

## **Feminist theory, feminist and anti-racist politics, and restorative justice**

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### **Biographical note**

KATHLEEN DALY is Professor of Criminology and Criminal Justice at Griffith University, Brisbane. Since 1995, she has directed a program of research on restorative justice and the race and gender politics of new justice practices in Australia, New Zealand, and Canada.

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## **Feminist theory, feminist and anti-racist politics, and restorative justice**

Feminist engagement with restorative justice (RJ) takes several forms, and this chapter maps five areas of theory, research, and politics.<sup>1</sup> 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 many RJ advocates are poorly informed. At the same time, there are other domains of feminist engagement with RJ. Before turning to these areas, we give an overview of feminist theory and politics, and different perspectives on law and justice.

### **Feminist theory and politics**

Feminist theory (which comprises many theories) is concerned with the ways in which sex/gender structures social institutions, social life, groups, the self, and the body. As importantly, it considers how knowledge is itself gendered, including how authoritative understandings of the world, both feminist and non-feminist can be evaluated. Feminist researchers work in all domains of knowledge. What is termed the 'second wave' of the women's movement emerged in the 1960s, alongside other social movements such as the civil rights movement in the USA, Indigenous social movements in North America and in Australia and New Zealand, gay and lesbian movements, and many more. These social movements were, at a minimum, calling for extending liberal ideals of citizenship and 'rights' to formerly excluded groups (such as women and people of colour), and more maximally, seeking a transformation of society.

### **Feminist perspectives on law and justice**

Feminist theory and politics have changed over the past four decades, and we depict these developments to contextualize shifts over time in feminist engagement with law and alternative justice practices.

*Liberal feminism* has been in place for over three centuries as women have sought to secure equality of legal and citizenship rights with men. In the 20<sup>th</sup> century, the rights agenda intensified further. In striving to remove barriers to women's access to the public sphere of education, paid work, and state entitlements, liberal feminists argued that most (perhaps all) sex-based classifications were wrong. The criminal justice agenda that flows from this stance is that women should have equal treatment and the same opportunities as men. Such an approach may advance women's employment in formerly male-dominated jobs (such as

police officers or prison guards), but it may ignore the impact of pregnancy and child care on women's paid work, and affect women adversely in other areas, such as sentencing policy (see Daly and Tonry 1997; Raeder 1993). The major justice question for liberal feminist theorists is, do women have the same rights and opportunities as men, and are they treated the same as men?

*Cultural feminism* has also been in place for over a century, and it is concerned with the limits of an 'equality with men' agenda. Emphasis is given to bringing women's social, sexual, and reproductive experiences to the fore, not to overlook or submerge them. This was (and is) a politically risky move because in bringing women's specificity or 'difference' from men into public debate, one may end up re-inscribing women's difference as deficiency compared to men. A celebrated 20<sup>th</sup> century example of cultural feminism is Carol Gilligan's (1982) research on gender differences in moral thinking. She finds that women's ways of responding to moral problems differ from those of men: girls and women more often use contextual and relational reasoning, whereas boys and men more often use abstract reasoning. She argues that both modes of thinking should be part of mature moral development. The major question for cultural feminist theorists is, how can 'women's ways of knowing' and women's 'difference' be brought more fully into a justice agenda?

Like liberal and cultural feminism, *radical feminism* analyses gender difference, but the arguments focus more forcefully on inequalities and power that construct gender difference. A well-known 20<sup>th</sup> century radical feminist, Catharine MacKinnon critiqued Gilligan's thesis, saying that the content of the reputedly 'female voice' arose from men's dominance of women, and that women could not currently articulate a different form of power 'because his foot is on her throat' (in Dubois et al. 1985: 74-75). In MacKinnon's view, we cannot know what women's values or voice are until there is a transformation of gender power relations. Radical feminists examine the routine forms of oppression in women's everyday lives that flow from sex/gender, as this is experienced by female bodies and controlled through heterosexual relations and men's structural domination of women. The major question for radical feminist theorists is, how do we transform sex/gender power relations so that women are not subordinate to men?

