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The Effects of Regulated Discretion on Police Referrals to Restorative Justice

Diane Crocker
Saint Mary's University

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The Nova Scotia Restorative Justice Program relies heavily on referrals from police who are authorized to refer a range of property and both violent and non-violent offences. Federal legislation and provincial protocols guide referral decisions. Both are designed to ensure that police consider extra-judicial measures, including restorative justice. This article reports the findings of a survey of police officers on their views of restorative justice and the types of cases they consider appropriate for a referral. The findings confirm what other researchers have found about the types of cases police officers prefer to divert from mainstream criminal justice responses. Placed in the context of the Nova Scotia Restorative Justice Program, the current survey findings shed light on how efforts to structure discretion and decision-making will have limited effect.

Le programme de justice réparatrice de la Nouvelle-Écosse compte beaucoup sur les dossiers transmis par les policiers qui sont autorisés à y orienter des délinquants coupables d'infractions violentes et non violentes. Les lois fédérales et les protocoles provinciaux orientent leurs décisions. Tant les lois que les protocoles visent à faire en sorte que les policiers envisagent le recours à des moyens extrajudiciaires, y compris la justice réparatrice. Cet article fait état des conclusions d'un sondage effectué auprès de policiers sur leurs vues de la justice réparatrice et des types de cas qu'ils considèrent comme appropriés pour le transfert. Les conclusions confirment ce que d'autres chercheurs ont constaté quant aux types de cas que les policiers préfèrent écarter des réponses usuelles de la justice pénale. Dans le contexte du programme de justice réparatrice de la Nouvelle-Écosse, les conclusions du sondage expliquent comment les efforts visant à structurer le discernement et la prise de décision auront un effet limité.

* Associate Professor, Department of Sociology and Criminology, Saint Mary's University. I would like to thank the Halifax Regional Police for their cooperation. Superintendent Don Spicer, Sergeants Mike Spurr, Dennis Crowell, and Lindsay Hernden facilitated my access to members of the police force. Constable Richard MacDonald contributed to the development of the questionnaire. Retired Superintendent Mike Burns was also integral to the early development of the research and Jennifer Llewellyn provided feedback on the project as it evolved. Researchers and other partners involved with the NSRJ-CURA contributed to this project by identifying relevant questions for the survey. Several were of particular help in designing the questionnaire including Bruce Archibald, Yvonne Atwell, Sylvia Dearing, and Pat Gorham. I also thank Chris McNeil, former Deputy Chief of the Halifax Regional Police, for his valuable feedback on an earlier report on the findings of this survey. The research also could not have been completed without the help of two research assistants: Ben Burgess and Josh Norwood. Thanks also to Lindia Smith for editing assistance. Jennifer Llewellyn, Bruce Archibald, and Don Clairmont provided feedback on an earlier draft of this paper. This paper was presented at the International Conference on Restorative Justice co-organized by the NSRJ-CURA and the International Institute on Restorative Practices in June 2011. The Social Sciences and Humanities Research Council (grant # 833-2005-1007) funded this research as part of a larger grant to the Nova Scotia Restorative Justice-Community University Research Alliance.

Introduction

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Introduction

Police forces across Canada have been open to restorative justice and other extrajudicial measures. In the 1990s, for example, the RCMP officially adopted a restorative justice response to non-violent offences and developed a program of Community Justice Forums.¹ Other police forces across the country have, at least ostensibly, endorsed restorative justice and encourage its use under certain circumstances.² These examples are consistent with some research that shows police officers themselves support the values of restorative justice.³

In Nova Scotia, police forces participate directly in the province's restorative justice program. They refer youth to the program and, at times, attend sessions.⁴ In Halifax, the municipal police force, who participated in the survey reported in this article, has taken several measures to support the restorative justice program. For example, they have assigned a Youth Court Officer who reviews files relating to youth and may refer a case to restorative justice even if the attending officer initially chose to lay a charge.

The Nova Scotia Restorative Justice Program (NSRJ) relies heavily on referrals from police services across the province. Between 1998 and

1. Jhama Chatterjee & Liz Elliott, "Restorative Policing in Canada: The Royal Canadian Mounted Police, Community Justice Forums, and the Youth Criminal Justice Act" (2003) *Police Practice & Research* 347.

2. A Google search of "restorative justice," "police," and "Canada" finds many examples of police forces who have included reference to and discussions of restorative justice on their web pages.

3. Voula Marinos & Nathan Innocente, "Factors Influencing Police Attitudes towards Extrajudicial Measures under the Youth Criminal Justice Act" (2008) 50 *Can J Crim & Crim Jus* 469; Thomas Winfree, "New Zealand Police and Restorative Justice Philosophy" (2004) 50 *Crime & Delinquency* 189.

4. For details on the process of referrals see Bruce Archibald & Jennifer J Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2005) 29 *Dal LJ* 297.

2010, of the almost 10,000 referrals involving a Criminal Code offence, sixty per cent have come from police.⁵ The rate of referrals from police (compared to other sources) has remained fairly stable over time with a low of forty-five per cent in 2002 to a high of seventy-one per cent in 2010.⁶ High levels of referrals from the first point of contact with the criminal justice system are consistent with the underlying principles of restorative justice, and many people working in the system believe that referrals should, for the most part, come from police.⁷

While police make up a large proportion of the referrals to restorative justice, restorative justice agency directors have suggested that police sometimes fail to refer eligible cases. The directors wondered whether police lacked knowledge about the program or simply felt that it was an inappropriate response for certain offenders or offences. The appointment of the Youth Court Officer in Halifax suggests that the police administrators in Halifax shared these concerns about whether front-line officers would refer appropriate cases.

