

1 Restorative Justice and Family Violence

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A New and Troubling Political Context

Many of the authors in this collection are both scholars and activists in the social movements that are drawn into conversation here. These are the social movement for restorative justice, the women's movement, more particularly the battered women's movement, and movements for Indigenous self-determination. Some participants, such as Joan Pennell and Kay Pranis, have had significant involvements in all three. Most of our authors are sympathetic to the aspirations of all three social movements, though some are deeply concerned that the social movement for restorative justice is overreaching the limits of the contribution it has to make.

The conversation takes place against a background of considerable growth in popular and political backing for restorative justice, as manifest in the enthusiastic support of many nations, and the lack of opposition from any, to restorative justice in the Declaration of Vienna from the UN Congress on the Prevention of Crime and Treatment of Offenders (April 2000). In few countries, however, has this political support translated into major resource shifts toward restorative justice within criminal justice systems. In no country has there been any such resource shift with respect to the regulation of family violence.

A question we raise is whether the latter fact reflects a lack of courage or an appropriate prudence given the many special hazards we discuss in this book when restorative justice is applied to family violence. It could be a mixture of both. We personally certainly felt influenced by both when the Reintegrative Shaming Experiments (RISE) were set up in Canberra in 1994, the aim of which was to measure the comparative effectiveness of restorative conferencing with normal court processing. Some in the police undertook some preliminary experimentation with restorative justice conferencing for family violence. They viewed it as successful and wanted to push on. The Attorney General opposed this, arguing that domestic violence should be explicitly excluded from

RISE. We supported him in this. Partly it was lack of courage. We did not want this political fight; we wanted local women's groups to be sympathetic to what we were attempting, which basically they came to be. Secondly, we felt that while it was quite possible that conferencing could be redesigned to cope with the special dangers of family violence, we and our colleagues in the police did not have the competence to accomplish the redesign. In retrospect, we were right here; we clearly did not have the competence that Joan Pennell, Gale Burford and the local communities where they worked subsequently mobilized to develop their successful Canadian conferencing programs. Thirdly, we felt there was much validity in the feminist critiques of mediation and Alternative Dispute Resolution (ADR) as they had been practised until that time. So we saw disturbing potential to do harm rather than good.

In the year the papers in this essay were first written (2000), we learnt that it was in the RISE violence experiment that Lawrence Sherman, Heather Strang and their team found conferencing to have the biggest effect in reducing criminal reoffending (a net reduction of 38 percent compared to cases randomly assigned to the Canberra courts). These were violence cases that explicitly excluded domestic violence. So for us as editors this collection is a labour of conscience. We have to ask ourselves the question whether in the name of women's rights we actually did a disservice to women in excluding violence against them from the Canberra experiment. We still feel quite unsure about the answer to that question. But we are sure there is a moral imperative to keep asking the question. The qualitative experience from South Australia that Kathleen Daly is marshalling through the South Australian Juvenile Justice project (Daly, this volume), where at least with juvenile conferencing, a decision was made not to exclude family violence and rape, is yet to reveal that this was a terrible mistake. One of us was consulted on that decision as well. This was an easier policy judgement – whether the South Australian conferencing legislation should be drafted to explicitly exclude family violence or rape. It still seems that it was right to say that legislatively to exclude conferencing for all time from what Daly describes in her essay as gendered violence would have been premature. Indeed it would have precluded the very policy prescription about judging cases concretely rather than abstractly that Daly develops in her chapter here. No such legislative exclusion had been included in the prior New Zealand law (see the chapters by Morris and Busch).

A Changing Evidentiary Context

The new openness to thinking about the applicability of restorative

justice to family violence also occurs in the context of increasing though still cautious optimism that restorative justice may have promise for reducing crime and quite convincing evidence that citizens who experience restorative justice as victims, offenders and participants perceive it to be fairer and more satisfying than courtroom justice (Braithwaite, 2001). In 1999 one of us published a review of the evidence that reached encouraging, though hedged, conclusions about the efficacy of restorative justice (Braithwaite, 1999a). Only one of more than 30 studies could be interpreted as showing an increase in reoffending for any type of offender put into restorative justice programs and many showed reduced offending, though mostly not very convincingly, given the quality of the studies.

