

## **Feminist engagement with restorative justice**

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## **Feminist engagement with restorative justice**

### **Abstract**

We analyse five areas of feminist engagement with restorative justice (RJ): theories of justice; the role of retribution in criminal justice; studies of gender (and other social relations) in RJ processes; the appropriateness of RJ for partner, sexual, or family violence; and the politics of race and gender in making justice claims. Feminist engagement has focused almost exclusively on the appropriateness of RJ for sexual, partner, or family violence, but there is a need to broaden the focus. We identify a wider spectrum of theoretical, political, and empirical problems for future feminist analysis of RJ.

### **Key Words**

anti-racist theories, feminism, race and gender politics, restorative justice, violence against women

## **Feminist engagement with restorative justice**

Feminist engagement with restorative justice (RJ) takes several forms, and this article maps five areas of theory, research, and politics. They are theories of justice; the role of retribution in criminal justice; studies of gender (and other social relations) in RJ processes; the appropriateness of RJ for partner, sexual, or family violence; and the politics of race and gender in making justice claims. There is overlap among the five, and some analysts or arguments may work across them. However, each has a particular set of concerns and a different kind of engagement with RJ.

The most developed area of feminist scholarship concerns the appropriateness of RJ for partner, sexual, or family violence. It is not surprising that feminist analysts have focused on this area: it is a common context in which women come into contact with the justice system, and the significance of gender is readily apparent. It is also an area in which RJ advocates are poorly informed. At the same time, it is important to recognize other domains of feminist engagement with RJ.

### **Theories of justice**

A sketch of feminist theorizing about justice, even a highly selective one, is daunting because the term 'justice' has many referents. We limit our discussion to the response to crime, but we recognize that some believe that criminal justice is not possible without social justice or that RJ can promote social justice. However, social justice includes a far broader set of aspirations that are beyond the reach of this article.

#### *Early feminist thought (1970s and 80s)*

Feminist engagement with alternative justice pre-dated the emergence of RJ, which occurred around 1990 (see Daly and Immarigeon, 1998). The introduction of a range of informal justice practices, including alternative dispute resolution and the 'different voice' construct of Carol Gilligan (1982) have had a large impact on feminist theory and activism.

#### *Different voices*

Gilligan (1982) argued that girls' (or women's) moral reasoning was not inferior, as might be inferred from Kohlberg's stage theory, but was guided by an ethic of care centred on moral concepts of responsibility and relationship; it was a concrete and active morality. By contrast, the ethic of justice privileged by Kohlberg centred on moral concepts of rights and rules; it was a formal, universalizing, and abstract morality. Gilligan argued that both the male and female voice should have equal importance in moral reasoning, but that women's voices were misheard or judged as inferior to men's.<sup>1</sup> The different voice construct was popular for many reasons; among them, it seemed to respect and honour 'women's ways of knowing' and was adopted by many feminists.

Frances Heidensohn (1986) and Kay Harris (1987) applied the care/justice dichotomy to the criminal justice system. Heidensohn compared a 'Portia' model of justice, which values rationality and individualism, and is centred on law, equality, and procedure, with a more women-centred 'Persephone' model, which values caring and personal relations, and is centred

on responsibility and cooperation. Heidensohn urged that greater attention be given to the values and concepts of justice associated with a Persephone model. Harris (1987: 32) argued 'for a massive infusion of the values associated with the care/response model of reasoning', although she also believed that it would be mistaken to substitute a justice/rights orientation with a care/response orientation. Harris's comment demonstrates a feminist unease with alternative justice forms. Although individualist and rights-based approaches ignored women's caring relationships and embeddedness in a 'community', there were concerns with 'forced community' (Olsen, 1984: 393-4), that is, women would not be able to enjoy individual freedoms in communities that were male-normed or dominated by men, or they would not be able to leave harmful social relationships.

Daly (1989) challenged the association of justice and care reasoning with male/masculine and female/feminine voices, arguing that this gender-linked association was not accurate empirically, and that it would be misleading to think that an alternative to men's forms of criminal law and justice practices could be found by adding women's voice or reconstituting the system along the lines of an ethic of care. Interpreting and applying law often involves relational and concrete reasoning, and thus the problem was not the absence of such forms or reasoning, but that certain gender or other hierarchical relations were presupposed, maintained, and reproduced.

