

RELATIONS OF DOMINATION AND SUBORDINATION: CHALLENGES FOR RESTORATIVE JUSTICE IN RESPONDING TO DOMESTIC VIOLENCE

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‘[H]istories, social relations, and conditions ... structure groups unequally in relation to one another and ... *shape what can be known, thought and said* ... we need to direct our efforts to the conditions of communication and knowledge production that prevail, calculating not only who can speak and how they are likely to be heard but also how we know what we know and the interest we protect through our knowing.’¹

Non-domination is said to be a core value of Restorative Justice (‘RJ’), but if we acknowledge that asymmetrical social relations position people differently, and ‘shape what can be known, thought and said’,² what are the implications for RJ practices? Canadian sociologist Sherene Razack has examined ‘how relations of domination and subordination stubbornly regulate encounters in classrooms and courtrooms’;³ I wish to extend this analysis to other rooms, including those that are the settings for RJ. This is an important focus for inquiry since proponents of RJ commonly suggest that it offers advantages over conventional criminal justice – especially for victims of crime. Yet we know relatively little about how differential social relations play out within the dynamics of restorative processes, and in turn how they may shape the meanings that emerge. In the current Australian context, law reform bodies have been considering whether RJ processes provide an answer to some of the failings of conventional criminal justice in responding to family violence or sexual offences.⁴ In this article I examine these issues through the lens of gendered violence, with particular

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1 Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (University of Toronto Press, 1998) 10 (emphasis in original).

2 Ibid.

3 Ibid 10.

4 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9 (2010) 545–60; Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 84; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) 478.

reference to domestic violence and sexual assault, as a means of displacing the approach common in much RJ literature of working with an undifferentiated concept of victim (offender and offence).⁵

I RESTORATIVE JUSTICE AS VICTIM FOCUSED

Among the most common claims made by proponents of RJ are that it offers significant benefits to victims of crime and that it redresses the failure of conventional criminal justice to attend to victims' needs and interests. While RJ models differ in the emphasis they give to victims' interests, RJ is said to be victim-centred and victim-focused, and it is argued that by putting harm at the centre of restorative deliberations, victims' interests will be served.⁶ The benefits claimed for victims include numerous symbolic, material, therapeutic and moral outcomes.⁷ Many of these claims have not been tested. Victim participation rates in RJ schemes vary substantially (from 7 per cent to 85 per cent).⁸ Most empirical research has focused on victim satisfaction rather than other concepts, but demonstrates that victims and other participants report high levels of satisfaction with RJ,⁹ although satisfaction has been conceptualised inconsistently.¹⁰ While there is no clear and agreed theoretical account as to how or why RJ should benefit victims,¹¹ many of the claims made focus on the communicative potential of RJ.

A Communication is Key to Restorative Justice Encounters

Proponents of RJ give great weight to the communicative potential of RJ processes. For instance, Lode Walgrave argues that '[a]fter a crime has occurred, the settings in support of restoration are more appropriate for communicating moral disapproval and provoking repentance than are traditional punitive

5 I have used the term domestic violence to highlight my specific concerns with RJ in the context of violence committed by a current or former intimate partner and because domestic violence is the term used in relevant legislation and policy in NSW. However, in parts my argument may apply more broadly to other offences that might be considered under the heading of gendered harms. In other jurisdictions such as Victoria and in the *Family Law Act 1975* (Cth) the term 'family violence' is used to incorporate domestic violence; where I draw on literature from such jurisdictions I have preserved the terminology used in the original source.

6 James Dignan, *Understanding Victims and Restorative Justice* (Open University Press, 2005).

7 An overview of these claims is provided in Kathleen Daly and Julie Stubbs, 'Feminist Engagement with Restorative Justice' (2006) 10 *Theoretical Criminology* 9; see also Julie Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology and Criminal Justice* 169.

8 Dignan, above n 6, 137.

9 Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (The Smith Institute, 2007).

10 Jo-Anne Wemmers and Marisa Canuto, 'Victims' Experiences with, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature' (Department of Justice Canada, Policy Centre for Victim Issues, 11 March 2002).

11 Simon Green, 'The Victims' Movement and Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007) 171.

procedures and sanctions'.¹² It is said that in conventional courts 'confrontation prevails over communication' and the threat of punishment is an obstacle.¹³ While not all RJ processes involve face to face interaction between victim and offender, 'communication between the victim and offender is the primary process by which conflict resolution is reached'.¹⁴

Some typologies of RJ characterise those processes in which victims and offenders are involved in dialogue as more fully restorative than other models;¹⁵ key features include 'narrative, promotion of understanding, addressing emotional issues and reparation'.¹⁶ Some models of RJ, such as Victim Offender Mediation ('VOM'), are described as 'dialogue-driven, focusing on sharing experiences and perspectives first, and only secondarily turning to whatever potential resolutions or agreements might evolve', rather than 'settlement-driven'.¹⁷ Others describe RJ as deliberative justice.¹⁸