In light of these observations, I designed a survey to investigate which variables inform police officers' decisions to refer a particular case to restorative justice. I hoped to better understand the factors that discourage officers from making referrals. The survey asked questions about the type of offenders and offences that police officers prefer to refer to the Nova Scotia Restorative Justice Program. Understanding police officers' views is critical to the success of the program given that the hope is for almost all young offenders to have access to restorative justice.⁸

This article begins by outlining the context in which referrals are made to the NSRJP and the policies guiding such referrals. I then provide a brief review of the literature that helped guide the development of the survey and contextualizes this research. After presenting the survey findings, I discuss the results and conclude that efforts to structure decisions or discretion,⁹ to make decisions more predictable and based on concrete reasons, will have a positive but limited effect. I conclude that, given police officers'

5. The program also responds to violations of municipal by-laws and provincial statutes. I have reported the numbers for criminal offences because our survey questions included only these offences.

6. Restorative Justice Information System, Department of Justice, Nova Scotia.

7. Don Clairmont & Ethan Kim, "Getting Past the Gatekeepers: The Reception of Restorative Justice in the Nova Scotian Criminal Justice System" (2013) 36 Dal LJ 359.

8. This desire can be inferred from the fact that almost all offences are eligible to be referred to the program, notwithstanding the fact the referrals for the most serious offences may be made only by courts or corrections.

9. According to Carrington and Schulenberg (2008) the term "structured decision-making" originated in KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

preconceived notions of the suitability of restorative justice for certain offenders and offences, policy makers should consider other ways to ensure that restorative justice, or other extrajudicial measures are available to all youth who come into contact with the law. Efforts to structure decisions through explicit policies may fail to change officers' views and thus may not effectively increase their propensity to refer cases to the program.

I. *Context*

Police in Canada generally exercise discretion in laying charges. They can decide, based on the evidence or other factors, whether the laying of a charge is warranted. In some instances, such as domestic violence, legislators have limited police discretion to ensure that charges are laid.¹⁰ The legislation relevant to this research, the *Youth Criminal Justice Act* (*YCJA*)¹¹ structures police discretion in relation to youth crime.¹² The *YCJA* requires criminal justice officials to consider "extrajudicial measures" (pre-charge)¹³ and "extrajudicial sanctions" (post-charge).¹⁴ The *YCJA* involves police as the front-end source of referrals.¹⁵ It encourages these responses regardless of whether the youth has been previously cautioned or charged. The Department of Justice Canada summarizes the principles of the *YCJA* as follows:

- extrajudicial measures should be used in all cases where they would be adequate to hold the young person accountable;
- extrajudicial measures are presumed to be adequate to hold first-time, non-violent offenders accountable; and,
- extrajudicial measures may be used if the young person has previously been dealt with by extrajudicial measures or has been found guilty of an offence.¹⁶

While the intention seems quite clear, the Act fails to provide detailed guidelines.¹⁷ On the one hand then, the *YCJA* requires police consider

10. For example, police forces across Canada have adopted mandatory or pro-arrest policies that encourage arrests and limits officers' discretion. See Trevor Brown (2000) "Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses," Research and Statistics Division, Department of Justice, Canada.

11. *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*].

12. Peter Carrington & Jennifer Schulenberg "Structuring Police Discretion: The Effect on Referrals to Youth Court" (2008) 19 *Crim Jus & Pol Rev* 349 at 350.

13. *YCJA*, *supra* note 11, s 4.

14. *Ibid*, s 10.

15. Chatterjee & Elliott, *supra* note 1.

16. Department of Justice Canada, *The Youth Criminal Justice Act: Summary and Background* (Ottawa: Department of Justice Canada, 2010) online: <<http://www.justice.gc.ca/eng/pi/yj-jj/ycja-ls/jpa/back-hist.html>>; also see *YCJA*, *supra* note 11, s 10.

17. Carrington & Schulenberg, *supra* note 12 at 353.

options other than charging. On the other, as Carrington and Schulenburg¹⁸ suggest, the Act is devoid of precise guidelines for the application of discretion. They characterize it as “structuring police discretion.”

While the *YCJA* structures discretion at the national level, legislation in Nova Scotia provides more detailed guidelines. Nova Scotia has an extensive restorative justice program that includes the extrajudicial measures and sanctions referenced in the *YCJA*. In Nova Scotia, a decision to refer a case to restorative justice depends on several factors:¹⁹

1. Eligibility of offence to be referred by police;
2. Seven minimum requirements;
3. Discretionary factors.

Only certain offences may be referred at the police level. Police may refer provincial statute offences, minor property offences, disorderly conduct offences, minor assaults not resulting in physical injury, and minor mischief. These offences are also eligible for a formal caution.²⁰ Police may also refer most other *Criminal Code* offences with the exception of twelve of the most serious crimes, including murder and aggravated assault.²¹ The more serious offences may be referred post-charge by the Crown, the court, or corrections, depending on the offence. Currently, cases involving sexual assault and spousal/intimate partner violence are ineligible for restorative justice.²²

To make a referral to restorative justice, officers must complete the “Restorative Justice Checklist” for each encounter with a young person. The Checklist includes the seven minimum requirements laid out in the *YCJA*²³ that must be met for a referral to be made:

18. *Ibid* at 350.

19. Nova Scotia Department of Justice, *Restorative Justice: A Program for Nova Scotia, Program Authorization* (Halifax, Department of Justice, 2003), online: <<http://www.gov.ns.ca/just/tj/materials.asp>> [Authorization].

20. With a formal caution the police send a letter to a youth’s parent or guardian. The letter confirms that the youth has admitted committing an offence, but that the police have decided not to lay a charge. The caution does not result in a criminal charge or criminal record but is held by the police. The police may use it in relation to subsequent involvement of that youth with the justice system. See *Authorization, ibid* at 4.

21. The specific offences include fraud and theft-related offences over \$20,000; robbery; sexual offences (proceeded with as a summary offence); aggravated assault; kidnapping; abduction and confinement; criminal negligence/dangerous driving causing death; manslaughter; spousal/partner violence offences; criminal harassment; impaired driving; indictable sexual offences (indictment); and murder. For details see Archibald & Llewellyn, *supra* note 4 at 315; *Authorization, supra* note 19 at 4.

