



Enlightened Justice

Consequentialism and Empiricism

From

Beccaria to Braithwaite

Why Does Beccaria Matter?

- Today, not 1764
- Whitehead—forgetting our founders
- Reformer?—refused to travel
- Researcher?—did almost none
- Causal Theorist?—deterrence not new
- Proportionality?—Montesquieu 1721
- Death Penalty?—Quakers said it first
- Greatest happiness?—Hutcheson 1725

Three Reasons

1. Symbol of the Enlightenment
2. Leader of Consequentialism (Utilitarian)
3. Architect of the “science of justice”

241 Years Later

- Is The Enlightenment going dark?
- Do we care about consequences of justice?
(Still? Yet?)
- Do we care about empirical evidence on those consequences?

The Braithwaite Bulwark

- ***Enlightened*** perspective of both reason and emotion, sense and sensibility
- ***Consequentialist*** if not pure Utilitarian
- ***Empiricist*** if not purist on internal validity

Enlightened Justice

DEFINED:

The administration of sanctions under criminal law guided by

1. Inviolable principles of human rights of suspects
2. Consequences reducing human misery
3. Empirical evidence of what works best

1. Symbol of the Enlightenment

Beccaria was “was deeply indebted to the Enlightenment; the Enlightenment came to be deeply indebted to him.”

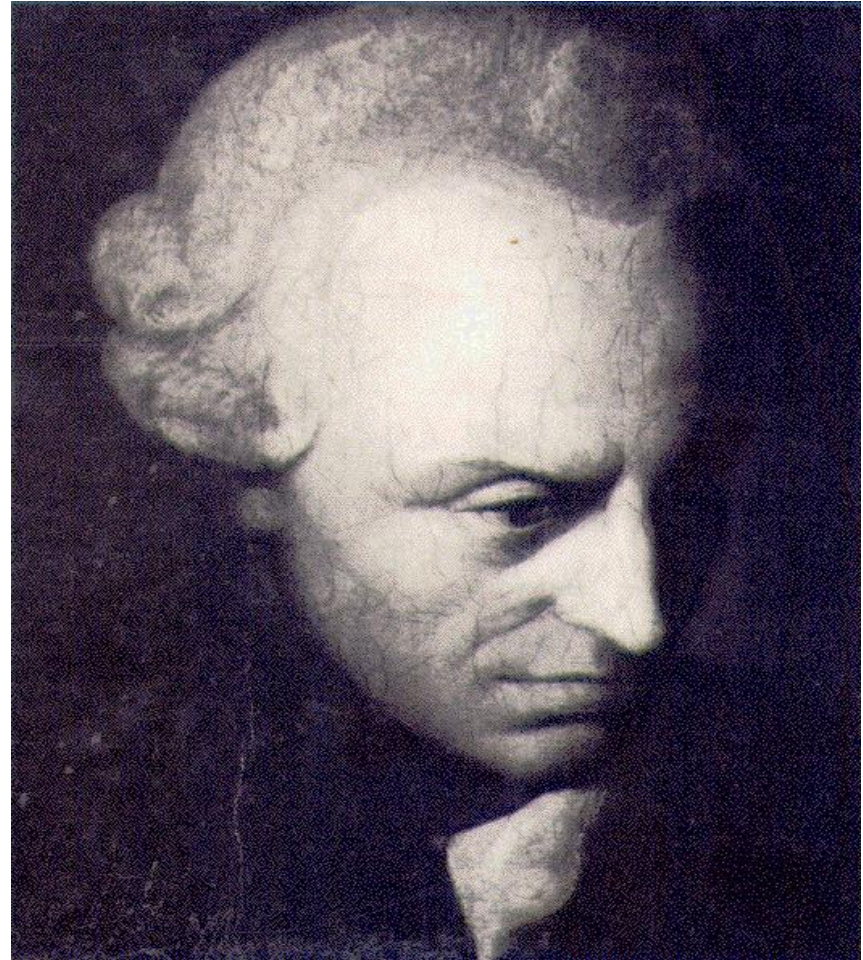
--Peter Gay, *The Enlightenment, vol. 2*
(1969)

What Is Enlightenment?

“Dare to know!”

--Immanuel Kant
1784

“Have the courage to
use your own
understanding”



Was Ist Aufklärung?

“Aufklärung is der Ausgang des Menschen aus seiner selbstverschuldeten Unmündigkeit. Unmündigkeit ist das Unvermogen, sich seines Verstandes ohne Leitung eines Anderen zu bedienen. Selbstverschuldet ist diese Unmündigkeit, wenn die Ursache derselben nicht an Mangel des Verstandes, sondern der Entschliessung und des Mutes liegt, sich seiner ohne Leitung eines Andern zu bedienen. Sapre aude! Habe mut, dich deines eigenen Verstandes zu bedienen! ist also der Wahlspruch der Aufklärung.”

--Immanuel Kant, 1784

What Is Enlightenment?

“Enlightenment is man’s emergence from his self-imposed nonage. Nonage is the inability to use one’s own understanding without another’s guidance. This nonage is self-imposed if its cause lies not in lack of understanding but in indecision and lack of courage to use one’s own mind without another’s guidance. *Dare to know!* “Have the courage to use your own understanding” is therefore the motto of the enlightenment.”

“The Recovery of Nerve”

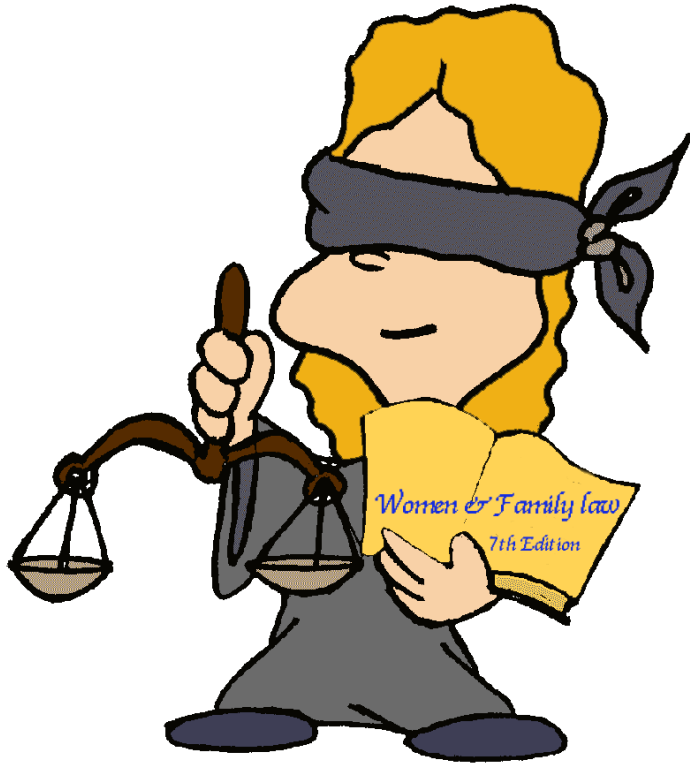
--Peter Gay

Loss of nerve: Gilbert Murray—from Roman Empire, sapping of vitality and rationality:

- Asceticism
- Mysticism
- Pessimism
- Loss of self-confidence, of hope, of faith in human effort
- Despair of patient inquiry
- Cry for infallible revelation
- Indifference to the welfare of the state

18th Century: Reason and Emotion

- Scientific Advances—theory
- Medical advances--practice
- Inventions of machinery
- Evidence that human agency matters
- Egalitarian view that individuals matter
 - achievers
 - victims
- Awakening of empathy, awareness of suffering of others



REINVENTING JUSTICE:

The Rational Management of

EMOTIONS

Cesare de Beccaria



- 1764 Treatise a
“Tipping Point”
- Enormous Effect:
 - Capital Punishment
 - Torture
 - Secret Trials
- Less Effect:
 - No Retribution
 - Prevention ONLY

Beccaria Re-Invented Justice



- Moral Theory
- Empirical Theory
- Descriptive Research
- Innovations as *Blueprints*

