

Restorative Justice in Diverse and Unequal Societies

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Restorative Justice in Diverse and Unequal Societies by Kathleen Daly

Can restorative justice deliver a better or more effective kind of justice in diverse societies, that is, those structured by socio-economic and political inequalities, and with age, gender, racial-ethnic divisions? It would be absurd to think I could answer this grand question with any degree of certainty or accuracy: the modern idea of restorative justice is only in its infancy. Moreover, an 'answer' presumes that we know what 'restorative justice' is and that we can agree on the meaning(s) and comparative referent for 'better' and 'more effective' kinds of justice. Despite these formidable challenges, I respond to the question by reviewing available research and by placing restorative justice in political context. My focus will be mainly on racial-ethnic divisions and one form of restorative justice -- conferencing -- as it is practiced in Australia and New Zealand.¹

Defining restorative justice

Restorative justice is an umbrella concept that refers to many things. As applied to criminal matters, it can be defined as a method of responding to crime that includes the key parties to the dispute (that is, victim and offender) with the aim of repairing the harm. To date, restorative justice has been used primarily in cases where people have admitted they have done something wrong; it thus focuses on the penalty phase of the criminal process, not on the fact-finding phase. Restorative justice may refer to *diversion* from formal court process, to *actions taken in parallel* with court decisions, and to meetings between offenders and victims *at any stage* of the criminal process (arrest, pre-sentencing, sentencing, and prison release). It is used not only in responding to

adolescent and adult crime, but in a range of civil matters. In the past 25 years and around the world, it has been called many things: informal justice, reparative justice, transformative justice, among others. The concept is now being applied *after the fact* to programs and policies, which have been in place for some time. For example, in New Zealand where a strong version of restorative justice is in place legislatively, the naming of family group conferencing as restorative justice came several years *after* the passage of the *Children, Young Persons and Their Families Act 1989*. So too in South Australia, where youth justice coordinators began to associate their practices with restorative justice several years after the passage of the *Young Offenders Act 1993*.

Justice contrasts

When one first dips into the restorative justice literature, the first thing one 'learns' is that restorative justice differs sharply from retributive and rehabilitative justice. For example, it is said that restorative justice focuses on *repairing the harm* caused by crime, whereas retributive justice focuses on *punishing an offence*; or that restorative justice is characterised by *dialogue and negotiation* among the parties, whereas retributive justice is characterised by *adversarial relations* among the parties; or that restorative justice assumes that *community members or organisations take a more active role*, whereas for retributive justice, '*the community*' is represented by the state. And so forth (see Appendix 1). Most striking is that all the elements associated with retributive justice are depicted as residing on the inferior side of the justice dualism.

Strong contrasts may be comforting, but they seduce us into complacent, dichotomous thinking about justice practices. The hard and challenging work ahead is to think more deeply and to

visualise more shades of grey in imagining how this emerging justice form will articulate with the 'old' -- both in terms of the *aims* of restorative justice (e.g., repair of harm) and the *practices* of restorative justice (an informal legal process).

My critique of strong justice contrasts is three-fold. First, I do not accept the oppositional framings of retributive, rehabilitative, and restorative justice on empirical and philosophical grounds. I have put forth this position for some time (Daly, 1996, 1998; Daly and Immarigeon, 1998), at first tentatively, but now with greater confidence, having spent time in the field conducting a major project on conferencing in South Australia (Daly et al., 1998). As practiced, restorative justice contains emotional and psychological elements of both retributive and rehabilitative justice. Philosophically, a mix of apparently contrary justice practices -- that is, of punishment and reparation -- can be accommodated in philosophical arguments (Duff, 1992, 1996; Daly, 1999). To be sure, there are several key differences between restorative justice and other justice modes: the process is designed to include victims as central actors and to use a more informal, negotiated decision-making process that includes both lay and legal actors. But on core elements of justice aims and purposes (e.g., to punish, rehabilitate, provide restitution, repair harm), the oppositional contrast is not appropriate.

Second, I am not convinced that we can (or should) remove the idea of punishment from a restorative justice process or outcome, even in its most ideal form (Daly, 1999; see also Zedner, 1994). Rather, we might consider how the idea of punishment can be part of restorative justice.

Finally, most people today admit that restorative justice cannot *replace* current penal law and procedures. Rather, the idea is that informal (and non-criminalising, non-stigmatising) processes of social control, coupled with the use of dialogue and persuasion, should form a larger share of justice system activity than is now the case.

In sum, characterising restorative justice as being the 'opposite' of retributive justice cannot be sustained empirically when one examines conference practices. In any new justice venture, we should expect to find both the 'old' and the 'new' working alongside each other. Indeed, the strength of conferencing as one practice of restorative justice is that it permits multiple justice aims -- of retribution, restitution, and rehabilitation -- to be accommodated in one process. Commentators would do well to shift their rhetorical claims away from an oppositional (and adversarial) framing of retributive and restorative justice and move towards a more complex reading of justice principles and practices that reflects what conference participants (not just the professionals) are thinking and doing.

Varieties of restorative justice

Looking around the world today, the following practices fall under the rubric of restorative justice:

- 'Conferencing' of several varieties in Australia, New Zealand, England, the USA, and Canada. Whereas the northern hemisphere version of conferencing is generally police-run, the southern hemisphere version is not.²
- 'Sentencing circles', which arose in Canadian First Nations (or indigenous) groups, and which are now being taken up in justice practices for indigenous and non-indigenous groups in Canada and the USA.

