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**Does punishment have a place in restorative justice?**

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## **Does punishment have a place in restorative justice?** by Kathleen Daly

What *is* the place of "punishment" in a process and outcome termed "restorative"?

For the past several years, I've been challenging colleagues to rethink the oppositional contrast they use in comparing retributive and restorative justice (Daly 1998, 1999a, 1999b). The source of my critique comes from what I have observed in family or diversionary conferences in Australia;<sup>1</sup> what victims, offenders, and their supporters say; and the many post-conference debriefings I've had with coordinators and other researchers.

What does this oppositional contrast look like? (see Appendix, Overhead 1)

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 *community members or organisations take a more active role*, whereas for retributive justice, *'the community' is represented by the state*.

In sum, all the elements associated with "the good" (and the superior justice form) are in the restorative justice column, whereas those associated with "the bad" (the inferior justice form) are in the retributive column.

I've observed close to 60 conferences since coming to Australia. I find that routine practices do not reflect a model of strong contrasts. Instead, I see conferences as a flexible incorporation of

- some elements of retributive justice (in particular, censure for past offences),
- some elements of rehabilitative justice (in particular, what shall we do to encourage future law-abiding behaviour?), together with
- new terms that give the process a particular restorative justice stamp (by asking, for example, how do we repair the harm? how can the offender make amends to a victim?)

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<sup>1</sup> Conferencing is one kind of restorative justice practice; there are many others (Daly and Immarigeon 1998)

Observing conferences can tell us a lot about how the process works. But how do conference participants understand what is happening? Today, I present selected findings from the SAJJ (for South Australia Juvenile Justice) Research on Conferencing Project (Overhead 2). We interviewed offenders (young people) and victims on many features of the conference experience, including their views on the place of punishment in it. Before turning to the project, I review problems of defining retribution and punishment.

### **Defining retribution and punishment**

A major problem in talking about the relationship of retributive to restorative justice is that there are many meanings of retribution and punishment.

*Retribution.* To simplify, retribution has two meanings<sup>2</sup>:

- One is neutral or non-punitive. Retribution is associated with responding to past crime; its justification is to censure wrong-doing. For some, censure itself is the punishment.
- Another is more punitive. Retribution is associated with emotions of revenge or punitive intentions toward wrong-doers, that is, to inflict pain on them.

Already we see problems. How do we distinguish between what is punitive and what is not? And what about the term *punishment*?

*Punishment.* There is a large meaning of punishment as a social institution as defined by Garland (1990: 17):

[Punishment] is a complex and differentiated legal process .... involv[ing] discursive frameworks of authority and condemnation; a repertoire of penal sanctions, institutions, and agencies; a rhetoric of images by ... which the penal process is represented to its various audiences.

We could all agree, I think, that restorative justice is one practice in this large meaning of punishment as a social institution.

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<sup>2</sup> There are, of course, more than two meanings. See review by Cottingham (1979)

Disagreement occurs when we shift from the large to the small meaning of punishment, or in Garland's terms, to "the repertoire of penal sanctions."

Working with this small meaning, some say that punishment is the "intentional" or "deliberate imposition of pain" on an offender. They would say that incarceration and fines are punishment, but not probation or a reparative measure such as doing work for a crime victim. For example, Martin Wright (1991) argues that whereas punishment is an *intended deprivation*, non-punishment is intended to be *constructive*. Likewise, Nigel Walker (1991: 3) says that "it is *the belief or intention of the person* who orders something to be done, and not the belief or intention of the person to whom it is done, that settles the question whether it is punishment."<sup>3</sup>

Others define punishment as anything that is unpleasant, a burden, or an imposition of some sort on an offender. Thus, compensation is a punishment, as is having to attend a counselling program, paying a fine, having to report to a probation officer on a regular basis, or doing work for a crime victim (Duff 1992; Davis 1992).

There is both imprecision and variation in how people use key terms. Some will say that punitive sanctions are punishment, whereas the non-punitive ones are not. In this way, punishment and punitiveness are collapsed as one dimension. I propose that we conceptualise retribution, punishment, and punitive/non-punitive as separate dimensions, each having its own continuum of meaning (Overhead 3). In the meantime, it is plain that when we use these terms, we are not talking about the same thing.

