

## Restorative justice: the real story

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## Restorative justice: the real story

### Abstract

Advocates' claims about restorative justice contain four myths: (1) restorative justice is the opposite of retributive justice, (2) restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice, (3) restorative justice is a 'care' (or feminine) response to crime in comparison to a 'justice' (or masculine) response, and (4) restorative justice can be expected to produce major changes in people. Drawing from research on conferencing in Australia and New Zealand, I show that the 'real story' of restorative justice differs greatly from advocates' mythical 'true story'. Despite what advocates say, there *are* connections between retribution and restoration (or reparation), restorative justice should *not* be considered a pre-modern and 'feminine' justice, strong stories of repair and goodwill are uncommon, and the raw material for 'restorativeness' between victims and offenders may be in short supply. Following Engel (1993), myth refers to a true story; its truth deals with 'origins ... with how something came to be'. Origin stories, in turn, 'encode a set of oppositions' such that when telling a true story, speakers transcend adversity. By comparing advocates' true story of restorative justice with the real story, I offer a critical *and* sympathetic reading of advocates' efforts to move the idea forward. I end by reflecting on whether the political future of restorative justice is better secured by telling the mythical true story or the real story.

## **Restorative justice: the real story**

### **INTRODUCTION**

Much has been written in recent years that damns and sings the praises of restorative justice. In contrast to the voluminous critical and advocacy literatures, there is a thin empirical record of what is happening on the ground.<sup>i</sup> The aim of this paper is to present the 'real story' of restorative justice, one that reflects what has been learned from research on conferencing<sup>ii</sup> in Australia and New Zealand. I am being mostly, although not entirely, ironic in proposing to tell the real story of restorative justice. There are many stories and no real one. I shall recount what I have learned on my journey in the field, which began in the early 1990s (Braithwaite and Daly, 1994) and intensified in 1995 when I moved to Australia to work with restorative justice researchers at the Australian National University and to initiate my own program of research.

It has taken me some time to understand and make sense of the idea of restorative justice. When I arrived in Australia, my questions centred on what was happening in the conference process. What were victims, offenders, and their supporters saying to each other? How did they relate to one another? What did the professionals (the coordinators and police) think was going on? Did the critiques of conferencing, especially by feminist and anti-racist analysts, have merit? I began to observe conferences in 1995; since then, I have observed close to 60 of them; and as part of a major project on conferencing in South Australia, members of my research group and I observed 89 youth justice conferences and interviewed over 170 young people (offenders) and victims associated with them, in 1998 and again, in 1999 (Daly et al., 1998; Daly, 2001b).

The more I observed and talked with those involved, attended professional meetings, and read about restorative justice, the more perplexed I became. I discovered that there was a substantial gap between what I observed in conferences and what both the advocates and

critics were saying about restorative justice. This is what moves me to tell the real story, and I do so by analysing four myths that feature in advocates' stories and claims:

1. Restorative justice is the opposite of retributive justice.
2. Restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice.
3. Restorative justice is a 'care' (or feminine) response to crime in comparison to a 'justice' (or masculine) response.
4. Restorative justice can be expected to produce major changes in people.

Although I focus on advocates' claims, there can be as much distortion by the critics, as well. Moreover, there are debates among the advocates on the meaning and practice of restorative justice; thus, my characterisation of the advocacy position is somewhat of a caricature.

I use the concept of myth in two ways. First, myth can be understood simply as a partial truth, a distorted characterisation that requires correction by historical or contemporary evidence. Second, myth can be understood as a special form of narrative. Following Engel (1993: 790-92), myth 'refers not to fantasy or fiction but to a "true story" ... which is sacred, exemplary, significant'. 'The "truth" of myth differs from the "truth" of historical or scientific accounts'. Engel suggests that myths 'differ from other forms of storytelling' in that they 'deal with origins, with birth, with beginnings ... with "how something ... began to be"'. He discovers in his analysis of the 'origin stories' of parents of children with disabilities that they 'perceive the world in terms of a set of oppositions that originate in the diagnosis of their child' (p. 821). A recurring origin story is that the professional (a doctor) is wrong about the initial diagnosis, and 'the parent's insights have ultimately triumphed over those of the professional' (p. 821). As such, when parents retell their stories, 'the triumphant ending will be achieved again'. 'The very act of retelling is a way to ensure that ... values and outcomes in the myth will triumph over pain, opposition, and disorder'. Engel says that this

sense of triumph reveals the 'affirmative, creative power of myth', where myth 'abolishes time' and 'the work of myth [transcends adversity]' (pp. 823-24).

When I began to write this paper, I used the concept of myth as partial truth, a foil against which I could write a more authoritative story. But as I began to analyse the myths, I began to see them in a different light, in Engel's terms, as origin stories that 'encode a set of oppositions' (p. 822). While I shall spend more analytical time telling the real story of restorative justice, using myth as partial truth, I also offer a sympathetic reading of advocates' true story of restorative justice by viewing myth as a creative device to transcend adversity. I end by reflecting on whether the political future of restorative justice is better secured by telling the real story or the mythical true story.

## **THE PROBLEM OF DEFINITION**

Restorative justice is not one thing, but an umbrella concept that refers to diverse practices to resolve disputes in schools and workplaces, to respond to crime, and to make decisions in the care and protection or child welfare areas. For juvenile and criminal cases, it is used primarily when people have admitted to an offence; it therefore focuses on the penalty, not fact-finding phase of the adjudication process. Restorative justice can refer to *diversion* from formal court process, to *actions taken in parallel* with court decisions, and to meetings between victims and offenders *at any stage of the criminal process*, including an offender's release from prison. The word is now being applied after the fact to programs and policies that have been in place for some time. The idea of restorative justice has proved to be enormously popular with governments, who now wish to package a range of police responses and correctional programs as 'restorative' (e.g., LaPrairie, 1999 for Canada; Crawford, 2001 for England and Wales). While it is not possible to have a precise definition that covers a diverse array of practices across a range of decision-making sites, both in and outside of

institutions of criminal justice, a general definition might be this: those with a stake in a crime (typically a victim, an offender, and their supporters) come together to discuss the offence and its impact, and they decide what to do to 'repair the harm' to the victim and perhaps also to a larger collectivity.