- Victim-offender mediation schemes, which include a variety of practices in the UK, European, and Scandinavian countries.
- Other practices such as 'reparation boards' in Vermont, services to crime victims, meetings between imprisoned offenders and victims (or their family members)

Turning to the Antipodes, there is diversity in how conferencing is practiced and where it is located organisationally. Compared to other countries in the world, New Zealand has the most developed and systemic model of restorative justice in place. All juvenile cases that are not disposed of by the police go to a conference at some stage, including those sentenced in court. New Zealand is also unique in that the conference idea emerged not only from the interests of state officials and professional workers, but it also came out of a political process that involved both 'top down' activism (by judges) and 'bottom up' activism by Maori groups. No other jurisdiction in the Antipodes has had this kind of majority-minority group political history in fashioning welfare and justice policies. In Australia, my impression is that the idea of conferencing moved into the policy and legislative process almost entirely via mid-level administrators and professionals (including the police), largely sidestepping politics 'from below' (see also Cunneen, 1997).

Although New Zealand is considered an exemplary place for restorative justice, not all is going according to plan. At a conference in Wellington in October 1998, I learned that the major stakeholders in New Zealand all agreed on the principles, but there were insufficient resources to follow through on them. Earlier that year, in July 1998, a conference examining Maori-state relationships in the criminal

justice system was held; one commentator reports that 'the majority of Maori presenters ... condemned the government' for the sorts of policies that had emerged in the previous decade (Tauri, 1999:164).

For Australia, here are highlights of what's happening today, drawing from legislation, administrative guidelines, and procedure manuals:

- All eight states and the territories have used conference, but there are five in which conferencing is active in youth justice cases: South Australia, Western Australia, Queensland, and New South Wales, which legislatively established conferences during 1993-97. The fifth jurisdiction is the Australian Capital Territory (ACT), which has no legislative basis and where the police have run conferences since 1995 in connection with the Re-Integrative Shaming Experiments (RISE). In Victoria, conferencing is used only for pre-sentence matters and operated by a non-state organisation. Tasmania passed legislation in 1997, which includes conferences, but the state is undecided on how they should be implemented. In 1999, the Northern Territory introduced diversionary conferences as one of several diversion programs for a selected set of offenders and offences.³
- For the five more active jurisdictions, conferences are typically used in juvenile criminal matters, not adult matters, except in the ACT during 1995-97 in the handling of drink driving cases. Also in Queensland, while not part of the legislation, there is an administrative understanding that conferences can be used for some adult cases. Conferencing is mainly used in criminal matters, not in care and protection decision-making, except in South Australia.

Turning to youth justice cases:

- There is great variety in the numbers of conferences held in each jurisdiction annually: South Australia completes over 1 400 conferences a year; in Western Australia, the estimate is 1 200 to 1 400 (although it is difficult to get a precise number); in the ACT, 200 to 250 a year; in Queensland, which is only operating pilots, about 200 a year; in Victoria, which only uses conferences in selected sentencing matters, about 40 a year; and in New South Wales, it is too early to say since the state just began operations in June 1998. (For comparison, the annual number of youth justice conferences in New Zealand ranges from 5 850 to 6 600.) ⁴
- Some jurisdictions tie their practices to the theories of 'restorative justice', others to 'reintegrative shaming', and others to a mixture of both and additional elements. Such theories are not given in the legislation, but rather in procedure or practice manuals.
- Referral to conference is typically used as a diversion from court process, but in several jurisdictions (Queensland and New South Wales), conferences can also be used as a pre-sentencing option.
- While conferencing is mainly used in handling cases that come to police attention, it is also used in schools and workplace disputes in Queensland and New South Wales, as part of Transformative Justice Australia.
- In one jurisdiction (Queensland) victims have veto power over whether a conference can be held, and in three jurisdictions (Western Australia, Queensland, and New South Wales), victims have veto power over the conference agreement or plan if they are present at the conference.

Although it is possible to highlight what Australian jurisdictions are doing (see also Barga, 1996, 2000), actual practices may differ from what is stated in legislation or administrative guidelines. Each Australian jurisdiction has a

different history and politics of what preceded conferencing, and these affect how the idea has taken hold and will evolve in that jurisdiction. Not only is there jurisdictional variation in how justice system workers are experimenting with conferencing, but also in any one jurisdiction, police officers and conference coordinators (or other practitioners) may have different views on what they are trying to accomplish. This diversity of *ideological perspective* and *actual practice* has yet to be mapped and analysed, but it is crucial task in depicting 'what is going on' in Australia today.

Can restorative justice deliver a 'better' or 'more effective' kind of justice in diverse societies?

New Zealand and Australia are engaged in a large experiment with restorative justice, one with a restricted time frame (ten years in New Zealand, five in Australia) and with varied political histories, organisational sites, and state support. Despite these qualifications, the short answer I give is a qualified 'yes': within the constraints of liberal law, restorative justice can deliver a 'better' or 'more effective' kind of justice in diverse and unequal societies *if* it is tied to a political process and *if* it is well resourced. For now, I leave to the side the problem of assessing 'better' and 'more effective' justice. (For example, what indicators would one choose for 'effective'? For which groups and for what conflicts is any justice practice better or more effective? What is restorative justice to be compared to?) I assume any society will require multiple justice modalities, not just one. Other assumptions ground my claims about justice system practices in diverse and unequal societies:

- Any justice practice, however well intentioned, can be expected to reproduce existing relations of inequality (Abel, 1982; Matthews, 1988).

- Efforts to achieve a more just society will come largely from policies of redistributing wealth and political power, along with changes in divisions and value of labour, not from justice system policies. However, we can identify more and less 'just' responses to crime in unequal societies.
- A major tension in justice systems -- the twin demand for an 'individual' and 'uniform' response -- cannot be satisfied in a single justice model. We have seen in the past century great injustices arising from strong applications of both 'equal' and 'individualised' treatment.
- Relations of inequality do not work in the same way for different groups. There are distinctive influences of gender, compared to class or race-ethnicity, on lawbreaking and the state's response to crime. Gender does not seem to fit the expectable pattern of inequality and criminalisation, in which the more subordinated members of society are more likely subject to state social control (Daly and Tonry, 1997).