Although some feminist scholars continue to emphasize the need to bring women's experiences and 'voices' into the criminological and legal frame, Gilligan's different voice construct has been superseded by more complex and contingent analyses of ethics and moral reasoning. However, some RJ advocates have not kept up with these developments. For instance, Masters and Smith (1998) invoke Gilligan's work in their attempt to compare retributive justice and RJ, and they argue that RJ offers a more caring response to crime (see Daly's critique, 2002a: 64-6).

### *Informal justice*

Research and theory on the possibilities of informal justice (Abel, 1982; Matthews, 1988), and experimentation with victim-offender mediation and community conflict resolution during the 1970s and 1980s provided an impetus towards RJ. These and other alternative justice practices gave concrete expression to the aspirations of social movement and community development activists, but they also attracted feminist critique.

Although some feminist analysts saw mediation as compatible with feminist values, it continues to be controversial in some contexts. For example, it has been criticized for defining battering (or other offences) as 'disputes', for 'pushing reconciliation', 'erasing victimization', and 'limiting [formal] justice options' (Lerman, 1984; Presser and Gaarder, 2000: 180-1). Critiques of mediation have been influential in curbing feminist interest in RJ, but mediation and RJ practices are not the same (Presser and Gaarder, 2000: 181). For example, in their ideal form, RJ practices recognize crime victims and offenders, there is no push to reconcile, nor is victimization erased. Additional support people are present beyond the victim-offender dyad, and a normative stance against partner violence can be articulated by community members, including feminist groups (Braithwaite and Daly, 1994).

### *Later feminist thought (1990s to the present)*

Psychoanalytical, postmodern, and critical race theories have had a significant impact on theorizing gender differences and differences among women. For example, in characterizing

gender difference, some feminists argue that it may not be possible to construct 'woman' except as a lack, an absence, or as 'not man'. Thus, the question arises, is the subject of law (or justice) ultimately always masculine, such that woman is 'always and only the Other'? (Hudson, 2003: 133). If the answer is yes, then 'there can be no possibility of different but symmetrical (male and female) subjectivities' (Ibid.), as Gilligan had posited. In characterizing differences among women, critical race theorists have emphasized power differences among women and a racial/ethnic inflection of 'woman' (Wing, 1997).

Major debate exists among feminist philosophers concerning the term *woman*: is it a stable unified category, or a fluid and contingent one? As characterized by Barbara Hudson (2003: 136-7), scholars such as Iris Marion Young and Seyla Benhabib argue that specific identities, such as black woman or lesbian, are formed in advance of encounters with others, and are invoked in 'staking claims to justice'. Others, such as Drucilla Cornell and Judith Butler, argue that specific identities are fluid and contingent, based on what occurs in interactions with others. Thus, for Young and Benhabib it would be possible to construct a 'procedural basis for deliberating issues of justice' (Hudson, 2003: 136), whereas for Cornell and Butler this would not be possible, except at a local level. What unites these theorists, along with critical race feminists, is that the category woman is not stable and unified, but inflected by other elements of difference among women. If this is so, then the idea of a 'woman's justice' or a 'feminist justice' is not possible because the subject woman (or category women) is too differentiated or contains hierarchies of difference, which cannot be smoothed over or blended without excluding and oppressing some groups of women. Thus, major challenges exist for imagining alternative ways of 'doing justice' in a socio-legal order that assumes different subjectivities and positionalities.

Hudson (2003) builds on feminist and other social theorists to conceptualize a post-liberal and post-communitarian justice, which must satisfy certain conditions (see also Hudson, 2005). Among the conditions, she endorses the 'liberal ideas of rights and equal respect and equal liberty' of Habermas and 'his proposals of a communicative ethics', which provide for a 'discursive justice', where multiple views are heard (Hudson, 2003: 175). However, she identifies weaknesses in his (or other liberal and communitarian perspectives on justice): they lack an 'openness to Otherness' to 'alterity' (Ibid.) and have overlooked key insights from recent feminist thought. Within criminal justice, a lack of openness to Otherness may lead to repression and expulsion of those members 'who cannot or will not be assimilated into a homogeneous community identity' (p. 205). Thus, criminal justice should be 'predicated on difference rather than identity' and the major principle of justice should be 'equal respect' (p. 206).

Hudson argues that justice must be 'relational, discursive, plurivocal, rights regarding, and reflective' (p. 206). She believes that RJ 'could meet these requirements of justice', but she has reservations about how RJ ideals are implemented in practice. Notwithstanding a stated interest in balancing the interests of offenders, victims, and the community in RJ practices, she argues that there is 'insufficient regard for offenders' interests and moral status' (p. 207); and despite the promise of a more discursive justice, the potential remains for victims, offenders, or both to be dominated by others in RJ encounters. She advocates adopting a "'deep" relationalism', in which 'the situated self' and his or her relationship to a community or the wider society is more fully examined, but she finds instead that in RJ practices, the only relationship considered is between victim and offender (pp. 210-1).