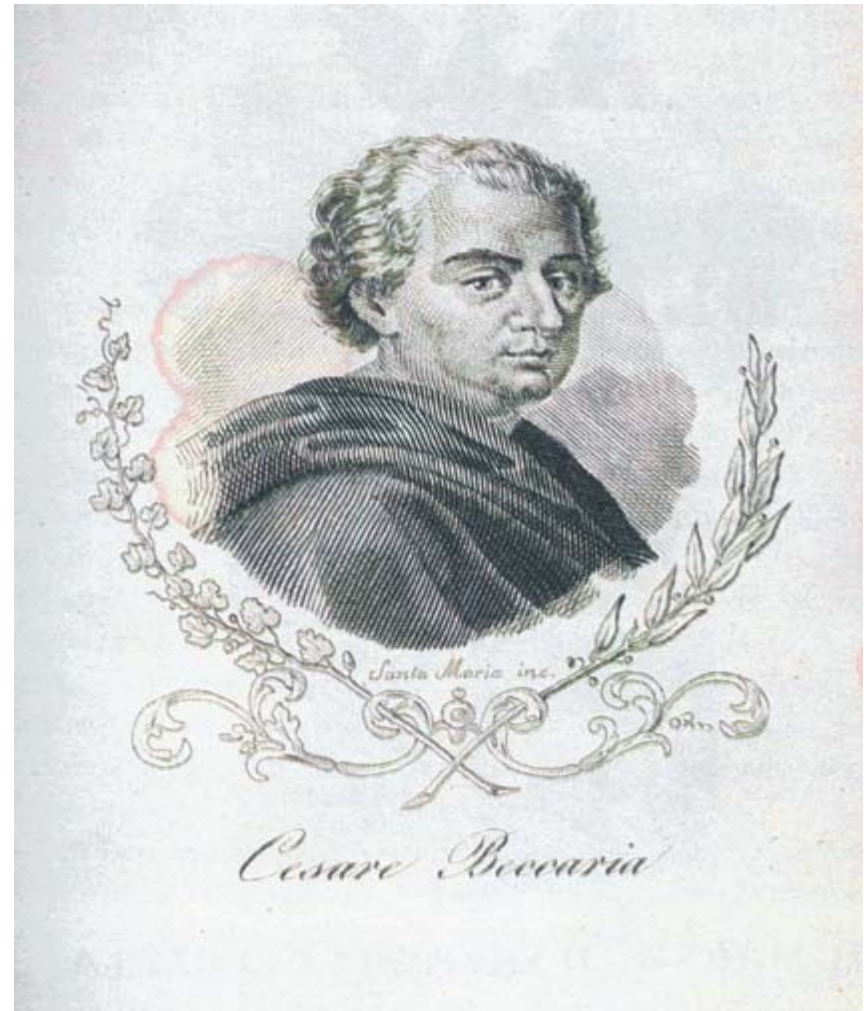
Beccaria's Aspirations

“The science of justice.”

--Peter Gay

“Geometric precision”

--Beccaria



Beccaria's CURSE



- Light = Moral Truth
- Not Scientific Truth
- Causal Claims
- No Experimentation
- No Falsification
- Curse Lives On:
 - Law, Social Science, Public Policy

Problem To This Day

“Neither men nor affairs may be understood when viewed only from one’s library”

--Marquis d’Argenson



Henry Fielding's Enlightenment



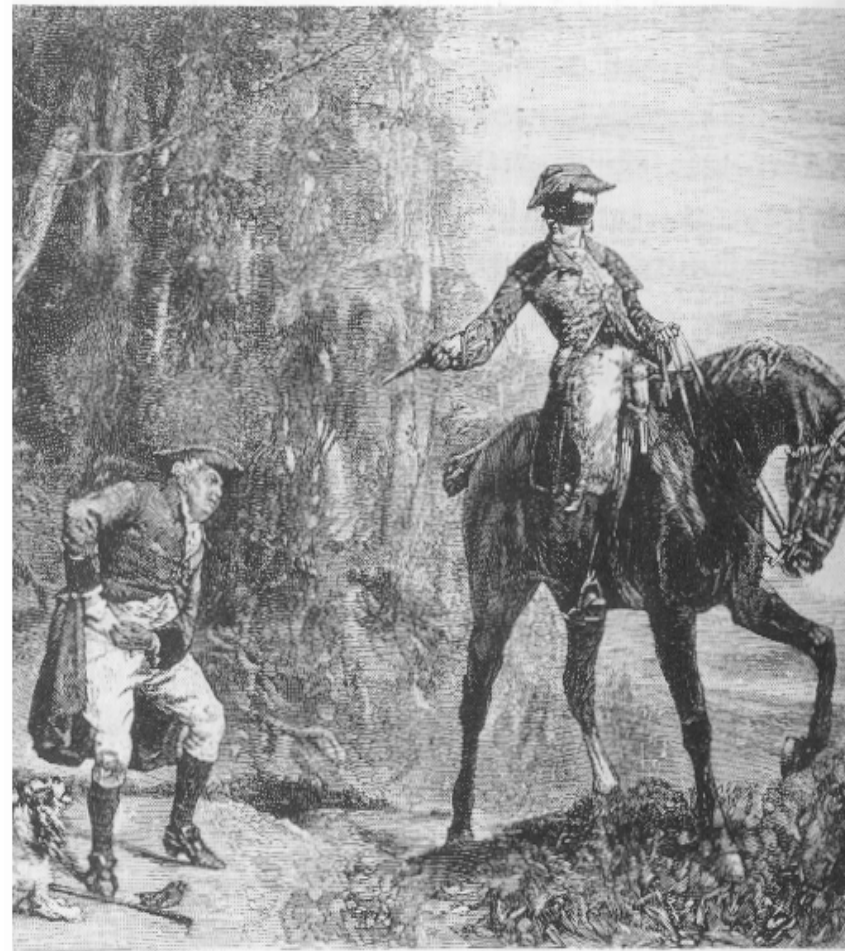
- Playwright
- Novelist (Tom Jones)
- Magistrate
- Police Chief
- Environmental Criminologist

“..the Late Increase in Robberies

- 1751
- First Criminological treatise (English)?

Focused on

- Cheap Gin
- High density of bars
- Influx of rural poor
- Possible remedies



Experiment in Policing

- Bow Street Runners
- First Paid Police
- Funded by a Home Office “grant”
- Secret plan
- Response to murder wave
- Arrests of a gang
- Murders stopped



Fielding The Inventor

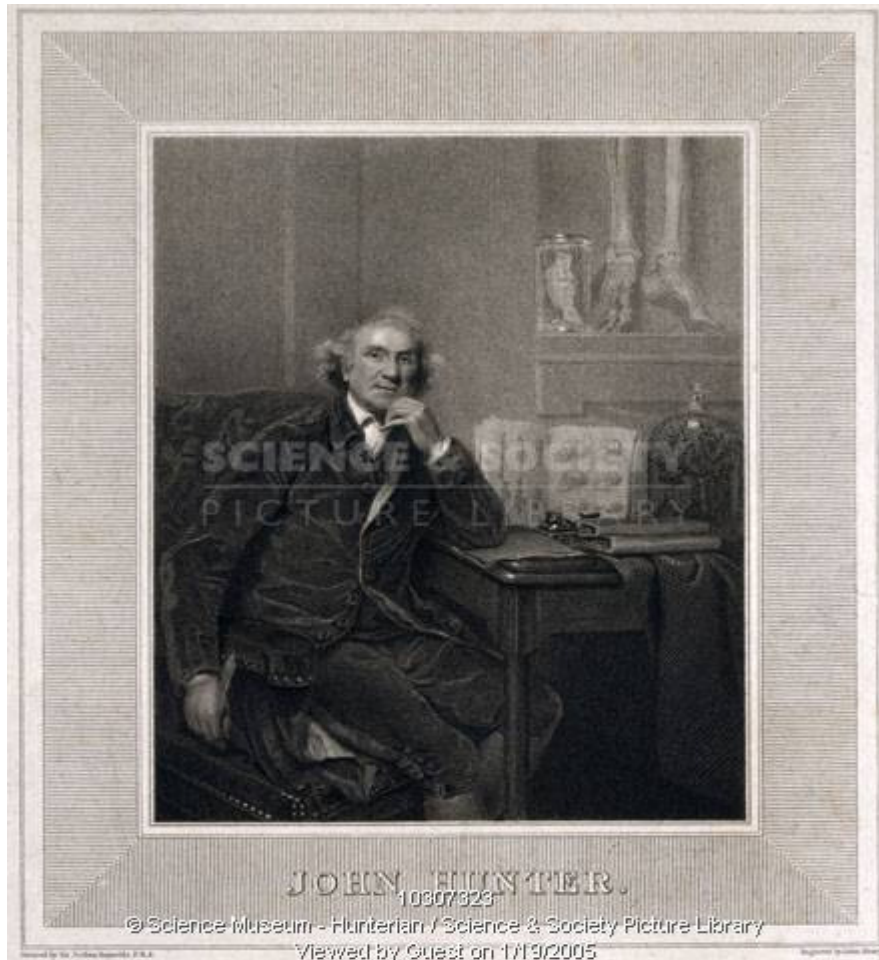


- Crime Reporting
- Crime Analysis
- Rapid Response on horse
- Kept Runners going by stretching out the grant
- Focused on prevention, not revenge

“Don’t think. Try.”
How smallpox was defeated.