If the idea of restorative justice is to succeed, it must be tied to a political process, and by that I mean a process of engagement among and between the interests of political minority groups (e.g., indigenous and feminist) and governments, although it would be mistaken to limit such engagement to relatively powerless segments of society. As Braithwaite (1996:8-9) emphasises, restorative justice has great potential in responding to corporate and state crime.

For research, I shall draw from studies of conferencing in New Zealand, findings from the Re-Integrative Shaming Experiments (RISE) in the ACT, a preliminary study I conducted of conferencing in the ACT and South Australia, findings from the South Australia Juvenile Justice (SAJJ) Research on

Conferencing project, and other research in Western Australia, Queensland, and South Australia.⁵

New Zealand

Commentators often say that New Zealand's family group conferencing reflects 'traditional' Maori practices of dispute resolution. This is only partly right, and it has led to the misleading claim that the conference process is an 'indigenous' practice. The more accurate story is that Maori people's struggles during the 1980s for a greater voice in care and protection cases, via family decision-making, led to the development of family conferencing as a method of decision-making. (Its use in youth justice cases came as an after-thought.) The idea was that better decisions would result with increasing participation of Maori 'family groups' and with decreasing involvement of state social workers or other professionals.

The following highlights findings from research carried out in New Zealand during 1990-91 (Maxwell and Morris, 1993; Morris and Maxwell, 1993), coupled with more recent studies by them.

- Most families and young people (offenders) felt involved in the decision-making process.
- Most families and young people were satisfied with the outcomes reached.
- Almost all conferences resulted in agreed outcomes.
- Most young people carried out agreements made in the conference (that is, performed the community work, made apologies, and the like).
- Compared to young people and their families, victim participation was substantially less (half of victims attended conferences), and victims' levels of satisfaction with the process were not as high.

- The 1989 Act 'specifically advocates the use of culturally appropriate processes and the provision of culturally appropriate services' (Morris, 1999:4). However, Maxwell and Morris (1996:95-96) report that while 'conferences could transcend tokenism and embody a Maori process, they often failed to respond to the spirit of Maori or [to reach outcomes] in accord with Maori philosophies and values'. (They note that traditional Maori 'methods of justice were not always benign' in that they included death, slavery, and exile.) They find that 'the new system remains largely unresponsive to cultural differences' and that this is partly a consequence of the government not honouring its commitment to provide resources. They also note that there can be problems of communication and understanding when differing cultural groups are represented as crime offenders and victims.

For system effects in New Zealand, there has been a two-thirds reduction in juvenile court appearances from 1987 to 1996 and a 50 percent reduction in custodial sentences for juveniles during this time, although adult incarceration rates have not decreased (Morris, 1999:5). Somewhat paradoxically, in light of this apparent decarceration trend, the New Zealand government's 'Budget in Brief' for 1999 announced plans to establish seven youth prisons with the stated aims of getting 'young people out of adult prisons', keeping 'young prisoners close to their families', and providing 'better education services'.⁶

Maxwell and Morris have carried out several studies on whether the experience of going to a conference may reduce re-offending, and their work is all that we currently have on this question. In an early study, they report that of the young people in their conference sample in 1990, four years

later, the majority (58 percent) had been convicted of a criminal or traffic offence in youth or an adult court. They find that 'the young people who became re-offenders or persistent re-offenders were more likely to have committed a larger number of offences initially and to have had a previous a criminal history when entering the sample; they were more likely to be older and Maori', among other dimensions (Maxwell and Morris, 1996:107). In a second study of their sample, six and half years later, Maxwell (1999) finds that those who were 'persistently re-convicted' (defined as having appeared in court five or more times on criminal matters, 28 percent of the sample) could be distinguished from those who had not been convicted (29 percent) by a series of variables indicative of the young person's problems in early childhood, by how the young person and their family supporters felt during the conference, and by subsequent events in the young person's life. Maxwell (1999:7) concludes that that 'successful early intervention is likely to be the most effective strategy' in preventing offending; however, conferences may play a role if certain elements are present: when young people and their supporters see the outcome as having been achieved fairly, when they leave the conference not feeling badly about themselves, and when young people feel they are 'truly sorry' for what they have done.

Compared to Australia, the New Zealand government has given more attention to addressing indigenous (Maori) over-representation in the system. Despite such attention, New Zealand academic commentary ranges from hesitantly positive or lukewarm (Olsen et al., 1995; Maxwell and Morris, 1996; Tauri and Morris, 1997) to strongly critical (Tauri, 1999) of how well the conference process has grappled with cultural, class, and racial differences.

Re-Integrative Shaming Experiments (RISE) (Canberra)

RISE is important because it compares justice practices in courts and conferences, and it does so with a random assignment of cases to court and conference. RISE's limitations are that

(1) conferences in Canberra are used for relatively minor offences (especially in comparison to South Australia), although conferencing had been used in cases of adult drink driving, and

(2) conferences use the Wagga-style model (police-run conferences), which is atypical for Australia. Here are highlights of what we have learned from RISE, based on data gathered from court proceedings and conferences observed, along with interviews conducted during 1995-97 (Sherman et al., 1998; Strang, 1999):

- Offenders report greater procedural justice (defined as being treated fairly and with respect) in conferences than in court proceedings.
- Offenders report higher levels of restorative justice (defined as the opportunity to repair the harm they had caused) in conferences than in court.
- Conferences more than court increased offenders' respect for the police and law.
- Victims' sense of restorative justice is higher for those who went to conferences rather than to court (e.g., recovery from anger and embarrassment).
- Victims in conferences report high levels of procedural justice, but this could not be measured for court victims because they rarely attended.

RISE suggests that conferences deliver a better kind of justice than does court. To date, analyses have not yet explored whether judgments of procedural and restorative

justice vary by social location (e.g., gender and race/ethnicity).