McCold (1999/2000) constructed a venn diagram to distinguish practices that he considers to be fully, mostly, or only partly restorative.<sup>iii</sup> He suggests that fully restorative practices occur at the intersection of the three circles of 'victim reparation', 'offender responsibility', and 'communities of care reconciliation'. At that intersection, there are peace circles (or sentencing circles) and conferences of various types. Outside that intersection are other recent practices (e.g., truth and reconciliation commissions, reparative boards), as well as those that have been around for some time (e.g., youth aid panels and victim services). Using McCold's definition, the research reviewed here and the jurisdictions I have studied use 'fully restorative' practices.

## MYTHS ABOUT RESTORATIVE JUSTICE

### Myth 1. Restorative justice is the opposite of retributive justice.

When one first dips into the restorative justice literature, the first thing one 'learns' is that restorative justice differs sharply from retributive justice. It is said that

- restorative justice focuses on *repairing the harm* caused by crime, whereas retributive justice focuses on *punishing an offence*;
- restorative justice is characterised by *dialogue and negotiation* among the parties, whereas retributive justice is characterised by *adversarial relations* among the parties; and
- restorative justice assumes that *community members or organisations take a more active role*, whereas for retributive justice, *'the community' is represented by the state*.

Most striking is that all the elements associated with restorative justice are *good*, whereas all those associated with retributive justice are *bad*. The retributive-restorative oppositional contrast is not only made by restorative justice advocates, but increasingly one finds it canonised in criminology and juvenile justice textbooks. The question arises, is it right?

On empirical and normative grounds, I suggest that in characterising justice aims and practices, it is neither accurate nor defensible. Despite advocates' well-meaning intentions, the contrast is a simple sales pitch to market the superiority of their justice 'products'. To do that, definite boundaries are marked between the *good* (restorative), the *bad* (retributive), and the *ugly* (rehabilitative) types of justice. Advocates seem to assume that an ideal justice system should be of one type only, that it should be pure and not 'contaminated' by or mixed with others. Before demonstrating the problems with this position, I give a sympathetic reading of what I think advocates are trying to say.

Mead's (1917-18) "The psychology of punitive justice" contrasts two methods of responding to crime. One he termed 'the attitude of hostility toward the lawbreaker' (p. 227), which 'brings with it the attitudes of retribution, repression, and exclusion' (pp. 226-27) and which sees a lawbreaker as 'enemy'. The other, exemplified in the (then) emerging juvenile court, is the 'reconstructive attitude' (p. 234), which tries to 'understand the causes of social and individual breakdown, to mend ... the defective situation', to determine responsibility 'not to place punishment but to obtain future results' (p. 231). Most restorative justice advocates see the justice world through this Meadian lens; they reject the 'attitude of hostility toward the lawbreaker', do not wish to view him or her as 'enemy', and desire an alternative kind of justice. On that score, I concur, as most readers and researchers no doubt would. However, the 'attitude of hostility' is a caricature of criminal justice, which over the last century and a half has wavered between desires to 'treat' some and 'punish' others, and which surely cannot be encapsulated in the one term, 'retributive justice'. By framing justice aims (or principles)

and practices in oppositional terms, restorative justice advocates not only do a disservice to history, they also give a restricted view of the present. They assume that restorative justice *practices* should exclude elements of retribution; and in rejecting an 'attitude of hostility', they assume that retribution as a justice *principle* must also be rejected.

When observing conferences, I discovered that participants engaged in a flexible incorporation of *multiple* justice aims, which included:

- some elements of retributive justice (that is, censure for past offences),
- some elements of rehabilitative justice (for example, by asking, what shall we do to encourage future law-abiding behaviour?) and
- some elements of restorative justice (for example, by asking, how can the offender make up for what he or she did to the victim?)

When I related these findings to colleagues, one said, 'yes, this is a problem'. This speaker's concern was that as restorative justice was being incorporated into the regular justice system, it would turn out to be a set of 'simple techniques', rather than an 'ideal of justice ... in an ideal of society' (Walgrave, 1995: 240, 245) and that its core values would be lost. Another said (paraphrasing), 'retribution may well be present now in conferences, but you wouldn't want to make the argument that it *should be* present' (Braithwaite, personal communication).

These comments provoked me to consider the relationship between restorative and retributive justice, and the role of punishment in restorative justice, in normative terms. Distilling from other papers (e.g., Daly and Immarigeon, 1998: 32-35; Daly, 2000a, 2000b) and arguments by Duff (1992, 1996, 2001), Hampton (1998), and Zedner (1994), I have come to see that apparently contrary principles of retribution and reparation should be viewed as dependent on one another. Retributive censure should ideally occur before reparative gestures (or a victim's interest or movement to negotiate these) are possible in an ethical or psychological sense. Both censure and reparation may be experienced as 'punishment' by



offenders (even if this is not the intent of decision-makers), and both censure and reparation need to occur before a victim or community can 'reintegrate' the offender into the community. These complex and contingent interactions are expressed in varied ways and should not be viewed as having to follow any one fixed sequence. Moreover, one cannot assume that subsequent actions, such as the victim's forgiving the offender or a reconciliation of victim and offender (or others), should occur. In the advocacy literature, however, one finds that there is too quick a move to 'repair the harm', 'heal those injured by crime' or to 're-integrate offenders', passing over a crucial phase of 'holding offenders accountable', which is the retributive part of the process.

