

## **Seeking Justice in the 21<sup>st</sup> Century:**

### **Towards an Intersectional Politics of Justice**

by Kathleen Daly

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#### **ABSTRACT**

After setting the political and personal contexts, defining key terms, and comparing Indigenous and restorative justice, I clarify three interrelated sites of contestation between and among feminist and anti-racist groups as these relate to alternative justice practices. They are the inequality caused by crime (victims and offenders), social divisions (race and gender politics), and individuals and collectivities (rights of offenders and victims). I outline an intersectional politics of justice, which seeks to address the conflicts at each site. My intersectional framework attempts to align victims' and offenders' interests in ways that are not a zero sum game, and to find common ground between feminist and anti-racist justice claims by identifying the negotiating moves each must make. It proposes that victims and offenders have positive rights that are not compromised by collectivities.

Since 1978, as a student and academic, I have been interested in the relationship of inequalities to crime and justice, and in alternative ways of doing justice. My research began with studies of gender, crime, and sentencing; and in the mid 1980s, I started to read and write on the race and gender politics of crime and justice. In the mid 1990s, I moved from the United States to Australia to see and understand the emerging idea of restorative justice. In 2001, I began to study new forms of Indigenous justice. In this paper, I discuss what I have learned, and I attempt to mediate conflicts that have emerged between feminist and anti-racist groups in seeking justice.<sup>1</sup> My paper has three parts. After setting the context and defining key terms, I present and compare two innovative justice practices: restorative justice and Indigenous justice. Next, I clarify three interrelated sites of contestation between and among feminist and anti-racist groups as they relate to restorative and Indigenous justice. Finally, I outline a way forward by sketching an intersectional politics of justice.

For simplicity, my essay characterizes justice practices and their politics in simple terms, and often by using dichotomies. These are analytical short cuts, which may help us to make sense of complexity and difference; but when we scratch the surface, the dichotomies often fail us. One such dichotomy is victim and offender. We know that among offenders, there are many indications of victimization and trauma. Likewise, among victims, there are also offenders. These blurred boundaries of victimization and offending are well documented in research on males' and females' pathways to crime; in profiles of prisoners; and in reports on violence in educational and social welfare institutions. An intersectional politics of justice should be actively engaged in breaking down dichotomies and crossing boundaries. At the same time, I suggest that the inequality between a victim and offender that is caused by crime is a dichotomy that must be explicitly recognized and redressed in some way.<sup>2</sup>

## SETTING THE POLITICAL CONTEXT

Over the past two decades in nations such as the United States, Canada, Great Britain, Australia, New Zealand, and many European countries, the response to crime is moving in different directions. One tack is innovative: it promises to break out of established forms of criminal justice, to do justice differently. The other tack is repetitive: it promises to intensify established forms of criminal justice, to do justice more efficiently (the neo-liberal strand), and often, more punitively (the neo-conservative strand) (O'Malley, 1999). As many have observed (e.g., Garland, 1996, 2001; O'Malley, 1999), a major problem for government is managing these contrary and volatile trends. My essay focuses on developments in the innovative strand.

Starting in the 1960s, a variety of social movements called for the transformation of criminal justice. One set of critiques came from victims, and a second, from offenders. Victims said they were forgotten in the criminal process. They felt that they, not the defendants, were on trial. They wanted vindication and validation, but this did not occur. For some, this translated into demands for new criminal laws and procedures that made it easier to prosecute and punish crime, and for others, into more services and support for victims. Offenders said too many people were arrested and incarcerated, often on trivial matters. For certain groups, especially racialized groups, the criminal justice system was harmful and oppressive. This translated into demands for less criminalization, less use of custody, and for more alternatives to established criminal justice (Daly & Immarigeon, 1998).

In the late 1970s and early 1980s, and partly in response to these critiques, established criminal justice began to devolve and fragment, with the introduction of informal justice, neighborhood dispute centers, and mediation (e.g., Abel, 1982; Harrington, 1985). This activity intensified in the early to mid-1990s, with the rise of restorative justice (Daly & Immarigeon, 1998) and a variety of Indigenous justice practices in Canada (Green, 1998), the

United States (Yazzie & Zion, 1996), and Australia (Marchetti & Daly, 2004, 2007). During the 1990s, specialist and problem-oriented courts (such as the drug court and the domestic violence court), often, but not always, guided by therapeutic jurisprudence, were introduced in the United States (Wexler, 1990). These courts evolved and spread rapidly to other countries (Freiberg, 2001, 2005; Winick & Wexler, 2003). New forms of international criminal justice have been and are being created (Charlesworth & Chinkin 2000; Roberts, 2003), including new forms of transitional justice (Chinkin & Charlesworth, 2006; Hesse & Post, 1999; Rubio-Marin, 2006; *Socio & Legal Studies*, 2004).

Justice has exploded: it is operating under many new guises than ever before.

Although it is tempting to suggest that these diverse developments are guided by overarching principles of restorative justice (Sullivan & Tifft, 2006) or therapeutic jurisprudence (Winick & Wexler, 2003), my view is that we should recognize the specific contexts and politics of justice aspirations and practices. At the same time and despite particularity, there are shared elements and affinities across diverse practices (Marchetti & Daly, 2007). This theme is developed when comparing restorative justice and Indigenous justice.

### **THE PERSONAL CONTEXT**

My research interests in race and gender politics and in innovative justice practices are intertwined. During the mid-1980s I became troubled by my feminist colleagues' focus on victims in the criminal process, to the exclusion of offenders (Daly, 1989). This came to a head, when in May 1992, I was invited to speak at plenary panel at the Law & Society Annual Conference in Philadelphia on the Clarence Thomas confirmation hearings. Recall that Clarence Thomas, a black man, was nominated to the United States Supreme Court in 1991. During the Senate's hearings in October, a University of Oklahoma law professor and black woman, Anita Hill, testified that Thomas sexually harassed her over a period of time in the

1980s when he was Chair of the Equal Employment and Opportunities Commission, and she worked in his office. The exchanges between Thomas, Hill, and the senators were one of the most extraordinary events of our time: they dramatized the political cleavages and historical scars of race, gender, and sexual politics in the United States (Morrison, 1992). Thomas denied Hill's allegations as groundless. Critics accused Hill of being disloyal to her race, of trying to bring down a black man. In my plenary address, I asked: "If Thomas admitted he harassed Hill, and if he admitted this in ways you found sincere, and if he apologized for what he did and said he would make amends, what would have been your response? Would his admissions, apology, and efforts to make amends have been sufficient, ... or would you want more of a sanction" (Daly, 1992). My remarks caused some controversy. I appeared to have broken with feminist convention, which at the time was concerned with strengthening formal legal approaches to violence against women, not with alternative justice forms.