These three feminist perspectives dominated the political landscape in the 1960s and 1970s, but during the mid 1980s, they were unsettled by critical race feminism and feminists drawing from postmodern and post-structural social theories. The latter group of feminists retain varying degrees of commitment to the 'liberal-modernist project' (Hudson 2003: 123): some wish to 'reconstruct' it, and others, to 'abandon' it (Ibid.).

Liberal, cultural, and radical feminists typically focus on one axis of inequality and power—that connected to sex and gender difference—but other feminists are interested in connecting sex/gender to other relations of inequality, such as race and class. During the 1970s and 1980s, there was interest to connect feminist theories of gender (and patriarchy) with Marxist theories of class (and capitalism), a perspective termed *socialist feminism*. Soon after, there was interest to connect gender and class to race and ethnicity (see Daly 1993). *Critical race feminism*, which emerged in the early 1980s, built on these developments, and it challenged those feminist analysts who viewed women's circumstances through the lens of sex and gender alone. At the same time, critical race feminism challenged movements for racial justice, which focused on racialized men's, but not women's circumstances. This created increasing complexity in making 'rights' claims, especially because the law tended to centre *either* on gender relations *or* on race relations, but not on both together.<sup>2</sup> For critical race feminists, the question is, how can both women's and racialized groups' claims for rights and

justice be addressed? Analyses of power became more fractured and conceptualized as interactive or intersectional (Crenshaw 1989; Collins 1990; Wing 1997).

*Postmodern and post-structural feminism*, emerging at around the same time as critical race feminism, shared similar concerns, but conceptualized multiple identities and fractured justice claims in differing theoretical and political terms. There is considerable variety among this group of thinkers, some of whom see an emancipatory potential within the ideals of a liberal modern society, and others who do not. Informed by social theorists who argued against universalizing claims (whether about 'women' or 'black women', among others), and who wished to engage the problem of 'difference' in philosophical and linguistic terms, postmodern feminist theorists became highly reflexive about the problem of power in theorizing and explaining women's, and gender differences in, social existence. The idea of power relations shifted from conceptualizing the dominance of one group (such as men) over another (such as women) to analyzing the legal and social discourses which construct sex/gender relations. Several types of problems emerged. First, within feminist theorizing, the category *woman*, without reference to other social categories, became increasingly untenable. For example, who could speak as 'a woman' about things that mattered to women? Who could speak as 'a black woman'? Second, and as important, it was evident to some thinkers that woman and sex/gender relations more generally, was caught in a profound structural closure. Specifically, it seemed to many postmodern feminists that the transformative promise of radical and other critical feminisms was doomed. Because the meaning of gender (or other differences) is constructed in binary terms, that is, not 'man' (or not 'white' or not 'heterosexual', etc.), women are inevitably constructed as 'Other'. Foundational thinking about any social relation (gender, race, class, among others) lost authority. Justice claims became more complex. Not only did they become more contingent and uncertain, but for many social theorists, they became unknowable, deferred, or something that could only become. While such developments have been unsettling for some, they have opened up new possibilities for challenging legal and social discourses on gender (and other social categories), re-thinking justice, and for pursuing justice claims in different terms and on behalf of new coalitions and constituencies.

## **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 analysts believe that criminal justice is not possible without social justice. For example, some RJ advocates have a more expansive definition of justice; and embedded within Indigenous justice are socio-political aspirations of sovereignty and self-determination that presume a broad social justice agenda.

## ***Contexts of justice claims and practices***

Several streams of activism moved the idea of RJ forward, and social movements during the 1950s to 1970s were influential (Daly and Immarigeon 1998). One stream came from critiques of racism in police practices, courts, and prisons. In the USA, racial domination by whites was maintained, it was believed, by the over-criminalization and imprisonment of African-Americans and other racial and ethnic minority groups. Indigenous groups in the USA, Canada, Australia, New Zealand, and South Africa also challenged extant criminal justice practices as methods of maintaining neo-colonial power. These analyses were central