A major block in communicating ideas about the relationship of retributive to restorative justice is that there is great variability in how people understand and use key terms such as punishment and retribution. Some argue that incarceration and fines are punishments because they are *intended deprivations*, whereas probation or a reparative measure such as doing work for a crime victim are not punishment because they are *intended to be constructive* (Wright, 1991). Others define punishment more broadly to include anything that is unpleasant, a burden, or an imposition of some sort; the intentions of the decision-maker are less significant (Duff, 1992, 2001; Davis, 1992). Some use retribution to describe a *justification* for punishment (i.e., intended to be in proportion to the harm caused), whereas others use it to describe a *form* of punishment (i.e., intended to be of a type that is harsh or painful).<sup>iv</sup> On proportionality, restorative justice advocates take different positions: some (e.g., Braithwaite and Pettit, 1990) eschew retributivism, favouring instead a free-ranging consequentialist justification and highly individualised responses, while others wish to limit restorative justice responses to a desert-based, proportionate criteria (Walgrave and Aertsen, 1996; Van Ness, 1993). For the form of punishment, some use retribution in a neutral way to refer to a censuring of harms (e.g., Duff, 1996), whereas most use the term to

connote a punitive response, which is associated with emotions of revenge or intentions to inflict pain on wrong-doers (Wright, 1991). I shall not attempt to adjudicate these competing claims; the sources of antagonism lie in varied *definitions* and the different *images* these definitions conjure in people's heads about justice relations and practices. However, one way to gain some clarity is to conceptualise punishment, retribution, and punitive (and their "non" counterparts) as separate dimensions, each having its own continuum of meaning, rather than to conflate them, as now typically occurs in the literature.

Because the terms 'retributive' and 'restorative' justice have such strong meanings and referents, and are used largely by advocates (and others) as metaphors for the bad and the good justice, perhaps they should be jettisoned in analysing current and future justice practices. Instead, we might refer to 'older' and 'newer' justice forms. These terms do not provide a content to justice principles or practices, but they do offer a way to depict developments in the justice field with an eye to history and with an appreciation that any 'new' justice practice will have many bits of the 'old' in it.<sup>v</sup> The terms also permit description and explanation of a larger phenomenon, that is, of a profound transformation of justice forms and practices now occurring in most developed societies in the West, and certainly the English-speaking ones of which I am aware. Restorative justice is only a part of that transformation.

By the *old justice*, I refer to modern practices of courthouse justice, which permit no interaction between victim and offender, where legal actors and other experts do the talking and make decisions, and whose (stated) aim is to punish, or at times, reform an offender. By the *new justice*,<sup>vi</sup> I refer to a variety of recent practices, which normally bring victims and offenders (and others) together in a process in which both lay and legal actors make decisions, and whose (stated) aim is to repair the harm for victims, offenders, and perhaps other members of 'the community' in ways that matter to them. (While the stated aim of

either justice form may be to 'punish the crime' or 'repair the harm', we should expect to see mixed justice aims in participants' justice talk and practices.)<sup>vii</sup> New justice practices are one of several developments in a larger justice field, which also includes the 'new penology' (Feeley and Simon, 1992) and 'unthinkable punishment policies' (Tonry, 1999). The field is fragmented and moving in contradictory directions (Crawford, 1997; Garland, 1996; O'Malley, 1999; Pratt, 2000).

**Myth 2. Restorative justice uses indigenous justice practices and was the dominant form of pre-modern justice.**

A common theme in the restorative justice literature is that this reputedly 'new' justice form is 'really not new' (Consedine, 1995: 12). As Consedine puts it,

Biblical justice was restorative. So too was justice in most indigenous cultures. In pre-colonial New Zealand, Maori had a fully integrated system of restorative justice ... It was the traditional philosophy of Pacific nations such as Tonga, Fiji and Samoa. ... In pre-Norman Ireland, restorative justice was interwoven ... with the fabric of daily life ... (p. 12).

Braithwaite (1999: 1) argues that restorative justice is 'ground[ed] in traditions of justice from the ancient Arab, Greek, and Roman civilisations that accepted a restorative approach even to homicide'. He continues with a large sweep of human history, citing the 'public assemblies ... of the Germanic peoples', 'Indian Hindu [traditions in] 6000-2000 B.C.', and 'ancient Buddhist, Taoist, and Confucian traditions ...'; and he concludes that '*restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples*' (p. 1, emphasis added). What an extraordinary claim!

Linked with the claim that restorative justice has been the dominant form of criminal justice throughout human history is the claim that present-day indigenous justice practices fall within the restorative justice rubric. Thus, for example, Consedine (1995: 99) says

A new paradigm of justice is operating [in New Zealand], which is very traditional in its philosophy, yet revolutionary in its effects. A restorative philosophy of justice has replaced a retributive one. Ironically, 150 years after the traditional Maori restorative praxis was abolished in Aotearoa, youth justice policy is once again operating from the same philosophy.

Reverence for and romanticisation of an indigenous past slides over practices that the modern 'civilised' Western mind would object to, such as a variety of harsh physical (bodily) punishments and banishment. At the same time, the modern Western mind may not be able to grasp how certain 'harsh punishments' have been sensible within the terms of a particular culture.

Weitekamp (1999: 93) combines 'ancient forms' of justice practice (as restorative) and indigenous groups' current practices (as restorative) when he says that

some of the new[] ... programs are in fact very old. ... [A]ncient forms of restorative justice have been used in [non-state] societies and by early forms of humankind. [F]amily group conferences [and] ... circle hearings [have been used] by indigenous people such as the Aborigines, the Inuit, and the native Indians of North and South America. ... It is kind of ironic that we have at [the turn of this century] to go back to methods and forms of conflict resolution which were practiced some millennia ago by our ancestors ...