My Australian colleague John Braithwaite heard the paper, and some months later, in February 1993, he sent me a manuscript for comment. It was on the topic of family group conferencing in a place called Wagga Wagga, New South Wales. He said that conferencing (which would later be branded restorative justice) had benefits for both victims and offenders in cases of sexual and family violence. Sitting at my dining room table in Ann Arbor, Michigan, I vividly remember reading about conferencing practices with interest and excitement. We went on to co-author the paper (Braithwaite & Daly, 1994), and it was the start of my journey to Australia in 1995.

### **RACE AND GENDER POLITICS OF JUSTICE**

The term "race and gender politics of justice," as I use it, encapsulates the different emphases that Indigenous (or racialized political minority groups) and feminist groups take in seeking justice. In general, Indigenous groups emphasize offenders' interests; feminist groups,

victims' interests. This dichotomy shows the fault lines in Indigenous and feminist politics; and as one would expect, the politics are not that simple. There is growing interest in intersectional race and gender politics, which aim to negotiate differing Indigenous and feminist interests in seeking justice.

Intersectional thinking is recent, evolving, and applied in varied ways. It is used *empirically* to represent the multiple and shifting identities of people (e.g., Maher, 1997; see also McCall, 2005) and *politically* and *analytically* to critique categorical thinking in law, social theory, and social movement groups (Crenshaw, 1989, 1991; Marchetti, 2008). I use the term in the latter sense to address the conflicting interests of victims and offenders, social movement groups, and individuals and collectivities in responding to crime.

Intersections of race and gender was introduced by Kimberle Crenshaw to challenge the ways in which race and gender were used in law, and in feminist and anti-racist theories and social movements. For example, in law, when filing an anti-discrimination legal claim, one could lodge a complaint as a female or as a black person, but not as a black female. A female was presumptively white; a black, presumptively male. For theory, Crenshaw (1991, p. 1243) said that “feminist and anti-racist discourses failed to consider intersectional identities such as women of color.” At the time, feminist theories were principally about gender; and anti-racist theories were about colonialization, culture, and race-ethnicity. Moreover, neither feminist nor anti-racist social movements represented the interests of racialized women (Huggins, 1994; Moreton-Robinson, 2000).

Like other racialized women, Crenshaw pointed out that “black women are marginalized in feminist politics as a consequence of race, and they are marginalized in anti-racist politics as a consequence of gender.” However, she added a new dimension by saying that “black women do not share the burdens of these elisions alone:”

When feminism does not explicitly oppose racism, and when antiracism does not [oppose] patriarchy, race and gender politics often end up being antagonistic to each other and both interests lose (Crenshaw, 1992, p. 405).

Crenshaw's point is crucial to my thinking. If we want to do justice differently, we must find ways to align race and gender justice politics, and not permit the antagonisms to stall a more constructive and progressive agenda. An intersectional politics of justice may be a way to achieve this goal.

Currently, and depending on the jurisdiction, race and gender politics are often antagonistic. The negative effect is most deeply felt on racialized women, for whom seeking justice poses major dilemmas. For example, critics of Indigenous women's organizations say they are too closely aligned with feminist interests (or what is termed women's or *individual rights*), not with the *collective interests* or rights of Aboriginal people. In response, Indigenous women say they are being asked (unfairly) to put community interests ahead of their interests as women. Relating this to criminal justice, Emma LaRocque (1997, p. 81), a Canadian Indigenous woman, says "it remains a puzzle how offenders, more often than victims, have come to represent 'collective rights'." She argues that in the interests of "social harmony, ... the pendulum has swung way too far to the advantage of [offenders] within Native communities."

A related concern is that reputedly "cultural" arguments are used against Indigenous women (Razack, 1994, 1998).<sup>3</sup> More than 15 years ago, Audrey Bolger (1991, p. 50) and Sharon Payne (1992, pp. 37-38) called attention to "bullshit traditional violence" and "bullshit law," respectively, in Australia. Described by an Aboriginal woman in the Northern Territory as one of three kinds of violence in Aboriginal society (the others were alcoholic violence and traditional violence), "bullshit traditional violence" refers to men's assaults of women, usually

when they are drunk, which are justified as a “traditional right.” Payne noted a similar phenomenon, but used different categories:

... Aboriginal women are saying that they are being subjected to three types of laws. ... white man’s law, traditional law, and bullshit law. The latter [is] being used to explain a distortion of traditional law [that justifies] assault and rape of women ... These types of [cultural] defenses [set a dangerous precedent], and they denigrate Aboriginal men and Aboriginal culture.

All of the analysts above (LaRocque, Razack, Bolger, and Payne) suggest that race and gender politics are highly visible and most contested in cases of family and sexual violence.

### **INEQUALITIES OF CRIME, SOCIAL DIVISIONS, AND JUSTICE**

Among several puzzles of justice, one that provokes me is whether it is possible to do justice, including alternative forms, in an unequal (and, many would say an unjust) society. There are, in fact, two types of inequality to consider. First, a criminal act itself creates an inequality between an offender and victim. An offender has, in some way, harmed or hurt another, or claimed a position of superiority over another. As Hampton (1998, pp. 38-9) puts it, an offender has said, “I am up here, and you are down there, so I can use you for my purposes.” Justice means redressing that inequality and expressing the “victim’s equal value” (p. 39). Second, these individual acts called crime take place in, and some would argue are partly caused by, societies marked by inequality and histories of state violence. Can justice truly be achieved in this societal context? Probably not, especially when we appreciate that criminal law and established forms of criminal justice reproduce and amplify social inequalities, not reduce them.

