



**The University of Sydney**

# **Sydney Law School**

Legal Studies Research Paper  
No. 08/16

January 2008

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Stubbs Julie (2002) Domestic violence and women's safety: Feminist challenges to restorative justice in Strang H & Braithwaite J (eds) *Restorative justice and family violence* Cambridge University Press, Melbourne pp42-61.[ISBN 0 521 81846 X]

## **Domestic violence and women's safety: Feminist challenges to restorative justice<sup>1</sup>**

Julie Stubbs <sup>2</sup>

### Abstract

This chapter deals with domestic violence rather than other possible forms of family violence. It also proceeds from the position that domestic violence is different in many ways from other forms of crime. It takes as fundamental the need to provide safety to those who experience domestic violence, most commonly women and their children. An appeal to victim safety need not imply a punitive or exclusionary logic (see the debate between Scheingold, Olson and Pershing, Braithwaite and Pettit, and Daly in *Law and Society Review*, 1994). Restorative justice has made strong claims about providing better outcomes for victims than conventional criminal justice system practices and these claims are analysed with reference to empirical data concerning domestic violence. The chapter also examines the extent to which restorative justice practices mobilise resources for the protection of women and children – this is especially crucial at a time when resources are being withdrawn from the formal legal system and from the community.

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The term restorative justice *practices* is used in this chapter to highlight the diversity among initiatives undertaken in the name of restorative justice. While some proponents of restorative justice prefer to locate their analyses at the more general level of the allegedly shared values that denote restorative justice, I argue for greater specificity in the analysis. Attention to the effects of specific practices offers the opportunity to contrast different models of restorative justice and to benefit from the findings of important empirical work undertaken in related domains such as mediation (Pavlich, 1996; Cobb, 1997) and peacemaking (Coker, this volume and 1999).

Part 1 raises questions about the competing conceptions that seem to underpin the debate about alternative forms of justice for domestic violence. Part 2 considers diversity among women with reference to their different experiences of violence, their different pathways to the legal system,

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<sup>1</sup> I would like to acknowledge the research assistance of Sarah Ellison. The research on which this chapter is based was supported by a grant from the Legal Scholarship Support Fund, Faculty of Law, University of Sydney.

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and their particular subject positions. Part 3 examines the claims made about what restorative justice is said to offer victims. Are these so called benefits likely to offer victims of domestic violence meaningful resources – economic, symbolic or otherwise - with which to secure their safety?

### **Part 1 Theorising Domestic Violence**

In analysing alternative models of intervention for domestic violence it is apparent that three key dimensions on which the literature concerning restorative justice, victimology and domestic violence differs are: the theoretical underpinnings of domestic violence; conceptions of agency; and the relationship of alternative interventions to the formal legal system.

#### *Incident based or control based ?*

Much of the literature on restorative justice seems to assume a discrete incident between a victim(s) and offender(s) who are unknown to each other, or are not well known to each other. This is evident in claims that restorative justice offers benefits such as: to allow the victim to meet the offender and to learn that they were not specifically targeted but were chosen more randomly; that the consequences of the violence were unintended or not fully appreciated by the offender; that the offence is not likely to be repeated etc (Hudson & Galaway, 1996). Such assumptions typically are not valid in domestic violence cases and may need to be challenged for other forms of victimisation (Crawford, 2000b, p286-7). Incident based theoretical approaches to domestic violence which focus narrowly on physical harm and on discrete episodes of violence foster an individualistic analysis of violence (see Pavlich, 1996 on individualising discourses), may ignore the social context of domestic violence and may exacerbate the social entrapment of women (Ptacek 1999; Beth Richie, 1996).

Domestic violence is typically not an isolated event but arises through strategies that attempt to implement gender ideologies (Ptacek, 1999). Thus, a control based theoretical analysis of domestic violence is preferable because it has the capacity to recognise a number of features of domestic violence such as that: domestic violence includes a range of behaviours and coercive tactics not all of which are immediately discernible to others; it is often repetitive, meaningful and strategic, reflecting deeply held attitudes and beliefs rather than an isolated incident; and there are social and cultural dimensions that give meaning to the violence, that may authorise or sustain gender based violence, and may constrain women's options in dealing with violence (Ptacek , 1999 p9; Dobash & Dobash, 1979, 1992).

*Victim versus agent: a false dichotomy*

Literature concerning domestic violence and criminal victimisation more generally commonly portrays a dichotomous construction of victim and agency. Within this literature women are constructed as either on the one hand too victimised to exercise choices or on the other hand as active agents who are empowered through choice. There has been relatively little attention to this issue in the restorative justice literature, much of which simply assumes that victims are well able to assert their own interests in restorative processes. Moreover some authors have made claims about the allegedly positive value of restorative justice in overcoming power differentials between the parties in contradistinction to mediation practices<sup>3</sup> which are seen as more susceptible to inequitable outcomes (Braithwaite & Pettit, 1994). These claims warrant much greater scrutiny.

