

**Seeking Justice in the 21st Century:
The Contested Politics of Race and Gender**

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For over 25 years, as a student and academic, I have been interested in the relationship of inequalities to crime and criminal justice, and in alternative ways to do justice. My research began with studies of gender, crime, and sentencing; and in the mid 1980s, I began to read and write on the race and gender politics of crime and criminal justice. In the mid 1990s, I moved from the United States to Australia to do research on restorative justice; and in the past 5 years, I have been studying Indigenous justice. My aim in this lecture is two-fold: to give you a feel for what these new justice practices are like, and to show how they articulate with race and gender politics. I shall identify the grounds of contestation, and at the same time, argue for the need to find common ground.

I begin with a caveat. I will be characterising justice practices and their politics in simple terms, and often by using dichotomies. These are analytical short cuts that can make sense of complexity and difference. But scratch the surface, and they can easily fail us. One such dichotomy is 'victim' and 'offender'. We know that among offenders, there are many indications of victimisation and trauma. Likewise, among victims, there are also offenders. These blurred boundaries of victimisation and offending are amply documented in research on pathways to crime; in profiles of those imprisoned; and in reports on violence in educational and social welfare institutions.

I will offer a positive and hopeful reading of new justice practices. I do so because we regularly hear about *problems* of crime and disorder, about *problems* with the police, courts, and prisons. We rarely hear about positive developments, about how some things are going right. My positive reading will be tempered by honesty and realism.

Setting the Context

Let me now set a broader context. Over the past 10 to 15 years in countries like Australia, we find that the response to crime is moving in opposite directions. One tack is innovative: it promises to break out of established forms of criminal justice, to do justice differently. The other tack is repetitive: it promises to

intensify established forms of criminal justice, to do justice more efficiently, and often, more punitively. A major problem for government is managing these contrary trends.

I shall focus on the innovative tack. Starting in the 1960s, a variety of social movements called for the transformation of criminal justice. One set of critiques came from victims, and a second, from offenders.

Victims said they were forgotten in the criminal process. They felt that they, not the defendants, were on trial. They wanted vindication and validation, but this did not occur. For some, this translated into demands for new criminal laws and procedures that made it easier to prosecute and punish crime, and for others, into more services and support for victims.

Offenders said too many people were arrested and incarcerated, often on trivial matters. For certain groups, especially racialised groups, the criminal justice system was harmful and oppressive. This translated into demands for less criminalisation, less use of custody, and for more alternatives to established criminal justice.

In the late 1970s and early 1980s, and partly in response to these critiques, established criminal justice began to devolve and fragment, with the introduction of informal justice, neighbourhood dispute centres, and mediation.¹ This activity intensified in the 1990s, with the rise of restorative justice and Indigenous justice.² During the same period, problem-solving courts (such as the drug court and the domestic violence court), guided by ‘therapeutic jurisprudence’, were introduced.³ New forms of international criminal justice were created.⁴ Justice has exploded. It is operating under many new guises than ever before.

¹ See, e.g., Abel (1982) and Harrington (1985).

² Restorative justice attempts to reconcile both offender and victim claims, whereas Indigenous justice practices have been largely offender-centred. A third new justice form is transitional justice, which addresses ‘the transition from violence to peace’ (Bell and Campbell 2004: 300) in places such as Northern Ireland, South Africa, the former Yugoslavia, Argentina, Iraq, among others (see generally Hesse and Post 1999; *Social & Legal Studies* 2004).

³ See Freiberg (2001, 2005); problem-solving courts are largely offender-centred.

⁴ See Roberts (2003: 116), who suggests that international criminal justice [IcrimJ] ‘is too raw and recently-minted to have agreed conceptual boundaries, settled subject matter or conventional taxonomy’. Two broad types of IcrimJ have been set in motion: the United Nations ad hoc criminal tribunals for the Former Yugoslavia and Rwanda, and the International Criminal Court. See also Henham (2004).

Some of you may be wondering how I came to be here today, to talk about restorative justice (RJ) and Indigenous justice (IJ). It all began with my interest in race and gender politics. During the mid-1980s I became increasingly troubled by my feminist colleagues' focus on victims in the criminal process, to the exclusion of offenders.⁵ This came to a head, when in 1992, I was part of plenary panel at the Law & Society Annual Conference in Philadelphia on the Clarence Thomas confirmation hearings. You will remember that Clarence Thomas, a black man, was nominated to the United States Supreme Court in 1991. During the Senate's hearings in October, a University of Oklahoma law professor and black woman, Anita Hill, came forward to testify that Thomas sexually harassed her over a period of time in the 1980s when he was Chair of the Equal Employment and Opportunities Commission, and she worked in his office. The exchanges between Thomas, Hill, and the senators were one of the most extraordinary events of our time: they dramatised the political cleavages and historical scars of race, gender, and sexual politics in the United States.⁶ Thomas denied Hill's allegations as groundless. Critics accused Hill of being disloyal to her race, of trying to bring down a black man. In my paper, I asked: 'If Thomas admitted he harassed Hill, and if he admitted this in ways you found sincere, and if he apologised for what he did and said he would make amends, what would have been your response? Would his admissions, apology, and efforts to make amends have been sufficient ... or would you want more of a sanction?'.⁷ My remarks caused some controversy. I had broken with feminist convention.

My Australian colleague John Braithwaite heard the paper, and some months later, he sent me a manuscript for comment. It was on the topic of 'family group conferencing' in a place called Wagga Wagga. He said that conferencing (which would later be branded restorative justice) had benefits for both victims and offenders in cases of sexual and family violence. I remember reading his paper with great interest and excitement. We eventually co-authored the paper,⁸ and it was the start of my journey to Australia.

⁵ Two examples. First, at a meeting of the Women's Division of the American Society of Criminology some time in the late 1980s, it was announced that there were nearly 30 panels that dealt with women or gender 'issues', and all but two examined victims. Second, in my critique of Gilligan's different voice argument (Daly 1989), I said that feminist conceptions of justice had to focus both on victims and offenders in the criminal process, not victims alone.

⁶ Toni Morrison's (1992) edited collection on the hearings, including her introductory essay, is excellent.