John Hunter to Edward Jenner

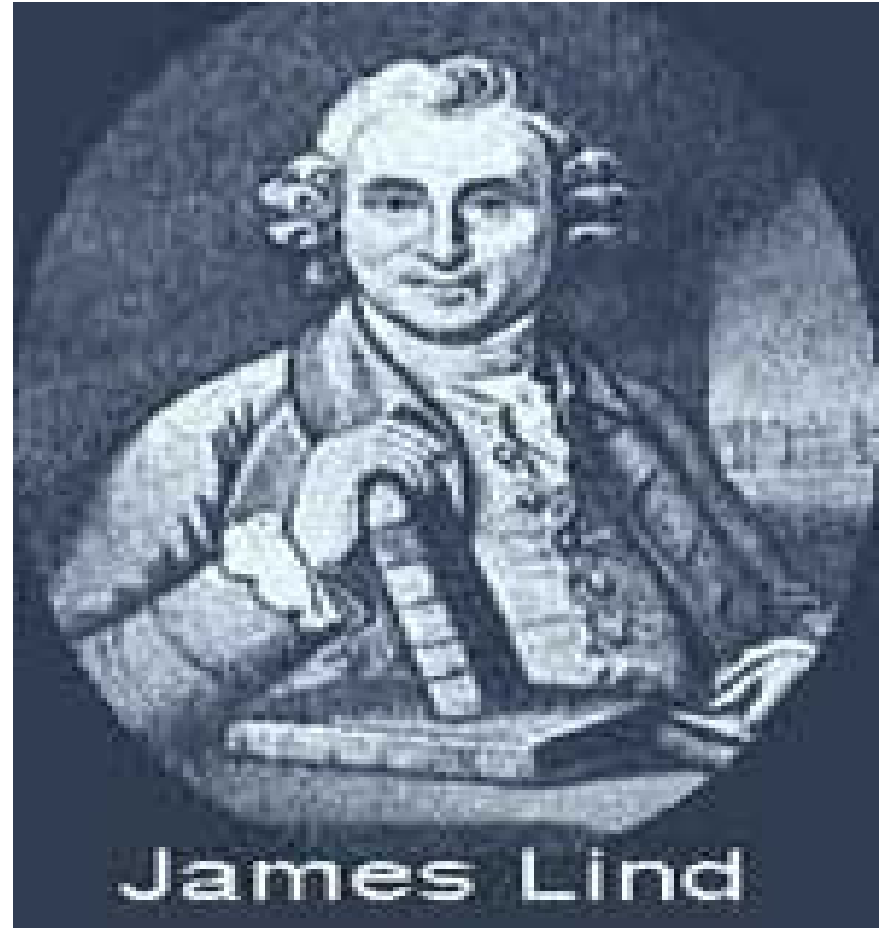


- Hunter: Organ Transplants
- Jenner: Experiments in Cowpox Vaccine
- Smallpox: extinct world-wide--1977



Limes and Scurvy: James Lind

- Experimental Method
- Compared different diets on long trip
- Found limes or fruit cured scurvy
- Then found it prevented scurvy
- British Navy: 42 years to evidence-based policy



So Who Had More Effect?

Beccaria



Fielding



The Wrong Question

- Beccaria: the power of theory
- Fielding: the power of experiment
- Imagine:

Combining both in a common effort
for

Enlightened Justice

2. Leader of Consequentialism

Beccaria

- Made the world safe for Fielding's inventions
- Beccaria "It is better to prevent crimes than to punish them." (Montesquieu to Conan Doyle)
- Changed paradigm from severity to certainty as a way of reducing crime

“The Rage to Punish”

- Spirit of Laws:

- Zeal to punish is a great source of mischief

- imaginary crimes (witchcraft)

- don't avenge the Deity:

“One must honor the deity, and never avenge it”

--Montesquieu

Proportionality vs. Prevention

- Tension between the two ideas
- Beccaria: severity of punishment = severity of harm
- i.e., consequences for criminal should match consequences for victim
- But then says ONLY justification is that which prevents (deters)
- Theory: proportional = effective
(stands to “reason”?)

Not Just Deserts

- Consequentialism for choice of penalty
- Cannot be linked to proportionality
- Must be linked to prevention, regardless
- Prevention must be based on evidence

3. Architect of the Science of Justice

- Geometric Precision
- Not theoretical, but based on experiments
- Sentencing guidelines from post-sentence impact on crime, general + specific
- Moral principle of minimal harm
- No matter how surprising, or counter-intuitive the evidence may be
- As long as evidence is reliable

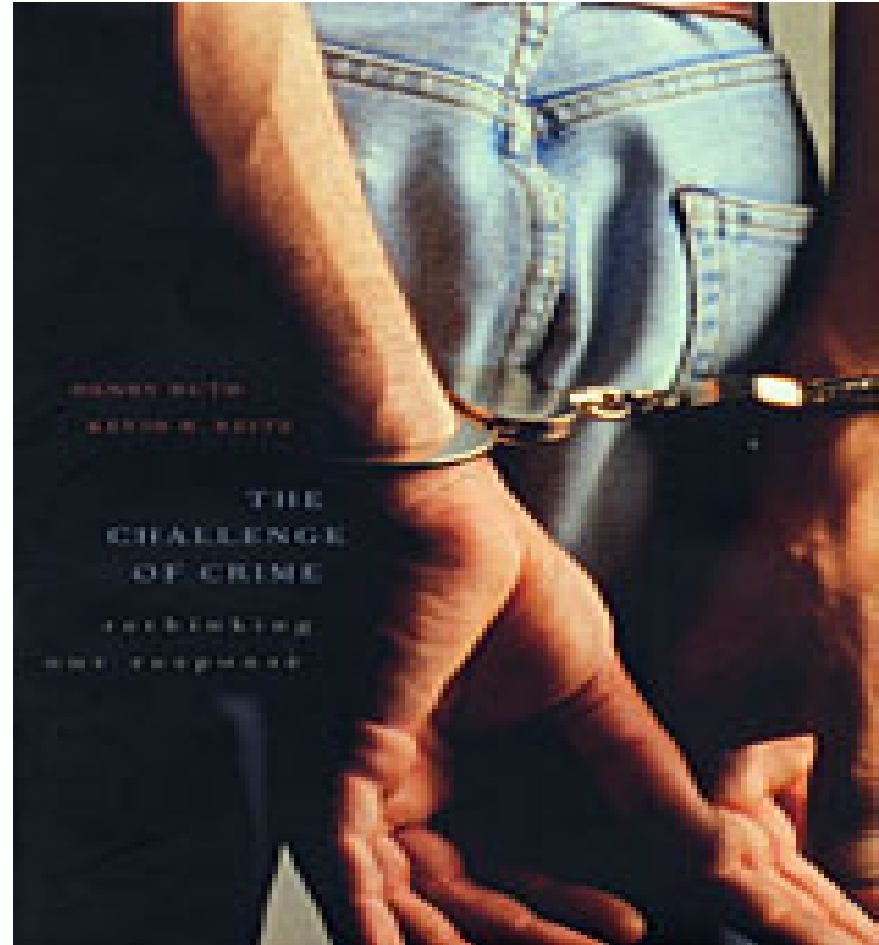
Make The World Safe for

- Experiments in Justice
- Fielding
- Franz von Liszt
- Herbert Sturz (release on recognizance)
- John Braithwaite

Verdict on Seeking Verdicts

Ruth & Reitz, 2003 on Braithwaite:

- Moral entrepreneur
- Shifting terminology
- “Mystifying”
- Clearly testable hypotheses



Moral Duty to Experiment

Braithwaite has

“endorsed the premise that crime reduction should not simply be asserted by program advocates, but should be studied under rigorous conditions, with no guarantees in advance that positive results will be found.”

Henry S. Ruth, Jr.



Moral Duty To Experiment

Whenever large human consequences are at issue in crime response programming, such methodologically sound research should be undertaken—unless a good reason can be cited to explain its absence

Henry S. Ruth, Jr.



Reason and Emotion

- Logical analysis
 - Evidence on causes
 - Focus on pain
 - Who is suffering and why?
1. Misery of victims
 2. Cohesion of society
 3. Outcast offenders



Sense and Sensibility

- ***Sense*** = reason to face facts, consider alternatives
- ***Sensibility*** = empathy for the pain of others, moral outrage at the rage to punish
- ***Balance*** to keep the two separate, letting sensibility serve as the engine driving the effort to impose “common sense” on the reduction of harm

Consequentialism

Broad view of consequences of all action:

- Theory: when offender understands consequences for victim, less crime
- Program: have victim and offender both understand consequences of crime ***and*** its antecedents—misfortune of offender
- Justice: hate sin, reintegrate sinner

David Hume Revived

- Empathy
- Our own feelings
- Inform us of others'
- Heather Strang:
master emotion of
restorative justice
- Rejection of shame
- Rise of sympathy
- Mechanism for
compliance



Not Pure Utilitarianism

- “Moral algebra” implicitly a fantasy
- “Felicific calculus” impossible
- “Muddling through” diverse facts is our best hope
- Measure consequences, deliberate
- Then let those most affected decide on their sensibility
- Increase legitimacy and democracy

Empiricist

- Don't trust belief
- Independent assessment
- If consequences matter, we must know what they are
- Reliable evidence is essential, or else major change is unlikely to succeed



Not Purist on Internal Validity

- Egalitarian impulse to treat all evidence with respect
- Respect to all scientists as people
- Danger of respecting biased results
- Pragmatism to prefer controlled tests
- Internal (inside social science) vs. external context of debate over methods
- External will win—medical model RCT