I confess to a limited knowledge of justice practices and systems throughout the history of humankind. What I know is confined mainly to the past three centuries and to developments in the United States and several other countries. Thus, in addressing this

myth, I do so from a position of ignorance in knowing only a small portion of history. Upon reflection, however, my lack of historical knowledge may not matter. All that is required is the realisation that advocates do not intend to write *authoritative histories* of justice. Rather, they are constructing 'origin myths' about restorative justice. If the first form of human justice was restorative justice, then advocates can claim a need to recover it from a history of 'takeover' by state-sponsored retributive justice. *And*, by identifying current indigenous practices as restorative justice, advocates can claim a need to recover these practices from a history of 'takeover' by white colonial powers who instituted retributive justice. Thus, the history of justice practices is re-written by advocates not only to authorise restorative justice as the *first* human form of justice, but also a form of justice that is congenial to modern-day indigenous and, as we shall see in myth 3, feminist social movements for justice.

In the restorative justice field, most commentators focus specifically (and narrowly) on changes that occurred over a 400-year period (8th to 11th centuries) in England (and some European countries), where a system of largely kin-based dispute settlement gave way to a court system, in which feudal lords retained a portion of property forfeited by an offender. In England, this loose system was centralised and consolidated during the century following the Norman Invasion in 1066, as the development of state (crown) law depended on the collection of revenues collected by judges for the king. For restorative justice advocates, the transformation of disputes as offences between individuals to offences against the state is one element that marked the end of pre-modern forms of restorative justice. A second element is the decline in compensation to the victim for the losses from a crime (Weitekamp, 1999).

Advocates' constructions of the history of restorative justice, that is, the origin myth that a superior justice form prevailed before the imposition of retributive justice, is linked to their desire to maintain a strong oppositional contrast between retributive and restorative

justice. That is to say, the origin myth and oppositional contrast are both required in telling the true story of restorative justice. I do not see bad faith at work here. Rather, advocates are trying to move an idea into the political and policy arena, and this may necessitate having to utilise a simple contrast of the good and the bad justice, along with an origin myth of how it all began.

What does concern me is a smoothing over and a lumping together in one justice form the specific histories and practices of justice in pre-modern societies. Is it appropriate to refer to all of these justice practices 'restorative'? What, in fact, do they have in common? What is gained, and more importantly, what is lost by this homogenising move? Efforts to write histories of restorative justice, where a pre-modern past is romantically (and selectively) invoked to justify a current justice practice, are not only in error, but also unwittingly reinscribe an ethnocentrism their authors wish to avoid. As Blagg (1997) and Cain (2000) point out, there has been an orientalist appropriation of indigenous justice practices, largely in the service of strengthening advocates' positions.

A common, albeit erroneous, claim is that conferencing 'has its direct roots in Maori culture' (Shearing, 2001: 218, note 5; see also Consedine, 1995). The real story is that conferencing emerged in the 1980s, in the context of Maori political challenges to white New Zealanders and to their welfare and criminal justice system. Investing decision-making practices with Maori cultural values meant that family groups (whanau) should have a greater say in what happens, that venues should be culturally appropriate, and that processes should accommodate a mix of culturally appropriate practices. New Zealand's minority group population includes not only the Maori but also Pacific Island Polynesians. Therefore, with the introduction of conferencing, came awareness of the need to incorporate different elements of 'cultural appropriateness' into the conference process. But the devising of a (white, bureaucratic) justice practice that is *flexible and accommodating* toward cultural

differences does not mean that conferencing *is* an indigenous justice practice. Maxwell and Morris (1993: 4), who know the New Zealand situation well, are clear on this point:

A distinction must be drawn between a system which attempts to re-establish the indigenous model of pre-European times and a system of justice which is culturally appropriate. The New Zealand system is an attempt to establish the latter, not to replicate the former. As such, it seeks to incorporate many of the features apparent in whanau decision-making processes and seen in meetings on marae today, but it also contains elements quite alien to indigenous models.

Conferencing is better understood as a fragmented justice form: it splices white, bureaucratic forms of justice with elements of informal justice that may include non-white (or non-Western) values or methods of judgment, with all the attendant dangers of such 'spliced justice' (Daly, 1998; Findlay, 2000; Pavlich, 1996). With the flexibility of informal justice, practitioners, advocates, and members of minority groups may see the potential for introducing culturally sensible and responsive forms of justice. But to say that conferencing *is* an indigenous justice practice (or 'has its roots in indigenous justice') is to re-engage a white-centred view of the world. And, as Blagg (1997) suggests, it may lead to a 'double failure' for members of indigenous groups: not only will they appear to have 'failed' to act in a law-abiding fashion, and but also they will appear to have 'failed' to act appropriately as indigenous people according to a white-centred justice script.

**Myth 3. Restorative justice is a 'care' (or feminine) response to crime in comparison to a 'justice' (or masculine) response.**

Myths 2 and 3 have a similar oppositional logic, but play with different dichotomies. The following chart shows the terms that are often linked to restorative and retributive justice.

<i>restorative justice</i>	<i>retributive justice</i>
pre-modern	modern
indigenous (informal)	state (formal)
feminine (care)	masculine (justice)
eastern (Japan)	western (US)
superior justice	inferior justice

Note here the power inversion, essential to the origin myth of restorative justice, where the subordinated or marginalised groups (pre-modern, indigenous, feminine) are aligned with the more superior justice form.

Many readers will be familiar with the 'care' and 'justice' dichotomy. It was put forward by Carol Gilligan in her highly popular book, *In a Different Voice* (1982). For about a decade, it seemed that most feminist legal theory articles were organised around the 'difference' versus 'dominance' perspectives of Gilligan and MacKinnon, respectively. In criminology, Heidensohn (1986) and Harris (1987) attempted to apply the care/justice dichotomy to the criminal justice system. I came into this debate in 1989, saying that we should challenge the association of justice and care reasoning with male/masculine and female/feminine voices, respectively (Daly, 1989). I suggested that this gender-linked association was not accurate empirically, and argued that it would be misleading to think that an alternative to men's forms of criminal law and justice practices could be found by adding women's voice or reconstituting the system along the lines of an ethic of care.