Walgrave argues that by positioning 'victimisation as the focal concern', RJ 'provides a huge communicative potential'.¹⁹ Some accounts make more direct claims that the communicative practices of RJ will benefit victims. Proponents commonly emphasise that the discursive character of RJ offers victims the opportunity to tell their stories and participate in determining an agreement about how to redress the harm. This is said to be empowering or 'therapeutic' for victims. Some advocates presume that telling their story is cathartic for victims, and 'dissolves disturbing images arising in the mind as a result of the offence, empowers them and gives them a sense of closure'.²⁰ Kay Pranis says that '[p]ersonal narratives are the primary source of information and wisdom in restorative justice approaches' but '[t]he critical element is to use [them] to understand the harms, the needs, the pains and the capacities of all participants so that *an appropriate new story* can be constructed'.²¹

The aspirations of RJ to promote victims' needs and interests are laudable, but as some RJ proponents have come to recognise, these aspirations are difficult

12 Lode Walgrave, *Restorative Justice, Self-Interest and Responsible Citizenship* (Willan Publishing, 2008) 51.

13 John Braithwaite, 'Between Proportionality and Impunity: Confrontation – Truth – Prevention' (2005) 43 *Criminology* 283 cited in Walgrave, above n 12, 50.

14 Green, above n 11, 176–7.

15 D W Van Neww, 'The Shape of Things to Come: A Framework for Thinking about a Restorative Justice System' in E G M Weitekamp and H J Kerner (Eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002), cited in Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009).

16 Ibid 40.

17 Mark S Umbreit et al, *Facing Violence: The Path of Restorative Justice and Dialogue* (Criminal Justice Press, 2003) 10–11.

18 Adam Crawford, 'Institutionalizing Restorative Youth Justice in a Cold Punitive Climate' in Ivo Aertsen, Tom Daems and Luc Robert (eds), *Institutionalizing Restorative Justice* (Willan Publishing, 2006) 120.

19 F Schweigert, 'Moral Education in Victim Offender Conferencing' (1999) 18 *Criminal Justice Ethics* 29, cited in Walgrave, above n 12, 51.

20 G Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing, 2002) 117, cited in King et al, above n 15, 56.

21 Kay Pranis, 'Restorative Values and Confronting Family Violence' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 31 (emphasis added).

to meet in practice.²² Much RJ scholarship suffers from a reliance on an undifferentiated notion of the victim, from inadequate attention to the competing interests of the parties in RJ, and from an as yet underdeveloped analysis of communication within RJ processes.

B Beyond the Undifferentiated Victim (Offender or Community)

Several commentators have noted limitations within RJ responses to victims. These include a tendency to assume an ‘idealised victim’, which may ‘tacitly ... endorse similar stereotypical notions of the victim’²³ and ‘a highly undifferentiated view of the victim’²⁴ which pays little regard to victim characteristics or ‘assumes a uniformity of characteristics among the victim population’.²⁵ Perhaps this reflects what James Dignan has described as the ‘profound ambivalence in relation to victims’ within the ‘philosophical and intellectual traditions’ that have ‘nurtured’ RJ developments.²⁶ Walklate traces three different constructions of the victim within RJ in the United Kingdom; ‘the structurally neutral victim’, ‘the socially inclusive community as victim’ and ‘the offender as victim’.²⁷ I concur with Walklate that each of these constructions is flawed.

As Walklate suggests, the first of these – the presumption of the ‘structurally neutral victim’ – underpins the focus of typical RJ models on ‘bringing the two parties to the event together in the sense of an equal relationship, to make repairs for what has happened’; but what of those ‘from a structurally less powerful position’, and might not RJ reproduce existing inequalities?²⁸ As Chris Cunneen has argued, we need to ask ‘whether the difficulties and disadvantages particular groups face in the formal legal process are resolved by the restorative justice process’.²⁹ In the second construction of victim, it is ‘the socially inclusive community’ that is deemed to be the victim. Adam Crawford has observed that within RJ processes the ‘community ... appropriated as a surrogate victim’ can serve to ‘dilute direct victim engagement and reparation’ and serve as ‘an excuse for victim non-attendance’.³⁰ Within this frame, the notion that victim and offender can each be reintegrated into an idealised, socially inclusive community

22 Mary Achilles and Howard Zehr ‘Restorative Justice for Crime Victims: The Promise, The Challenge’ in Gordon Bazemore and Mara Schiff (eds), *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson Publishing, 2001) 87.

23 Green, above n 11, 183; see also Sandra Walklate, ‘Changing Boundaries of the “Victim” in Restorative Justice: So Who is the Victim Now?’ in Dennis Sullivan and Larry Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006) 279.

24 Walklate, above n 23, 279.

25 Green, above n 11, 183; see also Strang who cautions against these tendencies: Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2004) 209.

26 Dignan, above n 6, 105. He identifies these as the ‘civilisation’ thesis, the ‘communitarian’ thesis, and the ‘moral discourse’ thesis.

27 Walklate, above n 23, 273–85.

28 Ibid 280.

29 Chris Cunneen, ‘Thinking Critically About Restorative Justice’ in Eugene McLaughlin et al (eds), *Restorative Justice Critical Issues* (Sage Publications, 2003) 182–94 at 192.