Braithwaite Embodies Dualism of Theory and Invention

Beccaria



Fielding

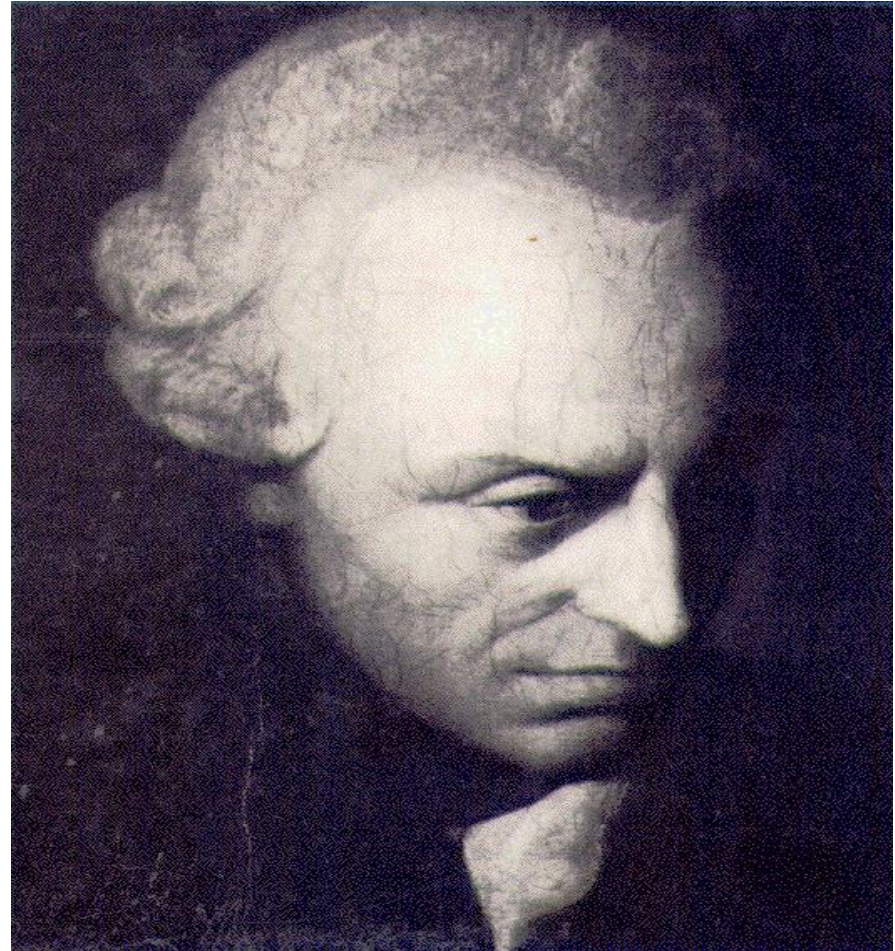


Re-Integrates What Kant Divided

Values + Facts =

Facts sought based on
values for a better
world

Facts guide ***action*** to
make a better world



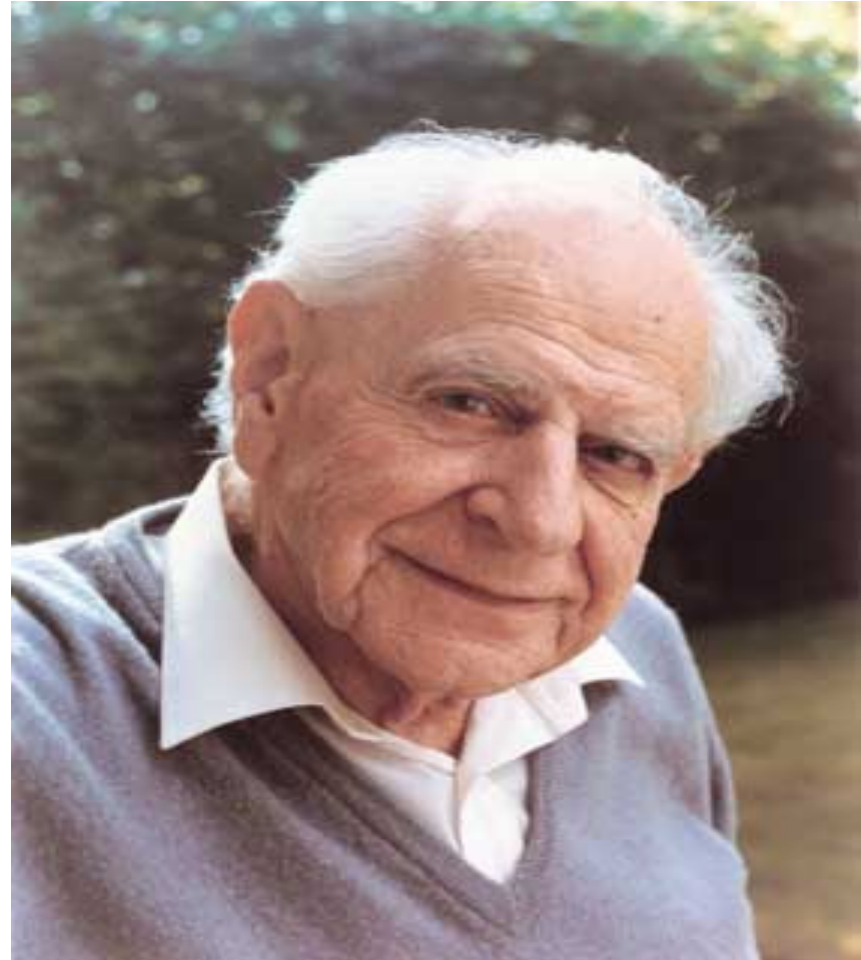
Enlightenment Social Science

- Not for amusement of social scientist
- But for utility in making a better world
- Not through despotic social engineering
- Democratic deliberation
- Courage for *all* to know



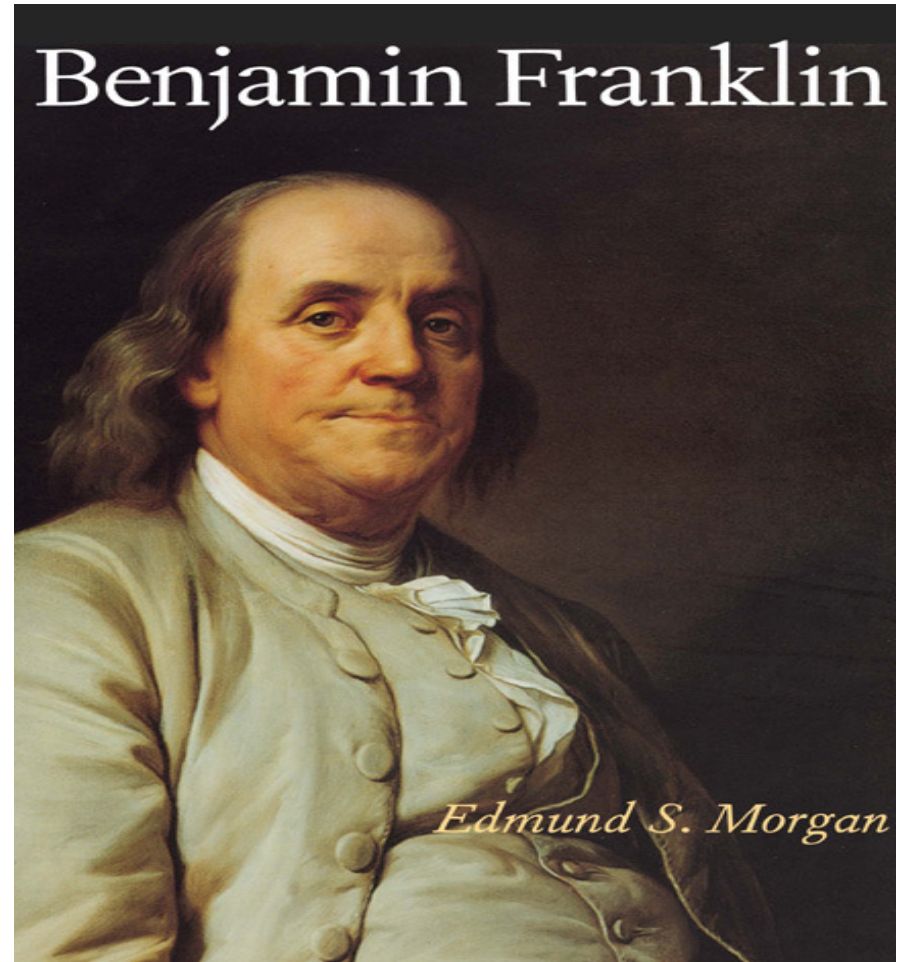
Not Karl Popper

- Endorsed criticism
- Advocated open debate
- Father of falsifiability
- Could not ABIDE any criticism of HIMSELF!!!!
- Or his work



Not Even Ben Franklin

- Widely read
- Often criticized
- Electricity to statecraft
- Never replied
- Never defended
- Never explained
- Silence to critics
- Work speaks for itself



Braithwaite's Biggest Test

- Experiments in Restorative Justice
- Mixed Evidence
- Possible “majority” of vote count method

What IF some or multiple studies show?

--No effects on crime

--Increases in crime

--Highly specific offense/offender/community

conditions under which RJ is safe and effective?