22. For details see Archibald & Llewellyn, *supra* note 4 at 324.

23. These statutory requirements are laid out in the *YCJA, supra* note 11, s 10.2. See also *Authorization, supra* note 19 at 6.

1. Referral is consistent with the protection of society;
2. Referral is appropriate having regard to the interests of the offender, victim, and the community;
3. The offender accepts responsibility for his/her actions²⁴;
4. The offender has been informed of, and consents freely and fully, to participating in the program;
5. The offender has been advised of his/her right to counsel without delay and is given a reasonable opportunity to retain and instruct counsel;
6. There is sufficient evidence to proceed with the prosecution of the offence;
7. Prosecution of the offence is not barred by law.

In theory at least, police should fill out the checklist for all encounters with a young person to show, for those not referred, why the referral is inappropriate. In practice, the checklists are often used for only those cases being referred.²⁵

While these requirements are fairly specific they leave room for interpretation. For example, officers may differ in how they assess whether an offender has accepted responsibility for an incident. They may also disagree about whether a referral is consistent with the protection of society.²⁶

The eligibility requirements and the seven minimum requirements should guide an officer's decisions as to whether they may refer the case to restorative justice. The protocol that authorizes the Nova Scotia Restorative Justice Program also provides for twelve discretionary factors that officers may consider.²⁷ These factors are a matter of provincial policy and police officers decide which ones are relevant to a particular case. The protocol states that:

- 6.1 Prior to an offender being referred to the Restorative Justice Program at any of the referral entry points, the following discretionary factors must be considered:
 - 6.1.1. the cooperation of the offender;
 - 6.1.3. the desire and need on the part of the community to achieve a restorative result;

24. This requirement relates to a basic premise in restorative justice: that wrongdoers must accept responsibility before undertaking restorative justice. It differs from a legal admission of guilt.

25. Personal communication with Pat Gorham and Don Clairmont.

26. There appears to be no judicial consideration to date of these requirements.

27. *Authorization*, *supra* note 19 at 7. See also Nova Scotia Department of Justice, *Restorative Justice Program Protocol* (Halifax: Department of Justice, 2005), online: <<http://www.gov.ns.ca/just/rj/materials.asp>> [*Protocol*].

- 6.1.4. the motive behind the commission of the offence;
- 6.1.5. the seriousness of the offence and the level of participation of the offender in the offence, including the level of planning and deliberation prior to the offence;
- 6.1.6. the relationship of the victim and offender prior to the incident, and the possible continued relationship between them in the future;
- 6.1.7. the offender's apparent ability to learn from a restorative experience and follow through with an agreement;
- 6.1.8. the potential for an agreement that would be meaningful to the victim;
- 6.1.9. the harm done to the victim;
- 6.1.10. whether the offender has been referred to a similar program in recent years;
- 6.1.11. whether any government or prosecutorial policy conflicts with the restorative justice referral;
- 6.1.12. such other reasonable factors about the offence, offender, victim and community which may be deemed to be exceptional and worthy of consideration.

Given the discretionary aspects of the decision to refer, understanding the circumstances under which the police exercise discretion is critical to ensuring successful referrals to the program. Our questionnaire allowed us to look at how officers interpret several of the discretionary factors.

II. *Literature review*

Several Canadian researchers have explored whether policies that structure discretion have the intended consequences in relation to youth crime. Carrington and Schulenberg²⁸ analyzed Canadian police data and found a change in charging behaviour after the implementation of the *YCJA*. They conclude that the Act has successfully structured discretion and diverted many youth away from being charged. Clairmont has shown how the policies that both structure discretion and decision making led to increasing referrals to the Nova Scotia Restorative Justice Program compared to an earlier diversion program.²⁹ This research suggests that policies directing police to refer youth to extrajudicial measures can affect police decisions and reduce charging. But these policies still leave room for discretion and others have looked into what factors police use to make their decisions.

Marinos and Innocente found that officers were uncomfortable with using extrajudicial measures for youth with prior criminal justice system

28. Carrington & Schulenburg, *supra* note 12.

29. Clairmont & Kim, *supra* note 7.

contact of any kind.³⁰ According to their interviews, officers felt that youth with prior criminal justice encounters needed to be held accountable by the formal criminal justice system. Other researchers have come to similar conclusions about the importance of prior contact with the criminal justice system in police decision making about youth.³¹ Given that the *YCJA* emphasizes that the criminal justice response applies to the current offence,³² the fact that prior contact continues to be relevant presents a concern.

Research has consistently found youth attitude also affects police decision to divert or use an extrajudicial measure—this finding has been consistent over time in Canada.³³ Attitude, or “swagger”³⁴ is a “proxy for remorse and responsibility.”³⁵ As Schulenburg demonstrates, officers typify particular types of youth as delinquent.³⁶ Attitude is part of that typification, along with prior contact with the criminal justice system.

Police have also identified seriousness of offences as another relevant factor in deciding to refer a youth to extra-judicial measures. Officers consistently report a preference for diverting cases involving minor offences.³⁷ Their comfort with the use of extrajudicial measures for less serious offences reflects their support for “progressive discipline” whereby harsher responses are reserved for the most serious offences.³⁸ As a result of this view, we might find that police refer only minor offences to extrajudicial measures.

Related particularly to the Nova Scotia context, Clairmont analyzed the Restorative Justice Checklists completed by police officers.³⁹ The Checklists document the reasoning behind an officer’s decision to refer to restorative justice or to charge. Clairmont found the following reasons were most commonly cited on the checklists:

30. Marinos & Innocente, *supra* note 3.

31. Anthony Doob & C Cesaroni, “The Decline in Support for Penal Welfarism: Evidence of Support among the Elite for Punitive Segregation” (2003) 43 *Brit J Crim* 434; Kelly Carrington, “Postmodernism and Feminist Criminologies: Disconnecting Discourses” in Kathleen Daly & Lisa Maher, eds, *Criminology at the Crossroads* (New York: Oxford, 1998); Peter Carrington & Jennifer Schulenburg, “Introduction: The Youth Criminal Justice Act—A New Era in Canadian Juvenile Justice?” (2005) 46 *Can J Crim & Crim Jus* 219.