Established (or standard) criminal justice attempts to respond to the first kind of inequality, the one caused by crime itself, although it does so poorly. New justice practices<sup>4</sup>



may offer some improvement. They may also be able to relate an individual criminal act to a broader set of community or societal relations. However, we should not expect new justice practices alone to achieve social justice. Striving for this achievement will require other major societal commitments and policies.

Sketched more fully below, an intersectional politics of justice has three parts: it aims to respond to the first kind of inequality by aligning victims' and offenders' interests in ways that are not a zero sum game; it attempts to find common ground between feminist and anti-racist justice claims by identifying the negotiating moves each must make; and it proposes that victims and offenders have positive rights that are not compromised by collectivities.

### **INDIGENOUS JUSTICE AND RESTORATIVE JUSTICE**

Many restorative justice advocates say, wrongly in my view (Daly, 2002, pp. 61-4), that the modern practice of restorative justice *is* an Indigenous justice form. Their claims gloss over the histories and particularities of Indigenous social organization before and after colonial conquest. Moreover, "culture" is wrongly depicted in romantic and static terms, as if it were frozen in time (see also Blagg, 1997; Cunneen, 2003). From the point of view of *process*, there are overlaps between restorative justice and Indigenous justice practices. There are also points of difference, in particular, the role of politics and political aspirations. In the following discussion, I give greater attention to Indigenous justice because few readers are likely to be aware of recent developments, especially by comparison to restorative justice.<sup>5</sup>

#### ***Indigenous Justice***

As others and I use the term, Indigenous justice refers to modern practices that have emerged in the past 10 to 20 years in North America and Australia. These practices do not use customary law; rather, with some exceptions, they work within a "white" state's criminal laws

and procedures.<sup>6</sup> Indigenous justice refers to a variety of justice practices, normally focused on sentencing, in which Indigenous people have a central role in responding to crime. They include urban sentencing courts, community justice groups' advice to judges in sentencing, Elders' participation in sentencing, and a variety of forms and contexts of sentencing circles. Indigenous justice can be seen as a way to rebuild Indigenous communities and to redress the destruction of Indigenous peoples' culture and social organization brought about by colonialism and state violence (Marchetti & Daly, 2004, 2007).

Indigenous justice practices can be arrayed on a continuum. At one end are practices, such as the Navajo Nation's Peacemaking Division in the United States, which has been developed from within the Navajo Nation, with entry into peacemaking courts by the Navajo police (Coker, 2006). Courts like this are rare: the Navajo Nation has a semi-sovereign relationship with the United States federal government in ways that do not exist for Indigenous peoples in Australia, New Zealand, or Canada. At the other end of the continuum are practices in which Indigenous groups or communities have "input" into sentencing decisions, but these decisions are largely imposed by "white justice." At this extreme of the continuum, the practices may more accurately be termed a form of restorative justice. I agree with Canadian lawyer Jonathan Rudin (2005, p. 99), who says that unless Indigenous people "are given some options and opportunities to develop processes that respond to the needs of that community," the practices should not be termed Indigenous justice. He suggests, for example, that sentencing circles, which are "judge-made and judge-led initiatives," should be termed restorative justice, not Indigenous justice. Rudin is referring to Canadian circle sentencing, which began in the late 1980s and early 1990s, pioneered by judges (especially Judge Barry Stuart) while traveling on circuit to remote areas, although it has since "fall[en] out of favor with the courts" (p. 97) and diminished in use. Although circles may be used less

often now in Canada, they were imported, albeit in a highly modified manner into Australia in the late 1990s.

Compared to North America and New Zealand, Australia has the most well developed repertoire of Indigenous justice practices. Although Indigenous participation in sentencing has occurred informally in remote Australian communities for several decades, formalization of these practices began in the late 1990s, both in urban and remote areas. Today, all but one state (Tasmania) has established some type of Indigenous justice practice (see Marchetti & Daly, 2007). To simplify my discussion, I focus on Indigenous sentencing courts, not on all Indigenous justice practices.

To be eligible, an offender must be Indigenous (or in some courts, Indigenous or South Sea Islander) and have entered a guilty plea or have been found guilty. The charge is normally heard in a Magistrates' or Local Court (analogous to a misdemeanor or less serious felony court in the United States); the offence occurred in the geographical area covered by the court; and although there is lay participation, a judicial officer retains the ultimate power in sentencing. During the sentencing process, the judicial officer typically sits at eye-level with the offender, usually at a bar table or in a circle rather than on an elevated bench. Although both a prosecutor and defense attorney are present, their professional role shifts to accommodate a greater degree of interaction between a defendant, his or her supporters, the Elders, other service providers or community members, and a judicial officer. This contrasts with the mainstream court, where the interaction is normally between a judicial officer and an offender's legal representative. Most, but not all Indigenous sentencing courts, do not allow sexual or family violence offences to be heard, among other types of exclusions (see detail in Marchetti & Daly, 2007, pp. 421-22).

A key feature of the courts is the involvement of Elders and the impact they can have on an offender's attitude and behavior. All the courts involve Elders or Respected Persons,

but their role and degree of participation varies greatly: it may include advising the judicial officer, talking to and interacting directly with an offender, and taking a support or monitoring role post-sentence. The Elders' participation is one mechanism by which the sentencing process can be made more culturally appropriate. Ideally, a positive impact occurs when an Elder has an existing relationship with an offender and when the offender comes to understand that they have "committed an offence not only against the white law but also against the values of the [Indigenous] community" (Harris, 2004, p. 73). In this way the application of white law is inflected by Indigenous knowledge and cultural respect.

A colleague and I have been researching Australian Indigenous justice practices since 2001. We find that the courts encourage a more open and honest level of communication between the offender and magistrate; place greater reliance on Indigenous knowledge in the sentencing process that includes informal modes of social control both inside and outside the courtroom; and may fashion more appropriate penalties that are better suited to the offender's situation (Marchetti & Daly, 2004). They may have longer-term effects such as strengthening Indigenous communities by re-establishing the authority of Elders. However, we note that without appropriate services or programs that would benefit an offender in a particular community post sentence, there is little scope for these courts to impose more effective penalties.