⁷ Daly (1992).

⁸ Braithwaite and Daly (1994).

Race and Gender Politics of Justice

What, you may ask, is the race and gender politics of justice? I use the term to encapsulate the different emphases that Indigenous and feminist groups take in seeking justice. In general, Indigenous (or racialised groups) emphasise offenders' interests; feminist groups, victims' interests. This dichotomy shows the fault lines in Indigenous and feminist politics, and as one would expect, the politics are not that simple. In fact, there is growing interest in what is called *intersectional* race and gender politics, which aim to negotiate differing Indigenous and feminist interests in seeking justice.⁹

Intersectional thinking is recent. It began in the 1980s when racialised women challenged the ways in which race and gender were used in law, and in feminist and anti-racist theories and social movements. In law, when filing an anti-discrimination legal claim, you could lodge a complaint as a female or as a black person, but not as a black female. A 'female' was presumptively white; a 'black', presumptively male. For theory, Kim Crenshaw said that 'feminist and antiracist discourses failed to consider intersectional identities such as women of color'.¹⁰ At the time, feminist theories were principally about gender; and anti-racist theories were about colonialisation, culture, and race-ethnicity. Moreover, neither feminist nor anti-racist social movements represented the interests of racialised women.¹¹

Like other racialised women, Kim Crenshaw pointed out that 'black women are marginalized in feminist politics as a consequence of race, and they are marginalized in antiracist politics as a consequence of gender'. However, she added a new dimension by saying that 'black women do not share the burdens of these elisions alone':

When feminism does not explicitly oppose racism, and when antiracism does not [oppose] patriarchy, race and gender politics often end up being antagonistic to each other and both interests lose'.¹²

⁹ Recent examples include the Aboriginal and Torres Strait Islander Women's Task Force on Violence (2000), who move across offender and victim positions, and the Aboriginal Women's Action Network in Canada. When Crenshaw introduced the term intersectionality, she analysed the circumstances of African-American women in anti-discrimination law and as victims of violence. The term has since expanded to include many other contexts and applications.

¹⁰ Crenshaw (1991: 1243).

¹¹ See, e.g., Huggins (1994) and Moreton-Robinson (2000).

¹² Crenshaw (1992: 405).

I want to underscore this point. If we *really* want to do justice differently, we must find ways to bring race and gender justice politics together, and not permit the antagonisms to stall a more progressive agenda. Otherwise, both interests lose.

Currently, and depending on the jurisdiction, race and gender justice politics are antagonistic. The negative effect is most deeply felt on racialised women, for whom seeking justice poses major dilemmas. In Canada, for example, critics of Indigenous women's organisations say they are too closely aligned with feminist interests (or what is termed women's or *individual rights*), not with the *collective interests* or rights of Aboriginal people. In response, Indigenous women say they are being asked (unfairly) to put community interests ahead of their interests as women. Relating this to criminal justice, Native American Emma LaRocque says 'it remains a puzzle how offenders, more often than victims, have come to represent "collective rights"'. She argues that in the interests of 'social harmony', 'the pendulum has swung way too far to the advantage of [offenders] within Native communities'.¹³

A related concern is that 'cultural' arguments are used against Indigenous women.¹⁴ As Sharon Payne said nearly 15 years ago, '... Aboriginal women are saying that they are being subjected to three types of laws. ... white man's law, traditional law, and bullshit law. The latter [is] being used to explain a distortion of traditional law [that justifies] assault and rape of women ... These types of [cultural] defences [set a dangerous precedent], and they denigrate Aboriginal men and Aboriginal culture'.¹⁵ LaRocque's and Payne's remarks show that race and gender politics may be especially antagonistic in cases of family and sexual violence.

Doing Justice in Unequal Societies

Among the many puzzles of justice, one that has especially provoked me is whether it is possible to do justice, including alternative forms, in an unequal

¹³ LaRocque (1997: 81). The same phenomenon is evident in Australia's landmark document, the Royal Commission into Aboriginal Deaths into Custody (RCIADIC). Elena Marchetti's (2005) PhD research shows that in the early 1990s, the deaths of Indigenous young men and their dispossession and marginalisation featured more prominently and weighed more heavily in the minds of RCIADIC staff and Indigenous community members than did the victimisation and dispossession of Indigenous women.

¹⁴ Razack (1994: 920); LaRocque (1993: 86; 1997: 89), who says 'problems of racism from the outside and gender domination on the inside have been routinely whitewashed under the rubric of cultural differences'.

¹⁵ Payne (1992: 37-38).

(some would argue, an unjust) society. There are two types of inequality to consider. First, the criminal act itself creates an inequality between an offender and victim. An offender has, in some way, harmed or hurt another, or claimed a position of superiority over another. Justice means redressing that individual act. Second, these individual acts called crime take place in, and some would argue are partly caused by, societies marked by inequality and histories of state violence. Can justice truly be achieved in this societal context? Probably not, especially when we appreciate that criminal law and established justice practices reproduce and amplify social inequalities, not reduce them.

Established criminal justice attempts to respond to the first kind of inequality, the one caused by crime itself, although I think it does so poorly. New justice practices may offer some improvement. They may also be able to relate an individual criminal act to a broader set of community or societal relations. However, we should not expect new justice practices to achieve social justice, despite the views of RJ advocates, in particular, who believe this is possible. Achieving social justice will require other commitments and policies.

Restorative Justice

When I came to Australia in 1995, the idea of restorative justice (RJ) was in its infancy, and there was just one research project underway.¹⁶ I initially pursued my race and gender politics interest: my Fulbright research explored whether critiques of RJ, including feminist and anti-racist ones, had merit.¹⁷ Rather than attempt to define RJ now, it is more easily grasped with a case study.

Case 1: Stolen car

Imagine you walked out of your house one day to find that your car was gone. You call the police, and they tell you it was taken by two male youths the night before and then abandoned. One youth was arrested when he attempted to run away. You recover the car and can drive it, but it is not working properly. Although it was not worth much, you relied on it for your business.