My preliminary research in Australia

During 1995-96 when I was a Senior Fulbright Scholar at the Australian National University, I observed 24 youth justice conferences in the ACT and South Australia, and I travelled to Alice Springs to learn about a pilot police-run conferencing project (Daly, 1996). I was interested to explore several critiques of conferencing, among them, anti-racist and feminist arguments (Blagg, 1997; Stubbs, 1995). Blagg was critical of Wagga-style conferencing, which, he believed, would give the police increased powers over Aboriginal youth and which would mobilise 'shame' inappropriately in conferences controlled by non-Aboriginals. Replying to Braithwaite and Daly's (1994) arguments for using conferencing in family violence and rape cases, Stubbs (1995) noted potential problems of gender power imbalances and of victims feeling worse from a conference (citing results from Maxwell and Morris, 1993:119-120). In addressing the anti-racist critique, I found that conference dynamics worked more smoothly when, in addition to offenders (or victims), there were other Aboriginal participants at the conference such as police aids, community workers, or Aboriginal Legal Rights Movement representatives. Contrary to Blagg's concern of increasing police powers, statistics from South Australia (Wundersitz, 1996; Doherty, 1999) and Western Australia (Jones, 1994) show that the proportions of Aboriginal and non-Aboriginal youth referred to conference are about the same.

For the feminist critique, I found support for concerns of potential re-victimisation of women in conferences. Of the 28 victims at the conferences, I judged seven to have either been treated with disrespect and to have been emotionally

distraught as a result of the conference. Six were women; and the one male was an Aboriginal boy. While gender power imbalances such as men dominating discussion or having more sway in decision-making were not apparent, I did note that conferences were gendered events. While few offenders were female (15 percent), women were 52 percent of the offender's supporters; and more mothers than fathers of young people were present at conferences, although women were not more involved than men in supervising the completion of agreements. These findings, which I view as tentative and suggestive, were explored further in a larger study of conferencing, which I launched in 1998, the SAJJ project.

South Australia Juvenile Justice (SAJJ) Research on Conferencing

SAJJ gathered observational and interview data during 1998-99 on 89 conferences and 172 offenders and victims; in addition, police officers and coordinators completed surveys for each conference, and they were interviewed at the end of the research period. SAJJ differs from RISE in that it focuses on conferences alone, its sample size is smaller, and it examines conferences run on the New Zealand, not the Wagga model (Daly et al., 1998). Data reduction and analysis has just begun, but these findings can be highlighted:

- Conferences receive high marks by the four key conference groups (police, coordinators, victims, and offenders) on measures of procedural justice, including being treated with respect and fairness, having a voice in the process, among others. Analyses by participants' social locations such as gender and race/ethnicity show no differences.
- Compared to the very high marks for procedural justice, there are somewhat lower levels of restorative justice (defined as 'movement' between victim and offender toward greater empathy or understanding of the other's situation).

This suggests that while it is possible to have a process perceived as fair, it is relatively harder for victims and offenders to resolve their conflict completely or to find common ground -- at least at the conference itself.

- Systematic observations of conferences were carried out to determine if power imbalances were present, if victims were re-victimised, and if derogatory comments were made. In the interviews, we asked young people (offenders) and victims whether they felt disadvantaged in the conference because of their sex or race-ethnic identity. Instances of explicit expressions of prejudice and power, or of felt disadvantage, were rare.

Other research in Western Australia and Queensland

From all studies of conferencing to date -- from New Zealand, the ACT, and South Australia -- the strongest and most consistent finding is that the process is viewed as fair by participants and there are generally high levels of satisfaction with processes and outcomes. These findings are also evinced in reports from Western Australia (Cant and Downie, 1998) and Queensland (Palk et al., 1998). With some exceptions (e.g., Maxwell and Morris, 1993; Olsen et al., 1995, on Maori participants), comparatively little is known about how ideas of 'fairness' and 'satisfaction' may vary by racial-ethnic identities. Cant and Downie (1998:61) find that in Western Australia, 35 percent of Aboriginal youth cases, which were referred to metropolitan Justice Teams, were returned to the police or to the court 'as unsuitable or unsuccessful compared with 17 percent of non-Aboriginal referrals'. The reasons were an inability to locate the youth, the youth not attending the meeting (conference), and the youth not completing the action plan. Interviews were conducted with a small number of Aboriginal families (a total

of seven) in the metropolitan and country areas, who gave positive and negative reactions in roughly equal measure.

South Australian report on Aboriginal and non-Aboriginal contact with the justice system

It is plain that the introduction of any new justice measure by a dominant 'white' system, however well-meaning or well-resourced, is going to be met with wariness by indigenous people. Moreover, any new measure cannot erase a long history of police practices, with the accumulated memories of distrust and anger on both sides. I want now to turn to a statistical report, just released from the South Australia Office of Crime Statistics (Doherty, 1999), using 1997 data from South Australia, which compares patterns of Aboriginal and non-Aboriginal contact with the juvenile justice system. Reports like this are valuable for showing the system-wide handling of crime, not just the portion dealt with by conference. At the same time, the atheoretical tenor of such reports, which intend to discuss 'race differences' without a theory of 'race', is unsatisfactory.