30 Crawford, above n 18, 138.

that is so common in RJ literature situates victim and offender as ‘just like us’,³¹ and glosses over the different positions and competing interests of victim, offender and ‘community’. Like the ‘structurally neutral victim’ frame, it offers no recognition of the community as a source of crime – as shaped by power relations – or of bias, prejudice or stereotypes. The third issue – offender as victim – requires a more complex response. The capacity of RJ to respond more fully to the offender, their history and their context, including the possibility that they too have been victims of crime, of marginalisation and other ills is a desirable feature of RJ, although Hudson and others note that this is less likely to be possible for some offenders and especially those that are *not like us*.³² However, from the lens of gendered violence, there are problems in affording the offender victim status or some kind of equivalence with the victim.

A response to these concerns is not to see the categories of victim and offender as having fixed or singular meanings, but rather to challenge RJ proponents to deeper reflection on the complexities of the labels victim and offender. For instance, what claims do these categories invoke? How are they interpreted and given meaning within the micro-context of the RJ process, and in the context of wider cultural understandings of those terms and of the specific offences that they stand for? If we see gendered and racialised violence as reflecting and reinforcing the subordination of women and racial minorities, what challenges does this offer to processes of restorative justice?³³ In a context where some forms of gendered harm such as domestic violence or sexual assault (or variants thereof) are not universally denounced, but may in fact find support in some aspects of the wider culture, the frames of the structurally neutral victim and the idealised community are ineffectual and may obscure important systemic dimensions of the harms they are meant to redress. There are also strong reasons to critically examine offender claims to victimhood at least where they are deployed to deflect or minimise responsibility. Recent research based on a large scale, Australia-wide, community attitude survey found that the strongest predictor of attitudes that were supportive of violence against women was being less supportive of gender equity.³⁴

One focus of feminist engagement with RJ, including my own work and especially work by Kathleen Daly, has been to challenge the undifferentiated approach common in many RJ models. One aspect of that work has been to consider the way in which the interests of victims, offenders and others may differ and compete in ways that are shaped by different offences and their contexts and meanings.

31 Walklate, above n 23, 280–1.

32 Barbara Hudson, ‘Beyond White Man’s Justice: Race, Gender and Justice in Late Modernity’ (2006) 10 *Theoretical Criminology* 29.

33 *Ibid.*

34 VicHealth, *National Survey of Community Attitudes to Violence Against Women 2009* (2009).

II COMPETING INTERESTS

The competing interests in play within conventional criminal justice are clear. As Lucia Zedner notes with respect to the conventional criminal justice system, the potential for conflict between the ‘stakes legitimately held by each of these parties – offender, victim, and society – are not readily reconcilable and their pursuit creates the potential for conflict’.³⁵ With RJ the possibilities of conflicting and competing interests also arise and need to be given due attention.

In RJ literature these opposing interests are sometimes acknowledged,³⁶ and at other times glossed over. For instance, Mara Schiff has a useful chapter on the interests of stakeholders, but she deals with each category separately without explicitly recognising that these may be in conflict.³⁷ In contrast John Braithwaite recognises:

Restorative justice has no easy escape from the horns of the dilemma that equal justice for victims is incompatible with equal justice for offenders ... it is a trilemma; restorativists are enjoined also to be concerned with justice for the community ... [and so] must reject a radical vision of victim empowerment that says any result the victim wants she should get so long as it does not breach upper constraints on punishment ... the goal ... [is] equal concern and respect for all those affected by the crime.³⁸

However, as noted above the assumption of ‘a socially inclusive community’ into which both victims and offenders are to be reintegrated ‘is untenable since it assumes that the interests of both victims and offenders are always reconcilable’.³⁹ It also fails to adequately attend to competing conceptions of community and to characteristics of communities.⁴⁰ Dignan notes that not only are there potentially conflicting sets of interests between victims and offenders, victims or offenders and the wider community, and ‘those of the state as opposed to the interests of “civil society”’,⁴¹ but there are also different conceptions of community evident in RJ writings, allowing for a possible multiplicity of competing interests. Different constructions of community include ‘offence communities’, ‘communities of care’, ‘secondary, indirect or generic victims’, or the ‘wider community’.⁴² As Dignan notes, communities are not always benign: ‘Many communities are intolerant, illiberal, coercive, engage in socially exclusionary practices and espouse a form of communitarianism that is not at all “individual centered” but authoritarian and repressive.’⁴³

35 Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 30–1.

36 Dignan, above n 6, 105.

37 Mara Schiff, ‘Satisfying the Needs and Interests of Stakeholders’ in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007) 228.

38 John Braithwaite, ‘In Search of Restorative Jurisprudence’ in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing, 2002) 150, 160.

39 Walklate, above n 23, 281.

40 Crawford, above n 18.

41 Dignan, above n 6, 179.

42 *Ibid* 183–5.

43 *Ibid* 102.

In whichever reading we give to the construct ‘community’, the meanings of victim, offender and offending will be shaped in part by community values, perhaps in variable ways. Thus we need a more complex approach recognising, first, that interests may conflict, secondly, that the categories victim, offender and community are not fixed, and thirdly that they each are implicated in shaping and giving meaning to the other with reference to specific types of offence.