*But the different voice is back!* Now the 'ethic of care' (Persephone) is pitched as the alternative to retributive justice (Portia). Masters and Smith (1998) attempt to demonstrate that Persephone, the voice of caring, is evident in a variety of restorative responses to crime. Their arguments confuse, however, because they argue that Persephone is 'informed by an ethic of care as well as an ethic of justice' (p. 11). And toward the end of the article, they say



'we cannot do without Portia (ethic of justice), but neither can we do without Persephone' (p. 21). Thus, it is not clear whether, within the terms of their argument, Persephone stands for the feminine or includes both the masculine and feminine, or whether we need both Portia and Persephone. They apparently agree with all three positions. They also see little difference between a 'feminine' and a 'feminist approach', terms that they use interchangeably. In general, they normally credit 'relational justice as a distinctly feminine approach to crime and conflict' (p. 13). They say that 'reintegrative shaming can be considered a feminine (or Persephone) theory' and that there is a 'fit between reintegrative shaming practice and the *feminist ethic of care*' (p. 13, my italics since the authors have shifted from a feminine ethic to a feminist ethic). Toward the end of the paper, they make the astonishing claim, one that I suspect my colleague John Braithwaite would find difficult to accept, that 'reintegrative shaming is perhaps the first feminist criminological theory'. They argue this is so because the 'practice of reintegrative shaming can be interpreted as being grounded in a feminine, rather than a masculine understanding of the social world' (p. 20).

There is a lot to unpick here, and I shall not go point by point. Nor do I wish to undermine the spirit of the paper since the authors' intentions are laudable, in particular, their desire to define a more progressive way to respond to crime. My concern is that using gender dichotomies, or any dichotomies for that matter, to describe principles and practices of justice will always fail us, will always lead to great disappointment.<sup>viii</sup> Traditional courthouse justice works with the abstraction of criminal law, but must deal with the messy world of people's lives, and hence, must deal with context and relations. 'Care' responses to some offenders can re-victimise some victims; they may be helpful in *some cases* or for *some offenders* or for *some victims* or they may also be oppressive and unjust for other offenders and victims. Likewise, with so-called 'justice' responses. The set of terms lined up along the 'male/masculine' and 'female/feminine' poles is long and varied: some terms are about

process, others with modes of response (e.g., repair the harm), and still others, with ways of thinking about culpability for the harm.<sup>ix</sup>

I am struck by the frequency with which people use dichotomies such as the male and female voice, retributive and restorative justice, or West and East, to depict justice principles and practices. Such dichotomies are also used to construct normative positions about justice, where it is assumed (I think wrongly) that the sensibility of one side of the dualism necessarily excludes (or is antithetical to) the sensibility of the other. Increasingly, scholars are coming to see the value of theorising justice in hybrid terms, of seeing connections between apparent oppositions (see e.g., Bottoms, 1998; Daly, 2000a; Duff, 2001; Hudson, 1998; Zedner, 1994).

Like the advocates promoting Myth 2, those promoting Myth 3 want to emphasise the importance of identifying a different response to crime than the one currently in use. I am certainly on the side of that aspiration. However, I cannot agree with the terms in which the position has been argued and sold to academic audiences and wider publics. There is a loss of credibility when analyses do not move beyond oppositional justice metaphors, when claims are imprecise, and when extraordinary tales of repair and goodwill are assumed to be typical of the restorative justice experience.

#### **Myth 4. Restorative justice can be expected to produce major changes in people.**

I have said that attention needs to be given to the 'reality on the ground', to what is actually happening in, and resulting from, practices termed 'restorative justice'. There are several levels to describe and analyse what is going on; first, what happens in the justice practice itself; second, the relationship between it and the broader justice system; and third, how restorative justice is located within the broader politics of crime control. I focus on the first level and present two forms of evidence: (1) stories of dramatic transformations or moving

accounts of reconciliation and (2) aggregated information across a larger number of cases, drawing from research on conference observations and interviews with participants.

### **Stories of restorative justice**

Consedine (1995: 9) opens his book by excerpting from a 1993 New Zealand news story:

The families of two South Auckland boys killed by a car welcomed the accused driver yesterday with open arms and forgiveness. The young man, who gave himself up to the police yesterday morning, apologised to the families and was ceremonially reunited with the Tongan and Samoan communities at a special service last night.

The 20-year old Samoan visited the Tongan families after his court appearance to apologise for the deaths of the two children in Mangere. The Tongan and Samoan communities of Mangere later gathered at the Tongan Methodist Church in a service of reconciliation. The young man sat at the feast table flanked by the mothers of the dead boys.

Consedine says further that this case provides 'ample evidence of the power that healing and forgiveness can play in our daily lives. ... The grieving Tongan and Samoan communities simply embraced the young driver ... and forgave him. His deep shame, his fear, his sorrow, his alienation from the community was resolved' (p. 162).

Another example comes from Umbreit (1994: 1). His book opens with the story of Linda and Bob Jackson, whose house was broken into; they subsequently met with the offender as part of his sentencing disposition. The offender, Allan, 'felt better after the mediation ... he was able to make amends to the Jacksons'. Moreover, 'Linda and Bob felt less vulnerable, were able to sleep better and received payment for their losses. All parties were able to put this event behind them'. Later in the book, Umbreit (1994: 197-202) offers

another case study of a second couple, Bob and Anne, after their house was burglarised a second time. He summarises the outcome this way:

Bob, Anne, and Jim [the offender] felt the mediation process and outcome was fair. All were very satisfied with participation in the program. Rather than playing passive roles ... [they] actively participated in 'making things right'. During a subsequent conversation with Bob, he commented that 'this was the first time (after several victimisations) that I ever felt any sense of fairness. The courts always ignored me before. They didn't care about my concerns. And Jim isn't such a bad kid after all, was he?' Jim also indicated that he felt better after the mediation and more aware of the impact the burglary had on Bob and Anne (p. 202).