Good News

1. Two RCTs show crime reduction effects:

- Canberra Violence: 2 year impact
- Indianapolis 7-14 yrs: 6 month impact

2. Victim Benefits of RJ strong, consistent

Bad News

- Increase in crime among Aboriginals
- Overall increase in crime among juvenile property offenders in Canberra
- No effect on crime in non-experimental Oxford study published in late 2004, 29,000 cases in analysis of cautioning for minor offenses

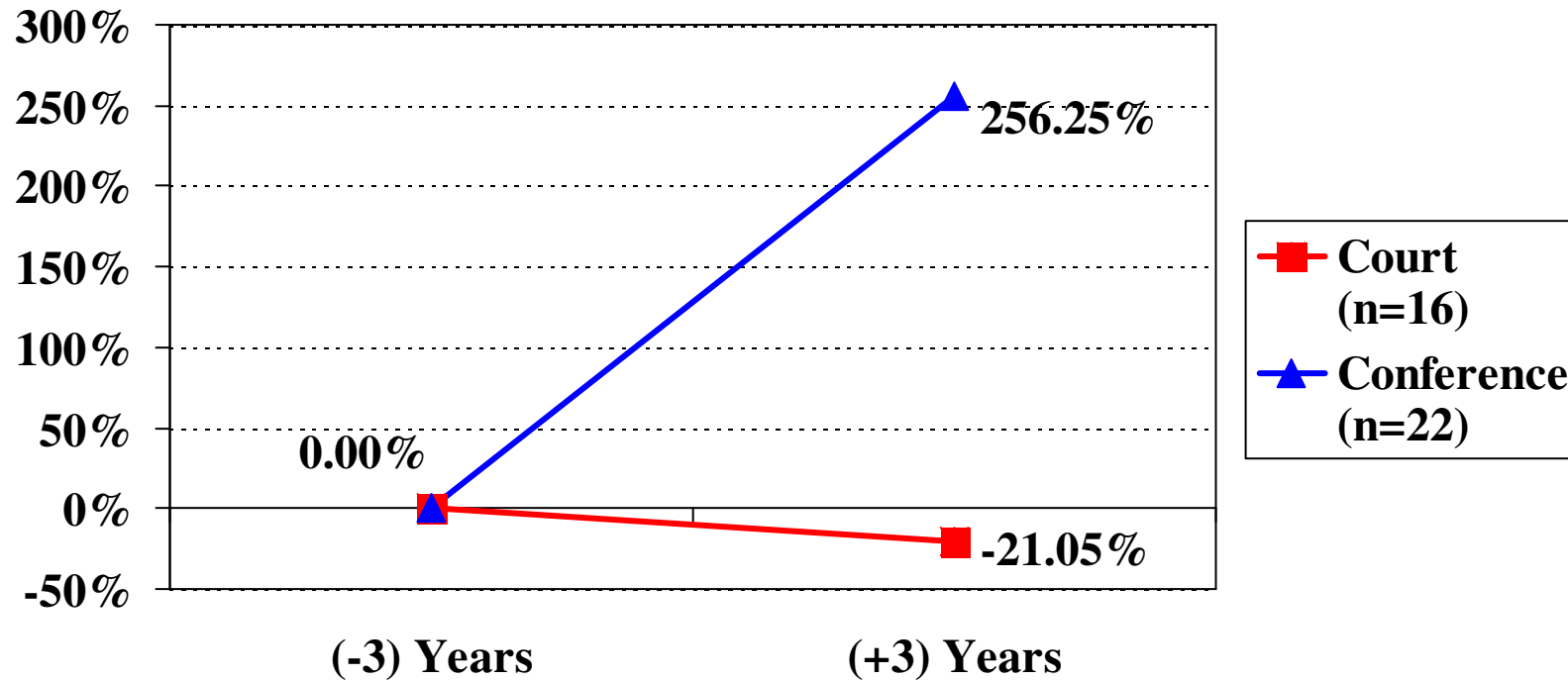
Evidence: Canberra

Randomized Trials of
RJ for

- Violent crime
- Property crime
- Shoplifting
- Drinking Driving



Juvenile Personal Property & Violence (\leq Age 30) Percent Change in Victimed Offense Arrests 3 Years Before/After Random Assignment: **ABORIGINAL** Offenders by Assigned Treatment

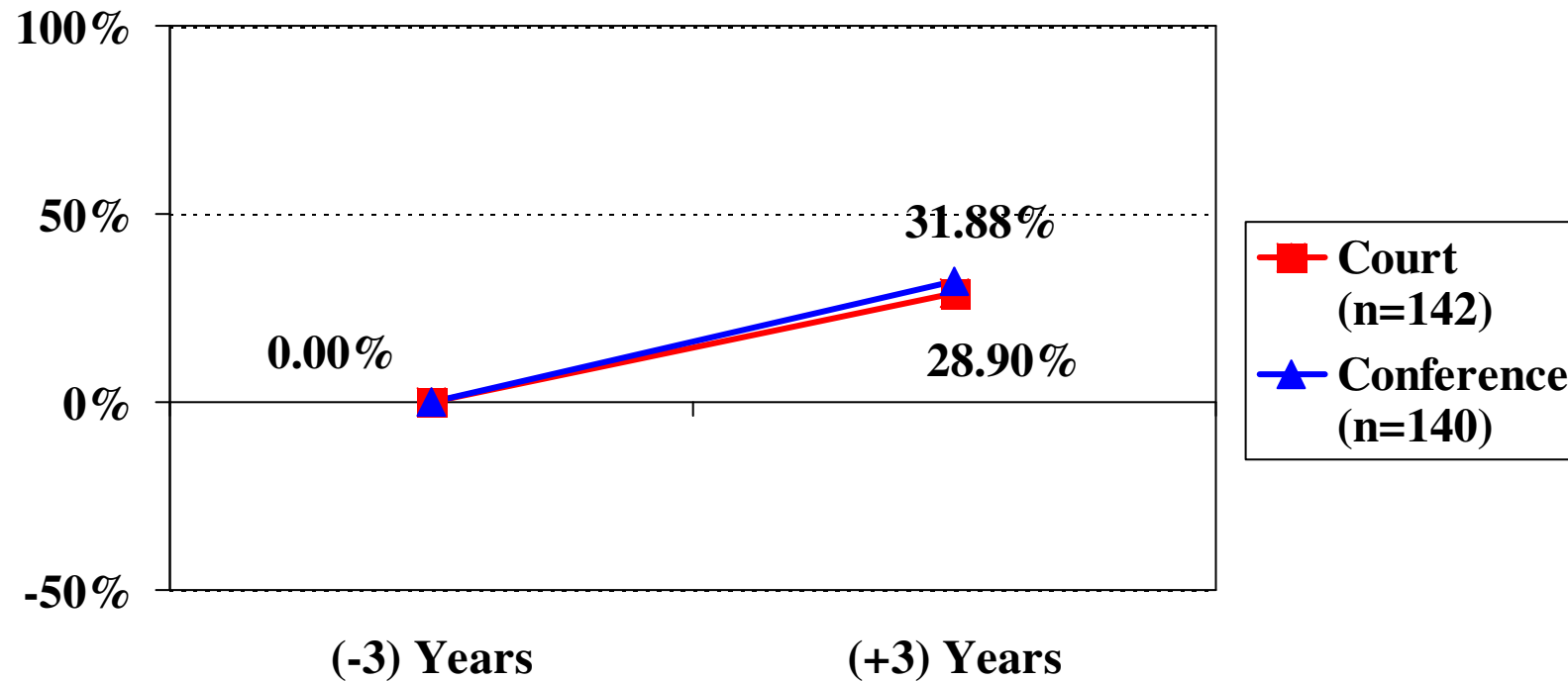


Court T1 to T2, $t = -.485$, $df = 15$, $p \leq .635$

DC T1 to T2, $t = 2.722$, $df = 21$, $p \leq .013$

Diff of differences, $t = -2.465$, $df = 35.565$, $p \leq .019$, Cohen's $d = -.827$

Juvenile Personal Property & Violence (\leq Age 30) Percent Change in *Victimed* Offenses Arrests 3 Years Before/After Random Assignment: **WHITE** Offenders by Assigned Treatment