My aim today is not to settle debates over definitions.<sup>4</sup> Rather, I want to initiate a discussion about the place of punishment in a restorative justice process by presenting the views of

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<sup>3</sup> We might ask, why has it been important to justice elites (the philosophers, the scientists, the professionals) to draw a line between a decision-makers' intentions "to inflict pain" and "to be constructive"? If we look at the western history of punishment as a social institution, we find that over the past several centuries, elites have become increasingly concerned that sanctions appear to be "humane," that they have a constructive character. [How this may be experienced by offenders, those at the receiving end, is, of course, another matter.] Today we have Departments of Correction, not Departments of Punishment. In Norbert Elias's (1939) terms, the "civilised sensibilities" that made public hangings and torture "unthinkable" in western nations by the 19th century may be responsible for making the very word "punishment" unspeakable to many today.

<sup>4</sup> I should be clear on my own meanings. I define punishment as anything that is unpleasant or a burden of some sort, I do not think the intention of a decision-maker is determining, and I use a neutral meaning of retribution as censure for past crime.

offenders and victims who have participated in conference processes. What do they think is going on? Do they think the conference process and outcome is a type of punishment?

### **What is conferencing?**

In contrast to all other places in the world, conferencing is legislated in Australia and New Zealand. It is mainly (although not exclusively) used as a diversion from court for juvenile offenders who have admitted to the offence.

In Australia today, conferencing is routinely used in youth justice cases in South Australia, Western Australia, New South Wales, Queensland, and the ACT.<sup>5</sup> In all these jurisdictions, except the ACT, the New Zealand conferencing model is used. In this model, conferencing has, at a minimum, two professionals present -- a coordinator who runs the conference and a police officer. The other conference model -- Wagga -- has just one professional present: the police officer who runs the conference and gives the police perspective. Whereas the main model of conferencing in Canada, the US, and Britain is Wagga, that in the Antipodes is the New Zealand style.

A conference lasts, on average, one to two hours. It is attended by the offender (and their supporters), the victim (and their supporters), any other relevant people, in addition to the police officer and convenor or coordinator. After the introductory phase, the main activity of the group is to discuss (1) the offence and its consequences and (2) what the penalty should be. The discussion on penalty is to be decided as much as it is possible "by consensus," which means that there is no one decision-maker whose intentions can rule. Rather, everyone there (including the young person) is supposed to participate, at least in theory. This practice alerts us to some of the problems of using intentions of a decision-maker as the deciding criterion in deciding what is and is not punishment.

### **The SAJJ project**

Let's turn then to the SAJJ project (for an overview of Year 1 of the research, see Daly et al. 1998). We had two waves of data collection in 1998 and 1999. In 1998, we observed a total of 89 conferences that were held during a 12-week period in the metropolitan Adelaide area and in two country towns (Port Augusta and Whyalla). The observed conferences were

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<sup>5</sup> One of the five jurisdictions (the ACT) has no legislative basis. See Barga (1996, forthcoming) and Daly (1999b) for a review of legislation and research in New Zealand and Australia.

selected on the basis of the offence category. "SAJJ-eligible" offences included all personal crimes of violence, and all property offences that involved personal victims or "community victims" (such as schools, churches, housing trusts). Excluded were shoplifts and drug cases.

Here are some features of the conference sample (Overhead 4)

- 44 percent of the offences dealt with were personal crimes of violence; the rest were property offences (break and enter, illegal use of a motor vehicle, property damage)
- for 67 percent, the type of victim was a personal victim, although we also had organisational and occupational victims.
- in nearly 30 percent, the victim was injured, and in 70 percent, the victim sustained economic losses (median loss was \$350)
- in 74 percent of conferences, the victim was present
- in 15 percent, there was more than one young person (offender) in the conference

For each conference, the police officer and coordinator completed a self-administered survey, and a SAJJ researcher completed a detailed observational instrument. We aimed to interview all the young people/offenders (YPs, N=107) and the primary victim associated with each offence (N=89) in 1998 and a year later, in 1999.

We achieved a respectable response rate in both years (see Overhead 5). Of the 196 offenders and victims in the SAJJ sample, we interviewed 88 percent in Year 1; of that group, we interviewed 92 percent in Year 2. The overall response rate for the two years is 81 percent (158/196, with 4 cases pending; thus it may go up a bit).

The interview schedules in 98 and 99 have a mix of open and close-ended items. All the interviews were conducted face to face, except those with victims who did not attend the conference, which were conducted by phone. For the YPs, the interview lasted 35 to 50 minutes; for the VICs, the interview was normally longer: 50 to 90 minutes. All the face-to-face interviews were tape-recorded, with the open-ended questions transcribed.

In year 1 the focus of the interviews was on the offenders' and victims' judgments of whether elements of procedural and restorative justice were present in the conference. In year 2, we wanted to know how the passage of time affected offenders' and victims' judgments of the process and promises made; their attitudes towards each other; whether the conference had an impact on "staying out of trouble" (offenders) or on "getting the offence behind them" (victims); and for victims, how their experience in the conference process affected (or not) their views of young people and the politics of crime control.