Today, in Australia, there are over 30 sentencing courts operating. In some jurisdictions (Victoria, New South Wales, and more recently, Queensland), the courts receive substantial state funding, largely to pay for an Indigenous staff officer and to support Elders' time and transport. Although Indigenous sentencing courts began in the adult jurisdiction in 1999, youth courts are now being established, and there is interest to extend the idea to more serious offences in the District Court jurisdiction.<sup>7</sup>

### ***Restorative Justice***

Restorative justice encompasses diverse practices at different stages of the criminal process, including *diversion* from court prosecution, actions taken *in parallel* with court decisions, and meeting between victims and offenders *at any stage* of the criminal process (for example, arrest, pre-sentencing, and prison release) (for discussion of problems of definition, see Johnstone, 2003; Johnstone & van Ness, 2007). It can be used by all agencies of criminal justice (police, courts, and corrections). It is also used in non-criminal decision-making contexts such as child protection and school discipline. It is sometimes associated with the resolution of broad political conflict (such as South Africa's Truth and Reconciliation Commission), although transitional justice may be a the more appropriate term. Although definitions vary, a popular one, proposed by Tony Marshall (2003, p. 28) is a "process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future."

The practices associated with restorative justice include conferences, circles, and sentencing circles. (As practiced in Australia, circles are better viewed as a type of Indigenous sentencing court.) The common elements of restorative justice are an informal process; a dialogic encounter among lay (not legal) actors, including offenders, victims, and their supporters; an emphasis on victims describing how the crime has affected them and offenders taking responsibility for their acts; and consensual decision-making in deciding a penalty, which is normally centered on "repairing the harm" caused by the crime.

### ***Comparing Restorative Justice and Indigenous Sentencing Courts***

At a general level, there are similarities between restorative justice and Indigenous sentencing courts<sup>8</sup> in that both

- *require an admission* to offending (or in some jurisdictions, an offender choosing “not to deny” an offence);
- *rely on lay actors* (for restorative justice, victims and their supporters, an offender’s supporters, and other community members; for Indigenous justice, an offender’s supporters, Elders, and other members of the Indigenous community); and
- assume that *incarceration is a penalty of last resort*.

In addition, both emphasize the need for

- *improved communication* between legal authorities, offenders, victims, and community members, using plain language and reducing some legal formalities;
- *procedural justice*, i.e., treating people with respect, listening to what people have to say, and being fair to everyone; and
- *persuasion and support* to encourage offenders to be law-abiding.

However, there are significant differences in the qualities of “doing justice” and in justice aspirations. For restorative justice, the focus of the interaction and relationship building is between offenders, victims, their supporters, community members, and “the community” (a non-racially specified community),<sup>9</sup> along with professionals such as a police officer and coordinator. For Indigenous sentencing courts, the focus is between offenders, their supporters, Elders, the Indigenous community (including service providers), and “white justice” (typically, embodied in the legal roles of the magistrate, prosecutor, and defense attorney).<sup>10</sup> Doing justice in a restorative process gives attention to victims and to re-building relationships between a victim, an offender, and their community; whereas doing justice in Indigenous sentencing courts gives attention to changing relationships between white justice and Indigenous people, including the offender. Relatively less attention is currently given to addressing the needs of victims in Indigenous sentencing courts, although this may change (Marchetti & Daly, 2007).

For justice aspirations, restorative justice focuses on holding offenders accountable for crime, attempting to repair harms to a victim (or a community), and engaging a process where mutual recognition of both victims and offenders can be facilitated. Its political aspirations are limited to changing justice practices to become more reintegrative and negotiated, to changing individual offenders, and to assisting individual victims. Indigenous sentencing courts have broader and more explicit political aspirations for social change in group relations: to make the court more culturally appropriate (and by implication to break down the whiteness of law and procedure, and to inject it with Indigenous knowledge and values) and to develop greater trust between Indigenous people and dominant white systems of regulation. These elements may, in time, contribute to changing white justice, transforming relations between white justice and Indigenous people, rebuilding Indigenous communities, and ultimately changing the character of race relations (Marchetti & Daly, 2007).

### **SITES OF CONTESTATION**

For several years, I have sought to clarify the different positions that feminist and anti-racist groups have taken toward justice practices (Daly, 2005; Daly & Stubbs, 2006, 2007). Here I consolidate and extend my previous work by identifying three sites of contestation. My examples focus on alternative justice practices at the penalty stage (post-plea) of the criminal process for adults.<sup>11</sup>

#### ***Site 1. Inequality Caused by Crime: Victims and Offenders***

Addressing the inequality caused by crime is a crucial, if often overlooked, site of contested justice. The points raised in the discussion of Site 1 are relevant to all types of criminal justice processes, i.e., established, restorative, and Indigenous. However, my examples draw from restorative justice, which gives greater attention to victims.

Barbara Hudson (2003) reflects upon whether the multiple objectives of restorative justice can be achieved in one process. She asks, is it “reasonable to expect one process to ‘do justice’ to both victims and offenders” (p. 177). In doing justice, Hudson has in mind a dual concern with both distributive justice (equity between a victim and offender) and substantive justice (responsiveness to the individual needs of a victim and offender). For distributive justice, she is concerned that restorative justice practices may tip the scales more toward a victim’s rights than an offender’s: “there is no guarantee that victim interests in adequate reparation can be equitably balanced with offender interests in impositions that do not exceed proportionality to culpability” (p. 188). She suggests further that established criminal justice “admits to the impossibility of this balancing” and attempts to “‘do justice’ to victims and offenders in separate processes” (p. 188). For Hudson, the heart of the contestation lies in assuming a “‘zero sum’ approach to victims and offenders, which sees rights for one being at the expense of concern for the other” (p. 178). For substantive justice, Hudson outlines the potential power of restorative justice processes in both the telling of stories and listening to them: “the hearing is at least as important as the saying. The telling of the harm suffered and of the reasons for the offence must make the victim and offender real to each other, if the harm and its causes and circumstances are to be acknowledged as real” (p. 180). Despite this, “there is no guarantee that [an offender and victim] will agree on the version or meaning of events” (p. 184). What is innovative about restorative justice is not that a victim’s perspective is presented, but rather that the intention in doing so is “to change the offender’s perspective” (p. 184).