¹⁶ The Re-Integrative Shaming Experiments (RISE), based at the Australian National University, began in July 1995, just before I arrived. During my Fulbright year, I learned a good deal about how to conduct research on RJ conferences, by observing the RISE project and learning from Heather Strang, the project manager. There were two major publications then available, one from Australia (Alder and Wundersitz 1994) and another from New Zealand (Maxwell and Morris 1993). The term 'restorative justice' was applied after the fact to 'family group conferences' or 'conferencing' more generally.

¹⁷ See Daly (1996, 2000a) for analysis of 24 conferences observed in the ACT and South Australia.

Two months later you get a call from a Youth Justice Coordinator, who wants to know whether you'd like to participate in a family conference. At the conference, you will meet the young person who stole your car, tell him how it affected you, and discuss ways he can make up for what he did. In addition to the coordinator, there will be other people there, including a police officer, the youth's parents, and any supporters you, the victim, wish to bring. The conference will last about an hour and 30 minutes.

Would you be interested to do this? Would you see benefits in meeting this young person, learning why he stole your car, and deciding an outcome?

In Australia today, all jurisdictions use conferences – one form of RJ – as a means of bringing victims, offenders, and their supporters together to discuss the impact of a crime and its consequences.¹⁸ Conferences are typically used as diversion from court for youth who have admitted to an offence. If an offender attends a conference and completes the agreement, there is no official criminal record.

Conferencing in Australia was sparked by developments in New Zealand, where it began in 1989, as a result of Maori political challenges to white New Zealand and to its welfare and criminal justice systems. Today New Zealand and Australia are world leaders in using RJ conferences in the youth justice system.¹⁹ Adult conferences are being piloted in New Zealand, South Australia, the ACT, and this month, in New South Wales. They are used to provide pre-sentence advice to judicial officers.

The term RJ is used in different ways. For example, Desmond Tutu said the South African Truth and Reconciliation Commission (TRC) was a restorative justice process, while I see the TRC as an example of transitional justice (i.e., a means to make a transition from violence to peace in post-conflict societies). Likewise, sentencing circles, which began in Canada and are now being taken up in Australia, are called restorative justice. As currently practiced in Australia, circles are a form of Indigenous justice.

Setting aside these definitional problems, there has been great attention paid to RJ by researchers and governments, as diverse practices fly under the RJ flag. Why is RJ so popular? It promises to do many things, including responding to

¹⁸ Conferences may be used in other contexts, such as in schools or in care and protection matters.

¹⁹ For overview of conferencing in Australia, see Daly and Hayes (2001); for history, see Daly (2001).

both victim's and offender's interests in the criminal process. In particular, it promises:

- to hold offenders accountable for what they did, but not to stigmatise them;
- to give victims a greater role and more voice in the criminal justice process;
- to provide a means for those directly affected by a crime to decide what to do about it, and not to rely solely on professional or legal opinion; and
- to fashion penalties that make victims, offenders, and supporters feel that justice has been done and that the offender's offence has been repaired in some way.²⁰

In 1998, my research group and I observed 89 youth justice conferences in South Australia, which included cases of stolen cars (like the one I just outlined), a variety of assaults, property damage, and break and enter offences. Most victims were individuals, but some were organisations (such as schools). We interviewed the offenders and victims after the conference, and a year later, in 1999. Here are key findings.²¹

(1) It is easier to achieve fairness than restorativeness.

Studies of RJ in Australia and elsewhere find high levels of perceived fairness or procedural justice.²² To questions such as 'were you treated fairly?', 'were you treated with respect?', 'did people listen to you?', a very high percent of participants (80 percent or more) said they were. Offenders and victims also report high levels of 'satisfaction' with the process and outcome. By contrast, I found relatively less evidence of restorativeness, which I define as a mutual recognition between a victim and offender (or their supporters) or positive movement between them.²³

²⁰ This is the new justice language of RJ. In RJ terms, there is an offender's 'harm', not a crime or a wrong against a victim; and the offence is to be 'repaired' not punished. This language can be challenged (see Daly 2000b; Duff 2003).

²¹ The following draws from Daly (2001, 2002, 2003a, 2003b, 2006).

²² For a review of Australian and New Zealand research, see Daly (2001); for reviews of UK research, see Hoyle, Young, and Hill (2002), and Crawford and Newburn (2003).

²³ Depending on the question asked, restorativeness was present in 30 to 60 percent of the youth justice conferences studied. Note that researchers use different measures for restorativeness. For example, in the Re-Integrative Shaming Experiments (RISE), restorative justice for offenders was defined as the opportunity to repair the harm they had caused, and for victims, it was defined as recovery from anger and embarrassment. In my project, restorativeness was measured by items that tapped the *degree and quality of interaction* between victims, offenders, and their supporters.

(2) There are *limits* on offenders' desires to repair the harm and on victims' capacities to see offenders in a positive light.

Victims and offenders come to conferences with varying degrees of readiness and capacities to make the process work. Some have negative orientations and closed minds that cannot be changed, and others have positive orientations and open minds. Conferences may engage restorative orientations already present in offenders and victims, or they may create openings for these orientations to emerge. If victims have fixed negative attitudes (e.g., they think the offender is a 'bad person'), a conference is unlikely to move them in a more positive or restorative direction. Likewise, offenders may not feel especially remorseful for what they did.

(3) A 'sincere apology' is difficult to achieve.

RJ advocates say that a major benefit of conferences, which sets them apart from court, is that offenders apologise to victims. Apologies are indeed frequent at conferences, but they vary in sincerity. Most offenders told us that they said sorry to a victim because they were really sorry, but most victims told us they believed the offenders' apologies were insincere.²⁴ A sincere apology can be difficult to achieve because some offenders are not really sorry for what they did, victims would like offenders to display more remorse, and there are mixed signals when apologies are made and received.

(4) When conferences succeed in ways they are supposed to, there are positive consequences.

RJ encounters range from great to poor. When the process works as it should, there are beneficial effects later. For example, for offenders, the more successful conferences were associated with reduced levels of re-offending; and for victims, they were associated with greater reductions in anger toward and fear of offenders. The conference process can have a short-term positive effect on aiding a victim's recovery from crime, but over time, other things make more of a difference.