Braithwaite promotes the principle of non-domination in RJ, and proposes minimum guarantees on the offender and the victim sides: ‘the law should assure them [victims] of a right to put their views in their own voice.’⁴⁴ But is that sufficient? By contrast, Kathleen Daly argues 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’.⁴⁵ For Daly we 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’.⁴⁶

In RJ there are also other competing interests – for instance, different conceptual understandings arising from different professional circles; between practitioners, and between practitioners and their organisations; between program designers and organisations or employers; and with respect to organisations that fund programs.⁴⁷ In my research with project RESTORE – a pilot project for date rape and misdemeanour sexual offences established in Arizona by Mary Koss and her colleagues⁴⁸ – competing interests between partner organisations were especially significant, and resulted in very few cases being referred to the program which has now closed.⁴⁹

At this point I want to consider some of the empirical findings from RJ evaluations that to me signal the need for a shift beyond the undifferentiated approach to victim, offender and offence that I have noted.

44 Braithwaite, ‘In Search of Restorative Jurisprudence’, above n 38, 161.

45 Kathleen Daly, ‘Seeking Justice in the 21st Century: Towards an Intersectional Politics of Justice’ in Holly Ventura Miller (ed), *Restorative Justice: From Theory to Practice* (Emerald Group, 1st ed, 2008) 3, 4. Her project explicitly engages with race and gender politics in a manner that I find persuasive but for the purposes of this paper I do not deal directly with the intersection of race and gender – although I have done so in other work.

46 Ibid 16.

47 Theo Gavrielides, ‘Restorative Justice – The Perplexing Concept: Conceptual Fault-lines and Power Battles Within the Restorative Justice Movement’ (2008) 8 *Criminology and Criminal Justice* 165.

48 Mary Koss, ‘Restorative Justice for Acquaintance Rape and Misdemeanour Sex Crime’ in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Sage, 2010) 218.

49 Julie Stubbs, ‘Meanings of Justice: Sexual Assault and the Appeal to Restorative Justice’ (Paper presented at the Australian and New Zealand Society of Criminology Conference, Perth, 22–25 November 2009).

III EMPIRICAL FINDINGS

Evaluations of RJ have produced generally positive findings, although Dignan notes that the evidence is positive with respect to ‘process’ but equivocal with respect to outcomes.⁵⁰ The evidence is strongest for victim satisfaction and procedural fairness,⁵¹ although satisfaction is not consistently defined or conceptualised.⁵² Many other claims have not been tested empirically.

Some studies have found a gap between aspirations to meet victim interests and victims’ experiences. For instance, Maxwell and Morris’s 1993 New Zealand study found that approximately one quarter of victims felt worse after attending a conference. Victim concerns included that apologies made by offenders were not genuine, or that offenders were unable to make reparations; these were attributed to implementation problems and poor practice.⁵³ However, other research suggests that implementation failures might not be the full story. Consistent with other studies, Kathleen Daly’s research on juvenile conferencing in South Australia found evidence of procedural fairness, but less evidence of ‘restorativeness’; for Daly ‘[t]hese findings suggest that although it is possible to have a process perceived as fair, it can be harder for victims and offenders to resolve their conflict completely or to find common ground’.⁵⁴ The findings also call into question some claims made about the benefits of RJ for victims of crime;⁵⁵ they are ‘more equivocal regarding the part played by conferencing – as opposed to victim resilience, support from family and friends or simply passage of time – in contributing to any recovery’.⁵⁶ Carolyn Hoyle and her colleagues, in evaluating the Thames Valley Police initiative, found low levels of victim attendance in that program, but high levels of satisfaction among those who did attend.⁵⁷ However, a cautionary lesson that Dignan draws from that research is ‘the risk of secondary victimisation when offenders who do not fully admit responsibility for an offence are brought face to face with their alleged victims in a conference’.⁵⁸

50 Dignan, above n 6, 154.

51 Strang, above n 25; Sherman and Strang, above n 9.

52 Wemmers and Canuto, above n 10; Daniel W Van Ness and Mara F Schiff, ‘Satisfaction Guaranteed? The Meaning of Satisfaction in Restorative Justice’ in Gordon Bazemore and Mara Schiff (eds), *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson Publishing, 2001) 47.

53 Gabrielle M Maxwell and Allison Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Department of Social Welfare and the Institute of Criminology, Victoria University of Wellington, 1993); see also Dignan above n 6, 141.

54 Kathleen Daly, ‘Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects’ in Allison Morris and Gabrielle M Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart, 2001) 76.

55 Ibid.

56 Dignan, above n 6, 142, citing Kathleen Daly, ‘Mind the Gap: Restorative Justice in Theory and Practice’ in Andrew Von Hirsch et al (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart, 2003).

57 Carolyn Hoyle, Richard Young and Roderick Hill, *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (Joseph Rowntree Foundation, 2002).