Hudson’s analysis brings into relief the difficulties of moving beyond a zero sum approach to justice in one process. She is particularly concerned with how offenders may “lose” in restorative practices that do not have a “positive rights” stance for offenders (p. 193).<sup>12</sup> Her views are at odds with those of Annalise Acorn (2004), who is concerned that



victims will “lose” in restorative practices. For example, Acorn suggests that restorative justice meetings may give victims an “opportunity ... to vent or blow off steam” toward an offender, but they do not “validate or legitimate the victim’s desire to see the perpetrator suffer” (2004, p. 53). Moreover, she believes that offenders are likely to receive more compassion than victims in restorative justice meetings, and that victims themselves may minimize their own need for compassion.

Whereas Hudson is interested in *balancing rights* for offenders and victims, Acorn is interested in “*counterbalancing pain* for the wrongdoer” (p. 47). Whereas Hudson is concerned with introducing safeguards against punishments that may be excessive, Acorn is concerned that punishments may only weakly express a victim’s interests to see an offender suffer. Whereas Hudson sees restorative justice as “privileg[ing] the victim’s perspective,” Acorn believes that victims are not privileged, but used. Their contrasting views reveal an antinomy at the heart of the criminal process: each begins an analysis from the positional interests of an offender or a victim, and it is through the lens of an offender or a victim that the unfolding justice interactions are imagined.

To be fair to Hudson, she does shift positions from the lens of offender to victim and back, and she compares victims and offenders in established justice and restorative justice contexts. In so doing, she offers several ways forward. First, she emphasizes the importance of offenders recognizing “the victim as a real individual .... as real to the offender as those who encourage ... his offending” (pp. 180-81), alongside a parallel process of the offender being “revealed as a real person to the victim” (p. 181). Second, she believes that by ensuring a balance of rights of offenders and victims, we may move beyond a zero sum game. Third, she considers optimal justice processes in the light of different types of victim-offender relations, those when offences are targeted at a particular victim (e.g., sexual, partner, and family violence; and racial violence) and those that are not specifically targeted. Fourth, she

notes the several points of slippage and vagueness by restorative justice proponents, including the meaning of “accepting responsibility,” whether more than one meeting is required, and how long “proceedings” would last. Despite procedural safeguards and an emphasis on “undominated speech” in restorative justice meetings, Hudson concludes that there is “no guarantee that a fusion of horizons can be accomplished” (p. 185).

An intersectional politics of justice must fully recognize, not elide or gloss over, the differing positional interests of victims and offenders in the criminal process. These may, may not, or may only be partially “reconciled” in a restorative justice encounter, or many encounters, perhaps running in parallel for victims and offenders. Any such reconciliation must begin with redressing the inequality caused by crime. (This is a key point that Hampton and Acorn raise, but which Hudson does not address.) Such redress may come in many forms, and I shall not consider the debates concerning individualized and just deserts responses (Hudson, 2003, p. 186). Rather, drawing on the arguments of Duff (2003, pp. 48-9), I propose that the inequality caused by crime is redressed, at least ideally, by three types of “suffering” by an offender: remorse, received censure, and making reparation to a victim. Remorse is, in my view, the most important of the three. It is a precious commodity in that it cannot be forced, induced, taken, or imposed; it is the necessary resource that makes it possible to move justice from a zero sum game. When remorse is not forthcoming (or as importantly, is perceived as such), justice is a zero sum game; a victim’s anger toward an offender and desire for more suffering increase (Retzinger & Scheff, 1996), along with perhaps excessive demands for punishment. When remorse *is* forthcoming, it is possible to begin to align the interests of victims and offenders.<sup>13</sup>

*Site 2. Social Divisions: Race and Gender Politics*

The individual inequalities caused by crime take place in a wider political context, in which social divisions, structured by class, race-ethnicity, and gender (among others) form the grounds of contestation. Race and gender politics can be viewed as a group-based overlay on the positional interests of offenders and victims: Indigenous (or racialized minority) groups emphasize offenders' interests; feminist groups, victims' interests. In light of relations of Indigenous (or racialized minority) groups to the state, which are grounded in distrust spawned by a history of white racism, racial prejudice, and discrimination, taking the positional interest of an offender is logical and expected. Likewise, for feminist groups, who awakened consciousness to "the problem that has no name" (sexual and physical abuse by men toward women, particularly in the home), taking the positional interest of a victim is logical and expected. The ways in which these group-based interests relate to restorative justice and Indigenous justice are best revealed by providing examples.

First, drawing from Heather Nancarrow's (2006) research in Australia, we learn why Indigenous and non-Indigenous women have differing views on the potential and pitfalls of restorative justice. In 2000, two Queensland reports—one by the Aboriginal and Torres Strait Islander Women's Taskforce on Violence, and another by the Taskforce on Women and the Criminal Code—reached different conclusions about the merits of restorative justice for domestic and family violence. The first group, composed entirely of Indigenous women, saw restorative justice as a viable option; and the second, composed almost entirely of non-Indigenous women, did not. Nancarrow's research found that the two groups had different ideas of what restorative justice was and what it could achieve. Whereas the Indigenous women viewed restorative justice as a means of empowering Indigenous people, the non-Indigenous women equated restorative justice with mediation. Nancarrow found that Indigenous women's support for restorative justice stemmed from their distrust of established

criminal justice and the harm it currently causes (and has caused in the past), whereas non-Indigenous women had greater trust in the system. Both groups agreed that a combination of restorative justice and established criminal justice was possible; however, the Indigenous women saw restorative justice as the primary response, with established criminal justice as the back-up, whereas the non-Indigenous women saw it just the opposite way.