to decarceration movements, including prisoners' rights, alternatives to the prison, and arguments to abolish the prison; and they challenged the ways in which justice system practices routinely disadvantaged racialized groups. Whereas Indigenous and racial-ethnic minority group challenges to justice system practices focused largely on the experiences and treatment of accused persons and offenders, the women's movement centred attention to violence against women and children, and to the mistreatment of victims in the criminal justice process, although some feminist activism also focused on prisoners' rights campaigns. Although offenders and victims are often viewed as protagonists in the justice system, social movement politics made it possible to see them as having common experiences of unfair and unresponsive treatment, although as we shall see, there are inevitable tensions in making justice claims from a victim's and an offender's (or an accused's) perspective. Paralleling and shadowing social movement activism was research and theory on the possibilities of informal justice (Abel 1982; Merry 1982; Matthews 1988). Victim-offender mediation, community justice, among other alternatives gave concrete expression to the aspirations of social movement and community development activists; but these were not without feminist critique.

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

Feminist engagement with alternative justice practices pre-dates RJ's emergence (Daly and Immarigeon 1998). The introduction of a range of informal justice practices such as alternative dispute resolution, coupled with the work of Carol Gilligan (1982), had a large impact on feminist theory and activism.

### *Different voices*

Gilligan's (1982) difference voice construct was hugely popular in the 1980s because, among other reasons, it is a simple dichotomy that seems to respect and honour women's ways of knowing. Gilligan said that girls' (or women's) moral reasoning is guided by an 'ethic of care', which differs from an 'ethic of justice' (the 'male' voice, theorised by others to be at the top of a hierarchy of moral development). The ethic of care centres on moral concepts of responsibility and relationship; it is a concrete and active morality. The ethic of justice centres on moral concepts of rights and rules; it is 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. Her ideas had a major impact on feminist thought throughout the disciplines.

In criminology, Frances Heidensohn (1986) and Kay Harris (1987) applied the care/justice dichotomy to the criminal justice system. Heidensohn compares a 'Portia' model of justice, which values rationality and individualism, with a more women-centred 'Persephone' model, which values caring and personal relations. She says that greater attention be given to the values and concepts of justice associated with a Persephone model. Harris (1987: 32) argues 'for a massive infusion of the values associated with the care/response model of reasoning', although she also believes that it would be mistaken to substitute a justice/rights orientation with a care/response orientation. Daly (1989) challenges the association of justice and care reasoning with male/masculine and female/feminine voices, arguing that this gender-linked association is 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. During the 1990s, Gilligan's different voice construct was superseded by more complex and contingent analyses of ethics and moral reasoning. This shift was propelled, in part, by critical race and

postmodern feminist influences. However, some RJ advocates have not kept up with these developments in feminist thought. For instance, Guy Masters and David 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 critique in Daly 2002a).

### *Informal justice*

Informal justice, along with victim-offender mediation and community conflict resolution, featured in the 1970s and 1980s as precursors to RJ. Although some feminist analysts initially saw mediation as compatible with feminist values, many others thought it was inappropriate when partner violence was present. The mediation or conciliation model (Lerman 1984) was criticized for defining battering (or other offences) as 'disputes', for 'pushing reconciliation', 'erasing victimization', and 'limiting [formal] justice options' (Presser and Gaarder 2000: 180-1). Critiques of mediation were influential in curbing feminist interest in RJ, but mediation and RJ practices are not the same. 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 emphasize power differences among women and a racial/ethnic inflection of 'woman' (Wing 1997).

Major debate exists among feminist philosophers concerning the term *woman*. As reviewed by Hudson (2003: ch. 4), scholars such as Iris Marion Young and Seyla Benhabib say 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, say that specific identities are fluid and contingent, based on what occurs in interactions with others. What unites these theorists and critical race feminists, is that the category woman is not stable and unified, but inflected by other elements of difference among women. Assuming this is true, then a 'woman's justice' or a 'feminist justice' is not possible because the subject woman (or category women) is too varied or contains hierarchies of difference, which cannot be smoothed over without excluding and oppressing some women.