58 Dignan, above n 6, 148.

Few studies have examined how gender and other social relations (such as class, race, and age) are expressed in RJ practices, and most do not report findings by gender (a notable exception is Cook).⁵⁹ However, based on observations of youth justice conferences in the ACT and South Australia, Daly found that conferences were highly gendered events; few offenders were female, but most of the supporters for victims and offenders were female. Among the 25 per cent of victims who were treated with disrespect or were re-victimised during the conference, all but one were female.⁶⁰ In a second study of 89 conferences in South Australia, Daly found that victims' and offenders' experiences were shaped by the gendered contexts of offending and victimisation in the larger society.⁶¹ Her findings suggest that it is not only in cases of male violence against women and girls where these issues are pertinent. Further research by Daly has also demonstrated that RJ may do little to assist victims who have been deeply affected by crime;⁶² she noted 'the variable nature of restorative processes, which can be contingent on the offence, the kind of victim ... and the subjective impact of the victimisation'.⁶³

In a study of youth conferences in four Australian jurisdictions (ACT, NT, SA, Tas), Kimberly Cook undertook a qualitative analysis of 'doing difference' with particular reference to gender, race and class. She found that notwithstanding aspirations towards empowerment, remorse and reintegration and bridging gaps between the participants, in fact RJ tended to reinforce social privileges and disadvantages. Mothers of offenders were judged, or felt judged, as failed parents responsible for their child's offending. Fathers were mostly absent, but where present, were not judged in the same way and were mostly silent. Community representatives and facilitators were seen to encourage outcomes that reproduced existing hierarchies.⁶⁴ For Cook 'the "invisible privileges" around gender, race and class are reproduced, embraced and recommended as strategies for future goals of the participants'.⁶⁵

With these findings in mind, I now want to turn to considering RJ through the lens of gendered violence.

59 Kimberly J Cook, 'Doing Difference and Accountability in Restorative Justice Conferences' (2006) 10 *Theoretical Criminology* 107.

60 Kathleen Daly, 'Diversionary Conferencing in Australia: A Reply to the Optimists and Skeptics' (Paper presented at the American Society of Criminology Annual Meeting, Chicago, 20–23 November 1996).

61 Kathleen Daly, 'Sexual Assault and Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 62.

62 Kathleen Daly, 'A Tale of Two Studies: Restorative Justice from a Victim's Perspective' in Elizabeth Elliot and Robert M Gordon (eds), *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Willan Publishing, 2005) 164.

63 Ibid 167.

64 Cook, above n 59, 120.

65 Ibid 121.

IV TOWARDS A DIFFERENTIATED APPROACH: GENDERED (AND RACIALISED) HARMS

Proponents of RJ typically fail to consider whether the specific justice needs of victims might differ with respect to particular types of offence, characteristics of victims and offenders and types of victim-offender relationship. Kathleen Daly and Kimberly Cook have provided good empirical evidence that these issues may be pertinent for a wider range of offences, but gendered harms provide perhaps the clearest illustration of this.

In several papers over the last decade Barbara Hudson has examined the challenge to RJ represented by sexual and racial violence. In turning to RJ as one possibility of a more constructive response, Hudson considers what racial and sexual violence demand of RJ, including: strategies that can deal with large numbers of cases that ‘provide protection and redress for victims; that can change social attitudes from tolerance to disapproval; that can inculcate remorse and a desire for change in perpetrators, and that can bring about a rebalancing of power within the crime relationship’.⁶⁶ In considering whether the claims of RJ are likely to be met for victims of gendered harms, I would add to Hudson’s list the need for a more adequate theoretical account. I have argued elsewhere that the predominant approach to theorising crime within the RJ literature is an incident based definition which constructs crime as a conflict between individuals.⁶⁷ This is inadequate for dealing with domestic violence and perhaps other gendered harms for several reasons, including because it fails to engage with questions of structural disadvantage and with race based, class based and gendered patterns of crime.⁶⁸ In the case of domestic violence we need to recognise that it is highly gendered, involves the exercise of power and control, is commonly recurrent, may escalate over time, may affect people beyond the primary target, including children, other family members and supporters of the victim, and that it reflects and contributes to the subordination of women.⁶⁹ Domestic violence typically involves the violation of trust by an intimate partner, and perhaps also by the family and the community who have failed to protect the victim. The offender may exert considerable control over the victim through instilling fear of further violence.

66 Barbara Hudson, ‘Restorative Justice: The Challenge of Sexual and Racial Violence’ (1998) 2 *Journal of Law and Society* 237, 247.

67 Julie Stubbs, ‘Domestic Violence and Women’s Safety: Feminist Challenges to Restorative Justice’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 42.

68 Julie Stubbs, ‘Restorative Justice, Domestic Violence and Family Violence’ (Issues Paper 9, Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2004) <http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issues_Paper_9.pdf>.

69 James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999); Donna Coker, ‘Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 128.

In examining the potential for RJ to offer an effective and safe form of justice for victims of gendered harms, we also need to recognise that such victims commonly have both ‘survival needs and justice needs’;⁷⁰ survival needs are typically not acknowledged in the RJ literature but they may shape or condition the capacity for, and timing of, participation in RJ processes. Survival needs include ‘safety, physical health, economic issues such as housing and employment, education or retraining and immigration problems’. Justice needs include ‘an innate motivation to right wrongs’ which relates to their capacity to contribute to key decisions and be informed about their case, to receive timely responses, ‘to tell their story without interruption by adversarial and sometimes hostile questioning’, ‘to receive validation’, ‘shape a resolution that meets their material and emotional needs’ and ‘feel safe’.⁷¹