The dichotomous construction of victim and agent is conceptually limited and at odds with empirical research. There are numerous studies that demonstrate women's resilience, courage and recourse to multiple strategies to deal with domestic violence (Bowker, 1983; Schneider, 1992; Mahoney, 1994; Young et al 2000; Gondolf and Fisher, 1988; Keys Young 1998). Dobash and Dobash discuss 'the effects of men's violence on women's negotiations of everyday life', a useful phrase that transcends the victim/agent dichotomy and recognises women's active role in resisting violence but nonetheless emphasises that men's violence can effectively limit women's choices in crucial ways (as cited by Ptacek 1999 at px). Women may face choices between negative alternatives (Davies et al 1998). For some, remaining silent about abuse and or accommodation to their abusers may be important survival strategies.

A second limited conception of women's agency is evident in the construction of women as "atomistic, mobile individual[s]" rather than as highly interconnected to others, particularly to children (Mahoney 1994, p74; Maguigan, 1991; Coker, 1999). Women who seek legal assistance to deal with domestic violence are commonly mothers (Ptacek 1999; see also Davies et al, 1998) and often do so when the children become targets of violence or the mothers fear the effects of the violence upon the children. Batterers may use children as a means to manipulate or intimidate their partners or former partners: "[o]ne of the most common threats made by batterers is to take the children away from their mother, whether physically by snatching the children or by winning

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<sup>3</sup> Although there is a certain ambivalence about mediation in the restorative justice literature. Some authors embrace it as restorative justice while other authors seek to differentiate restorative justice from mediation.

a custody fight” (Davies et al 1998, p33). Women’s strategies to deal with domestic violence frequently are constrained by concerns about their children (Lewis, Dobash, Dobash & Cavanagh, 2000) and where women’s interests do not coincide with those of their children they face difficult choices.

A more complex conception of agency, together with an understanding of the control based nature of domestic violence, should caution against easy assumptions that women’s capacity to exercise choice is unconstrained. This more complex view of women’s agency has important implications for the development of domestic violence programs. Whether in the formal justice system, or in informal processes, women who have been the target of domestic violence need information, services and support to ensure that their decisions are as freely chosen as possible within the available constraints. Restorative justice scholars are yet to consider how to accommodate the relational agency of women with children.

#### *Engagement with the formal legal system*

The literature debating the role of the legal system in response to domestic violence ranges the full gamut from the uncritical appeal to more law and more enforcement whatever the consequences, to the absolute rejection of criminal justice intervention on the basis that it empowers the state but not women (Snider, 1998; 1994; see also Mills, 1999). Proponents of restorative justice also differ in how they would see restorative justice deployed vis a vis the formal legal system (Hudson & Galaway 1996).

Much of the restorative justice literature offers a damning critique of the formal legal system and promotes restorative justice as an alternative (Walgrave, 2000). By contrast Braithwaite and Daly (1994) have proposed that restorative justice, in the form of community conferencing, should be offered at an intermediate stage in a hierarchy of responses with other criminal justice processes and sanctions being invoked where conferencing fails. Others promote restorative justice as a tool through which to transform the criminal justice system (Hudson & Galaway 1996). Joan Pennell and Gale Burford’s model (this volume) suggests a process intersecting with formal legal intervention.

Some restorative justice scholars assume that the victim’s involvement in a restorative justice process is a singular event, capable of being conducted independently of the formal legal system. However, domestic violence victims are often enmeshed in a complex range of legal

interventions, especially where child contact and residence, divorce and or the division of property are in dispute. Rather than offering an alternative to the formal legal system as some restorative justice scholars suggest, a restorative justice intervention may add an additional layer to this complex picture.

Advocates of alternative legal interventions which privilege informal over formal responses to violence, or the converse, sometimes suffer from singular constructions of ‘the state’ or ‘the criminal justice system’, an idealised notion of restorative justice or a too rigid acceptance of a formal/informal dichotomy. Yet there are a number of domestic violence models in practice that deploy community-based programs in conjunction with the criminal justice system in interesting and innovative ways that challenge such depictions and transcend dichotomous constructs (for instance see Busch & Robertson, 1994). Such initiatives are deserving of more serious consideration, and demonstrate the need for careful evaluation of specific initiatives and a nuanced approach to conceptualisation beyond the formal/informal dichotomy.

Crawford has argued that “much of the restorative justice literature and current policy ... tend to obfuscate the role of the state and third parties, replacing these with a particularly ambiguous appeal to ‘community’ ordering and individual choice”(2000 p17; see also Walgrave, 2000). The capacity of informal or community based processes may often be determined by resources provided by government and the back up and authority of criminal justice agencies (O’Malley, 1997; see Braithwaite & Daly’s pyramid of enforcement 1994). Herman, a victims advocate, has argued that only the state has the authority and the capacity to marshal the necessary resources to repair the harm done to victims: “in a commendable effort to humanize the justice system and keep the state in the background, [we] will create another system without adequate resources for victims” (Herman, 1999 p10). The need to mobilise resources to provide safety for victims is crucial and is discussed further below.