32. Richard Barnhorst, “The Youth Criminal Justice Act: New Directions and Implementation Issues” (2004) 46 *Can J Crim & Crim Jus* 231 at 236.

33. Marinos & Innocente, *supra* note 3.

34. Clairmont & Kim, *supra* note 7.

35. Marinos & Innocente, *supra* note 3 at 484.

36. Jennifer Schulenburg, “Police Culture and Young Offenders: The Effect of Legislative Change on Definitions of Crime and Delinquency” (2006) 9 *Police Q* 423.

37. Marinos & Innocente, *supra* note 3.

38. *Ibid.*

39. Clairmont & Kim, *supra* note 7.

1. seriousness of offence;
2. criminal record;
3. views of victims;
4. “swagger”; and
5. whether they can attach a meaningful undertaking (e.g., the youth must not be out later than 10:00 at night).⁴⁰

His findings echo earlier research and suggest the need for further research to explore whether the factors that officers believe led to their choices really did.

While the policies that direct officers to consider extra-judicial measures may have an effect on the number of referrals to such programs, the research reviewed above suggests that these policies will have limited effect. In her research, Schulenburg explored whether, when making decisions about whether to divert a youth away from formal processes, officers rely more heavily on their typifications, based on their previous experience, or on policy.⁴¹ She found a split between rationales based on policy and those that drew on typifications. She concludes that “it is conceivable that the police will continue to arrest and lay charges for offences they perceive as serious despite a definition to the contrary in the YCJA.”⁴²

III. *Data collection and research design*

During the winter of 2011 a researcher attended police training sessions for members of the Halifax Regional Police. A researcher⁴³ invited officers to fill out a pen and paper questionnaire. The questionnaire asked officers about their views on restorative justice and their level of participation in the Nova Scotia program. It included two hypothetical scenarios or vignettes, discussed in more detail below, which described a typical encounter between a police officer and a youth. We asked officers to assess whether, in their personal opinion, a referral to restorative justice was appropriate. We also asked respondents to tell us whether they would caution, charge or refer the case to restorative justice. Appendix A provides details about the vignettes.

The vignettes included only offences that police officers may refer to the restorative justice program under the guidelines laid out in the program authorization document (described above). The most serious offence involved a youth who hit his friend with a stick. This offence probably does

40. *Ibid.*

41. Schulenburg, *supra* note 36.

42. *Ibid* at 444.

43. Either the author or a research assistant.

not constitute an aggravated assault, which would make it ineligible for referral from the police.⁴⁴ Many of the offences described in the vignettes constituted level one offences, making them eligible for a formal caution. For example, the incident involving minor vandalism, with little damage, constitutes a level one offence. Most of the offences constituted level one or two offences, making them eligible for a referral to restorative justice. The level one offences were also eligible for a formal caution.

We would not, however, expect all officers to caution or refer all of these cases given the discretion extended to the restorative justice protocols, the intent of the survey was to explore which discretionary elements are most important and how they affect both officers' personal views and how the officers think they would respond to particular incidents.

I chose variables that may relate to an officer's choice to refer, caution, or lay a charge based on a review of the literature and consultations with partners working on the NSRJ-CURA, including members of the Halifax Regional Police. The variables fall into three broad categories: characteristics of the offence, characteristics of the suspect, and characteristics of the officer. The goal of the survey was to assess how these variables affected both officers' personal views on whether restorative justice was appropriate and whether they would caution, refer, or charge.

The questionnaire was designed to tease out which variables affect officers' decisions. Known as a factorial survey,⁴⁵ the questionnaire included several vignettes about typical encounters that police might have with young people. We had two sets of vignettes: one to measure the effects of characteristics of the suspect and the other to measure the effects of characteristics of the offence.

In the first set of vignettes we varied the characteristics of the suspect: prior contact with police (yes or no), race (black or white), and class/demeanour (private school/polite or public school/argumentative).⁴⁶ The questionnaires distributed included vignettes with all possible combinations of these characteristics resulting in twelve unique vignettes. An equal number of officers receive each one. I have referred to this set

44. *Criminal Code*, RSC 1985, c C-46, S 268(1).

45. Guillermina Jasso, "Exploring the Justice of Punishments: Framing, Expressiveness and the Just Prison Sentence" (1998) 11 *Social Justice Research* 397; Guillermina Jasso, "Factorial Survey Methods for Studying Beliefs and Judgments" (2006) 34 *Social Methods & Research* 334; Lisa Wallander "25 Years of Factorial Surveys in Sociology: A Review" (2009) 38 *Social Science Research* 505.

46. This variable measures neither demeanour nor class but a combination of the two forming a stereotypically "good" youth, who acts politely and goes to a private school, and "bad" youth, who goes to public school and is argumentative. These are admittedly crude indicators of how an officer may perceive young people. The variable signifies several stereotypes.

of vignettes as the “suspect vignettes” in the description of the findings to follow.

In the second set of vignettes, we varied the characteristics of the offence so that officers received either a property offence or a violent offence. For each type of offence we also varied the seriousness (minor, serious), the level of harm (low, high), and the type of victim (person, institution). This resulted in twelve unique vignettes. An equal number of each was distributed among respondents.⁴⁷ I have referred to this set of vignettes as the “offence vignettes.”

The design of this research allows us to identify the factors that underlie an officer’s personal opinion or the kind of decision they would make. The research design makes this possible because some officers read different vignettes, with different combinations of the variables. For example, some officers read a vignette with a property offence, while others read a vignette with a violent offence. Our analysis can thus compare responses for the different vignettes to identify what kinds of offences officers prefer to refer to restorative justice. This design allows researchers to identify factors affecting views and decisions that may not be apparent to the research participant.

IV. Findings

A total of 297 members of Halifax Regional Police answered our survey. All front-line officers were required to attend the training at which we collected data. As a result, the sample essentially includes all front-line officers who would be in a position to make referrals to restorative justice, except those on vacation or out sick during the training.