Hudson sees RJ's major strength as its discursive potential, but this is also where RJ may reach its limits: it assumes that different perspectives can be reconciled, that community

members share values and beliefs, and that others are 'like us'. But what of harms that are incomprehensible, that are alleged to have been committed by those 'we do not recognize as our fellows' (Hudson, 2003: 213)? For these crimes and alleged lawbreakers, a group of 'ultra-Others', Hudson argues that we require a 'strong commitment to universal, inalienable, human rights... All persons, not just members of one's own community, not just members in good standing in any community, have rights that each of us is morally obliged to uphold' (Ibid.).

Hudson's analysis is a singularly important contribution to the field. Rather than asking, does RJ satisfy the justice claims of feminist, critical race, or other groups, she outlines a set of justice principles and asks, to what degree does RJ meet these principles? At the same time, she gives passing reference to particular kinds of criminal justice policies and practices, including RJ, and their implications for gender difference and women's situation, or for feminist debates in these areas. It is to these areas that we now turn.

### **The role of retribution in criminal justice**

Feminist engagement with RJ cannot avoid considering the role of criminal law and the aims of punishment in achieving justice. Whereas some believe that 'law can never bring justice into being' (Hudson, 2003: 191), others are more hopeful that better laws can achieve a more responsive criminal justice system. We focus on retribution because it is often used, wrongly in our view, to typify established criminal justice and to make comparisons with RJ.

Feminist debates about retribution are difficult to characterize because commentators presuppose an opposition of retributive and restorative justice (for a critique see Daly and Immarigeon, 1998; Daly, 2000, 2002a). Moreover, retribution is used in varied ways: often it is used negatively to refer to responses that are punitive, degrading, and or involve incarceration; but it can also be used neutrally to refer to censuring harms (e.g. Hampton, 1998; Daly, 2000; Duff, 2001) or deserved punishment in proportion to a harm (von Hirsch, 1993). Finally, commentators mistakenly refer to established criminal justice practices as retributive justice, when it is widely accepted that a variety of theories of punishment have been and are used.

Some feminists have criticized a feminist over-reliance on the criminal law to control men's violence against women (Martin, 1998; Snider, 1998).<sup>2</sup> They challenge feminist uses of 'punitive criminalization strategies', which rest on naïve beliefs that criminal law has the capacity to bring about social change and that deterrence promotes safety (Martin, 1998: 155, 184),<sup>3</sup> and they raise concerns that feminist reforms have not empowered women and may have been detrimental to racial and ethnic minority group women (Snider, 1998: 3, 10).

Jean Hampton has a more positive reading of the 'retributive ethic' in criminal justice. She distinguishes vengeance – a '[wish] to degrade and destroy the wrongdoer' – from retribution – a '[wish] to vindicate the value of the victim' (Hampton, 1998: 39). She also asks if it is possible to 'add something to this retributive response in order to express a kind of compassion for the [wrongdoer] in ways that might do him good, and if he has been the victim of injustice, acknowledge and address that injustice' (p. 43).<sup>4</sup> Hampton desires a 'more sophisticated way of thinking about the nature and goals of a punitive response, one that incorporates both compassion and condemnation ...' (p. 37). She anticipates that a 'well-crafted' retributive response should be cognitive, to 'provok[e] thought' in the mind of the

wrongdoer (p. 43, see also Duff, 2001). But what form and amount of retributive punishment are appropriate or necessary to vindicate victims? In considering the relationship between RJ and the expressive functions of punishment, Hudson (1998) proposes that censure for an act should be decoupled from the quantum of punishment, and this activity should occur in a context of penal deflation overall.