There is good reason to be critical of criminal justice practices especially because of their impact on the most marginalised groups in our societies (Ruttenberg, 1994; Snider, 1994, 1998; Fedders, 1997; Hudson, 1998). However, the wholesale rejection of the criminal justice system also may limit women’s options and their safety. In contrast to over-generalised claims made about the failures of the formal legal system, others have documented how victims, especially in cases involving interpersonal violence, may deploy various combinations of recourse to criminal justice and or bargaining with the offender “in accordance with their personal strategy independent of

any logic of punishment” (Zauberman, 2000, p45; see also Lewis et al 2000; Ford, 1991). Legal interventions may offer (some) women resources to deal with the violence (see Stubbs & Powell, 1989; Trimboli & Bonney, 1997; Young et al, 2000; Chaudhuri & Daly, 1992):

By creating a legal crisis, these women challenged the coercive control that men were exercising over them. Most women felt supported by the process and left the court with new resources that placed them in a better negotiating position with their partners or former partners....(Ptacek, 1999, p166).

Ptacek also found that “...the leverage they were able to gain through the threat of criminal sanctions was seen as beneficial; for many women standing up for their own rights offered its own rewards” (1999, p167; see also Merry, 1995).

## **Part 2 – Women’s diverse experiences**

It is trite to say that women’s experiences of violence vary and that different women have different needs and expectations of the legal process. Yet policy-makers face the dilemma of how to develop policies and programs that are responsive to difference. Victims of domestic violence come to be enmeshed in the criminal justice system in different ways, willingly or otherwise. Some are marked as offenders, perhaps because they have fought back against a violent partner, or too often due to the excesses of mandatory arrest policies that may result in action against both parties. For many women involvement with the criminal justice system commences at a time of crisis. They may seek immediate police protection from injury but have little or no conception about any consequent legal proceedings. Others may make strategic choices about seeking longer-term protection through intervention orders or other legal interventions. Women also may need or want different forms of intervention at different points in time as their circumstances change. As Lewis et al argue, it may be futile to consider interventions in isolation from the context in which women find themselves (2000, p202).

### *Domestic violence, race, ethnicity and racism*

The damaging impact of the criminal justice system on minorities offers a significant challenge to the development of domestic violence policy (Fedders, 1997; Blagg, this volume). Racist criminal justice practices have been expressed in various forms including the over-policing of minority men but also through the failure to protect minority women and children (Aboriginal and Torres Strait Islander Women’s Task Force on Violence, 2000; McGillivray & Comaskey, 1999).

Evidence indicates that Black women in the US are more likely to report domestic violence to the police than are other groups (Bachman & Coker, 1995; Hutchinson & Hirschel, 1996). We cannot conclude that this reflects a positive choice for criminal justice intervention rather than a lack of other alternatives. However, we need to be cautious in assuming that minority groups do not wish to use the criminal justice system in domestic violence matters.

As in other areas of feminist scholarship, research and practice concerning violence against women has been subject to criticism for failing to attend to differences among and between women (Crenshaw, 1991). Racism constitutes a significant obstacle for women seeking to deal with domestic violence and has shaped our capacity to talk about the issue (Ptacek, 1999 p19). A gendered analysis of violence which is inattentive to diversity can obscure important differences in the vulnerability of different social groups to domestic violence and in their recourse to deal with or escape violence (Ptacek, 1999; Stubbs & Tolmie, 1995). Suggesting that different social groups may experience differential levels of vulnerability to domestic violence too easily can be put to racist uses (Fontes, 1997; see also Daly, 1995). As Sherene Razack has written:

Culture talk is clearly a double-edged sword. It packages difference as inferiority and obscures gender-based domination within communities, yet cultural considerations are important for contextualizing oppressed groups' claims for justice, for improving their access to services, and for requiring dominant groups to examine the invisible cultural advantages they enjoy (1994, p896).

We have a responsibility to ensure that law and policy recognise and respond to the different needs and interests of women in different social locations. Sadly, in Australia the level of domestic violence experienced by Aboriginal women is extremely high (Greer, 1994; Bolger, 1991; Strang, 1992; Aboriginal and Torres Strait Islander Women's Task Force on Domestic Violence, 2000). Here I make no claims to speak on behalf of Indigenous women – I have no such authority. However, there is an urgent need to acknowledge such issues and to listen to Indigenous women in order to craft responses that are culturally appropriate and effective in offering Indigenous women, children and men safety, security and autonomy (see Behrendt; Blagg, Kelly; this volume).

Restorative justice programs have been promoted as being especially responsive to Indigenous communities, although Blagg (1997), Tauri (1999) and Cunneen (1997) have demonstrated the



problems of approaches that have used singular notions of indigeneity, and have failed to genuinely consult Indigenous peoples. Restorative or community based practices used in response to violence against women in Indigenous communities have produced mixed outcomes. Strong claims have been made about sentencing circles, healing initiatives or conferencing offering benefits to Indigenous communities but these accounts also have been challenged for relying on limited sources, and especially the interpretations offered by white, male commentators. For instance, Razack (1994,1998) has argued that high rates of violence have meant that Indigenous communities in Canada have not been safe places for women and children but outside those communities women also face the violence of racism. Moreover, community-based initiatives often have placed the development and delivery of programs into the hands of men, some of whom are themselves abusers who have continued their physical and sexual abuse (see also Griffiths & Hamilton, 1996; Nahanee 1992; McGillivray & Comaskey 1999; Nightingale, 1994; Brooks, no date).