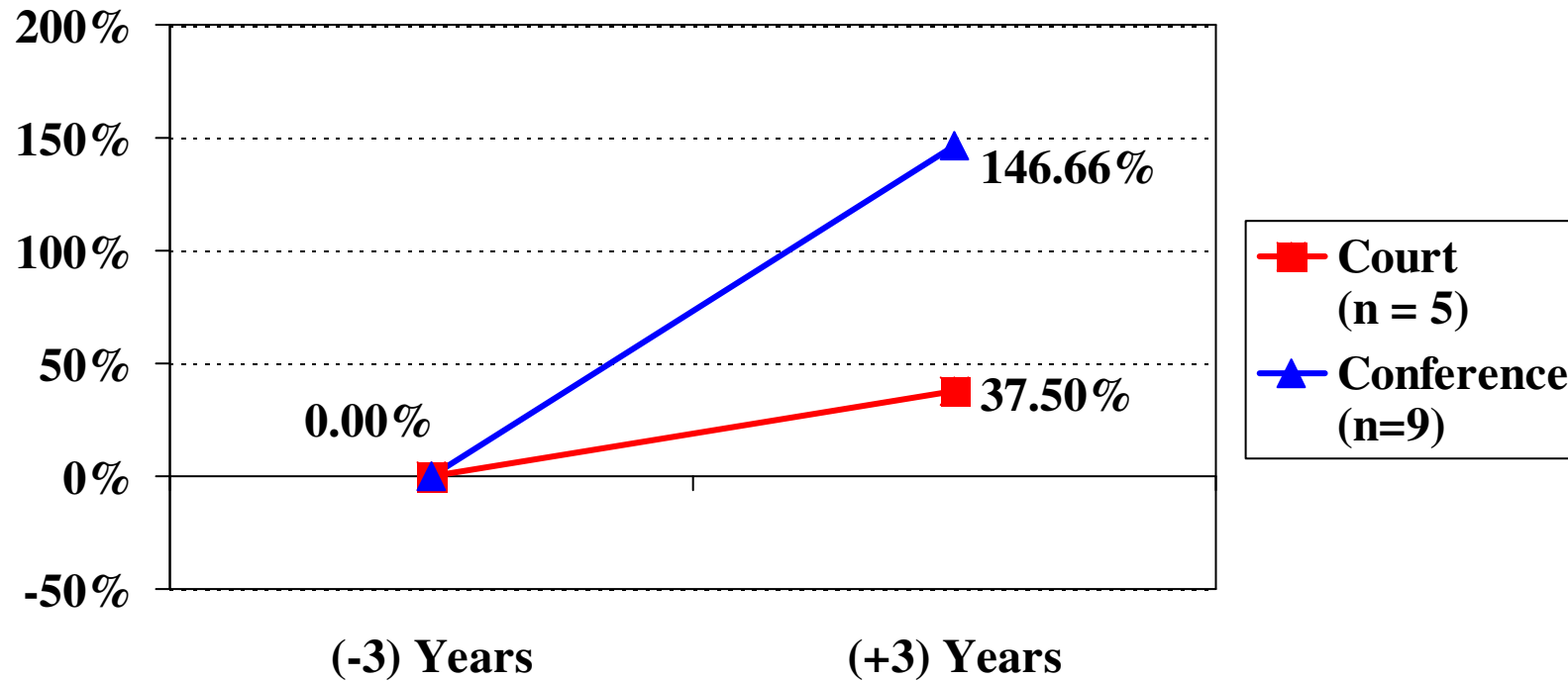
Court T1 to T2, $t = 1.456$, $df = 141$, $p \leq .148$

DC T1 to T2, $t = 1.641$, $df = 139$, $p \leq .103$

Diff of differences, $t = -.037$, $df = 280$, $p \leq .970$, Cohen's $d = -.004$

Violence (\leq Age 30)

Percent Change in ***Victimed*** Offense Arrests 3 Years Before/After Random Assignment: ***Aboriginal*** Offenders by Assigned Treatment



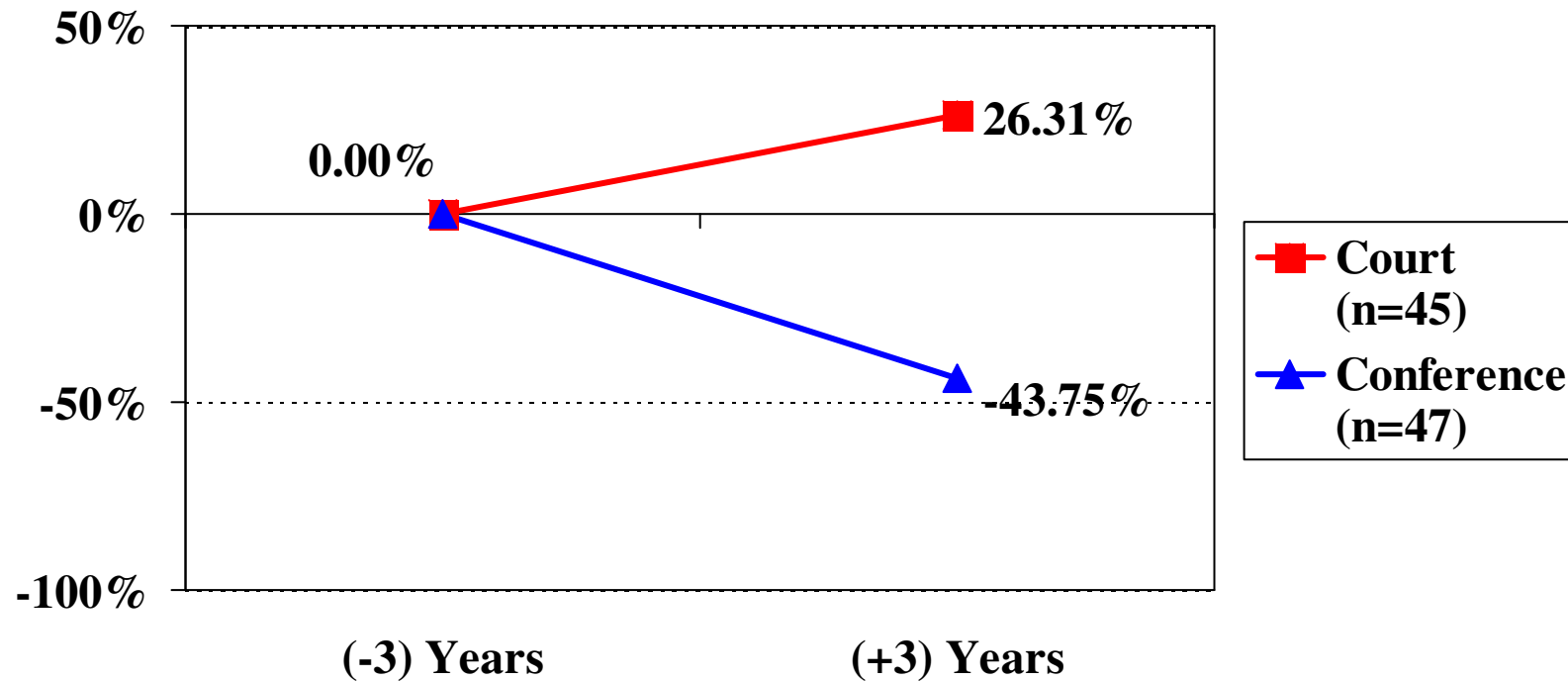
Court T1 to T2, $t = .688$, $df = 4$, $p \leq .529$

DC T1 to T2, $t = 1.459$, $df = 8$, $p \leq .183$

Diff of differences, $t = -.777$, $df = 12$, $p \leq .452$, Cohen's $d = -.449$

Violence (\leq Age 30)

Percent Change in ***Victimed*** Offense Arrests 3 Years Before/After Random Assignment: ***White*** Offenders by Assigned Treatment



Court T1 to T2, $t = .899$, $df = 44$, $p \leq .373$

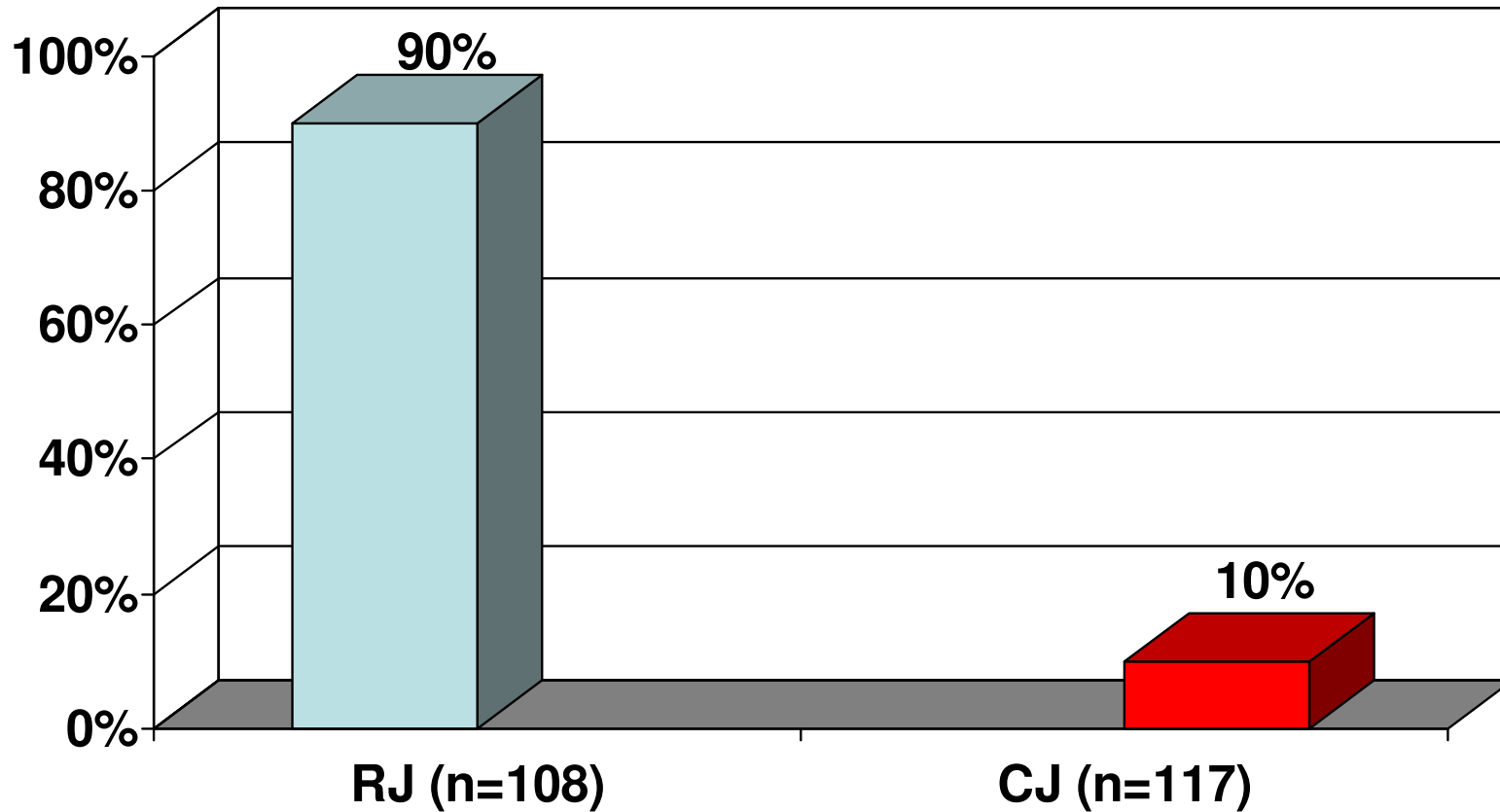
DC T1 to T2, $t = -1.758$, $df = 46$, $p \leq .085$