When the Doherty (1999) report was first issued, a news story appeared in the *Adelaide Advertiser*, headlined 'Justice system "fails young"' (9 June 1999:31), with a focus on the system's failure for Aboriginal youth. The newspaper story excerpted verbatim from an Aboriginal Legal Rights Movement analysis of the report (Booth, 1999), which drew on the statistics to demonstrate the continuing disadvantages of Aboriginal youth in the system. My reading of the Doherty report suggests that a more realistic *and* a more critical interpretation of the statistics is called for. From a realistic point of view, culpability for Aboriginal youth over-representation in arrest, court, and secure care facilities lies less in the justice system responses to crime

and more in the structure of Australian society, along with its historical and contemporary policies toward Aboriginal people. These structural determinants have severely eroded effective methods of social control of young people (especially its boys and young men) by adults, and they have severely eroded Aboriginal people's trust or belief in the legitimacy of white justice. Simultaneously, the statistics need to be interpreted more critically. Doherty (1999:100) rightly notes that the 'justice system itself does not have the capacity to redress the major structural inequalities facing the Aboriginal community'. However, she does not explicate the claim that 'the justice system has a responsibility to ensure that, once a young person, whether Aboriginal and non-Aboriginal, comes into contact with the police for suspected offending, that young person is dealt with effectively and equitably' (Doherty, 1999:100). I shall unpack this claim in a moment, but first, I highlight these findings from the report:

- In 1997, Aboriginal youth were 2 percent of South Australia's population, but they comprised 14 percent of all police apprehensions and 23 percent of admissions into secure care (detention, police custody, or remand) (pp. ix, 86).
- A higher share of Aboriginal (14 percent) than non-Aboriginal (4 percent) youth were 10 to 12 years old when apprehended (p. 6).
- Of Aboriginal youth apprehended, a higher share were arrested (47 percent) compared to non-Aboriginal youth (27 percent) (p. 22).
- Policing activity varies by place: most Aboriginal youth were apprehended in country divisions (57 percent), whereas most non-Aboriginal youth were apprehended in metropolitan divisions (77 percent) (p. 8). Nothing was made in the report of this striking difference.⁷

- Of Aboriginal youth apprehended, 13 percent received a formal caution, 18 percent were referred to a family conference, and 66 percent were referred to court (the rest were withdrawn). For non-Aboriginal youth, the respective percentages were 36 percent (formal caution), 18 percent (family conference), and 43 percent (court) (p. 27). Clearly, then, diversion from court is more likely for non-Aboriginal (54 percent) than Aboriginal (31 percent) youth.
- For a higher proportion of Aboriginal (19 percent) than non-Aboriginal (8 percent) youth, the conference did not go forward, the major reason being that the young person didn't show up (p. 43).
- More Aboriginal (27 percent) than non-Aboriginal (12 percent) youth failed to comply with the conditions of the conference agreement (p. 55).
- Because the broad offence categories for which youth were brought into the system do not differ by racial group, one cannot explain these differences by variation in offence category. However, the report offers no data on previous criminal history that might explain, in part, some of these differences.

Interpreting statistics: the need to move beyond liberal readings of racial difference

Statistical depictions of complex justice events can be difficult to interpret without knowing what is happening on the ground. For example, would we say that the reason that a higher proportion of Aboriginal youth did not show up on the day of a conference was because the youth justice coordinators didn't work hard enough or weren't sufficiently 'sensitive' to these cases? Or would we say that Aboriginal youth are disaffected with *any* justice system process, whether it is caution, conference, or court? From my research in South

Australia, I find no support for the former interpretation, but a good deal more support for the latter.

And how do we interpret the higher failure of Aboriginal youth to complete their conference agreements? Would we say that their family supports are not there to aid and assist them? That the undertakings are 'too hard' for them to complete? That Aboriginal youth see no value to completing the undertaking since it is just another 'shame job' that white justice has imposed? Surely, there must be a connection between the failure to complete agreements and subsequent police decisions to not refer certain cases to conference.

Which brings us to the key actors in the diversionary process: police officers. How *do* we explain police referral decisions, i.e., their relatively lower referrals to formal caution and higher referrals to court for Aboriginal than non-Aboriginal young people? Would we say that the police are 'overreacting' to Aboriginal youth, not dispensing sufficient discretionary leniency? Or would we say that more Aboriginal youth are refusing to admit they have done something wrong, thus foreclosing the opportunity either for a formal caution or a referral to conference? Perhaps we would say that because Aboriginal youth have a greater likelihood of previous contacts with the police than non-Aboriginal youth (for a variety of reasons) and because Aboriginal youth are less likely to complete agreements, the police have 'given up' seeing the value of diversion for those apprehended many times or who have 'failed' to honour conference agreements. Statistical data alone cannot tell us *what* the police or young people are doing and saying, and *why*.

We need to address the harder and more complex questions about how justice system practices are saturated and marked by

racial-ethnic (and other) divisions, both past and present. The Doherty report, like others of its kind, fails to get beyond numerical counts of things, sliced and diced in so many tables. It also fails to get beyond a liberal understanding of legal process and methods of interpreting racial-ethnic differences (Daly, 1994a, 1994b). For example, what is the meaning of 'equitable treatment' for Aboriginal young people when the equality standard is white-centred? What is the meaning of 'effective treatment' when a dominant white culture and justice system may simply decide that incapacitation is more 'effective' for Aboriginal young people? Why, in short, do commentators continue to construe justice as 'sameness of treatment'? Why would commentators ever assume that outcomes for heavily marginalised members of a society would be 'similar' to those of its more conventional members?

There is, of course, legitimate moral force in calling attention to the over-representation of marginalised groups in criminal justice systems, and Australia's Aboriginal peoples (especially its males) are no exception.⁸ However, we require a more critical reading of the statistics, which does not naively assume 'equality of outcomes' in an unequal society. The subsequent politicisation of the statistics (e.g., Booth, 1999 or media stories) does not, unfortunately, move an anti-racist political agenda forward. Rather, positions become hardened on both sides, derailing a dialogue of racial engagement. Looking to a future in which indigenous groups' sovereignty will be on the agenda (Murphy, 1999; Tauri, 1999), we shall need to contemplate several justice systems (not just the dominant 'white' system), working in parallel or articulated with one another in some way. When devising measures of the viability of these sovereign (if articulated) systems, we should not necessarily assume 'equality of

outcome' or 'equitable treatment' -- whatever people mean by those terms.