Here an intersectional framework which acknowledges the multiple and indivisible operation of race, class and gender may assist (Crenshaw, 1991; Daly & Stephens 1995; Daly & Maher 1998). In the absence of such an analysis, an appeal to community-based practices may fail to examine how cultural practices work to sustain the power differences between groups. They may privilege culture over gender (Razack, 1994,1998). Without recognition of the intersection of race, class and gender too often Indigenous women have been left with the invidious choice between politics and practices which represent their race but ignore their gender or the converse. A number of Aboriginal and Inuit women's organisations throughout Canada have questioned the capacity of local or community-based initiatives to protect their physical integrity and have lobbied to retain the external criminal justice system to respond to physical and sexual abuse (Griffiths & Hamilton, 1996; McGillivray & Comaskey 1999).<sup>4</sup>

Hollow Water and Canim Lake are two Canadian Indigenous communities said to have had success in challenging sexual and physical violence against women and children through restorative practices. However, in other Canadian communities victims' safety has been

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<sup>4</sup> McGillivray and Comaskey (1999) undertook research with Aboriginal women in Manitoba to examine their views towards alternative processes for dealing with intimate violence. "Respondents viewed community-based dispute resolution as partisan and subject to political manipulation (p143)." Other concerns expressed included: that offenders might stack the process with their supporters and avoid responsibility for their actions; that given the intimacy of reserve living the process might further shame women and children rather than the offender; the need to respect disclosures of abuse; and, that diversion

compromised. Griffiths and Hamilton note the failure of a program on South Island as arising, in part, from the following weaknesses: insufficient community consultation; lack of credibility of key participants; failure to address specific needs of the communities; political unrest in the communities; family feuds within communities; failure to meet the specific needs of victims and offenders; and, an inability to consider that not all community residents shared the same cultural values (1996 p186). Even in those models lauded as most successful, a role has been maintained for outside criminal justice agencies to deal with serious offenders (Griffiths & Hamilton 1996; Warhaft et al 1999). Restorative justice processes might offer great promise, but they do not in themselves guarantee victim safety or just outcomes. The successful models suggest that the inherent qualities of the communities are fundamental to positive outcomes. Dealing with physical and sexual violence may challenge community solidarity and risk further racism. Just as in the non-Indigenous community, not all communities have the interest, the skills or the resources to take on such matters. Poorly funded initiatives based on volunteer work by community members are unlikely to be effective or sustainable over time (The Aboriginal and Torres Strait Islander Women's Task Force on Violence, 2000). In the absence of infrastructure and resources to secure the safety of women and children, well intentioned programs that impose restorative justice on Indigenous communities may be counter-productive and may undermine the capacity for self governance by communities.

### **Part 3 - Empirical findings concerning domestic violence and challenges to restorative justice**

Women who seek legal intervention following domestic violence frequently do so after long periods of abuse, when the abuse is becoming more serious and affecting the children, or as a last resort when other efforts to stop the abuse have failed, saying 'enough is enough' (Harrell & Smith 1996 ; Keilitz et al p47). Australian studies of domestic violence have found that women who sought legal protection generally had experienced more severe violence than women who did not seek such intervention. For instance, Young, Byles and Dobson (2000) found that as compared to other women victims of domestic violence, women who sought legal protection were more likely to: have experienced more serious levels of violence; be injured; have children; be in a de facto relationship; and, have a partner who had been in trouble with the police before and, or had been violent in other contexts (see also Coumarelos & Allen 1998, 1999).

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may meet offenders needs but not victims' needs for safety. The respondents did not reject the Anglo-Canadian criminal justice system on cultural grounds (p142-3).

*What are the alleged benefits of restorative justice for victims?*

Within the restorative justice literature there is a strong emphasis on the alleged benefits for victims of having the opportunity to participate in an informal process that gives them the chance to speak, to receive an apology and to gain reparation (Hudson & Galaway, 1996; Strang, 1999). Hudson (1998) has emphasised the capacity of restorative justice to deliver both expressive and instrumental functions of punishment (see also Daly, this volume). To what extent are domestic violence victims' concerns and interests coincident with the claims made about the benefits of restorative justice for victims of crime?

Given the characteristics of domestic violence noted above it is not surprising that research findings indicate that women's primary concerns in pursuing legal intervention are protection for themselves and their children, and deterrence of and/or rehabilitation for their (ex)partners. Punishment is typically a lesser concern (Lewis et al 2000). Several studies also have found that some women express “a desire for external validation, a mechanism to communicate loudly and clearly that they were serious, and a public record of the abuse and their effort to stop it. All these goals contribute to their feeling of power in the relationship” (Davies et al citing Fisher & Rose 1995 p77; see also Erez & Belknap 1998; Ptacek 1999). The desire for external validation<sup>5</sup> has been found to be linked to women's sense of justice (Ptacek 1999 p157) and thus, for some women, restorative justice may be seen to be offering a form of second class justice, particularly if gendered violence is seen as being re-privatised and or treated differently from other offences (Coker, 1999; Hudson, 1998).