Annalise Acorn (2004) makes a different case for retribution in her critique of RJ. She believes that expecting compassion from victims in face-to-face RJ encounters is wrong. Acorn conceives of justice as 'some kind of counterbalancing pain for the wrongdoer' (p. 47), and she is critical of RJ advocates who 'see these connections between justice and the infliction of pain on the offender as arbitrary ...' (Ibid.). She argues that 'our institutions of retributive punishment put forward measured, state-administered punishment *precisely as a token* in order to prevent outraged victims and communities from going for what they *really* want' (p. 51, emphasis in original). RJ meetings may 'provide an opportunity for the victim to vent or blow off steam' toward an offender, but they do not 'validate or legitimate the victim's desire to see the perpetrator suffer' (p. 53). She thinks that the 'lived experience of relational justice' (defined as 'the personal achievement of relations of repair, accountability, healing, respect, and equality'), which RJ promises, is unlikely to be achieved. Nor does she think that RJ's sense of justice is desirable, even as a utopian vision (p. 162). Acorn contends that in an RJ encounter, 'the compassion we feel for the offender ... often upstages the compassion we feel for the victim. [And] the victim's compassion for the offender overshadows their desire to receive compassion for their own loss' (p. 150).

Acorn is primarily concerned with how victims can be 'used' in an RJ process and how their suffering is too quickly ignored, whereas Hudson is primarily concerned that offenders' interests are not given sufficient weight. Their different views reveal a fault line in feminist engagement with RJ: is it possible to both balance victims' and offenders' interests?

In the context of genocide and collective violence, Martha Minow (1998) considers a spectrum of responses from vengeance to forgiveness. She argues that no one path is the right one, and much depends on the contexts of the violence (pp. 133-5); moreover, survivors vary in 'their desires for revenge [and] for granting forgiveness' (p. 135). She distinguishes vengeance from retribution and views retribution as important and necessary to vindicate victims (although it may not be the right path for some nations following a mass atrocity); but at the same time, 'retribution needs constraints' (Ibid.). While she sees a role for bounded retribution in the aftermath of collective violence, she distinguishes this path from RJ, which she equates with reparation.

That RJ is posed as an 'alternative' to established criminal justice can create confusion in debates on the role of retribution (see also Duff, 2003: 48). By de-coupling retribution from vengeance and vindictiveness, and by not engaging in dichotomous and oppositional thinking about justice practices, it may be possible to deploy the positive and constructive elements of retribution in a restorative process.

### **Gender (and other social relations) in RJ processes**

There are few empirical studies of how gender and other social relations (such as class, race, and age) are evinced in RJ practices. Major projects on conferencing, such as the Re-Integrative Shaming Experiments (RISE) in Australia and associated research on victims'

experiences (Strang, 2002), have little to say about gender. Gender is not mentioned in key studies of youth justice conferences in New Zealand (Maxwell and Morris, 1993; but see Maxwell et al., 2004 below), the Thames Valley police restorative cautions (Hoyle et al., 2002), or referral orders and RJ in England (Crawford and Newburn, 2003).

Daly (1996) examined class, race, age, and gender dynamics within youth justice conferences in the ACT and South Australia. Based on observations of 24 conferences, she found that they were highly gendered events: few offenders were female (15 percent), but women were over half of the offender's (52 percent) or victim's (58 percent) supporters, and more mothers than fathers were present. She observed that 25 percent of the victims present were treated with disrespect or were re-victimized in the conferences; all but one were female. A New Zealand study (Maxwell and Morris, 1993: 119) also found that 25 percent of victims felt worse after attending a conference, but they did not indicate the victim's gender.

A second study by Daly of 89 conferences in South Australia found that the experiences of victims and offenders were conditioned by the gendered contexts of offending and victimization in the larger society (Daly, 2002c). Female victims of female assaults were distressed and frightened by the offence and the offender, and female victims of certain property offences perceived a threat of violence, more so than the male victims. Thus, a feminist lens should extend beyond assaults against girls or women. Moreover, any claimed benefits of conferences, especially reductions in victims' fear or the degree to which victims have recovered from offences, need to be qualified by reference to the gender composition and other features of the offence. As for female offenders, they were as self-assured as their male counterparts; and they were more defiant and less apologetic for their behaviour.<sup>5</sup>

Maxwell et al.'s (2004) study of youth justice conferences in New Zealand shows similar patterns in the gender composition of conferences to Daly's (1996) earlier study. From interviews with 520 youth, the study found that higher proportions of girls (58 percent) than boys (41 percent) had problems growing up (such as moving around a lot, experiencing violence and abuse, and running away from home) or were reported for care and protection (p. 73). Girls were less likely to say that the police treated them fairly during the police interview (26 percent) or the conference (51 percent) than the boys (44 percent and 64 percent, respectively) (p. 151). Although most youth had generally positive experiences of the conference process, the girls were less positive (pp. 150-1). As in Daly's later study (2002b), the girls appear to be less compliant and more challenging of the conference process than the boys. Maxwell et al. (2004) found that a lower share of girls (21 percent) than boys (37 percent) said that going to the conference helped them to reduce their offending (p. 151-2), although the girls were less likely to have re-offended (two-thirds) than the boys (80 percent) (p. 196-7). The study did not analyse gender and victimization.