²⁴ Of a subset of 47 pairs of victims and offenders who attended the conference, 61 percent of young people said 'sorry' to a victim because they were really sorry, but just 27 percent of victims believed that the youth were really sorry (Daly 2003a: 224). The RISE project in Canberra reached a similar result. Strang (2002: 115) reports that 77 percent of victims rated the apology as sincere or somewhat sincere; when disaggregating the data, 41 percent rated it sincere, and 36 percent, somewhat sincere (Strang 2004, personal communication).

A problem in the field is that some researchers only want to play up the nirvana stories of RJ. This is when offenders and victims (and their supporters) have highly charged, but positive emotional encounters: they cry, hug, forgive, and then eat lunch together. That may happen some of the time, but it is not typical. It is the *variation* in what happens that gives us the best insights.

All of this may sound negative, but it isn't. Rather, it is a realistic appraisal of what RJ can achieve, especially in high-volume jurisdictions. Also, and as importantly, much depends on the kind of offence. For example, my study found that the victims and offenders in the adolescent punch-ups were least likely to see the value of RJ; and that those victims who had suffered a great deal of distress from an offence were least likely to recover from it. These victims needed more than a legal intervention (whether court or RJ) to help them.

RJ has a lot of positive elements and benefits, more so than a regular court process. It also espouses many positive values and goals.²⁵

Despite this, doubts remain about how the process may work for certain types of crimes. For example, there was increasing debate among feminist scholars about whether RJ was appropriate in cases of sexual and family violence.²⁶ In 2000, my research interests turned to the debates and politics surrounding RJ, and I was curious to learn about emergent Indigenous justice practices. Members of my research group and I conducted a series of studies, including interviews with victim advocates, and with Indigenous and non-Indigenous women; quantitative and qualitative research on sexual assault and RJ; and Indigenous justice practices in Australia and Canada.²⁷ I will touch on three of these: Indigenous and non-Indigenous women's views of RJ, RJ and sexual assault, and Indigenous justice practices.

²⁵ See, e.g., Braithwaite (2002: 568-70), whereas others argue that RJ advocates 'put forward ... goals [that are] ambitiously but vaguely formulated' (von Hirsch, Ashworth, and Shearing 2003: 22). Acorn (2004: 162) takes these critiques a step further by arguing that RJ's sense of justice may not be desirable, even as a utopian vision.

²⁶ See Strang and Braithwaite (2002), although all but one article in this collection addressed domestic or family violence, not sexual violence. Coker (2002) argues that a different paradigm of 'transformative justice' is required for domestic violence.

²⁷ My interest in Indigenous justice was initially prompted when I supervised the thesis of a School of Criminology and Criminal Justice Masters of Arts student, Peter Mulder, who worked with the Community Justice Group on Palm Island (see Mulder 2001).

Indigenous and Non-Indigenous Women's Views of RJ

In 2000, two Queensland reports – one by the Aboriginal and Torres Strait Islander Women's Taskforce on Violence, and another by the Taskforce on Women and the Criminal Code, reached different conclusions about the merits of RJ. The first, composed entirely of Indigenous women, saw RJ as a viable option; and the second, composed almost entirely of non-Indigenous women, did not. One of my MA(Honours) students, Heather Nancarrow, was curious about why this had occurred. She interviewed the women, asking for their views on the appropriateness of RJ in cases of family and domestic violence. She learned that the two groups had different ideas of what RJ was and what it could achieve. Whereas the Indigenous women viewed RJ as a means of empowering Indigenous people, the non-Indigenous women equated RJ with mediation. She found that Indigenous women's support for RJ stemmed from their distrust of established criminal justice and the harm it causes, whereas non-Indigenous women had more trust in the system.²⁸ Both groups agreed that an amalgamation of RJ and established criminal justice was possible; however, the Indigenous women saw RJ as the primary response, with established criminal justice as the 'back-up', whereas the non-Indigenous women saw it just the opposite way.

This study is important in showing the reasons for a racialised split in women's views on RJ. It also reveals that when people are talking about RJ, they may not be talking about the same thing. Indigenous groups are typically interested in alternative justice forms because the criminal justice system has been so damaging and for so long. At the same time, Indigenous aspirations for justice are holistic and associated with self-determination. Despite what many RJ advocates say, these are not standard components of RJ as it is currently practiced in Australia.²⁹

In fact, some RJ advocates make erroneous claims that RJ is a pre-modern, Indigenous form of justice. As currently practiced in Australia, RJ is a hybrid justice form: it splices white bureaucratic forms of justice with elements of informal justice, which may include non-white (or non-western) values or methods of judgment.³⁰

²⁸ Nancarrow (2003).

²⁹ Kelly (2002) makes a case for RJ in responding to Indigenous family violence, as long as it is holistic, culturally appropriate, and tied to principles of self-determination.

³⁰ Daly (2001: 65-66).

RJ and Sexual Assault

In the RJ and sexual assault study, the question was, from a victim's point of view, is it better for one's case to be dealt with by an RJ conference or go to court? There were few jurisdictions in the world where it was possible to study this problem because sexual assault has been deemed ineligible for RJ or used only rarely.³¹

Although feminists have been critical of using RJ in sexual assault cases, based on my study, I would say that the critiques and fears are misplaced. I have no hesitation in endorsing RJ as court diversion in cases of youth sexual violence. My reasons are pragmatic: they are based on well-known evidentiary problems of proving sexual assault at trial, coupled with the value of RJ in these cases. Consider this case.

Case 2: Sexual assault

Imagine you were a victim of sexual assault, the accused person has been apprehended by the police, and you could choose to have the case diverted to a conference or go to court. You are 17 years old and female, and the accused is male and 17. If the case goes to conference, you know that the offender has admitted the assault, that an outcome will be decided, and you will have a say in deciding it. If the case goes to court, you cannot be sure what will happen, but there is a 50-50 chance that it will be dismissed and no penalty will be imposed at all. [*Note:* In the real world, victims do not have this power. The power to refer a case to conference rests foremost with a suspect, who, at a minimum, must make an admission to the police (or court) for a case to be referred. It then rests with the police or a judicial officer, who makes a referral on factors such as previous offending, case severity, and the victim's wishes.] If the case goes to conference and you as the victim decide to attend, you run the risk of re-victimisation in a face-to-face encounter with the offender, but at least you know he made an admission and there will be an outcome. The penalties imposed in court can, in theory, be more harsh than those agreed to in a conference. Having all of this information before you, along with the power to make the decision, what would you decide to do?