Thus, while the restorative justice literature emphasises participation, apology and reparation, victims of domestic violence have emphasised safety and external validation of their attempts to stop the abuse, together with deterrence and rehabilitation, over other possible outcomes. These apparent differences are worthy of much more research. However, they may suggest differing underlying understandings of domestic violence. For instance, an incident based analysis of victimisation may be implicit in the focus of restorative justice on apology and reparation. Arguably such a focus implies a *discrete, past* event. However, for victims of domestic violence

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<sup>5</sup> External validation seems to imply more than the ‘expressive function’ emphasised by Hudson which suggests a focus on community disapproval of the offending behaviour. By contrast, external validation seems to imply a further step, that is the affirmation of the woman’s entitlement to live without violence and perhaps also of her right to seek legal redress (see also McGillivray & Comaskey 1999 on the benefits of rights-based discourse, especially for Indigenous women).

who have experienced repeated violence, their interests lie in securing their safety against the threat of *ongoing* violence.

Perhaps the weakest part of the restorative justice literature concerns outcomes.<sup>6</sup> This may be because restorative justice has developed mainly in the juvenile justice domain where the young offender typically agrees to undertake a discrete task(s) and compliance with the task(s) results in the closure of the case file at the earliest possible time. Such an approach will be inappropriate in many cases of domestic violence and in any event may do little to enhance the safety of the victim. Outcome plans for domestic violence may require a significant commitment of resources over time in order to respond to a victim's concerns. For instance, Hudson (1998) has argued that for community disapproval to be effective and to provide protection, it needs to be backed by extensive resources including programs for offenders, holding facilities and recourse to injunctions, curfews, and strong sanctions. Can the 'community of care' assembled for the restorative process sustain such demands? Who will monitor the outcome? Over what period? Restorative justice processes are said to engage the community in responding to the offending behaviour (Presser and Gaarder, 2000). However, this appeal to community offers little real guidance as to mechanisms for accountability. As Crawford has argued:

joint and negotiated decisions, as the outcomes of restorative processes, tie the parties into 'corporate' decisions, but often fail to identify lines of responsibility thereafter and how these should be monitored, such that it becomes difficult to know who is accountable to whom, and for what (Crawford, 2000 p17).

#### *The rhetoric of the state stealing crime from the parties/ community*

While this often repeated claim, typically attributed to Nils Christie, has been an important rhetorical device for the victims movement and for informal justice more generally, it is inaccurate in its account of domestic violence. It denies the history of feminist activism that challenged the failure of the criminal justice system to respond to women's calls for assistance in domestic violence matters. Rather than stealing the conflict, the criminal justice system had long ignored women's calls for protection. While we have good reason to be concerned about criminal

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<sup>6</sup> Here I acknowledge the debates about consistency and proportionality. My concern in this chapter is the question of what might be appropriate (effective?) restorative outcomes for domestic violence.

justice practices, and especially mandatory arrest policies, we should not overlook the fact that many women actively seek legal intervention.

Communities typically know about domestic violence long before a matter is reported to authorities. Some domestic violence matters are successfully resolved within the informal domain (Bowker, 1983) but other cases are brought to the criminal justice system precisely because personal or community-based strategies have failed (Lewis et al 2000). In their study of 6,000 women who entered shelters, Gondolf and Fisher (1988) found that on average the women had tried five different types of help seeking (cited by Davies 1998 p75). Many women seek legal intervention as a means of mobilising additional resources. These resources may be symbolic, such as in denunciation of violence and the legitimisation of victim claims to non-violence by judicial authority, or they might be material. For instance, evidence indicates that police are more likely to act to protect women from violence where a court order is already in place.

Liz Kelly found that the support offered to victims of domestic violence by informal networks was important but typically provided temporary respite only, seldom brought a resolution to the problem of violence and where the women's supporters also became targets of violence, the problems were often compounded (1996, p77). The community is not necessarily well educated about domestic abuse (Kelly, 1996, p80). Family and friends may lack the capacity to offer assistance, or at times may collude with the violence (Keys Young, 1998). Denial, family solidarity and or divided loyalties also may intrude (Coker, 1999). In some communities, such as those that place great emphasis on the privacy of the family, there may be powerful disincentives for community members to be seen to assist women and children who experience domestic violence.

*The community – both source of the problem and the solution?*

Commentators have noted confusion in the appeal to community within some of the restorative justice literature. Pavlich (1998) has argued with respect to mediation, that a 'dubious formulation of community' is often deployed which is conflict-free, spontaneous and informal, and tapped for various and often contradictory political purposes (see also Cohen, 1985; Hudson 1998). As Crawford argues "if 'community' is a free-floating social identity, internally ascribed and easily escaped ....it fails to accord to 'community' any significant structural or institutional characteristics around which the suasive capacity of communities is constructed and maintained" (2000b,p301). In addition, 'community' is represented in a contradictory light as having the

capacity to offer a solution to crime in the present, but yet also a future outcome to be achieved through restorative justice practices (Crawford, 2000a, p6). Further, the restorative justice literature fails to give due regard to the community as having a role in the creation of crime (Coker 1999; Crawford , 1997, 2000b).