Conclusion

Restorative justice principles and practices have the *potential* to deliver a better kind of justice than what exists currently. With respect to racial-ethnic and cultural differences, the potential exists in the openness of the process to differing cultural sensibilities and to addressing relations of inequality (see LaPrairie, 1995). It has the potential to promote a 'dialogic view of morality' compared to the 'monologic voice of law' (Hudson, 1998, drawing from Habermas, 1984, 1987). It can make the justice system process more humane. But that potential cannot be assumed in the abstract or by passing a new law. It needs to be part of a broader engagement with the politics of race, class, and culture. That means, in part, that majority group justice system workers and citizens must begin to understand that 'assimilation' of minority group members into a white-centred process is not sufficient (or perhaps even acceptable) in creating a better justice system. Majority group members must change and accommodate as well. To date, the idea of restorative justice, as applied in Australia, claims to draw from indigenous justice forms, but as Blagg (1997) suggests, this 'Orientalist' appropriation may result in yet another 'failure' of Aboriginal people to perform according to a white-centred 'indigenous' justice script. Writing from the Canadian context, LaPrairie (1999) argues that the potential positive impact of restorative justice (and other alternatives) for indigenous people will not be realised unless there are sufficient resources and those resources are tied to the kinds of offences (and offenders) that are vulnerable to imprisonment. Otherwise, restorative justice

will be mere window dressing as racial disproportionalities in rates of imprisonment continue.

I have largely focused on racial-ethnic relations as one component of 'diversity' and restorative justice, and I have done so because 'race' *is* the social relation that recurrently politicises crime and justice. However, I would emphasise the importance of analysing race and gender together. In so doing, we may ask, why are Aboriginal *males* so much more likely to be caught up in the juvenile and criminal justice system than Aboriginal females? That is, does 'police-Aboriginal youth conflict' arise as much from gender as from race relations? How do gender hierarchies work in racial-ethnic groups, and how might this affect decision-making in informal legal processes like restorative justice?

Citizens, policymakers, and politicians mostly frequently ask, does restorative justice 'work'? And by that, they are asking, will it reduce re-offending? This is a too narrow way to judge any justice system practice. Rather we should ask, what should be the objectives of a 'just' response to crime? Should it be to do less harm? To control or prevent crime? To reduce the use of incarceration as punishment? To promote other justice ideals such as 'safer communities' or 'responsible citizenship'? Research suggests that within the constraints of liberal law, restorative justice does less harm compared to a court process and that people view the process as more fair than what happens in court. Whether restorative justice can accomplish other desirable justice goals is not as yet clear.

References

- Abel, R. (ed.) (1982) *The Politics of Informal Justice*, 2 Vols. New York: Academic Press.
- Adelaide Advertiser* (1999) 'Justice System "Fails Young"' 9 June, p. 31, by Leonie Mellor.
- Bargen, J. (1996) 'Kids, Cops, Courts, Conferencing and Children's Rights: A Note on Perspectives', 2 *Australian Journal of Human Rights* 209.
- Bargen, J. (2000) 'Kids, Cops, Courts, Conferencing and Children's Rights: A Note on Perspectives and Update for 1996-98', in M. Jones and L.A.B. Marks (eds.) *Children on the Agenda: The Rights of Australia's Children*. Sydney: Prospect Press.
- Bazemore, G. and M. Umbreit (1995) 'Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime', 41 *Crime and Delinquency* 296.
- Blagg, H. (1997) 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia', 37 *British Journal of Criminology* 481.
- Booth, Bridget (1999) 'South Australian Juvenile Justice System Fails Aboriginal Youth', 2 *ALRM Focus* 9.
- Braithwaite, J. (1996) 'Towards Criminology', in K. Hazlehurst (ed.) *Crime and Justice: An Australian Textbook in Criminology*. Sydney: LBC Information Services.
- Braithwaite, J. and K. Daly (1994) 'Masculinities, Violence and Communitarian Control', in T. Newburn and E. A. Stanko (eds.) *Just Boys Doing Business?* New York: Routledge.
- Cant, R. and R. Downie (1998) *Evaluation of the Young Offenders Act (1994) and the Juvenile Justice Teams*. Perth: Social Systems & Evaluation.
- Cunneen, C. (1997) 'Community Conferencing and the Fiction of Indigenous Control', 30 *Australian and New Zealand Journal of Criminology* 292.
- Cunneen, C. and D. McDonald (1996) *Keeping Aboriginal and Torres Strait Islander People Out of Custody*. Canberra: Australian Institute of Criminology
- Daly, K. (1994a) *Gender, Crime, and Punishment*. New Haven: Yale University Press.

Daly, K. (1994b) 'Criminal Law and Justice System Practices as Racist, White, and Racialised', 51 *Washington and Lee Law Review* 431.

Daly, K. (1996) 'Diversionary Conferencing in Australia: A Reply to the Optimists and Skeptics', Paper presented to the American Society of Criminology Annual Meeting, Chicago, November. to appear at <http://www.gu.edu.au/school/ccj/home.html>

Daly, K. (1998) 'Restorative Justice: Moving Past the Caricatures', Paper presented to Seminar on Restorative Justice, Institute of Criminology, University of Sydney Law School, April. to appear at <http://www.gu.edu.au/school/ccj/home.html>

Daly, K. (1999) 'Revisiting the Relationship between Retributive and Restorative Justice', Paper presented at Restorative Justice and Civil Society Conference, Australian National University, Canberra, February. to appear at <http://www.gu.edu.au/school/ccj/home.html>

Daly, K. and R Immarigeon (1998) 'The Past, Present, and Future of Restorative Justice: Some Critical Reflections', 1 *Contemporary Justice Review* 21.

Daly, K. and M. Tonry (1997) 'Gender, Race, and Sentencing', in M. Tonry (ed.) *Crime and Justice: A Review of Research*. Chicago: University of Chicago Press.