In addition to showing the reasons for a racialized split in women's views on restorative justice, Nancarrow's research also reveals that when people are talking about restorative justice, they are not talking about the same thing. This is a crucial point, and one of the reasons for the contestation that arises between and among Indigenous and non-Indigenous women on alternative justice forms, more generally. If justice alternatives are viewed by Indigenous groups (including Indigenous women's groups) as activities that operate at some distance from the state or that can be "owned" by Indigenous groups, they are appealing. For non-Indigenous women, by contrast, the task is to enjoin and work with the state to take crime (in particular, violence against women) seriously; not doing so means that such crimes may be re-privatized. Also, and of equal importance, non-Indigenous women may expect that the state can carry through on an agenda of criminalization without causing further harm to them or their families. Indigenous women would be more wary of assuming positive benefits of criminalization.

Second, drawing from research in Australia and Canada on Indigenous justice practices, we see that relatively less attention is given to the role of victims in the sentencing process. The focus instead is on using Indigenous mechanisms of social control and censure to attempt to change offenders, with incarceration understood to be a measure of last resort. How or whether victims are supported, or whether, more generally justice is achieved for victims, is a significant area of contestation between men and women within Indigenous enclaves, which I consider in the discussion of Site 3. Here, we can observe a related problem

when judicial officers may attempt to tailor (that is, reduce) penalties to the circumstances of male defendants, especially those who live in remote areas. In Canada, some Indigenous women observe that there appears to be a “discount” when Indigenous men rape or assault Indigenous women (see e.g., LaRocque, 1993, 1997; Nightingale, 1991; Razack, 1994).

LaRocque (1997, p. 89) suggests that “in the guise of cultural sensitivity, non-Native judges and lawyers have, as a rule, sympathized with Native rapists and child molesters on cultural grounds ...” Taking a contrary view, Hollow Water (Manitoba) community member Berma Bushie (1997, p. 135) argues that “we don’t believe in incarceration, “ [and] “the reason ... is there’s no healing in that place ... [and] “there’s no way that [offenders] can even talk about what they’ve done.”

These examples reveal the complexity of race and gender politics, and in particular, the shifting and differing positions taken by Indigenous women on established and alternative practices. On the one hand, Indigenous women may, more than non-Indigenous women, see the value of alternative justice practices, especially when these can translate into more meaningful ways of addressing crime and community disorder. At the same time, these alternatives may appear to protect “their” men from deserved penalties or from removal from the community. Their men (especially the more powerful leaders), in turn, may form alliances with non-Indigenous judicial officers and lawyers, who align themselves with the positional interests of offenders, although this is couched in terms of community interests and culture.

### ***Site 3. Individual Rights and Collectivities***

Examples from Canada and Australia reveal the gender politics that arise in Indigenous women’s relationship to “community.” Site 3 is related to Site 2 in that racialized women’s justice claims are often pulled more toward offenders than victims because offenders come to represent the “collectivity” of racialized group interests. It is important to recognize, however,

that individual rights claims may be marshaled differently, depending on the context. One context is women's rights to bring forward experiences of violence within racialized groups or collectivities (victims' rights). A second is an offender's rights when confronting a collectivity such as the state or a community.

*Gender politics and victims' rights*

In Australia and Canada, feminist claims for justice have been equated with women's individual rights; and anti-racist claims, with collective interests or rights of Indigenous people. What this translates to, concretely, is whether to prioritize offenders (in the interests of collective social harmony) or victims (in the interests of women's rights to safety).

Paraphrasing Emma LaRocque (1997, p. 87), Indigenous women are put in "an untenable position of having to choose between gender and culture."

As documented by Marchetti (2008) for Australia, during the investigations and research that was part of the Royal Commission into Aboriginal Deaths into Custody (1991), Indigenous women put community interests ahead of "women's issues." As a consequence, their experiences and concerns with family violence were not brought forward; rather they raised "concerns such as racism in the police force, housing, employment, education, and substance abuse" (Marchetti, 2008, p. 12). They did not wish to "encourage any line of inquiry that would reflect poorly on their communities, and in particular, their Indigenous men" (p. 14).

In Canada, the debates over collective and individual rights have been sparked by the use of several Indigenous justice practices for cases of violence against women and children (Cameron, 2006). In communities in and around Hollow Water, Manitoba, a community-wide process was established in the late 1980s to address widespread problems of sexual abuse within and across families and generations. Called Community Holistic Circle Healing, it uses a "decolonization therapy" that emphasizes "cultural values" in the "healing journeys" of

victims and offenders (Lajeunesse, 1996, pp. 59, 18). The process requires that an offender admit to offending and commit to a period of intensive counseling; parallel process are also set in motion to support victims. Although the Hollow Water circle healing process has received praise from restorative justice and Indigenous justice advocates, some Indigenous women say that community interests are given precedence over women's rights. For circle sentencing, Rashmi Goel (2000, p. 320) says that the "sentencing circle represents a significant step in the ability of Aboriginal communities to regain control over dispute resolution and justice matters. ... Success in the circle means success for the individual offender, and another step forward in recognizing Aboriginal self-government." However, this puts great pressure on Indigenous communities to "make the sentencing circle work," and in particular, to show its effects in reducing recidivism. One consequence, Goel says, is that victims' interests are silenced, especially victims of family and sexual violence: "the victim is obscured by a central focus on *the offender as a victim* of colonial society" (p. 324, emphasis added). The "circle encourages the Aboriginal woman to place her community interests ahead of her own" (p. 317) (see also Crnkovich & Addario, 2000; Stewart, Huntley, & Blaney, 2001).

Despite these problems, Goel considers the positive value of circles. They can be a forum to raise community awareness about family violence, provide community-based services, and offer women some means of redress. However, Goel believes that circles will only become meaningful and effective when women enter the circle as equals. The same point was made some time ago in the *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), where as Razack (1994, p. 913) suggests, Indigenous women's "responses speak of healing and community but also speak of safety of women and of equality; they are different in a significant way from the forgiving approach [advanced by advocates of circles] because they attempt to come to terms with women's realities at the intersection of racism and sexism."