The findings reported thus far fall within a realist epistemology in that the research has sought to determine whether, by observational or interview data, the experiences of RJ differ for males and females or for members of dominant and minority racial-ethnic groups. Such information is crucial and not easily obtained or interpreted. Nonetheless, realist approaches need to be supplemented by phenomenological and discursive approaches that, although rarely used in RJ research, offer the potential to deepen our understanding of gender (and other social relations) in RJ processes. For instance, research could take a social constructionist approach to gender and RJ (see Cook, 2005); or it could analyse RJ as a gendering strategy (Smart, 1992) or through the lens of 'sexed bodies' (Daly, 1997; Collier, 1998).

## **The appropriateness of RJ for partner, sexual, and family violence**

Feminist analysts face dilemmas in addressing the appropriateness of RJ for partner, sexual, and family violence. Many desire a less stigmatizing and less punitive response to crime in general, but we are not sure that RJ, as currently practiced, is capable of responding effectively to these offences (see, e.g. contributors to Strang and Braithwaite, 2002).<sup>6</sup> The potential problems and benefits of RJ for such offences are highlighted below; bear in mind that some problems may be more acute for some offences, and potential benefits, more likely for others.

### ***Potential problems with RJ***

These potential problems have been identified by Stubbs (1997, 2002, 2004), Coker (1999, 2002), Goel (2000), Presser and Gaarder (2000), Shapland (2000), Lewis et al. (2001), Busch (2002), Acorn (2004), and Hopkins et al. (2004).

*Victim safety.* As an informal process, RJ may put victims at risk of continued violence; it may permit power imbalances to go unchecked and reinforce abusive behaviour.

*Manipulation of the process by offenders.* Offenders may use an informal process to diminish guilt, trivialize the violence, or shift the blame to the victim.

*Pressure on victims.* Some victims may not be able to effectively advocate on their own behalf. A process based on building group consensus may minimize or overshadow a victim's interests. Victims may be pressured to accept certain outcomes, such as an apology, even if they feel it is inappropriate or insincere. Some victims may want the state to intervene on their behalf and do not want the burdens of RJ.

*Role of the 'community'.* Community norms may reinforce, not undermine male dominance and victim blaming. Communities may not be sufficiently resourced to take on these cases.

*Mixed loyalties.* Friends and family may support victims, but may also have divided loyalties and collude with the violence, especially in intra-familial cases.

*Impact on offenders.* The process may do little to change an offender's behaviour.

*Symbolic implications.* Offenders (or potential offenders) may view RJ processes as too easy, reinforcing their belief that their behaviour is not wrong or can be justified. Penalties may be too lenient to respond to serious crimes like sexual assault.

Critics typically emphasize victim safety, power imbalances, and the potential for re-victimization in an informal process. However, the symbolic implications are also important. Critics are concerned that in not treating serious offences seriously, the wrong messages are conveyed to offenders. They also believe that as an informal process, RJ may 're-privatize' male intimate violence after decades of feminist activism to make it a public issue.

### ***Potential benefits of RJ***

These potential benefits have been identified by Braithwaite and Daly (1994), Hudson (1998, 2002), Martin (1998), Morris and Gelsthorpe (2000), Presser and Gaarder (2000), Daly (2002b), Morris (2002), Pennell and Burford (2002), Koss et al. (2003), Hopkins et al. (2004), and Daly and Curtis-Fawley (2005).

*Victim voice and participation.* Victims have the opportunity to voice their story and to be heard. They can be empowered by confronting the offender, and by participating in decision-making on the appropriate penalty.

*Victim validation and offender responsibility.* A victim's account of what happened can be validated, acknowledging that she is not to blame. Offenders are required to take responsibility for their behaviour, and their offending is censured. In the process, the victim is vindicated.

*Communicative and flexible environment.* The process can be tailored to child and adolescent victims' needs and capacities. Because it is flexible and less formal, it may be less threatening and more responsive to the individual needs of victims.

*Relationship repair (if this is a goal).* The process can address violence between those who want to continue the relationship. It can create opportunities for relationships to be repaired, if that is what is desired.