As noted above, an adequate theorisation of domestic violence must recognise the social origins of gender and race based domination. In addition, Liz Kelly (1996) cautions against a conceptualisation of community that appeals to an ideal type that stresses consensus, shared history and values and fails to see the power relations, tensions, contradictions, conflicts and alliances. As she argues “[r]elationships of dominance and subordination are present in families and kinship networks, in localities and institutions, making the achievement of community much more complex than previously envisaged ” (Kelly, 1996, p72).

This is important for a number of reasons. First, the appeal to the involvement of the community in restorative justice processes offers no certainty concerning the values that will prevail in any particular restorative practice. This may be so particularly in models where no clear guiding theoretical commitments are evident (by contrast see republican criminology with its guiding principle of dominion, Braithwaite & Pettit, 1994). The requirement of a plea of guilty, a non-neutral facilitator,<sup>7</sup> and the inclusion of victim supporters as utilised in *some* conferencing models offer the potential to support victim’s interests, but the outcome cannot be pre-determined. We cannot assume that the group assembled for the conference have shared values or are knowledgeable about domestic violence (Hooper & Busch, 1996). The tensions, contradictions, conflicts and alliances identified by Kelly may be played out in any number of ways. As Kelly (1996) also notes, within the broader community the perpetrator often enjoys higher status than the victim, and this may have an impact on her credibility, the legitimacy accorded her claims and her capacity to access community resources. Finally, it has been recognised that:

Making amends and restoring troubled relations in an unequal society may mean restoring unequal relations and hence reaffirming inequality. If restorative justice is to be an element within a much wider policy concerned with constructing the conditions under which civility and mutuality breed, then it is limited by its reactive nature ... its reactive

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<sup>7</sup> Whether or not restorative justice is committed to a non-neutral facilitator who promotes certain normative values is contested within the literature.

essence, in responding to acts of victimisation, confines its potential as a transformative ideology.” (Crawford, 2000a p16; see also Dobash & Dobash 1992).

*What resources can the community generate?*

Concerns have been raised that a call for more involvement of the community is likely to rely on informal support from other women. Bea Campbell (1993) has documented the manner in which the withdrawal of social capital from the former industrial cities of northern England has resulted in women in those communities carrying huge burdens in trying to maintain community networks through their volunteer labour. In Australian Aboriginal communities, it is common for women Elders to “work relentlessly” to sustain their communities in a volunteer capacity with little support. In the absence of their services the prospects for some communities are grim (Aboriginal and Torres Strait Islander Task Force on Violence, 2000). Thus, sheeting responsibility back to communities could be a gendered form of privatisation (Kelly, 1996). Community involvement must be more than a euphemism for the unpaid work of women.

According to Crawford “[t]he weakness of community action is that it lacks authoritative means to mobilize resources above and beyond that which can be procured on a voluntary basis” (1997, p200). Communities are likely to differ in their capacities to offer resources to victims and offenders. The handing of crime control to communities at the same time as the withdrawal of state resources (Crawford 1997 p275-6), or the absence of significant resources to begin with, is likely to exacerbate social disadvantage. As Garland (1996) argues, “[a]ctivating communities, families and individuals, is made much less likely if these have been economically undermined and socially excluded” (p463). This issue has general relevance but also may be especially significant in many Indigenous communities with inadequate resourcing to allow genuine community control. LaPrairie has labelled this ‘responsibilisation without resources’ (1999, p150). As Herman has warned, “if victims’ needs are addressed only with the inherently limited resources of offenders and communities, restorative justice will ultimately be unsatisfying for victims” (1999, p7-8).

One model of restorative justice that may answer these criticisms is Joan Pennell’s feminist praxis (this volume) which uses conferencing explicitly to mobilise resources. This model has a strong commitment to investing resources at the outset, careful planning, consultation and selection of conference participants. It is likely to be very resource intensive and contrasts sharply with the much leaner and more standardised approaches that have been adopted in many of the juvenile

justice conferencing models. The fact that Pennell's model is exceptional reinforces the need for careful scrutiny of the various practices that appear under the umbrella of restorative justice.

*What are the victim's legitimate expectations and responsibilities in restorative justice?*

Evaluation studies of restorative justice commonly include a measure of victim satisfaction with process. However, little attention has been given to questions about the responsibilities of victims and their legitimate expectations in restorative justice. Might victims feel pressured or obliged to participate in restorative justice? Are they given adequate information on which to base informed consent to participate? What legitimate expectations might they have about the process and its aftermath? The salience of such factors is likely to be magnified in domestic violence matters. For domestic violence victims these issues need to be examined from a perspective that privileges victim safety.

Shapland (2000) has argued that victims are likely to face additional responsibilities in restorative justice as compared with the criminal justice process. The chance to actively participate in the process is often promoted as a benefit of restorative justice. Yet being required to face the offender in an informal setting and participate in determining the outcome of his case may offer little appeal to a domestic violence victim and may entail real risks. Domestic violence advocates have long recognised the potential burdens and risks for victims of being held responsible for decisions to prosecute. Some restorative justice scholars are beginning to recognise potential risks to victims in restorative practices (Bazemore & Umbreit, 2001). The related question of victim responsibility to accept an apology or offer forgiveness is examined further below.