A The Communicative Potential of RJ: Through the Lens of Gendered Violence

Barbara Hudson is cautious in her approach to RJ: she summarises the appeal of RJ as ‘its openness to storytelling and exploration of possibilities for creative and constructive responses to offences’.⁷² In the context of domestic violence she suggests that RJ ‘offers the victim the opportunity to choose how to present herself ... [to express] *her* feelings, her understanding of events, her wishes and demands for the future’.⁷³ However, Hudson recognises that the discursiveness of RJ is not without problems such as the risk of domination and the reproduction of power relations,⁷⁴ and she emphasises the need for ‘strong procedural safeguards’.⁷⁵ As Kim Lane Scheppelle writes with respect to courts, ‘[t]hose whose stories are believed have the power to create fact’.⁷⁶ That statement may be just as apposite in RJ. While RJ is not a fact-finding forum, the capacity to give meaning to the facts presented, and the new story that is constructed may be crucial to shaping safe and effective outcomes. In cases of gendered violence and other contexts where there are significant power differentials, the power to shape fact may play out in undesirable ways. Yet few studies have paid attention to how meaning is constructed within RJ processes and most empirical research on RJ has adopted a realist epistemology rather than more phenomenological or discursive approaches.⁷⁷ There is reason for concern that in responding to offences like domestic violence or sexual offences, contests around the meaning of the behaviour, its legitimacy and the harm caused may be particularly likely to

70 Koss, above n 48, 221; see also Judith Herman, ‘Justice from the Victim’s Perspective’ (2005) 11 *Violence Against Women* 571.

71 Koss, above n 48, 221–2.

72 Barbara Hudson, ‘Victims and Offenders’ in Andrew Von Hirsch et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart, 2003) 192.

73 *Ibid* 183 (emphasis in original).

74 Hudson, above n 32, 35.

75 Hudson, above n 72, 183.

76 Kim Lane Scheppelle, cited in Razack, above n 1, 37.

77 Daly and Stubbs, ‘Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice’, above n 7.

occur since popular discourses continue to trivialise such offences, challenge the credibility of the victim and/or construct women as complicit, for instance, by reference to allegedly provocative behaviour.

Most RJ programs require that the offender admits their offence as a condition for participation, but that does not adequately meet the concerns surrounding gendered crime for several reasons. The meaning of an offence cannot be readily assumed from a bald statement of the facts that make up the offence: where the parties have shared an intimate relationship, the meaning of a given event is derived from the context and the history of the relationship, and, while the offender may admit his conduct, those words or behaviours may be minimised, neutralised or their significance may be opaque to others.⁷⁸ Also, as Krista Smith notes, speaking publicly can be empowering but '[t]he risks of speaking frankly are great in the restorative justice context. An unwelcome story or a story "wrongly" conveyed runs the risk of rejection, derision or reprimand'.⁷⁹ Yet RJ approaches 'have not accounted for one of the chief characteristics of most domestic violence cases: the existence of ongoing danger occasioned by the victim's resistance to the batterers' authority and control'.⁸⁰

RJ processes require some measure of what communication scholars call communicative competence among RJ participants.⁸¹ Some attention has been paid to the capacity for young offenders to assert their own perspectives or interests in the presence of adults. But are there other preconditions for effective communication that need to be recognised?

Some RJ proponents have recognised the difficulties of communication across social distance⁸² although there is a need for much more work to be done with respect to that issue.⁸³ In the context of gendered violence, there may be risks of communication in a more intimate setting, or where intimacy between the parties shapes, gives meaning to and/or constrains communications. For instance, Heath and Jennings demonstrate that 'as people negotiate relationships, they calculate the costs and rewards of compliance, conflict, disclosure, and relational commitment'.⁸⁴ In asking people who have experienced domestic violence to participate in RJ conferences or circles we ask that they tell publicly something of their intimate relationships; this is not the formalised and legalistic account offered by their lawyer on their behalf in the courtroom under relatively

78 Russell Dobash et al, 'Separate and Intersecting Realities: A Comparison of Men's and Women's Accounts of Violence Against Women' (1998) 4 *Violence Against Women* 382.

79 Krista Smith, 'Dissolving the Divide: Cross-Racial Communication in the Restorative Justice Process' (2006) 15 *Dalhousie Journal of Legal Studies* 168, 186.

80 Loretta Frederick and Kristine Lizdas, *The Role of Restorative Justice in the Battered Women's Movement* (September 2003) Battered Women's JUSTICE Project, 29 <<http://www.bwjp.org>>.

81 Robert J Heath and Jennings Bryant, *Human Communication Theory and Research: Concepts, Contexts, and Challenges* (Routledge, 2000).

82 Kay Pranis, 'Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations' in Gordon Bazemore and Mara Schiff (eds), *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson Publishing, 2001) 287.

83 Cook, above n 59.

84 Heath and Bryant, above n 81, 215.

clearly articulated rules, but rather their personal story to be told in an informal setting in the presence of the offender and of others with whom the victim may have ongoing relationships. Those with the capacity to participate, and to shape the story that is told and in turn influence the outcomes that follow, may find this empowering. But whose account will prevail in the scripting of the new story to be derived as a result of the RJ process?