Hudson builds on feminist and other social theories to conceptualize a post-liberal and post-communitarian justice, which must satisfy certain conditions (2003: 206; see also Hudson 2006). She endorses Habermas's 'liberal ideas of rights and equal respect and equal liberty' and 'his proposals of a communicative ethics', which provide for a 'discursive justice', where multiple views are heard (p. 175). However, she identifies a major weakness in his (or other liberal and communitarian perspectives on justice): they lack an 'openness to Otherness' to 'alterity' (Ibid.) and overlook key insights from recent feminist thought. She proposes that

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 should be 'relational, discursive, plurivocal, rights regarding, and reflective' (Ibid.), and she believes that RJ may be able to 'meet these requirements', although she has reservations about whether RJ ideals are implemented in practice. Notwithstanding a stated interest by RJ advocates in balancing the interests of offenders, victims, and the community, she believes 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. Hudson's contribution to debates about RJ is especially important: rather than asking, does RJ satisfy the justice claims of feminist, critical race, or other groups, she outlines a set of ideal 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. There are several major aims of punishment, including deterrence, incapacitation, rehabilitation, and retribution. 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 of this approach see Daly and Immarigeon 1998; Daly 2000, 2002a). Moreover, retribution is used in varied ways: often it is used negatively to responses that are punitive, degrading, and or involve incarceration; but it can also be used neutrally to refer to censuring harms (e.g., Duff 1996; Hampton 1998; Daly 2000) or deserved punishment in proportion to a harm (von Hirsch 1993), which is decoupled from punitiveness. Finally, commentators mistakenly refer to established criminal justice practices as retributive justice, when 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>3</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), 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 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, which 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 1996, 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. She conceives of justice as 'some kind of counterbalancing pain for the wrongdoer' (p. 47) and is critical of RJ advocates who 'see these connections between justice and the infliction of pain on the offender as arbitrary ...' (p. 47). 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 is concerned 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 her desire to receive compassion for her own loss' (pp. 150-1).

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: are analysts more concerned with victims' or offenders' interests? Is it possible to balance both?

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. Here, she draws on Howard Zehr's (1990) oppositional contrast of retributive and restorative justice.<sup>5</sup>

That RJ is posed as an 'alternative' to established criminal justice can create confusion in debates on the role of retribution. Whereas most assume that the values of RJ are an alternative to the 'retributive ethic' of established criminal justice, or that RJ cannot include retribution (or punishment), there is another way to see the relationship between the two: as deeply entwined. Antony Duff (2003: 58) makes the point in philosophical terms: criminal mediation 'aims ... to achieve restoration, but to achieve it precisely through an appropriate retribution'. He argues that the 'retributivist slogan [the guilty deserve to suffer] says nothing

about *what* the guilty deserve to suffer' (p. 48, emphasis in original), and he nominates remorse, censure, and reparation. 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 expressed in RJ practices. Major projects on conferencing, such as the Re-Integrative Shaming Experiments (RISE) in Australia and related research on victims (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 in youth justice conferences in the ACT and South Australia. From observations of 24 conferences, she finds they are highly gendered events: few offenders were female (15 percent), women were the majority of the offender's supporters (52 percent) and victim's supporters (58 percent), and more mothers than fathers were present at conferences. She finds that 25 percent of the victims present were treated with disrespect or were re-victimized in the conferences; all but one were female. In these cases, the offender did not take responsibility for the act; this occurred when victims did not have supporters or were outnumbered by offenders and their supporters. In New Zealand, Gabrielle Maxwell and Allison Morris (1993: 119) also find that 25 percent of victims felt worse after attending the conference, but the authors did not indicate the victim's gender.

A second study by Daly of 89 conferences in South Australia finds that the experiences of victims and offenders are conditioned by the gendered contexts of offending and victimization in the larger society (Daly 2002b). 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 be broadened to include offences other than male 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; they were more defiant and less apologetic for their behaviour.<sup>6</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 finds that girls were more likely than boys to report difficulties growing up (such as moving around a lot, experiencing violence and abuse, poor relationships with others, and running away from home) and to have been reported for care and protection reasons (58 percent and 41 percent, respectively) (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. 150-51). As in Daly's later study (2002b), the girls appear to be less compliant and more challenging of the conference process than the boys.