Lastly, there is the fable of Sam, an adolescent offender who attended a diversionary conference, which was first related by Braithwaite (1996) and retold by Shearing (2001: 214-215). Braithwaite (1996: 2) says that his story is a 'composite of several Sams I have seen'; thus, while he admits that it is not a real story of Sam, it is said to show the 'essential features ... of restorative justice' (Shearing 2001: 214). This is something like a building contractor saying to a potential home buyer, 'this is a composite of the house I can build for you; it's not the real house, but it's like many houses I have sold to happy buyers over the years'. What the composite gives and what the building contractor offers us is a *vision of the possible*, of the perfect house. Whether the house can ever be built is less important than imagining its possibility and its perfection. This is the cornerstone of the true story of restorative justice, like many proposed justice innovations of the past.

Sam's story, as told by Braithwaite, is longer than I give here, and thus, I leave out emotional details that make any story compelling. Sam, who is homeless and says he was abused by his parents, has no one who really cares about him except his older sister, his former hockey coach at school, and his Uncle George. These people attend the conference,

along with the elderly female victim and her daughter. Sam says he knocked over the victim and took her purse because he needed the money. His significant others rebuke him for doing this, but also remember that he had a good side before he started getting into trouble. The victim and daughter describe the effects of the robbery, but Sam does not seem to be affected. After his apparent callous response to the victim, Sam's sister cries, and during a break, she reveals that she too had been abused by their parents. When the conference reconvenes, Sam's sister speaks directly to Sam, and without mentioning details, says she understands what Sam went through. The victim appreciates what is being said and begins to cry. Sam's callous exterior begins to crumble. He says he wants to do something for the victim, but doesn't know what he can do without a home or job. His sister offers her place for him to stay, and the coach says he can offer some him work. At the end of the conference, the victim hugs Sam and tearfully says good luck, Sam apologises again, and Uncle George says he will continue to help Sam and his sister when needed.

Many questions arise in reading stories like these. *How often* do expressions of kindness and understanding, of movement toward repair and goodwill, actually occur? What are the typical 'effects' on participants? Is the perfect house of restorative justice ever built? Another kind of evidence, aggregated data across a larger number of cases, can provide some answers.

### **Statistical aggregates of restorative justice**

Here are some highlights of what has been learned from research on youth justice conferences in Australia and New Zealand.<sup>x</sup> Official data show that about 85-90 percent of conferences resulted in agreed outcomes, and 80 percent of young people completed their agreements. From New Zealand research in the early 1990s (Maxwell and Morris 1993), conferences appeared to be largely offender-centred events. Just half of victims attended

conferences, and of all the groups involved, victims were the least satisfied with what happened. Maxwell and Morris (1996:95-96) also reported that 'the new system remains largely unresponsive to cultural differences' in handling Maori cases, which they argue is a consequence, in part, of too few resources. The most robust finding across all the studies in the region is that conferences receive very high marks along dimensions of procedural justice, that is, victims and offenders view the process and the outcomes as fair.

In the Re-Integrative Shaming Experiments (RISE) in Canberra, admitted offenders were randomly assigned to court and conference. Strang et al. (1999) have reported the following findings to date. Compared to those offenders who went to court, those going to conferences have higher levels of procedural justice, higher levels of restorative justice, and an increased respect for the police and law. Compared to victims whose cases went to court, conference victims have higher levels of recovery from the offence. Conference victims also had high levels of procedural justice, but they could not be compared to court victims, who rarely attended court proceedings. The RISE findings are important because they give us an indication of the *relative* merits of a conference or court proceeding. Few other projects can do this.

Like other studies, the South Australia Juvenile Justice (SAJJ) Research on Conferencing Project finds very high levels of procedural justice registered by offenders and victims at conferences. To items such as, were you treated fairly, were you treated with respect, did you have a say in the agreement, among others, 80 to 95 percent of victims and offenders said that they were treated fairly and had a say. In light of the procedural justice literature, these findings are of interest because, as the argument goes, when citizens perceive a legal process as fair, when they are listened to and treated with respect, there is an affirmation of the legitimacy of the legal order.

Compared to the high levels of perceived procedural justice, the SAJJ project finds relatively less evidence of restorativeness. The measures of restorativeness tapped the degree to which offenders and victims recognised the other and were affected by the other; they focused on the degree to which there was positive movement between the offender and victim and their supporters during the conference (the SAJJ measures are more concrete and relational measures of restorativeness than those used in RISE). Whereas very high proportions of victims and offenders (80 to 95 percent) said that the process was fair (among other variables taping procedural justice), 'restorativeness' was evident in 30 to 50 percent of conferences (depending on the item), and solidly in no more than about one-third. Thus, in this jurisdiction where conferences are used *routinely*,<sup>xi</sup> fairness can more easily be achieved than restorativeness. As but one example, from the interviews we learned that from the victims' perspectives, less than 30 percent of offenders were perceived as making genuine apologies, but from the offenders' perspectives, close to 60 percent said their apology was genuine.

These results lead me to think that young people (offenders) and victims orient themselves to a conference and what they hope to achieve in it in ways different that the advocacy literature imagines. The stance of empathy and openness to 'the other', the expectation of being able to speak and reflect on one's actions, and the presence of new justice norms (or language) emphasising 'repair' -- all of these are novel cultural elements for most participants. Young people appear to be as, if not more, interested in *repairing their own reputations* than in repairing the harm to victims. Among the most important things that the victims hoped would occur at the conference was for the offender to hear how the offence affected them, but half the offenders told us that the victim's story had no effect or only a little effect on them.