Although there is considerable debate on the appropriateness of RJ for partner, sexual or family violence, empirical evidence is sparse. There have been few studies of RJ for these offences (they include Braithwaite and Daly, 1994; LaJeunesse, 1996; Daly, 2002b, 2005; Pennell and Burford, 2002; Daly and Curtis-Fawley, 2005; see also the discussion of circle sentencing below), but insufficient attention has been paid to the great variation in the contexts and seriousness of these offences.

With the exception of circle sentencing, RJ has largely been kept off the agenda for partner and sexual violence, in part due to feminist or victim advocacy. New Zealand and South Australia are the only two jurisdictions in which RJ is used routinely in youth justice cases of sexual assault. In the New Zealand pilot of RJ as pre-sentence advice for adult cases, partner and sexual violence cases are currently ineligible. The US project RESTORE appears to be the first pilot to test RJ in adult cases of sexual violence (Koss et al., 2003).

After reviewing 18 conference cases of youth sexual violence, Daly (2002b: 81-6) concluded that the question of the appropriateness of RJ for these offences may be impossible to address in the abstract. In a more recent study of nearly 400 sexual violence cases finalized in court, by conference or formal caution, Daly (2005) concluded that conferences were a better option for victims, if only that there was an admission to the offence and an outcome. More of the youth at conferences than in court were required to attend an adolescent sex offender counselling program, and this, in turn, was associated with reductions in re-offending. While the court process may vindicate some victims, nearly half of court cases were dismissed or withdrawn.<sup>7</sup>

Evaluations of RJ must recognize the different kinds of violence experienced by victims in these cases, and whether it is ongoing, as is more likely in partner violence and some family violence cases. Feminist critiques of RJ focus mainly on partner violence and have raised well-founded concerns with RJ in these cases. Zehr (2003: 11, 39), a major RJ advocate, now suggests that 'domestic violence is probably the most problematic area of application, and here great caution is advised'. The central place of apology in RJ practices is suspect for partner violence, since 'the skill of contrite apology is routinely practiced by abusers in violent intimate relationships' (Acorn, 2004: 73). Acorn also argues that in emphasizing forgiveness and reconciliation, RJ would be inappropriate in cases of sexual violence and is antithetical to vindicating a victim's suffering. While some RJ advocates emphasize forgiveness and

reconciliation, and Zehr (2003: 8) suggests that 'this may occur more often' in RJ, he also insists that there is 'no pressure to choose to forgive or to seek reconciliation' and that these are not primary goals of RJ (see also Minow, 1998). However, some analysts question the assertion that the power to forgive is necessarily a choice freely open to victims; for example, Goel (2000: 326-7) suggests there are pressures on women to forgive in circle sentencing.

Debate continues over whether RJ may be more constructive than formal court processes in cases such as historical child sexual abuse (see Julich, 2005), sexual violence, or certain family violence cases. The use of RJ to divert admitted offenders from court remains controversial for many feminist activists, and specific consideration needs to be given to what is proposed by diversion. For instance, project RESTORE involves post-charge diversion, but requires sex offender treatment and ongoing monitoring of offenders (Koss et al., 2003). Much depends on the model used in carrying out RJ. For example, Joan Pennell and Gale Burford (2002) use a 'feminist praxis framework' in conceptualizing RJ responses to family violence; their approach is tailored to the dynamics of partner and family violence in ways that the standard RJ package is not.

### **Race and gender politics: different justice claims**

One of the legacies of the 1960s and 1970s social movement activity is that justice claims for offenders and victims are overlaid by race and gender politics, respectively. Specifically, racial and ethnic minority groups' claims commonly centre on the treatment of suspects and offenders, while feminist claims more likely centre on the treatment of victims. This can create problems in finding common ground.

Indigenous communities often show a willingness to engage with alternative forms of justice, born in part from a critique of the damage wrought by conventional criminal justice, and many are keen to adopt RJ. However, Indigenous aspirations for justice are commonly holistic and associated with calls for self-determination; and these elements are not often acknowledged in considerations of alternative modes of justice, nor are Indigenous women's perspectives typically addressed. As Chris Cunneen (2003) argues, little attention is paid to whether alternatives such as RJ are consonant with Indigenous aspirations for justice. Claims that RJ is derived from Indigenous practices and or is particularly appropriate for Indigenous communities have been challenged for denying the diversity among Indigenous peoples (Cunneen, 2003: 188) and for re-engaging a white-centred view of the world (Daly, 2002a: 61-4). Critics also say that RJ has been imposed on Indigenous communities, is neo-colonialist, not community driven, and is an adjunct rather than alternative to conventional criminal justice (Tauri, 1998).