Diff of differences, $t = 1.749$, $df = 90$, $p \leq .084$, Cohen's $d = .369$

Good News

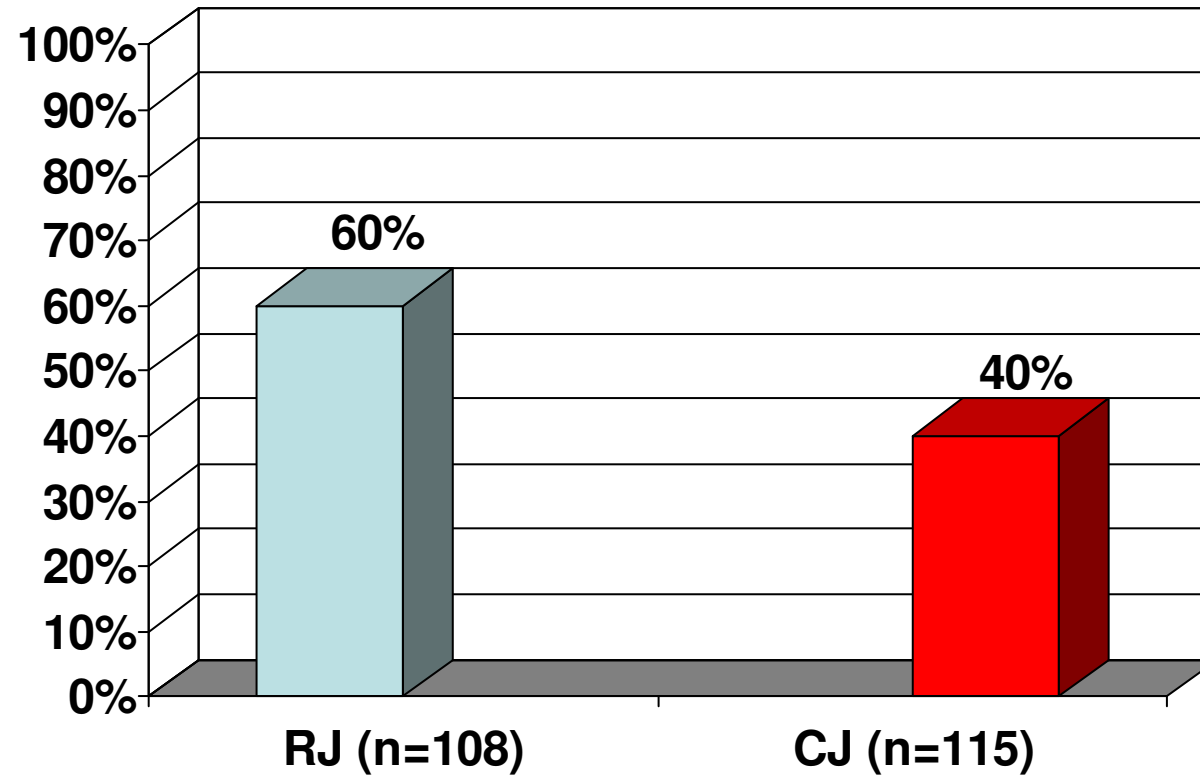
- London Robbery & Burglary Victims
- Offenders mostly in prison
- After pleading guilty
- Awaiting Sentence
- Chief Justice said reduce sentence 30%
- Applied to all offenders who volunteered