There are also risks including that of retaliation towards the victim whose story is unwelcome, and of inauthentic or strategic apologies by offenders. There are many reasons why apologies, which are commonly valued as an outcome of RJ, may be particularly ill-advised in domestic violence ('DV') contexts. Apology and forgiveness are themselves highly gendered with strong expectations on women to accept apologies. But domestic violence offenders are typically practiced at offering apologies as a means of buying favour only to re-offend.⁸⁵ There is no a priori reason for confidence that a 'new story' derived in the RJ process will necessarily reflect a progressive understanding of victimisation or gendered violence.⁸⁶ As Declan Roche has argued, the informality of a restorative process may permit a range of possible outcomes, including tyranny.⁸⁷ Without an explicit commitment to challenging women's subordination, older, limited understandings of gendered violence may prevail.⁸⁸ Questions remain about the extent to which the values orientation of RJ⁸⁹ is adequate to ensure victims' interests are met in the absence of an explicit normative commitment to challenging subordination.⁹⁰

Some might argue that this concern is met because victim participation in RJ is voluntary. I am not persuaded that the apparent 'voluntary' nature of RJ does meet these concerns. While the agency that victims of DV exercise is likely to be constrained, and victims will themselves vary in the resources they can draw on in RJ encounters, the choice to participate or not is not sufficient; the manner in which the process proceeds and the safety and effectiveness of outcomes that are reached are not met by consent. As Crawford notes, RJ asks participants to take on a more active responsibility than in the conventional criminal justice system, and thus 'justice should require that outcomes are grounded in a dialogue that recognizes and takes account of underlying inequities and injustices.'⁹¹ He argues that 'there is a need for professionals and procedures to contain and regulate aspects of public participation by mitigating power differentials between the

85 Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice', above n 7, 177.

86 Ibid; Coker, above n 69.

87 Declan Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003).

88 Ruth Busch, 'Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong?' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 223.

89 Pranis above n 21.

90 Hudson, above n 32; Donna Coker, 'Restorative Justice, Navajo Peacemaking and Domestic Violence' (2006) 10 *Theoretical Criminology* 67.

91 Adam Crawford, 'The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting' in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing, 2002) 101, 123.

parties, challenging arbitrary outcomes, rendering procedures open, accountable and contestable under the rule of law'.⁹²

While we need more research on the dynamics of conferences and how meanings are constructed within conferences,⁹³ two studies are particularly telling.

B Research on Conference Dynamics Related to Domestic Violence

Kathleen Daly and Heather Nancarrow's study of RJ and youth violence towards parents provides three case studies that involve a careful analysis of conference dynamics. They found that cases 'demonstrate vividly how ongoing violence between intimates and family members differs from "incident-based" violence, and why the standard conference model (and indeed, the standard police or court model) is poorly equipped and resourced to address violence'.⁹⁴ The conferencing model was not equipped to provide resources or outcomes for the victim, since legislation limited this to outcomes for the young person⁹⁵ (although coordinators may assist the victim with information for self referral to services).⁹⁶ These conferences required more time and work in setting up and providing safety measures and required a 'sophisticated understanding of the dynamics of partner and family violence' and more time and resources in monitoring outcomes, resources that were not available in RJ or in the court system.⁹⁷ Daly and Nancarrow argue that 'the cases show that informal processes can revictimize when offenders (or their supporters) do not take responsibility for the violence, minimize the harm, or cause distress to victims'⁹⁸ and that 'the most a conference can achieve is to re-image appropriate relations of respect and non-violence, and to check and challenge pro-violence and victim-blaming behaviours'.⁹⁹

Christa Pelikan's research analyses the dynamics of VOM for cases of domestic violence in Austria.¹⁰⁰ VOM differs from the conferencing forms of RJ

92 Ibid 125.

93 King et al, above n 15, 54–5.

94 Kathleen Daly and Heather Nancarrow, 'Restorative Justice and Youth Violence Against Parents' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 170.

95 Ibid 170–1.

96 The *Young Offenders Act 1997* (NSW), which is the primary source of RJ in NSW, also limits outcomes for victims to apologies or reparations made by the young person and does not contemplate meeting other needs of the victims; it may be left to the personal insights and initiative of a conference convenor to connect victims with other services or resources that might meet their needs.

97 Daly and Nancarrow, above n 94, 171.

98 Ibid.

99 Ibid.

100 Christa Pelikan, 'Victim-Offender-Mediation in Domestic Violence Cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research' (2002) 3 *Forum: Qualitative Social Research* <<http://www.qualitative-research.net>>; see also Christa Pelikan, 'Victim-Offender Mediation in Domestic Violence Cases – A Research Report' (2010) *Restorative Justice Online* <<http://www.restorativejustice.org/10fulltext/pelikan-christa.-victim-offender-mediation-in-domestic-violence-cases-a-research-report>>.