Daly, K, M. Venables, M McKenna, L. Mumford, and J. Christie-Johnston (1998) *South Australia Juvenile Justice (SAJJ) Research on Conferencing, Technical Report No. 1: Project Overview and Research Instruments*, School of Criminology and Criminal Justice, Griffith University, Brisbane, Queensland. at <http://www.aic.gov.au>

Doherty, J. (1999) *Aboriginal People and the Criminal Justice System, Report 2, Comparison of Aboriginal and Non-Aboriginal Contact with the South Australian Juvenile Justice System, 1997*. Adelaide: Office of Crime Statistics, South Australian Attorney-General's Department.

Duff, R. A. (1992) 'Alternatives to Punishment -- or Alternative Punishments?', in W. Cragg (ed.) *Retributivism and Its Critics*. Stuttgart: Franz Steiner.

Duff, R. A. (1996) 'Penal Communications: Recent Work in the Philosophy of Punishment', in M. Tonry (ed.) *Crime and*

Justice: A Review of Research. Chicago: University of Chicago Press.

Habermas, J. (1984, 1987) *The Theory of Communicative Action*, 2 Vols. Boston: Beacon Press.

Hudson, B (1998) 'Restorative Justice: The Challenge of Sexual and Racial Violence', 25 *Journal of Law and Society* 237.

Jones, N. (1994) *Juvenile Justice Teams--A Six-Month Evaluation.* Perth: Ministry of Justice, Strategic and Specialist Services Division.

LaPrairie, C. (1995) 'Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice', 6 *Criminal Law Forum* 576.

La Prairie, C. (1999) 'Some Reflections on New Criminal Justice Policies in Canada: Restorative Justice, Alternative Measures and Conditional Sentences', 32 *Australian and New Zealand Journal of Criminology* 139.

Markiewicz, A (1997) *Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program, Phase 2 Report.* Moorabbin, Victoria: Anglicare Southbridge Youth Services, 1001 Nepean Highway.

Matthews, R. (1988) 'Reassessing Informal Justice', in R. Matthews (ed.) *Informal Justice?* Newbury Park, CA: Sage.

Maxwell, G. and A. Morris (1993) *Family, Victims and Culture: Youth Justice in Zealand.* Wellington: Social Policy Agency and the Institute of Criminology, Victoria University of Wellington.

Maxwell, G (1999) 'Researching Re-Offending', in A. Morris and G. Maxwell (eds.) *Youth Justice in Focus: Proceedings of an Australasian Conference held 27-30 October 1998 at the Michael Fowler Centre, Wellington.* Wellington: Institute of Criminology, Victoria University of Wellington.

Maxwell, G. and A. Morris (1996) 'Research on Family Group Conferences with Young Offenders in New Zealand' in J. Hudson et al. (eds.) *Family Group Conferences.* New York: Willow Tress Press, Inc.

Morris, A. (1999) 'Creative Conferencing: Revisiting Principles, Practice and Potential', in A. Morris and G. Maxwell (eds.) *Youth Justice in Focus: Proceedings of an Australasian Conference held 27-30 October*

1998 at the Michael Fowler Centre, Wellington. Wellington: Institute of Criminology, Victoria University of Wellington.

Morris, A. and G. Maxwell (1993) 'Juvenile Justice in New Zealand: A New Paradigm', 26 *Australian and New Zealand Journal of Criminology* 72.

Murphy, L. (1999) 'Restorative Justice: Is It a New Strategy for Old Ideas?', Paper presented to Caxton Legal Centre Conference on Restorative Justice, Brisbane, July.

New Zealand Government (1999) 'The Budget in Brief, Budget 1999: Investing in the Next Generation', Rt. Hon. W. Birch, Treasury.

New Zealand Prime Minister's Statement (1999) 'Statement at Commencement of the 1999 Parliamentary Session (16 February), Rt. Hon. Jenny Shipley, Prime Minister.

Olsen, T., G. Maxwell, and A. Morris (1995) 'Maori and Youth Justice in New Zealand' in K. Hazlehurst (ed.) *Popular Justice and Community Regeneration*. Westport, CT: Praeger.

Palk, G., H. Hayes, and T. Prenzler (1998) 'Restorative Justice and Community Conferencing: Summary of Findings from a Pilot Study', 10 *Current Issues in Criminal Justice* 138.

Sherman, L. W., H. Strang, G. C. Barnes, J. Braithwaite, N. Inkpen, and M-M Teh (1998) *Experiments in Restorative Policing: A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments (RISE)*. Canberra: Australian National University. at <http://www.aic.gov.au>

South Australian Attorney-General's Department (1998) *Crime and Justice in South Australia, 1997*. Adelaide: Office of Crime Statistics, GPO Box 464.

Strang, H. (1999) 'Recent Research on Conferencing: the Canberra Experiments', in A. Morris and G. Maxwell (eds.) *Youth Justice in Focus: Proceedings of an Australasian Conference held 27-30 October 1998 at the Michael Fowler Centre, Wellington*. Wellington: Institute of Criminology, Victoria University of Wellington.

Stubbs, J. (1995) '"Communitarian" Conferencing and Violence Against Women: A Cautionary Note' in M. Valverde et al. (eds.) *Wife Assault and the Canadian Criminal Justice System*. Toronto: Centre of Criminology, University of Toronto.

Tauri, J. (1999) 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?', 32 *Australian and New Zealand Journal of Criminology* 153.

Tauri, J. and A. Morris (1997) 'Re-forming Justice: The Potential of Maori Processes', 30 *Australian and New Zealand Journal of Criminology* 149.

van Ness, D. and K. H. Strong (1997) *Restoring Justice*. Cincinnati, OH: Anderson.

Walgrave, L. (1995) 'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?', 34 *The Howard Journal* 228.

Wundersitz, J. (1996) *The South Australian Juvenile Justice System: A Review of Its Operation*. Adelaide: Office of Crime Statistics, South Australian Attorney-General's Department.

Zedner, L. (1994) 'Reparation and Retribution: Are They Reconcilable?', 57 *Modern Law Review* 228.