We asked several demographic questions and found that:

- eighty-one per cent were men;
- eighty-six per cent were Constables;
- on average, respondents had worked for Halifax Regional Police for five years;
- typically, respondents were between thirty-one and thirty-five years of age;
- twenty-six per cent had worked for another police force, usually for only one year.⁴⁸

47. Given that we have four variables, each with two options, we can in theory have sixteen unique vignettes. However, given the nature of the variables, some vignettes are not possible. For example, we cannot have a violent offence against an institutional victim.

48. None of the characteristics of the officers had an effect on their opinion or decisions.

According to the survey, members have little experience attending sessions of the NSRJ. Half said that they had never attended a session and only twenty-five per cent said that they had attended in the past year. Those who attended a session in the past year had typically attended only one. A small number, ten per cent, had attended more than one session in the past year; twenty-eight per cent had attended more than one over their career with Halifax Regional Police. Despite not having attended many restorative justice sessions, officers felt quite familiar with restorative justice in general, and the Nova Scotia program in particular (see Table 1).

V. *Support for restorative justice*

As shown in Table 2 below, officers generally viewed restorative justice as a viable alternative for youth and adults: almost three-quarters of officers agreed or strongly agreed.⁴⁹ While the data suggests a high level of support for restorative justice, one-quarter of our respondents disagreed that restorative justice offers a viable alternative. Given that the province and the police force itself have fully endorsed restorative justice, having so many officers disagree that it offers a viable alternative is surprisingly high.

In reference to our hypothetical scenarios, Table 3 shows that a large proportion, between one-third and one-quarter, felt that restorative justice was not at all appropriate for the incidents we described. Officers generally viewed the shoplifting incident contained in the vignettes as less appropriate for referral to restorative justice than the vignette that described either vandalism or an assault. The average responses provide further evidence of their discomfort. We gave answers of “not at all appropriate” a score of one; “somewhat appropriate” scored two; and, “very appropriate” was given a score of three. The average answer to the vandalism/assault vignette was 2.15 and the average response to the shoplifting vignette was 1.97. The higher average reveals that officers preferred the vandalism/assault vignette—they tended to find it more appropriate than the one involving shoplifting. When asked to comment on their choice, officers noted that the incident of shoplifting involved drugs and two discrete offences. Neither the *YCJA* nor the provincial protocols explicitly include these issues as factors that should be considered.

When asked what they would actually do in response to our vignettes, officers were reluctant to refer the incidents to restorative justice (see Table 4). Only about half said that they would refer the incidents and a

49. In contrast, public opinion polls show that the general public is more open to the use of restorative justice for youth than adults, Julian V Roberts & Loretta J Stalans, “Restorative Sentencing: Exploring the Views of the Public” (2004) 17 *Social Justice Research* 315.

large proportion said that they would lay a charge. Given that all vignettes describe eligible offences this finding suggests that officers rely on the discretionary factors available to them.

VI. *Eligible offences*

As shown in Table 5, we found that officers were more likely to deem property offences as appropriate for restorative justice compared to violent offences.⁵⁰ Similarly, a higher proportion of officers said that they would refer the property crime over the violent crime. These findings support the earlier conclusion that discretionary factors must be at play in their decisions because these crimes are eligible to be referred by the police. Police are not simply basing their decisions on the eligibility criteria.

VII. *Discretionary factors*

As described earlier, the provincial protocols include twelve discretionary factors and our survey included measures related to five of them: the cooperation of the offender, the seriousness of the offence, the harm done to the victim, and whether the offender has been referred to a similar program. We also included type of victim, either a person or an institution, which relates to one other factor identified in the discretionary factors: relationship between victim and offender. All of the discretionary factors in our vignettes had an effect on officers' views and decisions. Tables 6 to 10 show that the relationship between characteristics of the incident, officers' personal views, and choice to caution, refer, or charge.

Not unexpectedly, a higher proportion of officers were personally more comfortable with referring minor offences than serious offences and incidents resulting in less harm than those with more harm (see Table 6). Just over half of the officers agreed that the minor offence was very appropriate for restorative justice compared to twenty-five per cent who felt similarly about the more serious offence.⁵¹ Similarly, a higher proportion of officers felt that the offence with less harm was very appropriate for a referral compared to the offence that resulted in more harm (see Table 6).⁵² When asked what they would do about the incidents, a higher proportion of officers said that they would refer the more minor and less harmful incidents (see Table 7). These findings suggest that officers rely heavily on the discretionary factors relating to seriousness and harm. Their views

50. All the tables reported in this paper are statistically significant.

51. The minor offence was either a common assault or a *small amount* of vandalism. The more serious offence was either a serious assault or vandalism that caused substantial damage.

52. For the property offence, the level of harm was indicated by the dollar amount of the damage. The harm for the assault differed by the seriousness of the injury and the effect on the victim.

and their decisions reflect some of the discretionary factors laid out in the *Restorative Justice Program Protocol*.⁵³

We found some evidence, although weaker, about the relationship between the type of victim and the view of the officer about whether the case should go to restorative justice. It seems that officers are more likely to deem the incident as “not at all appropriate” for restorative justice if it involved a person as the victim, rather than an institution (Table 8). There was also a tendency, although weak, for officers to be more likely to think that they would lay a charge when the victim was a person, not an institution (Table 8). Possibly the officers deem these incidents as more serious.

Certain characteristics of the youth also had an effect on whether the officers personally believed that the incident was appropriate for restorative justice or how they would decide to respond. Prior contact stood out as being related to both personal views and officers’ decision to caution, refer, or charge (Table 9). Officers were more likely to deem a case “very appropriate” if the youth had no prior contact with police and they were less likely to agree if the youth had prior contact.⁵⁴ A much higher proportion of officers whose vignette included a youth with prior offences decided to lay a charge compared to those who received a vignette with a youth who did not have any prior contact. Interestingly, the relevant discretionary factor in the provincial protocols refers to whether a youth has been referred to a similar program, rather than whether he or she has had any prior contact with the criminal justice system. It seems that officers might be interpreting this factor in a broader way to refer to any contact with the system rather than as previous referrals to restorative justice.