³¹ In the region, there are two jurisdictions that routinely use conferences as diversion from court in youth sexual assault cases, South Australia and New Zealand. Queensland is now using conferences in these cases more frequently. In Canada, forms of RJ are used in adult cases of sexual assault as pre-sentence advice, as part of judicially-convened circles or more independent Indigenous community run circles (such as Hollow Water, see below). In the United States, a pilot project is underway that uses conferences in adult sexual assault cases (see Hopkins and Koss 2005).

We gathered and analysed nearly 400 cases of sexual assault that were disposed over a 6 ½ year period in South Australia.³² We found that about half the court cases were dismissed or withdrawn. Now perhaps some of the accused were wrongly charged. But the primary reason for case attrition is the prosecutor's judgment that it will be difficult to secure a conviction at trial, in light of evidentiary problems. The potential of RJ is that it opens up a window of opportunity, *for those who have offended*, to admit to what they have done. The incentive is that the admission comes without the potential risks associated with a court-imposed sentence, that is, a criminal record and detention sentence. Although critics have lodged concerns about the victimising effects of a face-to-face encounter, our study suggests that the court process can be more victimising: both in the frequency of case dismissal and the length of time it takes to dispose a case (twice as long for court cases).

Compared to the court youth, a higher share of the conference youth had to undertake an intensive counselling program, the Mary Street Programme, for adolescent sex offenders. And the youth who went through this programme – both court and conference – were less likely to re-offend. If RJ is used in sexual violence cases, it must be tied to a programme like this.

Not all youth sexual violence cases are appropriate for RJ or diversion from court. As RJ moves into the adult arena (as pre-sentence advice), special care will be required. If done right, there is considerable potential for RJ in historical child sexual abuse, especially in institutions. However, we need to pay attention to the lessons learned in Canada about the uses of sentencing circles in remote areas for sexual and family violence.³³

Indigenous Justice

While RJ is taking off, so too are a variety of Indigenous justice (IJ) practices.³⁴ RJ and IJ may overlap, but there are differences. Australian IJ practices were

³² See Daly (2005) for the quantitative archival study, and Daly and Curtis-Fawley (2005) for a qualitative study of two conferences.

³³ There is other evidence from Canada that if a conferencing model is used and conferences are well-resourced, well prepared, and informed by a holistic approach to sexual and family violence, they can be successful in reducing these forms of violence. See Pennell and Burford (2000, 2002), who convened conferences with different groups and in varied settings, including Indigenous and non-Indigenous, and remote and urban areas. Compared to this form of intensive RJ, Canadian circles have fewer resources, and victims may be forced to accept outcomes that compromise their safety (see Crnkovich and Addario 2000; Goel 2000; Stewart, Huntley, and Blaney 2001).

³⁴ In remote Australian Indigenous communities, IJ practices are one of several 'community justice mechanisms' (Blagg 2005: 6). What Blagg refers to as 'Aboriginal-owned community

created in consultation with, and have significant participation by, Indigenous community groups and staff. IJ is largely (although not exclusively) used in adult courts at sentencing, whereas RJ is largely (although not exclusively) used in youth cases as court diversion. Even when ideally practiced, IJ is a hybrid of western and Indigenous forms.³⁵

In Australia, there are two kinds of IJ practices.³⁶ One is Indigenous courts in urban centres, which set aside one to three days a month to sentence Indigenous offenders. The first urban court was held 6 years ago (in June 1999), in the Port Adelaide Magistrates' Court, in South Australia (the Nunga Court).³⁷ Since then, courts or sentencing circles have been established in Victoria (the Koori Courts in Shepparton, Broadmeadows, and the Warrnambool region); Queensland (the Murri and Aboriginal Courts in Brisbane, Rockhampton, and Mt Isa); New South Wales (circle sentencing in Nowra);³⁸ and most recently in the ACT and Northern Territory (circle sentencing). The second kind of practice takes place in remote Indigenous communities when judicial officers travel on circuit. It includes sentencing circles in more remote parts of Western Australia and New South Wales, and Justice Groups' court and community work in Queensland.³⁹

These IJ practices

- aim to address key goals of the Royal Commission into Deaths in Custody: to reduce the over-representation of Indigenous people as offenders in the justice system, and to increase the numbers of Indigenous people as staff and policy makers in the system; and
- have been spurred on with Justice Agreements between government and Aboriginal organisations; by a small number of pro-active magistrates and

justice mechanisms' include far more than policing and courts; they include broader concerns with economic development, governance, and sustainability (p. 7).

³⁵ Goel (2000: 316), drawing from Quigley (1994).

³⁶ The following draws from Marchetti and Daly (2004).

³⁷ Other South Australian Aboriginal courts have been established in Murray Bridge, Port Augusta, and Ceduna.

³⁸ New South Wales circle sentencing occurs in both urban and more remote areas. Circles have been established in Nowra, Dubbo, and Brewarinna; and five others are planned for Bourke, Lismore, Kempsey, Armidale, and Blacktown (Sydney area).

³⁹ The courts differ from earlier Aboriginal courts, such as the Courts of Native Affairs in WA, or those established in Western Australia and Queensland that deal with community by-laws (see Harris 2004). Community Justice Groups in remote parts of Queensland may give pre-sentence recommendations by fax or letter to judges in urban courts, as occurs in Cairns. Community Justice Groups are also active in urban areas such as Rockhampton and Brisbane.

judges working with Indigenous community groups, Elders, and organisations; and by an international movement of Indigenous people who have encouraged their development.

IJ practices are emergent, fluid, and experimental. They depend on the good will and energy of community groups, along with state resources. It is too early to evaluate these practices in the strict sense of that word. My colleague Elena Marchetti and I have watched the urban courts and practices in remote areas in Queensland, Victoria, South Australia, and New South Wales; and we have talked with the magistrates, defence lawyers, police prosecutors, Indigenous court workers, Justice Group members, and Elders in these places.