How often, then, does the exceptional or 'nirvana' story of repair and goodwill occur?

I devised a measure that combined the SAJJ observer's judgment of the degree to which a conference 'ended on a high, a positive note of repair and good will' with one that rated the conference on a 5-point scale from poor to exceptional. While the first tapped the degree to which there was movement between victims and offenders toward the 'other', the second tapped a more general feeling about the conference dynamics and how well the conference was managed by the coordinator. With this combined measure, 10 percent of conferences were rated very highly, another 40 percent, good; and the rest, a mixed or poor rating. If conferencing is used routinely (not just in a select set of cases), I suspect that the story of Sam and Uncle George will be infrequent; it may happen 10 percent of the time, if that.

Assessing the 'effects' of conferences on participants is complex because such effects change over time and, for victims, they are contingent on whether offenders come through on promises made. I present findings on victims' sense of having 'recovered' from the offence and on young people's re-offending in the post-conference period. In the Year 2 (1999) interviews with victims, over 60 percent said they had 'fully recovered' from the offence, that it was 'all behind' them. Their recovery was more likely when offenders completed the agreement than when they did not, but recovery was only partly influenced by the conference and an offender's behaviour. As important, they said, was the 'passage of time' and 'self-resources' such as their own resilience. However, conferences *can* have positive 'effects' on reducing victims' anger toward and fear of offenders. Drawing from the victim interviews in 1998 and 1999, over 75 percent of victims felt angry toward the offender before the conference, but this dropped to 44 percent after the conference and was 39 percent a year later. Close to 40 percent of victims were frightened of the offender before the conference, but this dropped to 25 percent after the conference and was 18 percent a year later.



Therefore, for victims, meeting offenders in the conference setting can have beneficial results.

The conference effect everyone asks about is, does it reduce re-offending? Proof (or disproof) of reductions in re-offending from conferences (compared *not only to court*, but to other interventions such as formal caution, other diversion approaches, or no legal action at all) will not be available for a long time, if ever. The honest answer to the re-offending question is 'we'll probably never know' because the amounts of money would be exorbitant and research methods using experimental designs judged too 'risky' in an ethical and political sense.

To date, there have been three studies of conferencing and re-offending in Australia and New Zealand, one of which compares re-offending for a sample of offenders randomly assigned to conference and court and two that explore whether re-offending can be linked to things that occur in conferences.<sup>xii</sup> The RISE project finds that for one of four major offence categories studied (violent offences compared to drink driving, property offences, shoplifting), those offenders who were assigned to a conference had a significantly reduced rate of re-offending than those who were assigned to court (Sherman, Strang, and Woods, 2000).

As others have said (Abel, 1982: 278; Levrant et al., 1999: 17-22), there is a great faith placed on the conference process to change young offenders, when the conditions of their day to day lives, which may be conducive to getting into trouble, may not change at all. The SAJJ project asked if there were things that occurred in conferences that could predict re-offending, over and above those variables known to be conducive to lawbreaking (and its detection): past offending and social marginality (Hayes and Daly, 2001). In a regression analysis, we found that over and above the young person's race-ethnicity (Aboriginal or non-Aboriginal), sex, whether s/he offended prior to the offence that led to the SAJJ

conference, and a measure of the young person's mobility and marginality, there were two conference elements associated with re-offending. When young people were remorseful and when outcomes were achieved by genuine consensus, they were less likely to re-offend during an 8- to 12-month period after the conference. These results are remarkably similar to those of Maxwell and Morris (2000) in their study of re-offending in New Zealand. They found that what happens in conferences (e.g., a young person's expressions of remorse and agreeing [or not] with the outcome, among other variables) could distinguish those young people who were and were not 'persistently reconvicted' during a 6-1/2 year follow up period.

### **THE REAL OR THE TRUE STORY?**

Advocates want to tell a particular kind of story, the mythical true story of restorative justice. This story asks people to develop their 'caring' sides and to 'resist tyranny with compassion' (Braithwaite, 1999: 2). It suggests that amidst adversity, there is great potential 'for doing good' for self and others (paraphrasing Eckel, 1997; cited by Braithwaite, 1999: 2). It rewrites the history of justice practices by celebrating a return to pre-modern forms, and it re-colonises indigenous practices by identifying them as exemplars of restorative justice. The true story offers some hope, not only for a better way to do justice, but also for strengthening mechanisms of informal social control, and consequently, to minimise reliance on formal social control, the machinery and institutions of criminal justice.

In order to sell the idea of restorative justice to a wide audience, advocates have painted a dichotomous, oppositional picture of different justice forms, with restorative justice trumping retributive justice as the superior one. There is a certain appeal to this framing of justice: it offers two choices, and it tells us which side is right. With this frame, who could possibly be on the side of retribution and retributive justice? Only the bad guys, of course. When we move from the metaphors and slogans to the hard work of establishing the

philosophical, legal, and organisational bases of this idea, and of documenting what actually occurs in these practices, the true story fails us. It lets us down because simple oppositional dualisms are inadequate in depicting criminal justice, even an ideal justice system, and no justice practice can be as extraordinary or successful *most of the time*, as the advocates would want us to think.