I'll be reporting a small portion of the results from the Year 2 interviews (see Overhead 5, lower part for features of the sample).

*Questions asked about punishment.* Here are the punishment-related questions we asked of both groups (Overhead 6). We began by asking, "We'd like to know what you think about punishment. So, can you tell me, what does punishment mean to you"? Then, after recording what they said, we asked the close-ended questions. We opened with, "People have different ideas about what is punishment and what is not. Thinking about your conference, would you say any of these were a type of punishment for you? (asked of the YP) / for the YP? (asked of the VIC). And then, we went through a set of four items.

- "Having to go to the conference -- was that a type of punishment?"
- "Having to face [name of victim] in the conference?"
- "Having to say what you did -- that is, describe the offence to others?"
- "Having to do the agreement?"

These items asked for the offenders' and victims' actual memories (or perceptions) of what they felt occurred. When asking these questions, we said to the interviewees that a "yes" meant a "definite yes" -- not just "yes, a bit."

We then went through a set of ten items of "kinds of things that are in agreements," asking whether any of them is a type of punishment. Unlike the group of four, these ten were more in the realm of the hypothetical since they may not have been in a YP's agreement (although they are the most frequent categories in agreements). They include

- apologising to the victim,
- paying compensation and doing work,
- curfews and bans from seeing certain friends, and
- having to attend school, go to counseling, go to the "Straight Talk" program (where prisoners talk to young people about what prison is like), or see a JPET worker (someone who provides information on accommodation and job skills training)

Then, we followed up with another open-ended question. "You've said some of these things are not punishment, and some of these things are. What makes this group of things not types of punishment? .... What makes these punishment?"

One of the last items in the interview asks, "Looking back on the conference, what do you think it was *for*. ... Do you think it was ... to help you ... to punish you ... to help the [name of victim], to stop you re-offending ... any other reason"?<sup>6</sup> And then, "which one of these is the main reason for having you go to a conference?"

### **What I expected to find**

For the punishment questions, I expected that a *portion* of both the young people and victims would see these conference process and outcome as punishment, but I was not sure what the size of that portion would be. I expected that a higher proportion of the young people than victims would see the items as types of punishment because they were on the receiving end of the censure and sanctions.

For the item, "what's the conference for?," I expected to see multiple purposes registered, including that of punishing the young person. I was not sure what they would say the primary purpose would be.

### **Results**

Turning first to the young people/offenders and the four questions about the conference process and outcome: 33 to 45 percent felt that having to go to the conference, face the

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<sup>6</sup> For the YPs the question was to help you, to punish you, to help [name of victim], to stop you re-offending. For the VICs, the question was to help you, to punish [name of YP], to help [name of YP], to stop [him/her] re-offending. For conferences with more than one offender, the SAJJ-identified "primary offender" was the person that victims were asked to focus upon.

victim, and say what they did were a type of punishment. However, 66 percent said that "having to do the agreement" was a type of punishment (Overhead 7).

For the victims, 60 to 66 percent said that the YP's having to go to the conference, face them as the victim, and say what they did were a type of punishment. Like the YPs, most victims (70 percent) said that "doing the agreement" was a type of punishment.

From other survey items (not detailed here), we know that the YPs' answers to the punishment questions are independent of their evaluations of the conference process and outcome. In the 1998 interviews, 86 percent of the YPs said that that the way the agreement was decided was fair. From the interviews in 1998 and 1999, few YPs (10 percent in 98 and 6 percent in 99) thought that the agreement was too harsh or somewhat harsh.

What might explain the different responses by the YPs and VICs to the three conference process items? Might they have different definitions of punishment? When I analysed the open-ended question, "what does punishment mean to you?," the YPs' and VICs' responses fell out in a similar set of categories, with roughly similar distributions:<sup>7</sup>

- About half of each group defined punishment with a neutral (or non-punitive) meaning of retribution. ["Umm. It's a consequence of bad actions. Sort of you get into strife, and they can, like, give you a punishment."]
- 10-15 percent saw it as something unpleasant or something you don't want to do ["Doing something you don't want -- don't want to do."]
- 10-15 percent saw it as pain, deprivation of liberty, or suffering. ["I don't know, just show them, you'd show them what punishment is. (How?) Bash them or do something that hurts."]
- 10-15 percent defined it only in terms of consequence. ["Say you do something that's bad, they give it to you so you won't do it again, like a deterrent."]

One explanation for the differences may be that the victims either hoped or assumed that the process was experienced as punishment for the young person.