To give you a flavour of these courts:⁴⁰

- The offender must be Indigenous (or in some places, South Sea Islander) and have entered a guilty plea.
- The process is informal. The magistrate sits, usually at eye level and at a table (not raised) with a respected Indigenous person or Elder. The offender, even if in custody, sits at the table beside a legal representative, and a support person (usually a family member or partner). Both the offender and supporter speak directly to the magistrate after the charges are read. Others may also speak. The idea is to have family members, Elders, and other community members do most of the talking, rather than the prosecutor or defence. Plain English is used.
- There are Indigenous court staff, including sheriffs.
- More time is taken in each case than occurs in a regular court.
- There is significant involvement by Elders, respected persons, or Justice Group members; but the magistrate retains the ultimate power in sentencing the offender.

Aims, Limits, and Positive Features of Indigenous Justice

These courts aim to make the legal process more culturally appropriate, to increase trust between Indigenous communities and judicial officers, and to have a more informal and open exchange of information.

The courts have limits. They work within the ‘white law’ system. The justice form is hybrid (white and black), not black alone. Critics are concerned that Indigenous people may be used by a white system to police and punish

⁴⁰ The courts are also convened for youth offenders in Queensland, South Australia, and Victoria. In Queensland, Justice Groups may also advise District and Supreme court sentencing.

Indigenous people. But the Indigenous people we have talked to see a lot of positives in these courts.

(1) There is better communication.

The Magistrate of a New South Wales circle court said the circle ‘removes physical and verbal barriers’, ‘there is no pompous lawyering’ and ‘the offender is no longer shielded by his or her lawyer’.⁴¹

(2) Decisions rely on Indigenous knowledge and methods of social control.

Elders, respected persons, or cultural advisors have varied roles, which occur both inside and outside the court. These people can be more effective than a magistrate, who does not know the offender or family.

(3) There are more appropriate penalties.

Some think that penalties in these courts are more lenient than in a regular court. Countering this, others say that when Indigenous offenders face community people they know, the sentencing process is not lenient. In the Nunga and Koori Courts, a higher proportion of defendants show up on the day. This has led to reductions in arrests for non-appearance by offenders on bail.⁴²

What is Justice?

Thus far in Australia, Indigenous courts and justice practices have attracted little criticism from prosecutors or the press.⁴³ In the South Australian Nunga Court, there have been only two appeals of sentence since the court began.⁴⁴ A Queensland case in 2001 received a lot of media attention. It involved an Indigenous young person (16 at the time), who raped his grandmother in a Cape Community. The District Court judge imposed a one-year jail term, but

⁴¹ Dick (2003).

⁴² Briggs and Auty (2003) and Boxall (2005).

⁴³ Briggs and Auty (2003) note that the Koori court was subject to criticism but mainly by the legal profession. Magistrate Chris Vass said that in the early days of the Nunga Court, he had little support from his judicial colleagues.

⁴⁴ I observed Nunga court proceedings the day these sentences were handed down and was surprised that they were appealed by the police prosecutor. They posed no specific challenge to Indigenous jurisprudence, but appeared to be motivated for other reasons. One involved an elderly man who was given additional time before his licence was disqualified, and the second involved a woman who, while under arrest, bit a police officer on the wrist.

suspended. The prosecutor appealed, and on appeal, the young person was re-sentenced to serve a longer term in jail (2 years). There was much media interest when this case first broke. Was the initial sentence ‘too lenient’? Whose interests should take precedence? In the judgment, the Chief Justice said, ‘the principles of punishment ... and protection of the community are as important in indigenous communities as they are elsewhere in Queensland’.⁴⁵

For over a decade, Canadian Indigenous women have raised questions about sentencing in remote areas, which appears to give a ‘discount’ when Native men rape or assault women.⁴⁶ A similar dynamic occurred recently in the Pitcairn Islands, where the Chief Justice said the penalties were ‘tailored to Pitcairn’, including ‘its dependence on the manpower of its able-bodied citizens’.⁴⁷ There are other examples such as Hollow Water and circle sentencing in Canada, although it is important to emphasise that the problems identified are most acute for women and children living in remote areas.

Hollow Water

For some time, RJ and IJ advocates have sung the praises of Hollow Water. In that community and several other remote communities in Manitoba, a community-wide process was established in the late 1980s to address widespread problems of sexual abuse within and across families and generations. The

⁴⁵ *R v A; ex parte AG (Qld)* [2001] QCA 542, BC200107521. This statement reveals the symbolic and political dimensions of appearing to have ‘equal sentencing’, from a white justice point of view.

⁴⁶ See LaRocque (1993, 1997), Nightingale (1991), and Razack (1994). The questions raised by differential sentencing go to the heart of race and gender politics. Should disadvantaged minority group men living in remote communities be punished the ‘same’ as their counterparts in urban areas, or the ‘same’ as urban, majority group men? If, as many argue, sentencing should be context dependent, what does this mean for victims? LaRocque (1997: 89) suggests that ‘in the guise of cultural sensitivity, non-Native judges and lawyers have, as a rule, sympathized with Native rapists and child molesters on cultural grounds ...’ Taking another tack, Hollow Water community member Berma Bushie (1997: 135) argues that ‘we don’t believe in incarceration’, [and] ‘the reason ... is there’s no healing in that place ... [and] ‘there’s no way that [offenders] can even talk about what they’ve done’.