One of the vignettes described the youth as polite and carrying a private school card. In the other, the youth was argumentative with a public school identification card. Table 10 shows that officers were more likely to deem incidents involving an argumentative, public school youth to be “not at all” appropriate than the incidents involving a polite, apparently upper class, youth.⁵⁵ The demeanor/class of the youth also affected how officers thought they would respond to the incident. A higher proportion of the polite, private school youth would have received a caution or a referral than the argumentative, public school youth. Similarly, a higher proportion of

53. *Protocol*, *supra* note 27 at 3.

54. Public opinion polls find that the general public is also hesitant to use restorative justice for repeat offenders. See Roberts & Stalans, *supra* note 49.

55. Because of the design of this variable we cannot draw any conclusions about the discrete effect of class on officers’ decisions or perceptions.

officers said that they would lay a charge against the argumentative youth. These results may reflect the inclusion of “cooperation of the offender” in discretionary factors of the provincial protocols and show that attitude or “swagger” is relevant to officers’ opinions and decisions. We cannot separate the effect of the class indicator (public or private school) from the demeanour, the findings here do show that officers have in mind a type of youth who is more suitable than others.

VIII. *Discussion*

In deciding whether to caution, refer, or charge, it appears that officers’ choices line up with the spirit of the referral protocols described earlier and that a large proportion feel comfortable referring cases to restorative justice. Officers were reluctant to refer the most serious and most harmful incidents. They hesitated to refer cases involving crimes against individuals or involving violence. Both of these may have been interpreted as more serious than property crimes and those against an institution. Officers’ referral patterns suggest that they follow a model of graduated referrals leading them to refer the least serious offences. This pattern was also described by Clairmont based on his interviews with police officers in Nova Scotia.⁵⁶ What is apparent from the current research is that officers apply the spirit of the legislation and the protocols in a fairly conservative way.

While the protocols say nothing explicit about type of youth best suited to restorative justice, the list of discretionary factors includes an assessment of several characteristics of the youth. In responding to our vignettes, we saw officers more reluctant to refer youth with prior police contact and those who were argumentative. It may be reasonable to assume that officers interpreted the argumentative youth as not taking responsibility and that referring a youth who has had prior contact with police is not in line with the protection of society. These decisions can therefore also be seen as in line with the restorative justice protocol. Having said that, restorative justice advocates would argue that, given the nature of the vignettes provided, officers were being far too cautious. Advocates would argue, and research supports their claim, that restorative justice should not be restricted to less serious offences and less troublesome offenders. Indeed, research has found that restorative justice may be most effective for cases involving serious offences.⁵⁷

56. Clairmont & Kim, *supra* note 7.

57. Tanya Ruge, James Bonta & Suzanne Wallace-Cabretta, *Evaluation of the Collaborative Justice Project* (Ottawa: Public Safety Canada, 2005).

These findings would be of less concern if we assumed that officers may have preferred to have some of the cases referred by someone else. It could be that officers in Halifax prefer to see the referral made by the Youth Court Officers, who review files and make referrals for cases not referred by the responding officer. Alternatively, as discussed by Clairmont, the officers may prefer to have cases referred at a higher level, post-charge to emphasise the seriousness of the offences.⁵⁸ However, the responses to other questions on this survey suggest that many personally felt that referrals were inappropriate for many of these cases. It seems then that many of the officers would not have been satisfied with referral to restorative justice from any level. Approximately one-quarter felt that restorative justice was not at all appropriate for the incidents described in the vignettes. As noted earlier, this proportion seems high in a police force that has been highly supportive of the restorative justice program.

Furthermore, it could be argued that all of the vignettes described cases that could, or even should be referred to restorative justice by the police. Many were so minor that they could have been cautioned. For example, the minor offences involved either a few hundred dollars of property damage or a youth who punched another, with no injury. Arguably, given the nature of the incidents in the vignettes officers should have been less conservative in their application of the discretionary factors and more open to referring what constitute low-level offences.

Conclusions

Officers working with Halifax Regional Police believe they are very familiar with restorative justice despite having attended very few restorative justice sessions. Given this perception, they would likely not welcome explicit training about restorative justice, but may benefit from attending sessions of the Nova Scotia Restorative Justice Program. Their participation may be especially important because of the hint in the survey of a relationship between attendance at sessions and comfort with making referrals.⁵⁹

Given the high level of support for restorative justice provided by Halifax Regional Police we might have expected officers to have been more personally open to restorative justice for our vignettes. We might have also expected that fewer of them would decide to lay a charge. While the findings suggest that police are making decisions in line with the protocols we might also question why so many were reluctant to refer cases that

58. Clairmont & Kim, *supra* note 7.

59. We found that officers who had attended more restorative justice sessions were very slightly more likely to say that they would refer the cases described in our vignettes.

could be referred. Depending on one's perspective, these findings confirm the utility of the protocols as they stand or suggest that work needs to be done to ensure that they are not interpreted as a way to limit referrals.

This research confirms what others have found about police officers' views—what this research did differently was to provide officers with hypothetical scenarios. This allowed us to identify factors, if any, that officers may not have realised were guiding their decisions. The findings suggest that officers rely heavily on discretionary factors rather than the criteria outlined in the minimum requirements. This may explain why many officers were reluctant to refer cases that clearly met the minimum requirements.

For policy-makers then, it may be worth considering how to move forward and find ways to generate more referrals to extrajudicial measures. Tightening up on policy and further structuring discretion may not have the intended consequences.⁶⁰ Given that we found some relationship between participation in restorative justice and preference for making referrals, it seems that policymakers should consider increasing opportunities for police officers to participate in restorative justice. As Shaw and Jané concluded:

Establishing formal protocols and procedures and training will not be sufficient, however. Police occupational culture which guides daily practice is often cited as a major factor inhibiting change. Primarily transmitted through stories and anecdotes, it is argued that giving police 'different stories to tell' (because of their closer involvement in justice decision-making) will facilitate a shift towards restorative justice (and community policing).⁶¹

60. Schulenberg, *supra* note 36.

61. Margaret Shaw & Frederick Jane, *Restorative Justice and Policing in Canada Bringing the Community into Focus* (Ottawa: RCMP, 1998).