The real story of restorative justice is a more qualified one. Empirical evidence of conferencing in Australia and New Zealand suggests that very high proportions of people find the process fair; on many measures of procedural justice, it succeeds. However, it is relatively more difficult for victims and offenders to find common ground and to hear each other's stories, or for offenders to give sincere apologies and victims to understand that apologies are sincere. There are limits on 'repairing the harm' for offenders and victims, in part because the idea is novel and unfamiliar for most ordinary citizens. For youthful lawbreakers, the limits also inhere in the salience of *any* legal process or adult exhortations to 'stay out of trouble', and the problems that adolescents may have in 'recognising the other', an empathetic orientation that is assumed to be central to a restorative process. For victims, the limits reside in the capacity to be generous to lawbreakers and to see lawbreakers as capable of change. A variety of observational and interview items from the SAJJ project suggests that a minority of conferences have the necessary raw material for restorativeness to occur. (One needs to be careful in generalising: the frequency of restorativeness would depend greatly on whether a jurisdiction uses conferences selectively or routinely and what kinds of cases are in the sample.) Overall, the real story of restorative justice has many positives and has much to commend, but the evidence is mixed. Conferencing, or any new justice practice, is not nirvana and ought not to be sold in those terms.

In the political arena, telling the mythical true story of restorative justice may be an effective means of reforming parts of the justice system. It may inspire legislatures to pass

new laws and it may provide openings to experiment with alternative justice forms. All of this can be a good thing. Perhaps, in fact, the politics of selling justice ideas may *require* people to tell mythical true stories. The real story attends to the murk and constraints of justice organisations, of people's experiences as offenders and victims and their capacities and desires to 'repair the harm'. It reveals a picture that is less sharp-edged and more equivocal. My reading of the evidence is that face-to-face encounters between victims and offenders and their supporters *is* a practice worth maintaining, and perhaps enlarging, although we should not expect it to deliver strong stories of repair and goodwill most of the time. If we want to avoid the cycle of optimism and pessimism (Matthews, 1988) that so often attaches to any justice innovation, then we should be courageous and tell the real story of restorative justice. But, in telling the real story, there is some risk that a fledgling idea will meet a premature death.

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## Notes

<sup>i</sup> Indicative examples of advocates are Bazemore and Walgrave (1999), Braithwaite (1999), Consedine (1995), Van Ness and Strong (1997), Umbreit (1994), and Zehr (1995). Among the skeptics/critics are Ashworth (1993), Blagg (1997), Delgado (2000), Hudson (1998), Levrant et al. (1999), and Pavlich (1996). Because the modern idea of restorative justice is new, publications reporting research are few. Among them are contributors in collections edited by Bazemore and Schiff (2001), Crawford and Goodey (2000), Hudson et al. (1996), and Morris and Maxwell (2001).

<sup>ii</sup> Conferences are meetings where an *admitted* offender(s), his/her supporters, a victim(s), his/her supporters, and relevant other people come together to discuss the offence, its impact, and what sanction (or reparation) is appropriate. The conference, which is run by a coordinator and attended by a police officer, is typically used as diversion from court prosecution, but it may also be used to provide pre-sentencing advice to judges and magistrates. Police-run diversionary conferencing is highly atypical of Australian and New Zealand conferencing, whereas it is more typical in UK and North American practices. See Bergen (1996), Daly and Hayes (2001), and Hudson et al. (1996) for overviews of jurisdiction variation in Australia and New Zealand.

<sup>iii</sup> McCold's proposal is discussed and debated in *Contemporary Justice Review* (2000); my reference is to his initial article in *Real Justice Forum* (1999).

<sup>iv</sup> Drawing from Cottingham's (1979) analysis of retribution's many meanings, restorative justice advocates tend to use retributivism to mean 'repayment' (to which they add a punitive kick) whereas desert theorists, such as von Hirsch, use retributivism to mean 'deserved' and would argue for decoupling retribution from punitiveness.

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<sup>v</sup> It is important to emphasise that 'new justice' practices have not been applied to the fact-finding stage of the criminal process; they are used almost exclusively for the penalty phase. Some comparative claims about restorative justice practices (e.g., they are not adversarial when retributive justice is) are misleading in that restorative justice attends only to the penalty phase when negotiation is possible. No one has yet sketched a restorative justice process for those who do not admit to an offence.

<sup>vi</sup> I became aware of the term 'new justice' from LaPrairie's (1999) analysis of developments in Canada. She defines 'new justice' initiatives as representing a 'shift away from a justice discourse of punitiveness and punishment toward one of reconciliation, healing, repair, atonement, and reintegration' (p. 147), and she sees such developments as part of a new emphasis on 'community' and 'partnership' as analysed by Crawford (1997).

<sup>vii</sup> Restorative justice advocates speak of the *harm* not of the *crime*, and in doing so, they elide a crucial distinction between a civil and criminal harm, the latter involving both a *harm* and a *wrong* (Duff, 2001).

<sup>viii</sup> In response to this point, one reader said there had to be some way to theorise varied justice forms (both in an empirical and normative sense), and thus, the 'disappointment' I speak of reflects a disenchantment with the theoretical enterprise to adequately reflect particularity and variation in the empirical social world. This is a longstanding problem in the sociological field. What troubles me is the construction of theoretical terms in the justice field, which use dualisms in adversarial and oppositional relation to one another.

<sup>ix</sup> There are other, more sophisticated, analyses of the ethics of care and its applicability to criminal justice. For example, Snider (1998) argues that we need to learn more about 'activities of caring ... or the implications of such an orientation, compared to those central to punishing' (pp. 27-28).

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<sup>x</sup> The major research studies in the region are Maxwell and Morris (1993) for New Zealand, Strang et al. (1999) for the ACT and the RISE project, and the results reported here for the SAJJ project in South Australia. See Daly (2001a) for a review of these and other studies. Space limitations preclude a review of the methods of each study; rather, general findings are summarised.

<sup>xi</sup> It is important to distinguish jurisdictions like South Australia, New South Wales, and New Zealand, where conferences are used routinely from other jurisdictions (like Victoria and Queensland), where conferences are used selectively and in a relatively few number of cases. When conferences are used routinely, we should not expect to see 'restorativeness' emerging most of the time.

<sup>xii</sup> Space limitations preclude a review of the definitions and methods used in the re-offending studies; rather general findings are summarised.