⁴⁷ *New Zealand Herald* (30 Oct 2004). The lead-in for the story was ‘they do things differently on Pitcairn Island’; and the journalist reported that had the same offences been committed on the New Zealand mainland, they would have attracted a 10 year jail sentence, rather than the 3 years imposed on one Pitcairn defendant. Such comparisons can be misleading and do little to advance a position of common ground in the race and gender politics of justice. See Coster (2004) for an analysis of why RJ was not used in the Pitcairn cases, despite the prosecutor’s repeated requests. Legal arguments by the defence, which concern the applicability of English law on the Pitcairn Islands, will be taken to the Privy Council later in 2005. If these arguments succeed, the trial and sentences will be annulled. The sentences handed down in October 2004 cannot be imposed until after the Privy Council decisions.

process is called Community Holistic Circle Healing; it uses a ‘decolonization therapy’ that emphasises ‘cultural values’ in the ‘healing journeys’ of victims and offenders.⁴⁸ No doubt, some good has come from these healing circles, but they have also been criticised by Indigenous women. Some argue that in the name of ‘culture’ and ‘healing’, offenders are being treated too leniently. Community interests, ‘cultural differences’, and tradition are given precedence. Paraphrasing Emma LaRocque, ‘Native women are being pitted against “their own people” and are put in ‘an untenable position of having to choose between gender and culture’.⁴⁹ She reports that she and other Native women have not felt ‘free to publicly challenge Hollow Water’.⁵⁰

Circle sentencing

Circle sentencing began in the early 1990s in a remote Canadian community and has been taken up in other areas.⁵¹ Rashmi Goel says that the ‘sentencing circle represents a significant step in the ability of Aboriginal communities to regain control over dispute resolution and justice matters. ... Success in the circle means success for the individual offender, and another step forward in recognizing Aboriginal self-government’.⁵² However, this puts tremendous pressure on Indigenous communities to ‘make the sentencing circle work’, that is, to show its effects in reducing recidivism. The consequences are that victims’ interests are silenced, especially victims of family and sexual violence: ‘the victim is obscured by a central focus on the offender as a victim of colonial society’. The ‘circle encourages the Aboriginal woman to place her community interests ahead of her own’.⁵³

⁴⁸ See Lajeunesse (1996: 59 and 18 on decolonization therapy and healing journeys, respectively) for evaluation of Hollow Water (report on file with the author).

⁴⁹ LaRocque (1997: 87).

⁵⁰ LaRocque (1997: 93). For contrary views, see Bushie (1997).

⁵¹ Although the Australian literature suggests that circles were borrowed from Canada, circle practices in the two countries differ. Canadian circles are not viewed as IJ, whereas Australian circles are. In New South Wales, circles were proposed by the Aboriginal Justice Advisory Committee (AJAC) to the Standing Committee of Criminal Justice System Chief Executive Officers; they have been formed with greater participation and control by Indigenous people than appears to be the case in Canada (Potas et al. 2003: 3).

⁵² Goel (2000: 320).

⁵³ Goel (2000); quoted material on p. 324 and p. 317 respectively. Crnkovich and Addario (2000) and Stewart, Huntley, and Blaney (2001) raise similar concerns about the ways in which community interests eclipse women’s interests in RJ or community-based approaches to family violence, drawing from Nunavut and British Columbia.

Despite these problems, Goel considers the positive value of circles. They can be a forum to raise community awareness about family violence, provide community-based services, and offer women some means of redress. Goel believes that circles will only become meaningful and effective when women enter the circle as equals.⁵⁴ Another crucial element is having sufficient resources to prepare people to engage in a long-term process of changing abusive behaviour, with the right protocol and therapeutic tools.⁵⁵

In Australia, circles in New South Wales have dealt with partner violence; and thus far, there has been no critique. Likewise, for cases in the Nunga court. In the Koori court, family and sexual violence cases are not eligible. Compared to Canada, less criticism has been raised by Australian Indigenous women on the ways in which male community leaders may use the process to their advantage, together with a lack of resources and safety for victims.⁵⁶ RJ-like approaches have been in place somewhat longer in Canada than Australia. As a consequence, there has been more interview research and analysis of cases that show what can go wrong when violence toward women and children is dealt with by ‘community’ decision-making. It is also possible that Australian Indigenous community initiatives have been created with a greater degree of power and participation of women. The Aboriginal community patrols are a good example.⁵⁷

Conclusion

New justice practices, and especially RJ, aim to balance offenders’ and victims’ interests in the criminal process. I find that the *promises* of the new justice are running ahead of practices, which are largely offender-centred. Victims *do* have a place – and certainly they have a greater role than in established criminal justice – but it is secondary. In doing justice differently, then, emphasis is given

⁵⁴ The same point is made in the *Report of the Aboriginal Justice Inquiry of Manitoba* 1991 (p. 507), where as Razack (1994: 913) suggests, Indigenous women’s ‘responses speak of healing and community but also speak of safety of women and of equality; they are different in a significant way from the forgiving approach [advanced by advocates of circles] because they attempt to come to terms with women’s realities at the intersection of racism and sexism’.

⁵⁵ This is the major lesson learned from the Pennell and Burford’s (2000, 2002) protocol and research on family group conferencing for serious cases of family and sexual violence.

⁵⁶ Note, however, that Blagg’s (2005: 18-19) review of developments in the Northern Territory finds that there is contention among Indigenous women over whether Aboriginal law may ‘reinforce the power of male Elders, who might themselves be perpetrators’ and the need for white law and white police to address family violence.

⁵⁷ See Blagg and Valuri (2004).

more to offenders' than victims' interests. Because the state has considerable power to prosecute and punish, this tilt toward offenders may be appropriate and inevitable. However, those victims who wish to participate in RJ or IJ should be brought in on a more equal footing.

Feminist and victim advocates have argued that certain offences should be ineligible for RJ, including sexual and family violence. I have proposed instead that RJ has great pragmatic potential in responding to youth sexual violence, although it must be tied to a therapeutic intervention. For adult sexual and family violence, Canadian research suggests that when circles do not have adequate support and resources for victims, they are ill-advised. We also see from Hollow Water and elsewhere that some Indigenous women would prefer abusers to be jailed, to be removed from the community for a while, although the preference is for facilities with effective forms of rehabilitation.⁵⁸

One frustration in depicting race and gender politics, RJ, and IJ is that the focus of everyone's attention is on sexual and family violence. This is important, but there are many other domains to explore. We are accustomed to thinking about crime as an individual act, but many offences arise in the context of community relations and social disorder. Thus, depending on the context, RJ or IJ could be used to address policing, on-going violence between youth groups, and damage to community buildings (such as schools and churches). It also has great potential for addressing state crime and historical injustices.⁵⁹

For most people, RJ offers hope and a more positive way to do justice. People want to believe there are better ways to respond to crime. I share that view. However, like the established court process, RJ and IJ have limits. In particular (and with some exceptions), they are set in motion only after a person admits to an offence.⁶⁰ RJ requires a positive orientation; an open mind; and an interest by victims, offenders, and their supporters to engage in the process. It requires people to speak and be active in the legal process when for so long they have been told to be quiet. For some victims, the effects of crime may be so harsh that

⁵⁸ McGillivray and Comaskey (1999) and the Aboriginal and Torres Strait Islander Task Force on Violence (2000) make similar points. In more remote communities, the preference is often given to community facilities and out stations (Blagg 2005: 22).