Zehr, H. (1990) *Changes Lenses*. Scottsdale, PA: Herald Press.

Appendix 1. Justice Contrasts

Two contrasts are made in the advocacy literature: (a) between retributive and restorative justice and (b) between retributive and rehabilitative justice. Proponents often characterise restorative justice as a 'third way', which transcends the punishment (retributive) and treatment (rehabilitative) dichotomy, or the justice (retributive) and welfare (rehabilitative) models. As suggested in the text, the retributive-restorative contrast cannot be sustained empirically, apparent philosophical differences can be accommodated, and we should aim to imagine shades of grey, rather than reproduce stark dualisms, as 'new' and 'old' justice forms articulate with one another.

(a) Retributive and Restorative Justice

retributive

crime is viewed as an act *against the state*

crime is an individual act with *individual* responsibility

an offender is defined by *deficits*

victims are *peripheral* to the process

the focus is on *punishing the offence*

characterised by *adversarial relationships* among the parties

'the community' is represented by the state; *community members* take *passive (or no) role*

restorative

crime is viewed as an act *against a person & community*

crime has *individual & social* dimensions of *responsibility*

an offender is defined by a *capacity to make reparation*

victims are *central* to the process

the focus is on *repairing the harm caused*

characterised by *dialogue and negotiation* among the parties

community members or organisations take a *more active role*

(b) Retributive and Rehabilitative Justice

retributive

focus on the offence

rehabilitative

focus on the offender

punish offence

treat offender

focus on blame for past
behaviour

focus on changing future
behaviour

Elements assembled from Bazemore and Umbreit (1995), van Ness and Strong (1997), Walgrave (1995), and Zehr (1990).

Endnotes

¹ I give greater attention to developments and variation in Australia than in New Zealand.

² Police-run conferences did feature in the early years (1991-95) of Australian conferencing, but today, police-run conferences are present only in the ACT on a regular basis. The New Zealand conference model, which has both a police officer and conference convenor present, is preferred in the Antipodes.

³ Juvenile property offenders, aged 15-16, can be diverted from a 28-day minimum period of detention to a diversionary program, which can include conferences, job training schemes, family therapy programs, outdoor programs, among others. The legislation, which was an amendment to the Juvenile Justice Act, came into effect in August 1999. It provides one way to relieve the pressures (organisational and political) caused by the Northern Territory's mandatory sentencing laws.

⁴ These numbers have been estimated or collated from two sources: research summaries or statistical reports, and conversations with the relevant people in jurisdictions having no published data. Note that the number of people referred to a conference per year is higher than the number of conferences held because about 10-12 per cent of conferences involve more than one offender (using South Australian data; South Australian Attorney-General's Department 1998: 41). Note too that some people report conferences that were planned (but not held) and others report only those conferences that were held. For South Australia, the numbers of conferences held are given in the South Australian Attorney-General's Department report (1998:41). In Western Australia, there are no reliable statistics gathered, but Bill Williamson (personal communication, November 1998) estimates that of the 2,806 young people referred to conference in fiscal year 1998 in metropolitan Perth, 84 per cent were accepted for conference, and of these 60 to 70 per cent had "full-blown" conferences. That translates to 1,410-1,650 people, and a smaller number

(estimated 1,235-1,435 conferences) per year, although one-third of these are for driving offences (personal communication during a meeting with three members of Juvenile Justice Teams, October 1999). For the ACT, there are no reliable statistics gathered, but Jeff Knight (personal communication, February 1999) said that 200 to 250 is a good range per year for non drink driving conferences held. In Queensland, the numbers were obtained from Gerard Palk (personal communication, July 1999). In Victoria, during 1995-97, there were on average, 20 conferences held per year in Phase 1, but a higher number in Phase 2 (19 in 6 months) (Markiewicz 1997: 3, 47); the aim is to have 40 per year. For New Zealand, the numbers are reported by the Department of Social Welfare; in fiscal year 1997, there were 6,618 youth justice conferences reported; there were 5,851 in 1990 (personal communication, Allison Morris).

⁵ In presenting the research, I preserve differences in researchers' uses of the terms 'young person' and 'offender' when referring to adolescent lawbreakers.

⁶ The document, a media release paper, states, 'Over the next three years \$17.7 million will be spent on four youth prisons ... Three other new units are planned [in other cities or towns]' (New Zealand Government, 1999). In Prime Minister Shipley's opening statement to Parliament in February 1999, the justification given for these youth prisons was as follows. 'There are a number of serious young offenders in our communities who need to be imprisoned ... [but] imprisonment becomes a fast-track to lives of more serious crime ... or as tragically ... young people in prison ... have taken their own lives' (New Zealand Prime Minister's Statement, 1999). These youth prisons are targeted to an older group of 'young people', those 17 to 20 years, who are currently imprisoned in adult facilities.

⁷ Unremarked throughout the report are these features of policing and Aboriginal relations:

(1) the substantially higher share of Aboriginal young people who are subject to country policing (where all youth may be more at risk to be 'over-policed' or brought in on trivial matters compared to the metropolitan areas) and (2) the role of previous contacts with the police (itself a complex mix of 'real' re-offending and system amplification) and how this affects referrals to court. These are crucial elements in

explaining Aboriginal over-representation in the system (Cunneen and McDonald, 1996).

⁸ Using data on rates of adult imprisonment as of June 1993 (Cunneen and McDonald, 1996: 26), Aboriginal women are 16 times more likely imprisoned than non-Aboriginal women, and Aboriginal men are about 14 times more likely to be imprisoned than non-Aboriginal men. Those ratios reflect 'race' differences within gender groups. However, gender differences within 'race' groups are even higher: for Aboriginal people, men are 18 times more likely to be incarcerated than women; for non-Aboriginal people, men are about 21 times more likely to be incarcerated than women. Thus, a general claim of 'Aboriginal over-representation' is insufficient; it must be linked to 'male over-representation' as well.