*Moralising discourses and the meanings of victim and offender*

The content of the terms 'victim' and 'offender' are not morally neutral – both are imbued with meanings drawn from the wider culture and may reflect incomplete knowledge, stereotypes or prejudice. Victims of crime are often judged to be deserving or undeserving, appropriate or inappropriate, innocent or complicit (Bumiller, 1990; Stanko, 1999; Madriz, 1997). Victims of domestic violence or sexual abuse are commonly subjected to moralising judgements based in competing conceptions of gender appropriate behaviour. Feminist critical race scholars remind us too that such judgements are often racialised such that while white, middle class women are frequently presumed to be 'good women' *providing they don't depart from their prescribed role* "black women have never had the benefit of that presumption" (Ammons, 1995, p1041-2; see also Crenshaw, 1991). As noted above, in the absence of an analysis of the social bases of gender and



racial based hierarchies, women who depart from idealised notions of victim status (and, or female gender roles) may be at risk in restorative justice processes of being denied legitimacy or judged as complicit in their own victimisation. This risk is likely to be greatest where the prevailing understanding of domestic violence is incident based.

*Might restorative justice compromise victim safety?*

Work on safety planning for battered women has identified a range of risks that battered women face generated by the batterer and through life circumstances. Leaving the relationship does not necessarily alleviate these risks (Davies et al, 1998). We need to ask whether restorative justice practices offer protections from partner and life generated risks and secondly, whether they may generate additional risks for battered women.

Presser and Lowenkamp argue that victim-offender dialogue “entails a kind of risk for victims that routine criminal proceedings do not” (1999, p336). A close encounter with the offender and the offender’s supporters may hold little appeal for victims of domestic violence and may signal an opportunity for further abuse, especially emotional abuse. The risk of trauma may be compounded when victims participate from a sense of obligation or guilt. Offenders may exercise considerable control over victims who are intimates and victims often have learned to accommodate to the interests of the offender as a survival strategy, or through fear of further violence (Hooper & Busch, 1996). The exchanges that occur between victim and offender in restorative justice take place under real constraints and may derive their meaning, which may not be obvious to others, from past events. Other risks of restorative processes include: a focus on consensus decision making may dilute concerns about victim interest; the absence of a genuine capacity for ongoing community support of the victim and for effective surveillance and social control of the offender; unwarranted assumptions that the process is likely to induce behaviour change in the offender; the potential for popular misconceptions of domestic violence to prevail, for instance the resort to family dysfunction models, or individualising discourses; and the focus on restoration may offer pressure for the couple to reconcile (Hooper & Busch, 1996).

In recognition of such risks, guidelines precluding direct victim-offender dialogue have been introduced in mediation, family therapy and counselling because of the fear of further abuse and victim blaming. For instance, in twenty US states, standards and guidelines for batterer intervention expressly prohibit joint couple counselling (Healey & Smith, 1998). Tolman (1996) warns that if restorative justice were to be pursued numerous safeguards for battered women

would be necessary and he cautions that “face-to-face contact must not be required” and “[s]uch proceedings must not be used to exchange dropping charges or orders of protection in return for restitution”( p182).

Offender screening to exclude those who are dangerous has been advocated as one means of reducing the risk of direct exchanges between victim and offender. While many restorative justice programs include offender screening, usually this does not focus on victim safety but on offence seriousness and willingness of the offender to participate. Presser and Lowencamp have characterised offender screening criteria used in restorative justice encounters as “neither victim-oriented, research-driven, nor consistently applied” (1999, p335; see also Brown, 1994 and Umbreit, 1996 p7 as cited by Presser & Lowencamp). Moreover, effective screening may be difficult to achieve since clinical assessments and statistical predictions of violence are not very accurate (Saunders, 1995) and the prediction of intimate homicide is even more imprecise (Campbell, 1995).

These concerns raise important practical and ethical questions for restorative justice practitioners. What mechanisms can be used to offer safety to victims before, during and after the restorative process? What are their ethical obligations with respect to the victim? Do they have an obligation to warn victims of potential risks and is a warning sufficient (Saunders, 1995; see also Hart, 1988)? This issue of ethics is returned to below.

Several researchers have highlighted indirect risks in restorative justice practices that use victims in the service of other ends. For instance, there has been criticism of UK mediation/reparation schemes being in the service of offenders not victims (Crawford, 2000a) and Moore and McDonald have acknowledged that in conferencing many victims have been ‘used’ in seeking a better outcome for young offenders (1995, p.149).

#### *The appeal to apology (and forgiveness)*

The restorative justice literature invests great significance in an apology. Some restorative justice scholars see the giving and accepting of an apology as the hallmarks of restorative justice (Moore, 1995; see also Braithwaite & Daly, 1994, p.205). While Pavlich has noted with concern that the regulatory environment of mediation exercises subtle pressure to forgive (Pavlich 1996), some scholars argue that within restorative justice victims have a *responsibility* “to accept the expressions of remorse made by the offender and to express a willingness to forgive” (Hudson &

Galaway 1996, p2). This assumes a certain level of trust between the parties and that an apology will be offered genuinely and accepted in good faith. Yet often there is little basis for trust since domestic violence is commonly characterised by repeated offending and apology. Domestic violence perpetrators often are adept at using apology to manipulate their partners and others (Stubbs, 1995,1997; Coker 1999, p86). This over-emphasis on the value of the offender apology has been labelled 'the cheap justice problem' (Coker, 1999, p15).