⁵⁹ Cunneen (2003: 185).

⁶⁰ Here are some exceptions I am aware of. The Victorian Koori juvenile court plans to establish a trial process that involves Elders (Blagg 2005: 40). In the Hollow Water Circle process, Bushie (1997: 147, 153-54) says that once a child discloses sexual abuse, the community members 'confront a victimizer' and get 'them to take responsibility' before reporting the person to the police. She also reports that during a sentencing circle, people come forward to admit responsibility for offending. Canadian circles can also be convened after a finding of guilt at trial.

any kind of legal process will be of little assistance. For all of these reasons, RJ practices fall short of ideals.

IJ poses even greater challenges to established criminal justice. As Briggs and Auty say about the Koori court,

We are embarked upon a paradigm shift, blending disciplines and cultures in real partnerships which would have been unthinkable ten years ago ... More than just the built environment ... is under scrutiny, and more than the shape of the bench is being changed.⁶¹

IJ requires a profound re-working of neo-colonial relations;⁶² methods of building greater trust between Indigenous and non-Indigenous people in policing, courts, and corrections; and building economic strength and political solidarity within Indigenous communities and organisations. Depending on the jurisdiction, elements of Aboriginal law could be applied to bail and sentencing decisions. Harry Blagg uses the term ‘constructive hybridisation’ to refer to the ways in which ‘Aboriginal values and principles can be incorporated into the non-Aboriginal justice system’.⁶³ But we need to ensure that none of these developments comes at the expense of Indigenous women’s interests or inappropriate uses of ‘cultural’ arguments.

Race and gender politics are at the centre of my story on justice and its future. Without finding common ground between the aspirations of Indigenous and feminist or women’s social movements, experiments with new justice practices will not succeed. I am especially attentive to how Indigenous women thread their way through this minefield.

Last year at a Family Violence Prevention Forum in Mackay,⁶⁴ Jackie Huggins said ‘we are not going anywhere without our men in dealing with family violence’. The experience of ‘standing with our men’ is not confined to Indigenous communities, nor is the problem of family violence. At the Forum, Mick Dodson said, ‘This is not just a black boy problem. White fellas are struggling, and we can learn from each other’. Their comments reflect ways of

⁶¹ Briggs and Auty (2003); quoted material on p. 17 and p. 18 respectively.

⁶² These include the need for new kinds of relationships between Aboriginal interests, the government, and the private sector, along with reconciling broken relationships among Aboriginal people (see Blagg 2005: 32-33 on the Munjurla study, which is part of the Western Australian Council of Australian Governments trial).

⁶³ Blagg (2005: 3).

⁶⁴ This Forum was convened by the Queensland Centre for Domestic and Family Violence Research, Central Queensland University, Mackay.

finding connections across potentially antagonistic race and gender politics. It is especially important that feminist and women's groups address potential antagonisms (racial and others) when contemplating the merits of RJ and IJ.

Applied to criminal justice, the contested politics of race and gender are about the relative importance we give to reducing the hard edge of criminal law and its effects on social exclusion and segregation, compared to 'righting' the inequality caused by crime and ensuring victim and community safety. I believe it is possible to deal with competing justice claims through new justice practices, especially if more resources and attention are given to victims. But there remains the problem of how these practices articulate with broader societal inequalities. They may be able to relate individual acts of crime to community and societal relations. However, the vision of a more just society will not be secured by making institutions of criminal justice larger or even smarter. Rather, that vision will be secured by policies in other domains, along with vibrant and active movements for social change.

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Note: With the exceptions noted, all the Daly publications are available at <www.griffith.edu.au/ccj/school/kdaly.html> or the website indicated.



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Originally from the United States, she received her PhD in sociology from the University of Massachusetts-Amherst (1983). She was Visiting Assistant Professor at the State University of New York at Albany (1982-83), Assistant Professor (1983-88) and Associate Professor (1988-92) at Yale University, and Visiting Associate Professor at the University of Michigan-Ann Arbor (1992-95). In 1995, she was awarded a Senior Fulbright Scholarship. She was based at the Australian National University's Law Program in the Research School of Social Sciences from September 1995 to May 1996 before taking up her current position at Griffith University in June 1996.

Professor Daly came to Australia to conduct research on restorative justice. Her Fulbright year research laid the foundation for the design of the South Australia Juvenile Justice Research on Conferencing Project, funded by the Australian Research Council (ARC) (1998-99). She received a second ARC grant (2001-03) to direct a program of research on the race and gender politics of the new justice practices, and a third ARC grant (2004-06) continues the research on Indigenous justice practices and extends the study of race and gender politics to Canada.

Professor Daly has authored (or co-authored) two books, three edited collections, and over 55 articles in journals, edited collections, and law reviews. She has written on gender, race, and sentencing; prostitution; domestic violence; white collar crime; media and crime; feminist and anti-racist challenges to criminology; and women, race, and gender in crime and the criminal justice system. Her more recent publications centre on restorative justice and Indigenous justice. She published an edited collection (with Lisa Maher), *Criminology at the Crossroads: Feminist Readings in Crime and Justice* (1998), and is editor of *Crime and Justice: An Australian Textbook in Criminology* (2003) (with Andrew Goldsmith and Mark Israel). She is co-editor (with Julie Stubbs and Kim Cook) of a special issue of *Theoretical Criminology* on Gender, Race, and Restorative Justice, to appear in November 2005.

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