Circle sentencing is one form of RJ (and Indigenous justice practice) that has been used widely in Canada and adopted more recently in Australia. In Canada, women's experiences with sentencing circles are mixed. Concerns have been raised that the subordination of women in some Canadian First Nations communities means that they do not enter the circle on an equal basis (Goel, 2000; Stewart et al., 2001) and that women have sometimes been excluded, silenced, or harmed because power relations were not recognized or gendered violence not taken seriously. Whether in the context of circles or conventional criminal justice, Razack argues that 'culture, community, and colonialization can be used to compete with and ultimately prevail over gender-based harm' (1994: 907). Thus 'cultural' arguments (such as that sexual violence occurs because the community is coming to terms with the

effects of colonialization) may be accepted while 'women's realities at the intersection of racism and sexism' (p. 913) are ignored. Hampton (1998: 43) underscores this point for disadvantaged and racialized men more generally: 'If, say, poverty and a history of discrimination played a part in a young man turning to violence, our failing to punish him, or our punishing him lightly, ends up further hurting the people who were already hurt by his violence' (p. 42).

In the Australian context, Melissa Lucashenko (1997: 155-6) suggests that state 'forms of violence against Aboriginal people have been relatively easy for academics and Black spokespeople to see' and 'to point a finger at' than 'the individual men doing the bashing and raping and child molesting ...' (Ibid.). She shows the difficult situation in which Indigenous women are placed: 'Black women have been torn between the self-evident oppression they share with Indigenous men—oppression that fits uneasily ... into the frameworks of White feminism—and the unacceptability of those men's violent, sexist behaviours toward their families' (Ibid.).

How, then, do these race and gender politics relate to RJ? First, there is considerable debate, and no one position. For instance, in Australia, there is support for RJ principles by many Indigenous people and organizations (*Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, 2000; Behrendt, 2003: 188-9). However, the use of RJ to divert men, who have been involved in family violence, from the criminal justice system is accepted by some communities (Blagg, 2002: 200), but strongly resisted by others. Indigenous communities vary culturally, politically, and in their access to resources.

Second, violence is experienced differently in Indigenous and non-Indigenous communities. 'Family violence' is the commonly preferred term for Australian Indigenous women and encapsulates a broader range of 'harmful, exploitative, violent, and aggressive practices that form around ... intimate relations' (Blagg, 2002: 193) than what is typically contemplated in feminist approaches to partner or domestic violence. Thus, if RJ-like responses are introduced, they will require significant reconceptualization of what is, ultimately, a white justice model. RJ cannot be prescribed, nor adopted formulaically. Rather it needs to be explored and transformed with due regard to Indigenous principles of self-determination, with reference to existing Indigenous initiatives, and with explicit recognition of Indigenous women's interests (Blagg, 2002: 199; see also Stewart et al., 2001: 57; Behrendt, 2003; Cameron, 2005; Coker, 2005).

Third, Indigenous and non-Indigenous women may differ in their conceptualization of, and responses to, RJ. For instance, Heather Nancarrow (2005) found greater support by Queensland Indigenous women than non-Indigenous women for RJ in domestic and family violence cases. Whereas the Indigenous women viewed it as a means of potentially empowering Indigenous people, the non-Indigenous women equated RJ with mediation. She found that non-Indigenous women had greater trust in the criminal justice system, whereas Indigenous women's support for RJ lay, in part, with their distrust of established criminal justice.

Finally, race and gender politics have a particular signature, depending on the country and context examined; and there is considerable debate among and between Indigenous and non-Indigenous women. For example, in contrast to Nancarrow's findings cited above, research by Anne McGillivray and Brenda Comaskey (1999) found that among the Canadian Indigenous women they interviewed, who had been long-term victims of partner violence, there was 'overwhelming support for punishment [jail]', although 'they also supported

effective treatment programs' (p. 117). The women 'saw jail as real and symbolic punishment, as a guarantee of some period of immediate safety', and that treatment without jail would be ineffective (p. 125). They had more mixed views of diversion: 'most thought diversion [was] worth a try' (p. 127), but they wanted to see conditions met such as 'guarantee[ing] treatment and victims' safety, and be[ing] immune to manipulation by abusers' (p. 133). McGillivray and Comaskey noted the women's options were limited because of 'reserve politics' and a lack of resources (p. 133), factors suggesting that the women's personal security was a more pressing concern than an abstract sense of justice. Other Canadian studies have not reported a strong preference for criminal justice, and some note disillusionment with, but not necessarily a rejection of, some models of alternative justice. For instance, Goel (2000) argues that problems with circle sentencing could be addressed by empowering women within their communities to ensure that they enter a circle on a more equal footing.