Table 1: Level of Familiarity

How would you describe your level of familiarity with...	<u>Percent Responding</u>		
	<u>Very Familiar</u>	<u>Somewhat Familiar</u>	<u>Not at all Familiar</u>
restorative justice?	50	50	0
the Nova Scotia Restorative Justice Program	40	59	1

Table 2: Level of Support

How strongly do you agree that restorative justice offers a viable alternative for...	<u>Percent Responding</u>			
	<u>Strongly Agree</u>	<u>Agree</u>	<u>Disagree</u>	<u>Strongly Disagree</u>
young offenders?	12	62	24	1
adults?	9	64	24	3

Table 3: Personal Opinion on Restorative Justice for Each Vignette

In your personal opinion, setting aside any of the rules about referring cases to restorative, how appropriate is restorative justice in this case?	<u>Percent Responding</u>			<u>Average Response</u> ⁶²
	<u>Very Appropriate</u>	<u>Somewhat Appropriate</u>	<u>Not at All Appropriate</u>	
Offence Vignettes	38	40	23	2.15
Suspect Vignettes	25	46	29	1.97

62. Higher scores indicate more agreement that the case was appropriate for a referral.

Table 4: Response to Each Vignette

Applying the rules as you understand them, what do you think you would actually do in this case?	<u>Percent Responding</u>		
	<u>Formal Caution</u>	<u>Refer to restorative justice</u>	<u>Charge</u>
Offence Vignettes	16	50	34
Suspect Vignettes	8	46	46

Table 5: Opinions About and Response to Property and Violent Offences

In your personal opinion, setting aside any of the rules about referring cases, how appropriate is this case for restorative justice?	<u>Type of Offence</u> ⁶³	
	<u>Property</u>	<u>Violent</u>
Very Appropriate	44	25
Somewhat Appropriate	40	39
Not at all Appropriate	<u>16</u>	<u>37</u>
Total Percentage	100	100
Total Respondents	(199)	(96)
What would you actually do about this incident?		
Formal Caution	10	29
Refer to restorative justice	62	25
Lay a Charge	<u>29</u>	<u>46</u>
Total Percentage	100	100
Total Respondents	(199)	(96)

63. The total number of questionnaires that included a property offence differed from the number that included a violent offence because of the more limited number of combinations of variables that could be included in the vignette about the violent offence.

Table 6: Opinions Depending on Seriousness and Level of Harm of the Offence

In your personal opinion, setting aside any of the rules about referring cases, how appropriate is this case for restorative justice?	<u>Seriousness of Offence</u>	
	<u>Minor</u>	<u>Serious</u>
Very Appropriate	51	25
Somewhat Appropriate	35	44
Not at all Appropriate	<u>13</u>	<u>32</u>
Total Percentage	100	100
Total Respondents	(144)	(151)

	<u>Level of Harm</u>	
	<u>Low</u>	<u>High</u>
Very Appropriate	45	30
Somewhat Appropriate	39	40
Not at all Appropriate	<u>24</u>	<u>30</u>
Total Percentage	100	100
Total Respondents	(149)	(146)

Table 7: Response Depending on Seriousness and Level of Harm of the Offence

What would you actually do about this incident?	<u>Seriousness of Offence</u>	
	<u>Minor</u>	<u>Serious</u>
Formal Caution	21	12
Refer to restorative justice	58	42
Lay a Charge	<u>22</u>	<u>46</u>
Total Percentage	100	100
Total Respondents	(144)	(151)

	<u>Level of Harm</u>	
	<u>Low</u>	<u>High</u>
Formal Caution	24	8
Refer to restorative justice	48	51
Lay a Charge	<u>28</u>	<u>40</u>
Total Percentage	100	100
Total Respondents	(149)	(146)

Table 8: Opinion and Response Depending on Type of Victim

	<u>Type of Victim</u>	
	<u>Person</u>	<u>Institution</u>
In your personal opinion , setting aside any of the rules about referring cases, how appropriate is this case for restorative justice?		
Very Appropriate	34	45
Somewhat Appropriate	40	39
Not at all Appropriate	<u>26</u>	<u>16</u>
Total Percentage	100	100
Total Respondents	(195)	(100)
What would you actually do about this incident?		
Formal Caution	17	13
Refer to restorative justice	44	61
Lay a Charge	<u>39</u>	<u>26</u>
Total Percentage	100	100
Total Respondents	(195)	(100)

Table 9: Opinions and Responses Depending on Youth's Prior Contact

	<u>Prior Contact</u>	
	<u>No</u>	<u>Yes</u>
In your personal opinion , setting aside any of the rules about referring cases, how appropriate is this case for restorative justice?		
Very Appropriate	37	14
Somewhat Appropriate	47	46
Not at all Appropriate	<u>17</u>	<u>40</u>
Total Percentage	100	100
Total Respondents	(144)	(147)
What would you actually do about this incident?		
Formal Caution	9	6
Refer to restorative justice	64	29
Lay a Charge	<u>27</u>	<u>65</u>
Total Percentage	100	100
Total Respondents	(146)	(149)

Table 10: Opinion and Response Depending on Youth Demeanour

In your personal opinion , setting aside any of the rules about referring cases, how appropriate is this case for restorative justice?	<u>Demeanour</u>	
	<u>Polite/private school</u>	<u>Argumentative/Public school</u>
Very Appropriate	29	21
Somewhat Appropriate	49	43
Not at all Appropriate	<u>22</u>	<u>35</u>
Total Percentage	100	100
Total Respondents	(146)	(145)
 What would you actually do about this incident?		
Formal Caution	12	4
Refer to restorative justice	47	45
Lay a Charge	<u>41</u>	<u>51</u>
Total Percentage	100	100
Total Respondents	(148)	(147)

Appendix

Each unique vignette was made up of a core story with several variations.