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 practices. For instance, research could take a social constructionist approach to gender and RJ (see Cook 2006); 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.<sup>7</sup> 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). The potential problems and benefits of RJ for such offences are highlighted below. 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 Acorn (2004), Busch (2002), Coker (1999, 2002), Goel (2000), Hopkins et al. (2004), Lewis et al. (2001), Presser and Gaarder (2000), Shapland (2000), and Stubbs (1997, 2002, 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), Daly (2002b), Daly and Curtis-Fawley (2005), Hopkins et al. (2004), Hudson (1998, 2002), Koss (2000), Koss et al. (2003), Martin (1998), Mills (2003), Morris (2002), Morris and Gelsthorpe (2000), Pennell and Burford (2002), and Presser and Gaarder (2000).

*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 (e.g., Braithwaite and Daly 1994; Daly 2002b, 2005; Daly and Curtis-Fawley 2005; Lajeunesse 1996; Pennell and Burford 2002; 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 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 where RJ is used routinely in youth justice cases of sexual assault. In a New Zealand pilot of RJ as pre-sentence advice for adult cases, partner and sexual violence cases are currently ineligible. The USA project, RESTORE, is the first pilot to test RJ in adult cases of sexual violence (Koss et al. 2003).

After reviewing 18 conference cases of sexual violence, Daly (2002b: 81-6) concludes 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) argues that conferences are a better option for victims, if only that there is an admission to the offence and a penalty of some sort. 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>8</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 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, Rashmi 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, including in institutions (see Julich 2006), 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 are associated with calls for self-determination; these elements are not often acknowledged in alternative modes of justice, nor are Indigenous women's perspectives typically addressed. Claims that RJ is derived from Indigenous practices and or is particularly appropriate for Indigenous communities have been challenged for denying 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)<sup>9</sup> 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.

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', by contrast with 'the individual men doing the bashing and raping and child molesting ...'. 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' (p. 156).

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 (Behrendt 2003: 188-9; *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* 2000). 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 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 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 the Indigenous principle of self-determination, with reference to existing Indigenous initiatives, and with explicit recognition of Indigenous women's interests (Blagg 2002: 199; Behrendt 2003; for Canada, see Stewart et al. 2001: 57; for the USA, see Coker 2006). Third, Indigenous and non-Indigenous women may differ in their conceptualization of, and responses to, RJ. For instance, Heather Nancarrow (2006) finds greater support by Queensland Indigenous women than non-Indigenous women for RJ in domestic and family violence cases. Whereas the Indigenous women viewed RJ as a means of potentially empowering Indigenous people, the non-Indigenous women equated RJ with mediation. The 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) finds that among the Canadian Indigenous women they interviewed, who had been long-term victims of partner violence, there is 'overwhelming support for punishment [jail]', although 'they also supported effective treatment programs' (p. 117). The women held mixed views toward diversion: most thought it 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).

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, a review of the justice system in the Canadian province of Nunavut questions whether conferencing and victim offender mediation meet women's needs and interests (Crnkovich et al. 2000). The authors note the potential to reflect 'Inuit values of restoring harmony and peace within the community rather than punishing an individual for a crime committed against the state' (p. 29). However, they are troubled by a lack of uniformity in practice and the potential for victims to be silenced, especially when members of powerful families were implicated as offenders; and an inordinate focus on the offender (p. 31). They also challenge the presumption of choice: 'When the community, including the accused and the victims, are given the choice between the outside Euro-Canadian justice system and their "own," the pressure to choose their own system will be great' (p. 30). They recommend 'developing a process of community involvement that is accountable and community based, representative and sensitive to gender as well as culture' (p. 37). Likewise, Goel (2000) argues that problems with circle sentencing could be addressed by empowering women in their communities to ensure that they enter a circle on a more equal footing.