## **Conclusion**

Feminist engagement with the idea of RJ is recent and evolving. Although there is scepticism about what RJ can do to advance women's, including racialized women's, justice claims, there is some degree of openness to experimenting with a new set of justice practices. Feminist debate on the merits of RJ revolves around those who believe that justice alternatives can offer more options for victims, offenders (or suspects), and communities than established criminal justice; and those who see more dangers than opportunities with informal justice, who are concerned with the symbolic significance of RJ as appearing to be 'too lenient', and who are critical of RJ's overly positive and sentimental assumptions of human nature for victims and victimizers. There are differences between and among white and racialized women in the degree to which the state and the criminal justice system are viewed as trustworthy and effective sites for responding to violence against women. We know that because of historical and contemporary experiences of racism in established criminal justice practices, racialized women are more open to experimenting with alternative justice practices. For Indigenous women, such practices need to be tied to principles of self-determination.

We have identified a wide spectrum of theoretical, political, and empirical problems for future feminist engagement with RJ. More attention needs to be given to ideal justice principles and to whether RJ measures up to those principles. For instance, greater reflection is required on the roles of retribution and punishment in RJ and mainstream criminal justice, and the potential for RJ across a wider range of offences and in handling broader forms of community conflict. This largely uncharted empirical ground should use the tools of realist, social constructionist, and discursive analyses. We require comparative analyses of feminist debates about RJ in different countries and for different communities, necessitating greater sophistication in comparative work. The different political contexts of feminist debates must be recognized. Whereas Cameron (2005) calls for a moratorium on new RJ or Indigenous justice initiatives for intimate violence cases in Canada, Coker (2005) argues that this position would be 'disastrous' in the US because it would mean greater federal intervention in the lives of American Indian women, using inappropriate crime control measures. A fundamental problem for comparative analysis is that the meanings and practices of RJ vary greatly. Among the more contentious areas is the optimal relationship between RJ and established criminal justice, especially for racialized women. The relationship of RJ to other new justice forms such as Indigenous justice, transitional justice, and international criminal justice is a rich, but untapped area.

Since the late 1980s, feminist analyses of justice have shifted from notions that criminal justice could be reformed by adding 'women's voice' or an 'ethic of care' to a more sobering appraisal of what, in fact, criminal law and justice system practices can do to achieve women's and feminist goals (Smart, 1989). During this period, several new justice forms have emerged, among them RJ; as a consequence, we face a far more complex justice field than a decade ago. It is clear that feminist and anti-racist theories and politics must engage with these new developments, at the national and international levels, and with state and community political actors. At the same time, we should expect modest gains and seek additional paths to social change.

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## Notes

<sup>1</sup> Gilligan later re-formulated her argument: she recognized that 'care' responses made within a 'justice' framework left 'the basic assumptions of a justice framework intact ... and that as a moral perspective, care [was] less well elaborated' (Gilligan, 1987: 24).

<sup>2</sup> This work has offered a welcome challenge to any naïve reliance on criminalization strategies, but some analysts have failed to acknowledge the diversity of responses to violence against women, which include hybrid models that engage advocacy groups, community groups, and criminal justice agents (see Stubbs, 2004).

<sup>3</sup> Martin (1998) considers established criminal justice to have an 'individualistic retribution ethic at its core' (p. 155); she equates retribution with punishment, and punishment with imprisonment. Retributivists such as von Hirsch (1993) would not equate retribution with general or specific deterrence, but rather with censure and punishment that is proportional to the seriousness of a crime.

<sup>4</sup> The masculine pronoun is used because Hampton is discussing a case that involved male prisoners' rights to vote.

<sup>5</sup> This result is partly a consequence of a high proportion of 'punch-ups' in the female offence distribution.

<sup>6</sup> Family violence (the commonly preferred term among Australian Indigenous women) refers to a broader array of offences than partner violence (e.g., child sexual abuse and family fights Blagg, 2002) and in youth justice cases, would include sibling assaults and assaults on parents by children.

<sup>7</sup> In South Australia, RJ is set in motion only after a youth admits the offence to the police (or in court). More research is needed to determine whether RJ, as diversion from court, may offer incentives for those who have offended to make admissions.

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