Compared to Canada, relatively less criticism has been raised by Australian Indigenous

women on the ways in which male community leaders may use Indigenous sentencing practices to their advantage. Circles and other Indigenous sentencing practices are more recent in Australia than Canada; as a consequence, less is known about them and the ways in which cases are handled. Having observed recent developments, I would say that Australian Indigenous initiatives have been created with a greater degree of participation by women, and with more explicit attention to women's interests (see also Blagg, 2002). At the same time, like Indigenous Canadian women, Australian Indigenous women are in structurally ambivalent relationship to their communities and their men when responding to sexual and family violence.<sup>14</sup> For example, Melissa Lucashenko (1997, pp. 155-56) says that "Black women have been torn between the self-evident oppression they share with Indigenous men—oppression that fits uneasily ... into the frameworks of White feminism—and the unacceptability of those men's violent, sexist behaviors toward their families." The experience of racial oppression is shared with men; community or culture can be a refuge from racism and a source of strength in challenging a dominant white society. At the same time, because some men may hurt and harm women and children, community is not a refuge or a safe place.

A key element in understanding the complexities of race and gender politics is to observe the way in which the terms victim and offender are discursively reconfigured and mobilized. I have said that the general stance of Indigenous (or racialized minority) groups is to emphasize offenders' interests in the criminal process. At the same time, in individual cases, Indigenous defendants may deflect or minimize culpability by constituting themselves as victims of white colonization (Goel, 2000). Describing the impacts of colonization or continued forms of neo-colonial relations is not the problem. The problem instead is that when an offender makes a discursive shift from offender to victim, the actual victim is



obscured. The zero sum game is played out with an offender taking the place of both offender and victim, with the actual victim having been removed (discursively) from the game.

### *Offenders' rights*

A second context of rights claims is when an offender faces the collectivity of the state (as victim). This is the context that Hudson (2003) has in mind in calling attention to the need to balance offender's and victim's rights in alternative justice practices. She suggests that although established criminal justice "does not necessarily afford the actual victim a hearing, it assumes the perspective of the victim" (p. 184). Further, she argues that established criminal justice "prioritizes the victim perspective in the sense that it makes the penalty relate to the harm done to victims, allowing for offender interests by the contrivance of a standard victim" (p. 186). Although restorative justice may individualize cases better than established justice, both solve "the problem of equilibrium ... by coming down clearly on one side—that of the victim" (Ibid.).<sup>15</sup> Taking the positional interests of an offender, Hudson is concerned that unless offenders have "positive rights," a zero sum game will be played out, with the rights of the collective (the state or community) eclipsing those of an offender.

## **INTERSECTIONAL POLITICS OF JUSTICE**

To address conflicts and competing interests that emerge in the sites of contestation, an intersectional politics of justice requires *resources* (offender remorse; knowledge and capacities of victims, offenders, community people; and state supports); *movement* of group-based interests to other positional interests; and *positive rights* for victims and offenders that are not compromised by collectivities. My framework is schematic, provisional, and unadorned: an intersectional politics of justice could easily become larger, more complex and sophisticated, and informed by a variety of social and political theories.

For redressing *the inequality caused by crime*, a required element that may begin to align the interests of an offender and victim is an offender's remorse. One of three types of offender "suffering" identified by Duff, remorse is the resource that shifts justice away from a zero sum game. I agree with Acorn and Duff that redressing the inequality caused by crime is achieved by a "sign" from the offender that s/he has harmed another person: it is a sign of recognition to the victim as a "real person" (as Hudson proposes) and a sign of suffering (even if this is only symbolic, as in a sincere apology). Without "real" offender remorse, neither distributive nor substantive justice can be achieved. I agree with Hudson (2003) that positive rights for victims and offenders are required, but within an intersectional justice framework, these are exercised and used as resources in Site 3.

For *social divisions*, including feminist and anti-racist social movement politics, there are numerous relationships to consider, but I shall focus on the two examples discussed above. Differences in group-based claims of Indigenous and non-Indigenous women can move toward common ground once non-Indigenous women began to recognize and take the positionality of Indigenous women.<sup>16</sup> What this means concretely is that non-Indigenous women need to see the state as not only invested with male interests, but also with class interests, white interests, and whiteness. It also means that non-Indigenous women appreciate the limits of criminalization and formal legality: in particular, this means that "getting tough" on offenders may translate into further harm to socially disadvantaged women. There are other related consequences of this shift in perspective as it affects service provision for victims. Finally, non-Indigenous women need to see the limits of an analysis of male violence against women that focuses solely on partner violence, not the broader set of relations and harms that are part of family violence (Kelly, 2002). Indigenous women will also need to move by becoming familiar with and strategic about the uses of formality legality. This is particularly relevant in establishing women's rights in a collectivity. Each group needs to

recognize the other as having important resources (knowledge and capacity) to achieve a shared objective of a safer and more secure society for women and children.

The common ground of male interests in justifying violence against women (that is, those of the judiciary and community leaders), which may cross boundaries of class and race, must change. Men must recognize and take the positionality of women. This is not as difficult as it seems. For some time, men have taken the positional interests of women, although in highly restricted ways by protecting or defending the honor of “their women” and children. Men need to shift from the positionality of *their* women and children, to that of all women and children.<sup>17</sup> At a Family Violence Forum,<sup>18</sup> Indigenous leader Mike Dodson made comments that showed intersectional thinking and ways forward. He said that family violence “is not just a black boy problem. White fellas are struggling, and we can learn from each other.”

For *individual and collective interests*, an intersectional politics of justice assumes that victims and offenders have positive rights, which are not compromised by collectivities. This is easier said than accomplished. Gender relations, and in particular, women’s subordinate position in white or racialized collectivities, is a seemingly natural condition. Invoking women’s individual rights is often viewed in negative terms: as elitist (white, middle class, feminist) and as anti-male, anti-family, and anti-community. Few women would wish to identify with this string of negatives.

At the Family Violence Forum, Indigenous leader Jackie Huggins said “we are not going anywhere without our men in dealing with family violence.” To “stand with our men” does not mean to be subsumed within or engulfed by a collectivity. It is an image that reflects intersectional thinking: a both/and status of standing side by side with men: as a woman and a member of a collectivity. Intersectional thinking is also apparent in Razack’s (1994, p. 913)

characterization of Canadian Indigenous women's interests in both "healing and community" and "safety of women and equality" in addressing crime and violence.