The Canadian context for contemporary race and gender politics includes 'the 30-year struggle by Aboriginal women for sexual equality rights' (Nahanee 1992: 33; see also McIvor 1996; Cameron 2006), including litigation over the denial of sexual equality to Indian women, and challenges to male-dominated Aboriginal organizations for not representing Indian women's interests. This struggle is commonly characterized as a clash between individual and collective rights. Critics say that certain Indigenous women's organizations were (and are) aligned with feminist interests (an individual rights focus), and by implication not with Aboriginal, communitarian interests. In response, some Indigenous women say that they are being asked to put community interests before their own individual interests, for instance, in the demands by some Indigenous organizations that women's claims for equality should await the attainment of Indian self-government (a collective rights focus). Teressa Nahanee (1992) sees the pursuit of individual rights claims as having brought important gains for Aboriginal women, but she seeks to avoid an oppositional and dichotomous construction of rights by arguing for a recognition of individual rights, and the accommodation of group rights, including those of women and children, 'within the collective' (p. 53). In connecting these debates to criminal justice, Emma LaRocque (1997) asks 'how offenders, more than victims, have come to represent "collective rights"' (p. 81), and she challenges the successes claimed for some alternative justice programmes in Aboriginal communities such as Hollow Water.

Australian debates have a different character; and in the absence of a national bill of rights, Constitutional challenges have been less significant than in Canada. Nonetheless, there have been significant political challenges to government and Indigenous organizations for failing to recognize Indigenous women's interests, especially concerning violence against women and children. Although the oppositional contrast between collective and individual rights is not as

deeply etched in political debates in Australia as in Canada, a clear example of the interests of Indigenous communities being counterposed with those of Indigenous women in debates about justice arose in the wake of the Royal Commission into Aboriginal Deaths in Custody. Some women reported being silenced in their attempts to raise concerns about violence against women and being told that, if they reported the violence, they put Indigenous men at risk (Greer 1994: 66; Cunneen and Kerley 1995; Marchetti 2005).

## Conclusion

Feminist engagement with 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. Debate about the merits of RJ has been conducted largely in the abstract, with little empirical research on areas that are of particular interest to feminist analysts. There are differences between and among white and racialized women on the degree to which the state and the criminal justice system are viewed as trustworthy and effective sites for responding to violence against women. However, in light of historic and contemporary experiences of racism in established criminal justice practices, racialized women may be more open to experimenting with alternative justice practices, and for Indigenous women, when such practices are tied to principles of self-determination.

We 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 depict men's and women's experiences of victimization and recovery from crime, as well as their experiences as offenders, using 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. 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. Finally, 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.

## Endnotes

<sup>1</sup> This chapter excerpts from and expands upon Daly and Stubbs (2006).

<sup>2</sup> As discussed in the section on race and gender politics, the same problem is evinced in the individual and collective rights debate in Canada.

<sup>3</sup> This work has offered a welcome challenge to any naïve reliance on criminalization strategies, but some analysts have failed to acknowledge the diverse responses to violence against women, which include hybrid models that engage advocacy groups, community groups, and criminal justice agents (see Stubbs 2004).

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

<sup>5</sup> Zehr (2003: 58) has since argued that retributive and restorative justice have commonalities of wishing the 'right the balance' in the aftermath of crime, and that the response should be proportional to the offending act.

<sup>6</sup> This result is partly a consequence of a high proportion of adolescent 'punch-ups' in the female offence distribution.

<sup>7</sup> Partner violence refers to couple violence, whereas family violence (the preferred term for Australian Indigenous women) refers to a broader array of offences such as child sexual abuse and family fights (Blagg 2002). For youth justice cases, family violence would include sibling assaults and assaults on parents by children.

<sup>8</sup> In South Australia, RJ can only occur when a youth has admitted 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.

<sup>9</sup> Circles have been identified as a form of RJ and an Indigenous justice practice. Some analysts distinguish between the two, and others do not. In practice, RJ is predominantly a 'white justice' form, which is applied to Indigenous offender cases, although ironically, advocates claim that RJ has its origins in Indigenous practices (see Blagg 1997 on an Orientalist appropriation of RJ). Circles are often assumed to reflect Indigenous practices, but this remains controversial. We do not address this matter, with its associated politics, here (but see Cameron 2006).

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