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<sup>7</sup> These examples come from the YP interviews. Note that when asked the follow-up question about what is and is not punishment, the YPs typically introduced the elements of coercion and imposition in defining punishment.

For the "kinds of things that can be in agreements" and whether any of them would be a type of punishment, there is striking agreement on the structure of what is and is not punishment for the two groups. Of the list of ten items, there is just one where we see strong, substantive differences. That item is "apologising to a victim." While about 45 percent of the YPs said that this would be a type of punishment, about 65 percent of the VICs said it would be. [Typically when YPs replied "no" to this item, they said "it was something that you should do."]

Looking at the rest of the items -- paying compensation to a victim, doing work for a victim or for others, having a curfew, and being banned from seeing or hanging out with friends -- all were similarly perceived by high percentages of both groups as types of punishments.

In comparison with these items, educational or counselling interventions were relatively less likely seen as punishment, although they were viewed as punishment by about half of each group.

From the follow-up question on what is and is not punishment, many YPs said that when a sanction helped them in some way (as in going to a JPET worker or learning about prison via "Straight Talk"), it was not punishment. But when a sanction was something they were made to do (coercion), that they didn't want to do (imposition), and that had no benefit to them (except perhaps to "teach me a lesson"), then it was a type of punishment.

As to "what the conference is for," the responses show that conferences are viewed as accomplishing many things: helping the YP and the victim, punishing the YP, and stopping the YP from re-offending. Of the four, punishing the YP was relatively less likely mentioned by both groups, although a majority said "yes" to this item. We also see that more of the YPs than the victims thought the conference was to punish the YP (64 and 56 percent, respectively), and more of the YPs than victims thought that the conference was to help the victim (86 and 72 percent, respectively).

For the conference "main reason," the modal response for both groups was to stop the YP re-offending, followed by helping the YP. Punishing the YP is infrequently given as the main reason for having the YP go to the conference, although 12 percent of the YPs thought that it was.

## Summary and implications

These young people and victims are saying that punishment has a place in conferencing, although not in a way that overwhelms other justice aims.

- First, YPs and VICs see the conference process and outcome as ultimately aimed at preventing future crime (to stop YP from offending and to help the YP); hence, the general justifying aim (that is, why punish?) is utilitarian and aimed at changing a YP's behaviour.
- Second, like debates in the academic literature, we find that the offenders and victims have varied understandings of what punishment means. When asked to define punishment, the majority of each group did not explicitly tie the term to things punitive. Rather, it was understood as a "consequence" of doing something wrong or as "paying back" or "making up" for what you did wrong.<sup>8</sup>
- Third, despite the varied understandings of what punishment is (ranging from neutral, to something that's unpleasant, to pain), the YPs and VICs viewed the structure of conference penalties in a similar light: some definitely were seen to be types of punishment, others might be, and others were not. For most YPs, having to participate in the conference process was not seen as a type of punishment, whereas most VICs thought it might be.
- Punishment was not viewed as the main purpose of a conference, but it was viewed as one of several purposes.

Compared with some restorative justice advocates who are uneasy with the term *punishment* and who would like to see the process and outcome as restorative, but not retributive, most of these young people and victims (although not all) are less affected by what I'd call *the punishment cringe* -- that is, a distaste for the word and all that it may imply. Their everyday understandings of punishment are that wrongs should be "made right" or that one should "pay

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<sup>8</sup> There is a good deal of complexity and contradiction in how the YPs and VICs contemplated the idea of punishment, and in how punishment differed from non-punishment. Hence, the results here are preliminary and rough-cut characterisations.

back" a wrong. In their view, "making things right" or "paying back" can be understood to be types of punishment without necessarily implying punitiveness or pain.

These results clarify some things for me, but they beg other questions. For example, some suggest that when a meaningful nexus is drawn between an offence and a sanction, e.g., when an offender makes up for a harm in a direct way to a victim, then we should think of that as a "restorative sanction" and not as "punishment." That argument may make sense to justice elites, but I wonder if young people can comprehend it in those terms. The SAJJ findings suggest that whether work is done for a victim or someone else, it is similarly viewed by over 90 percent of young people as punishment *because it is work*, something that takes them away from "fun things" or "spending time with my friends." Likewise, about 90 percent of victims said that doing work for a victim is a type of punishment.

The conclusion I draw is this. Restorative justice advocates should reconsider what punishment means to those in the heartland. Rather than repressing or eliminating the term, it is essential that we work with people's everyday understandings of punishment and the emotions connected to it. These may prove to be more malleable and less punitive than many have imagined.

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