While the above examples are about the relationship of individuals as crime victims to collectivities, intersectional thinking is also required for offenders in their relationship to collectivities. Drawing from Hudson (2003), positive rights can be a resource for offenders to avoid a zero sum game between victims and offenders.

With an intersectional framework, we can see the ways in which restorative and Indigenous justice improve upon established criminal justice, and where further improvements can be made. The quality of remorse is evoked, at least ideally, when an offender and victim are "real" to each other (restorative justice) or when an offender confronts an Elder (Indigenous justice). The emphasis placed on honest communication and dialogue gives the justice process immense discursive power, which is lacking in established criminal justice (Hudson, 2003).

Indigenous justice practices are not only discursive, but they may challenge and attempt to change a white legal perspective. Blagg (2005, p. 3) terms this "constructive hybridization," and it refers to the ways in which "Aboriginal values and principles can be incorporated into the non-Aboriginal justice system." Constructive hybridization reveals intersectional thinking. However, it must include Indigenous women's interests and avoid inappropriate uses of cultural arguments. Restorative justice practices typically work within a dominant white perspective, but they could benefit by using constructive hybridization.

Indigenous justice practices can be improved by bringing the voice or perspective of the victim into the process. This is especially important so that an offender does not take up the position of offender and a victim of colonial society, which has the effect of obscuring the victim. It may also serve to break the common ground of male interests (that is, those comprising white justice and black community leaders).

Both Indigenous and restorative justice rely on the capacities and actions of victims, offenders, and communities in responding more appropriately and meaningfully to crime. However, Hudson (2003, p. 190) calls attention to the danger of “putting too much responsibility onto victims and offenders and their ‘communities of care’ for crime reduction,” which absolves the state of its responsibilities and obligations. In particular, the state must provide adequate resources for effective rehabilitation of offenders and for services and support for victims. This obligation stems, in part, from the state’s “complicity in racist and sexist cultures” and its role in deepening “socio-economic inequities” (p. 191). The state too must begin to engage in intersectional thinking.

#### ENDNOTES

<sup>1</sup> This paper expands upon previous work (Daly, 2005; Daly & Stubbs, 2006; Marchetti & Daly, 2007). My thanks to Brigitte Bouhours, Elena Marchetti, Heather Nancarrow, and Gitana Proietti-Scifoni for their comments on an earlier draft.

<sup>2</sup> There are many complexities in the victim-offender relationship which I gloss over in this paper. In actual cases, victims and offenders often depart from idealized conceptions and assumptions (see Christie, 1986; Green, 2007; Daly, 2008).

<sup>3</sup> In her more recent work, Razack (2007) extends her discussion of women, gender, culture, and the state to debates among and between feminist, Muslim, and immigrant groups, in which contestation arises over the meanings and trade-offs of “refuge” for women in secular states and religious communities.

<sup>4</sup> Throughout this essay, I use new, alternative, or innovative justice practices to refer to restorative justice, Indigenous justice, and other related forms.

<sup>5</sup> Indigenous is capitalized except when it is not capitalized by others in quoted material.

Community participation can be from an Elder or a Respected Person, but for simplicity, I refer to Elders. This portion of the paper draws on material in Daly (2002), Daly et al. (2006), and Marchetti and Daly (2007).

<sup>6</sup> For analyses of customary law and modern forms of Indigenous justice, see Law Reform Commission of Western Australia (2006a, 2006b) and Northern Territory Law Reform Committee (2003).

<sup>7</sup> Inevitably, when Indigenous courts are discussed in Australia, someone will ask why there are not courts for other racialized minority groups. Chris Vass, who worked with an Indigenous community in South Australia to launch the first Indigenous sentencing court in 1999, said to me, “I don’t see anything wrong with the courts recognizing people from different cultures and dealing with that specific person in a slightly different way. All courts should adopt a slightly different approach so *that* person and *that* culture feel that that they’re being listened to rather than coming into an alien environment” (Daly interview with C. Vass, 28 September 2001, emphasis added).

<sup>8</sup> This section draws from Marchetti and Daly (2007), where comparisons are drawn among restorative justice, Indigenous justice, and therapeutic jurisprudence.

<sup>9</sup> There are significant debates in the restorative justice literature over the meaning of community, which I shall not address here (see Walgrave, 2002).

<sup>10</sup> Terms such as doing justice, white justice, whiteness, white system, white state, community, and the community are put in quotation marks when they first appear; after that, I use quotation marks for these works sparingly.

<sup>11</sup> Among the contexts and areas I do not include are youth diversionary conferences, proposed restorative justice guilty pleas (Combs, 2007), bail procedures, and a variety of prison or pre-release meetings.

<sup>12</sup> Hudson (2003, p. 193) defines a “positive rights agenda” as seeing “all humans has having rights which do not have to be earned, cannot be forfeited, and must be respected.”

<sup>13</sup> Following Hudson’s (2003, pp. 179, 182-84) point that we must distinguish between different types of victim-offender relations in depicting optimal justice responses, and in particular, between on-going intimate violence and “one-off” incidents, my remarks have in mind the latter types of victim-offender relations. As others have emphasized (e.g., Acorn, 2004, p. 74; Stubbs, 2007), remorse and apology are part of a cycle of violence in partner abuse.

<sup>14</sup> Of course, all racialized women in dominant white societies are likely to be in this structurally ambivalent relationship, but my analysis focuses on Indigenous women. In dominant white societies, the meaning of community for white women differs in that refuge may be sought in a variety of non-racialized communities.

<sup>15</sup> In a structural sense, Hudson is right that the state assumes the perspective of the victim; but in practice, whether for established or restorative justice, the experience of victims is rarely of justice coming down on their side.

<sup>16</sup> This discussion could be extended to different racial-ethnic contexts and specificities for dominant and minority groups, but I focus on Indigenous and non-Indigenous women as exemplars.

<sup>17</sup> This needs to be done in ways that do not reinscribe the superiority of white western men, who aim to “protect” women and children from black, non-western, or Other men (see Razack, 2007).

<sup>18</sup> The Forum was convened by the Queensland Centre for Domestic and Family Violence Research, Central Queensland University, Mackay, May 2004.

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