintegrated. Yet, it also reveals that implementing restorative justice on the ground will require more than a few amendments to sentencing provisions. Parker (2009) has argued previously that initial attempts at

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involving courts in restorative justice processes with businesses have highlighted a gap in the institutional design of regulatory capitalism and that what is required are 'problem-solving' courts. She argues that we need to radically reconceive of the role of the court in regulatory enforcement so that problem solving courts catalyze and coordinate effective and legitimate settlements of corporate misconduct (Parker, 2009).

This model presents several contributions to current theory and future research on reintegration after misconduct. First, we explore reintegration from the perspective of the role of governments in supporting rehabilitation, restoring the notion that wrongdoing is an act against victims and community instead of simply an act against the 'regulator' or government (Braithwaite, 2002). Second, we outline a process for regulators, judges, offenders, and communities to work together to ensure that companies both make amends for misconduct and engage in a learning process to prevent them in the future. Third, our model highlights the need for all of these parties to challenge their assumptions about the necessity of penance and punishment. In outlining this model, we advocate that penance and punishment may not need to underpin all of the stages of response to misconduct. Finally, we direct attention more explicitly toward rehabilitation as both a process and an outcome. Our model raises important questions with regard to how best to support and enforce the organizational changes needed to prevent future misconduct.

NOTES

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1. Creative sentences can only occur where the statute under which the offence occurs allows for it (Campbell, 2004). In Canada, environmental legislation and prosecution led the way within the creative sentencing movement (Hughes & Reynolds, 2009) and many environmental statutes now allow for it (Strickland & Miller, 2007). In Alberta, creative sentencing is allowed under section 234(1) of the Environmental Protection and Enhancement Act.
2. Clean-up costs are not included in the calculation.
3. These are Nehme's labels for the values. Goodstein and Butterfield used the following labels to describe the values: making amends, victim forgiveness, and community reintegration.

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