that are widely used in Australia and New Zealand and that have been the subject of most evaluations, but it is widely used in parts of Europe and in the US.¹⁰¹ Her research is one of few studies to examine the dynamics of an informal mechanism in cases of DV and to use qualitative methods;¹⁰² it has important implications for considering debates about the application of RJ processes to gendered harms. One of her research objectives had been to prepare a typology of DV cases that would guide the selection and placement of different categories of cases into the VOM program, other forms of diversion or criminal justice, but she found that she was unable to meet this objective because ‘there were no clearly discernable criteria, that would guide an a-priori placement of cases’.¹⁰³ Rather ‘the feasibility and suitability of mediation lies not with the power position and the behavior of the violent partner, but rather the – inner and outer – situation and disposition of the woman and whether she can muster the resources to break free from an oppressive relationship or alter it fundamentally ... these facts and conditions are almost impossible to assess beforehand and just based on reading the files’.¹⁰⁴ She found that VOM can assist the parties by ‘reinforcing processes of empowerment, of liberation even, that are *already on the way*’;¹⁰⁵ but VOM ‘at its limits’ was found to be futile in cases where empowerment had not commenced outside VOM and the victim lacked resources (money, qualifications, independence).¹⁰⁶ Pelikan also found that ‘[n]ot much is going on in the way of healing, or re-integrating, of visible effects of special/individual prevention’ but VOM did support the ‘[a]ffirmation of the norm’ of the ‘legally supported claim of the victim’.¹⁰⁷ She found that criminal justice procedures and VOM were both effective in affirming the norm.¹⁰⁸

101 Umbreit et al, above n 17.

102 Pelikan, ‘Victim-Offender-Mediation in Domestic Violence Cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research’, above n 100; Pelikan, ‘Victim-Offender Mediation in Domestic Violence Cases – A Research Report’, above n 100. She used a triangulation of methods: observations of VOM sessions, interviews with parties which in some cases were repeated after three to four months, interviews with mediators involved in the cases, and a comparison with an equal number of cases that went through criminal procedure though no details are reported of those cases and quantitative data (from agency and court files).

103 Pelikan, ‘Victim-Offender Mediation in Domestic Violence Cases – A Research Report’, above n 100; Pelikan describes how instead she developed a typology of restorative processes: Pelikan, ‘Victim-Offender-Mediation in Domestic Violence Cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research’, above n 100, [43].

104 Pelikan, ‘Victim-Offender-Mediation in Domestic Violence Cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research’, above n 100, [44].

105 Pelikan, ‘Victim-Offender Mediation in Domestic Violence Cases – A Research Report’, above n 100 (emphasis added).

106 Ibid.

107 Ibid.

108 Ibid; Pelikan, ‘Victim-Offender-Mediation in Domestic Violence Cases – A Comparison of the Effects of Criminal Law Intervention: The Penal Process and Mediation. Doing Qualitative Research’, above n 100, [48].

These findings challenge the idea that we can easily select for cases that might be safe and appropriate for RJ, and should temper some of the strong claims made about the therapeutic benefits of RJ for victims.

V DISCUSSION AND CONCLUSION

Influential scholars like Dignan recognise the challenge that arises from competing interests and the importance of a more differentiated approach to RJ. However, Dignan is satisfied that under a rights based framework competing interests between victim and offender can be adequately addressed, and that on the basis that ‘victims are to be treated with *equal* concern and respect ... their entitlement to seek and receive reparation from an offender should apply irrespective of the type or seriousness of the offence’ and thus ‘there is no reason in principle why *any* offence ... including ... domestic violence ... should be excluded from eligibility *provided* that victims feel they would benefit’.¹⁰⁹ This approach seems to suggest that *the* key question is one of inclusion or exclusion from *generic* RJ practices. I would argue that in working towards safe and more effective forms of justice for victims of DV or other forms of gendered harm that this is not sufficient. Generic models of RJ will not do. This fails to attend sufficiently to the specific characteristics of gendered violence. It has a very limited vision of victim needs – if RJ is to be true to the promises it makes to victims it may need to adopt models that have the potential to connect victims with services, support and outcomes beyond the apology or reparation that the offender may wish to, or be able to offer.

Recognising that victims, offenders, and others have competing interests and are differently positioned offers insights and challenges to RJ theory and practice. It also aids consideration of assumptions that underpin the communication exchanges between parties that are so central to RJ. We need more research that is trans-disciplinary and attends to the macro- and to the micro-foundations of RJ.¹¹⁰ We need to know more about the preconditions for effective dialogue in RJ exchanges. We need to acknowledge the difficulties of screening DV cases for RJ. If conferences are to proceed on the basis of face to face encounters we need particularly skilled facilitators and should include skilled community representatives in the conference. We might need to also build models that allow victim participation other than by personal attendance, as RESTORE did in the date rape context using victim surrogates.

I am also troubled that debates about RJ for DV not limit our vision to two options only – RJ or conventional criminal justice. Effective justice for domestic violence, sexual assault or other gendered harms might reside in hybrid models

109 Dignan, above n 6, 180.

110 Marta Poblet and Pompeu Casanovas, ‘Micro-Foundations of Restorative Justice: A General Framework’ in Robert Mackay et al (eds), *Images of Restorative Justice Theory* (Verlag für Polizei Wissenschaft, 2007) 234.

that are not limited either by RJ or by conventional criminal justice.¹¹¹ Without a strong normative commitment to anti-subordination and a clear theoretical framework for understanding victimisation, *generic* models of RJ cannot be relied on to promote victim interests in cases of gendered violence, nor to challenge racism or other forms of prejudice. New responses to gendered violence are more likely to be effective, safe and responsive to difference where the design and practice is guided by the principle of anti-subordination and draws on the expertise of women's advocates in the communities that they serve.

111 Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice', above n 67.