Robbery & Burglary Offender Apologies to Victims: RJ vs. CJ



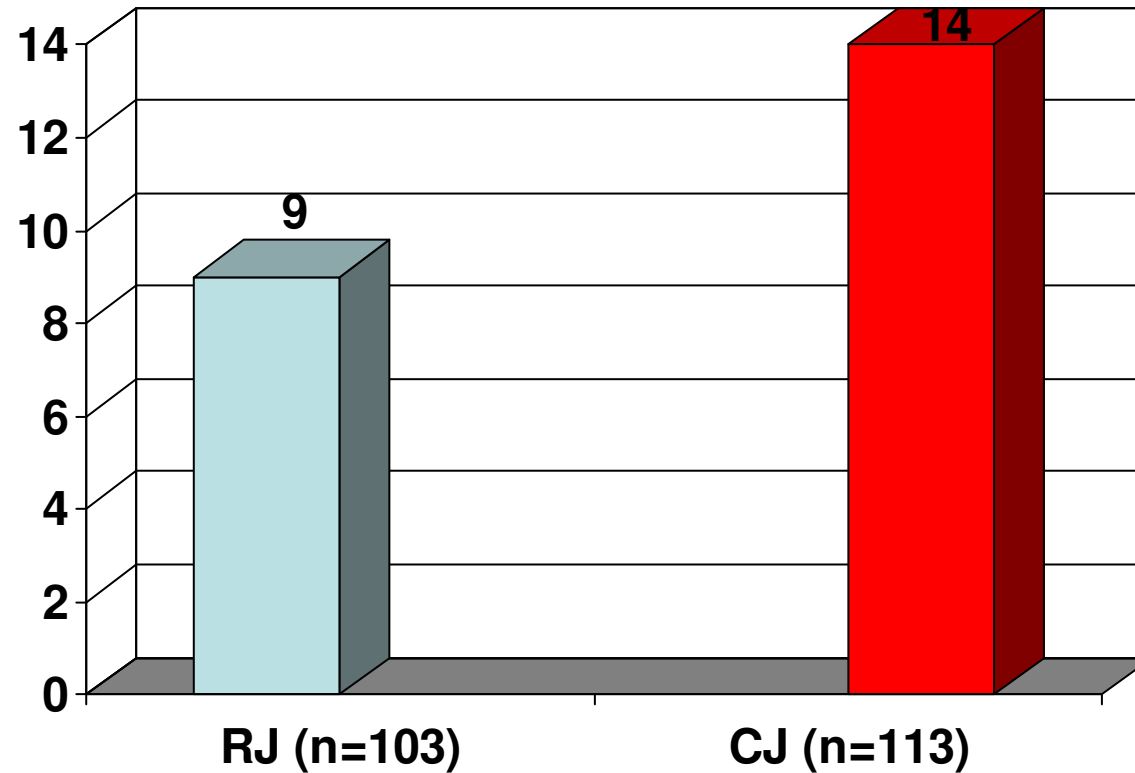
$p \leq 0.000$

Percentage of victims who forgave their offender



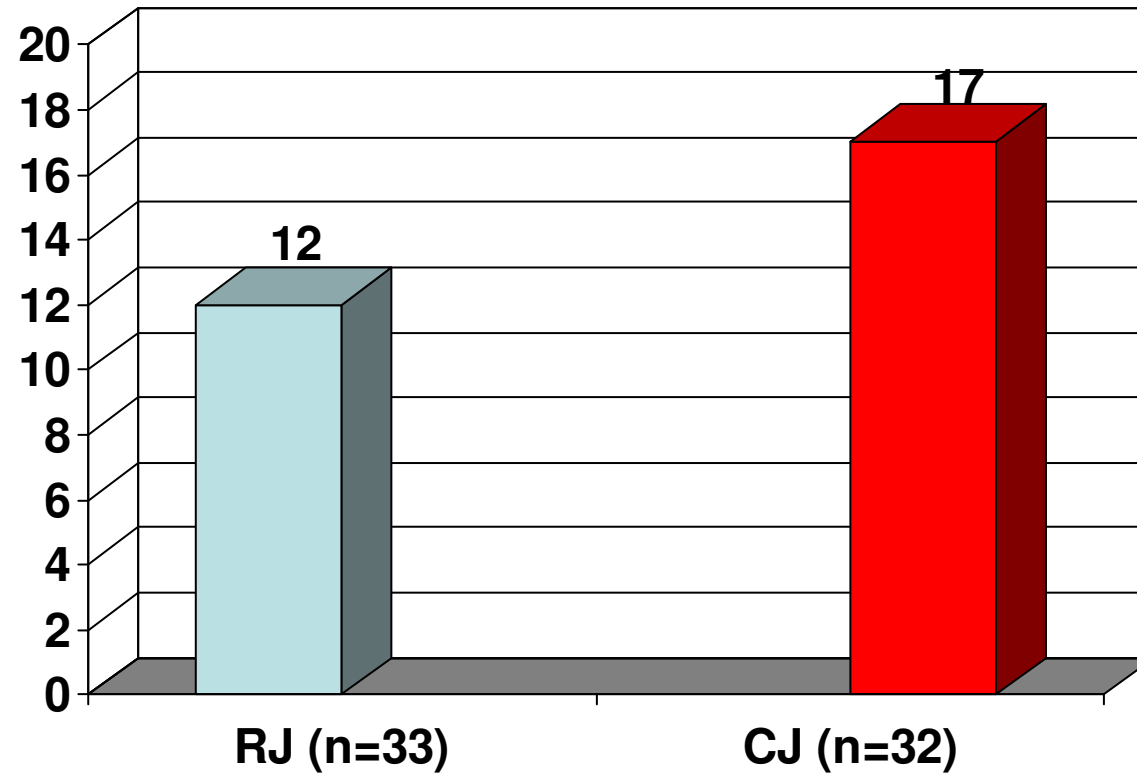
$p \leq 0.000$

Average level of Victim Post Traumatic Stress Both Robbery & Burglary (PTSD ≥ 33)



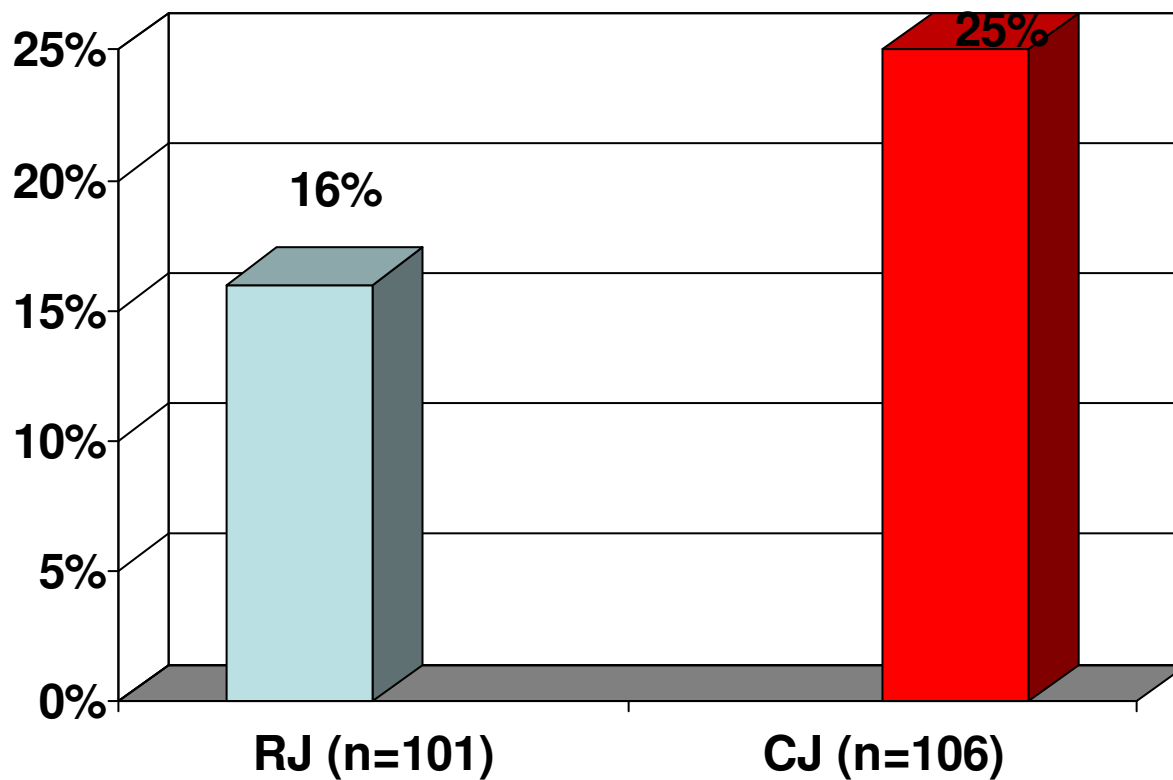
$p \leq 0.010$

Average level of Victim Post Traumatic Stress Robbery Only (PTSD \geq 33)



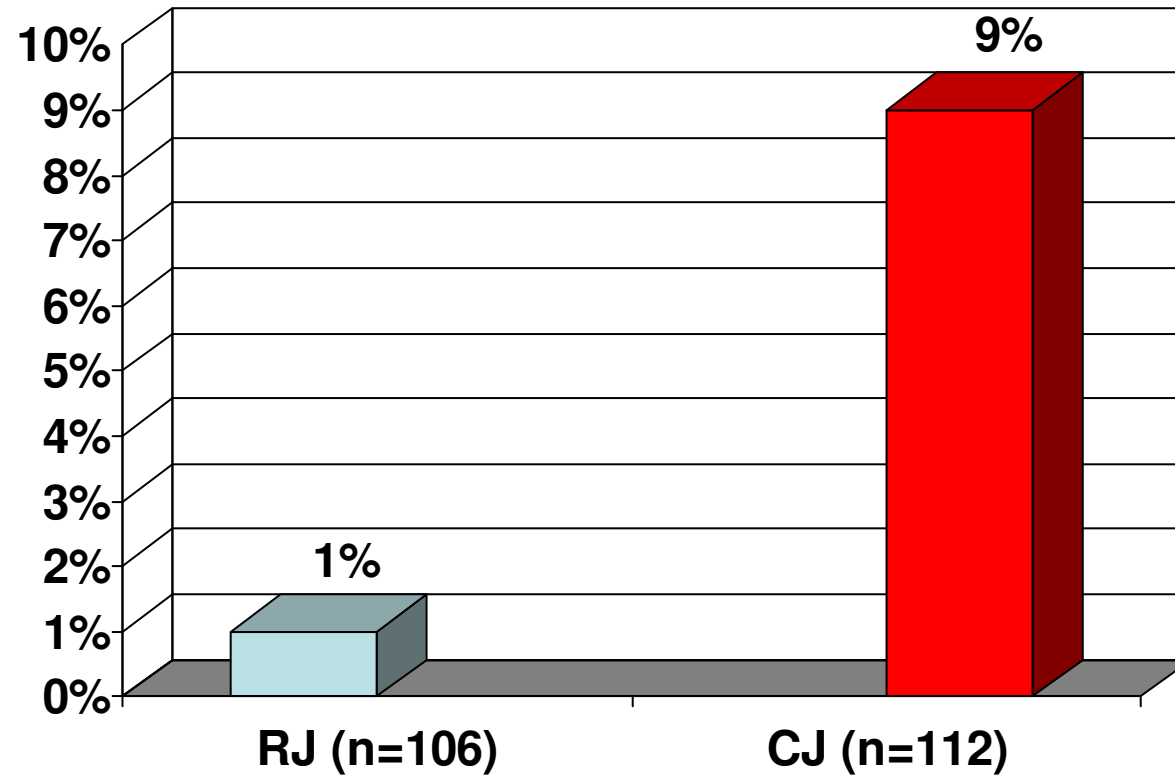
$p \leq 0.066$

Moderate to severe daily impairment from Crime Stress—including work



$p \leq 0.120$

Percent victims who wish to physically retaliate against the offender



$p \leq 0.006$

Next Question: Health

- Does RJ restore victims' health?
- Immune system theory
- Apology, empowerment?
- Work and its mental benefits
- Cancer?
- Heart disease?
- Smoking, drinking, stress addictions?

The Parable of the Nurse

As Voltaire used stories to provoke moral outrage, we can promote restoration

- London Robbery
- 80 Stitches
- Year off work
- Met with offender
- Effects dramatic



Harm Reduction is More Than Crime Reduction

- Moral Framework
- Ready for empirical evidence
- If crime does not go up with RJ
- Then RJ could help reduce crime consequences
- Even reduce imprisonment



Enlightened Justice

From Beccaria to Braithwaite:

The administration of sanctions under
criminal law guided by

1. Inviolable principles of human rights of suspects
2. Consequences reducing human misery
3. Empirical evidence of what works best

The Teamwork of Reinventing Justice



With Our Greatest Aim

To say, with John F. Kennedy,

“Ich bin ein Aufklärer!”