The Suspect Vignette varied the race of the suspect, whether he was in public or private school, whether he was co-operative or belligerent and whether he had prior contact with police (see text in bold for variations).

The Offence Vignette varied the type of offence, the seriousness of the offence, the level of harm and the type of victim. Some combinations of these variables were implausible and therefore not included (for example, a violent crime cannot be committed against an institution)

Each officer received one version of the suspect vignette and one version of the offender vignette.

Suspect Vignettes

Midway through your dayshift you are dispatched to a report of a shoplifter at a store on Spring Garden Road. Dispatch advises you that the complainant, the store clerk, saw a young male enter the store and put several expensive shirts in his backpack. The youth fled the store on foot and was seen running westbound toward Barrington. The complainant described the youth as a **black OR Caucasian** male approximately 14 years old, five foot seven inches tall. He was wearing **what looked like a private school uniform, khakis, a crested jacket OR wearing jeans, a black hooded sweater** and carrying a green backpack.

You make patrols and locate a youth matching the suspect description. You pull up next to him and exit your vehicle. **The youth attempts to run but there are too many people in the way. He throws down the backpack in frustration and curses at you. OR The youth does not attempt to run but is being a bit mouthy and belligerent.** You ask the youth his name and he gives you a **high school ID card OR an ID card from the Grammar School.** You identify the youth as Jonathan Smith and you are satisfied with the information that Jonathan has given you. Dispatch reports that he has **no previous history with the police OR one prior conviction for a minor assault.**

Jonathan gives you the backpack containing the stolen goods. You take his backpack and look inside. While taking out the stolen goods, you also find a small amount of what looks like marijuana. Jonathan reluctantly admits that it's his **and starts arguing with you about whether you had the right to look in his bag OR says he's worried about getting into trouble.**

Offence Vignette

Violent Offence Against a Person

You are driving a marked police vehicle in the area of Robie and Quinpool when you are dispatched to a report of a fight at a home on Duncan street. Dispatch advises that an anonymous caller reported two young people fighting. You arrive at the residence, exit your vehicle. You see two Caucasian males—one with a bloody nose, lying on the ground. The other is standing there, looking confused and upset.

You identify the male with the bloody nose as Sam MacDonald, 16 years old. The second male is identified as Daniel Smith, also 16 years old. You are satisfied with the information that the youths have given you and dispatch advised that neither have any previous contact with the police. You decide to question each separately about the altercation.

Daniel tells you that he was feeling really jealous because Sam had been flirting with his girlfriend. **He admitted having hit his friend with a stick and kicking him when he fell to the ground OR He admitted having punched Sam and kicked him when he was down.** He sounds pretty angry and is swearing a lot.

Sam tells you that Daniel confronted him and accused him of flirting with his girlfriend. Sam says that Daniel walked up to him, hit him with a stick and kicked him when he was down. His nose bleed is clearing up **but he tells you he thinks he should see a doctor and is really upset about the incident. He worries that the conflict will escalate again some other time. He seems really shaken up OR and he tells you he is feeling OK and would like to go home. He understands why his friend was upset and just wants to put the incident behind him.**

Property Offence Against a Person

You are driving a marked police vehicle in the area of Robie and Quinpool when you are dispatched to a report of a vandal at a home on Duncan Street. Dispatch advises that an anonymous caller reported seeing a youth running away from a garage that was covered in graffiti. You arrive at the residence and exit your vehicle. You see a young man in the walkway between the house and the garage. He has a spray can in his hand. When he sees you he swears and throws the spray can to the ground. He is clearly angry but does cooperate with your request to provide you with identification.

You identify the male as Daniel Smith, 16 years old. You are satisfied with the information that he has given you and dispatch advises that he has not had any previous contact with the police.

Daniel tells you that he was angry at the guy who owns the garage because he had not hired him to do odd jobs in his yard and around the house. While he admits to doing the damage, he sounds pretty angry and is swearing a lot.

While talking to Daniel you notice that the **damage to the garage is extensive—there's paint all over the door and the siding. It also appears that some of the siding has been ripped off the building. There is also damage to the eaves troughs. OR that only the door of the garage has been painted and the damage was minimal. You estimate it's only a few hundred dollars in damage.**

The owner of the building comes out. **and is clearly very upset. He says it's the third time his garage has been vandalized and he's started to feel like he's being targeted. He tells you that he has no money to fix his property OR He says it might cost several thousand dollars to fix the damage. Despite this, he is very understanding and he is concerned about why this happened.**

Property Offence Against an Institution

You are driving a marked police vehicle in the area of Robie and Quinpool when you are dispatched to a report of a vandal at Citadel High. Dispatch advises that an anonymous caller reported seeing a youth loitering around the school. You arrive at the school and exit your vehicle. You see one Caucasian male. He has a spray can in his hand. When he sees you he swears and throws the spray can to the ground. He is clearly angry but does cooperate with your request to provide you with identification.

You identify the male as Daniel Smith, 16 years old. You are satisfied with the information that he has given you and dispatch advises that he has not had any previous contact with the police.

Daniel tells you that he was angry at the school because he had not made the football team. While he admits to doing the damage, he sounds pretty angry and is swearing a lot.

While talking to Daniel, you notice that **only the door of the school has been painted and the damage was minimal. You estimate it will not cost much to fix. OR that the damage is extensive. There is paint all over the front door. Some planters have been kicked over and the glass in the door is broken. There's several thousand dollars in damage.**

You contact the principal on the phone, tell her what has happened and describe the damage. She says that she's disappointed in Daniel's reaction to not making the team. **She is concerned about why this happened OR She says that the school insurance will not cover this type of thing**

so the money to fix the damage will come directly out of the school's budget. She's concerned about how this will affect the school.