The focus on apology and its acceptance implies a validity and veracity in the speech acts of, and a shared meaning between, the participants. Yet research indicates that men and women talk about violence very differently. For instance Dobash et al (1998) <sup>8</sup> found significant discordance between men's and women's reports of domestic violence. Men tended to minimize the violence, blame the victim, and under-reported the following: serious violence; the number of violent acts; sexual violence; the infliction of injuries on their partner; and of controlling behaviour generally. The authors were careful not to assume simply that the women's accounts were accurate, but pointed to the importance of examining the idea that 'men and women are likely to interpret their victimization and perpetration of violence against intimates in very different ways' (p 407). The authors challenged the notion that men's accounts of their own violence can be used uncritically.

The tendency for men to rationalise and trivialise their own violence has been found in a number of studies. According to Dobash and Dobash, the dominant view from those working with perpetrators of domestic violence is that "offenders are deemed to be highly self-oriented, lack empathy and frequently deny responsibility, minimise the harm done and deflect blame onto others, particularly women" (Dobash & Dobash 1999 p4). Based on his own experience working with male batterers, Ptacek has reached a similar conclusion: "[men tend to] minimize or deny the intentionality of their violence...individuals often shift back and forth between denying responsibility for their violent assaults and arguing that women deserved it" (1999 p71).

Some proponents of restorative justice have placed great faith in social movement politics to ensure progressive outcomes in restorative processes (Braithwaite & Daly, 1994; Hudson, 1998). It has been suggested that pro-feminist and anti-racist groups should be participants in restorative processes in order to bolster victim narratives and to challenge those who do not take

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<sup>8</sup> Using in-depth interviews and three quantitative scales to measure violence they studied 122 men who had perpetrated violence against women, and 144 women who had been the victims of such violence, including 95 couples.

responsibility for their offending. However, in many locations such social movements are under threat through conservative government policy and funding cuts. In Australia we are currently witnessing the ascendancy of 'fathers' rights' groups in shaping law, policy and funding decisions and women's organisations are becoming increasingly marginal. Massive cuts to legal aid have pushed many women into informal processes and some women into making poorly framed and unworkable agreements around domestic violence and children, which are often breached (Rhoades, Graycar & Harrison, 1999). The capacity for progressive social movements to act as guarantors of safe outcomes in restorative justice processes is limited both by their diminishing resources and by the threats to their legitimacy offered through conservative government rhetoric.

Those engaged in restorative justice practices face an ethical dilemma. Does encouraging a battered woman to accept an apology and any reassurances about her future safety offer false hopes and act to compromise future safety? As Tolman has argued false hopes for victims fostered by apology may actually hamper victims attempts to leave or take other action to deal with the violence (1996, p183). A number of studies have demonstrated the impact of apology on battered women's decision making. For instance, Pagelow (1981) found that 73% of a shelter sample returned to their partner because he had apologised and they hoped he would change (see also Barnett and LaViolette; Okun 1986; Gondolf & Fisher 1988, as cited by Davies et al at p76). Welfare and Miller caution that from a therapeutic perspective there are risks for abuse survivors in privileging an apology: "An ill-timed, perpetrator-led apology or 'face-up' session is yet another insulting and potentially damaging process for the survivor, where yet again she is asked to put his demands first and to deny the complexity of her own experience" (1999, p6).

## **Conclusion**

Scepticism about the alleged benefits of restorative justice for domestic (or family) violence victims should not be dismissed as arising from a feminist 'myopia of police-courts-corrections' (Braithwaite, 2000). For the most part the restorative justice literature has failed to engage meaningfully with the issue of domestic violence. Critical scrutiny of the claims made on behalf of restorative justice suggests that they rely, at least in part, on assumptions about victimisation that are at odds with empirical findings concerning domestic violence, and perhaps other forms of victimisation. Participation, apology and reparation have been promoted as benefits of restorative justice practices for victims without due regard to the potential risks of participation and the knowledge that apology is a common tactic in abusive relationships. Without clear norms to guide restorative justice practices there is a real risk that common misconceptions about domestic violence will prevail. Individualistic conceptions of domestic violence or constructions of such violence as 'relationship problems' may compromise victim safety.

The interests of victims of domestic violence will be served best by finding mechanisms that offer enhanced safety and security. However, serious questions remain about accountability for the decisions reached in restorative justice practices and about the capacity for such practices to generate resources to assist victims of domestic violence. It should not be assumed that 'communities' have the capacity or the collective will to offer tangible support to victims or to exercise surveillance and control over offenders. Communities, however defined, will differ in their capacity to respond to the demands of restorative justice. For many victims of domestic violence having responsibility for their welfare sheeted back to the community may be hollow and unsatisfying.

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