Just one year on, this optimism was increased somewhat by new evidence that only became available during 2000. We have mentioned the RISE results, which, while mixed, are especially encouraging on violence. First results of a replication of RISE, or rather certain aspects of it, on only minor juvenile offenders in Indianapolis by McGarrell et al (2000) reveal a reoffending rate for cases randomly assigned to a restorative justice conference 40 percent lower than in the control group after six months, declining to 25 percent lower after 12 months. Another set of results of great importance, even though not based on random assignment, is that from the John Howard Society's Restorative Resolutions project in Winnipeg. The reoffending rate of the Restorative Resolutions group was one-third of that in a matched control group. The importance of this result is that it comes from a sample of serious adult offenders referred by prosecutors, Aboriginal legal aid and other organizations at the deep end of the system. Cases were not supposed to go into the restorative diversion unless they were headed for a prosecutorial recommendation of at least six months of prison time, an objective achieved in 90 percent of the cases. Allison Morris in her essay also discusses a new evaluation of two adult (mostly) restorative justice programs in New Zealand (that included some family violence cases) where significant reductions in reoffending occurred compared to a control group, though there are not enough family violence cases to analyse these separately (Maxwell, Morris & Anderson, 1999).

The most important recent empirical evidence for our concerns in this volume is the results of Gale Burford and Joan Pennell's (1998a) study of a restorative conference-based approach to family violence in Newfoundland. It found a marked reduction in both child abuse/neglect and abuse of mothers/partners after the intervention. A halving of abuse/neglect incidents was found for 32 families in the year after the conference compared to the year before, while incidents increased markedly for 31 control families. Pennell and Burford's (1997) research

is also a model of sophisticated process development and process evaluation and of methodological triangulation. While 63 families might seem modest for quantitative purposes, it is actually a statistically persuasive study in demonstrating that this was an intervention that reduced family violence. There were actually 472 participants in the conferences for the 32 families and 115 of these were interviewed to estimate levels of violence affecting different participants (Pennell and Burford, 2000a). Moreover, within each case a before-and-after pattern was tested against 31 different types of events (e.g. abuse of child, child abuses mother, attempted suicide, father keeps income from mother) where events can be relevant to more than one member of the family. Given this pattern matching of families \times events \times individual family members, it understates the statistical power of the design to say it is based on only 63 cases. Burford and Pennell (1998a: 253) also report reduced drinking problems after conferences.

We take the empirical evidence as tentative yet sufficient to impose an obligation on criminologists to be open to the possibility that restorative justice has something to offer in the domain of family violence that courts do not have to offer. We take feminist theory on ADR as instructive about the heavy obligations we bear to be cautious about rushing at innovation and to be mindful of the limits of our competence where lives are so precariously at risk. At a personal level we feel it is a test of our professional courage, our prudence, our openness to new evidence that might prove us misguided or naïve.

The Concepts

In light of all this uncertainty we have not been prescriptive on what either restorative justice or family violence should be seen to mean. Some contributors prefer domestic violence as a feminist concept (e.g. Stubbs), others follow the preference of many Indigenous women to use family violence (e.g. Kelly), while Daly makes a case for 'gendered harms'. As Wittgenstein might say, there is enough family resemblance among these concepts for us to have conversations across them. Nevertheless, it is clear that family violence is not a unitary phenomenon: it involves varying levels of violence, varying frequency and persistence and varied interpersonal and structural dynamics.

Similarly we wanted to set up the meaning of restorative justice as a matter to be contested rather than as a matter of prescription. The most general meaning of restorative justice is a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong.

Most of the contributors to this volume believe that face-to-face processes are important to realize the potential of restorative justice. However, there is no consensus on how to craft the relationship between separate face to face processes where victims draw support from loved ones and other victims and where offenders meet with other offenders, or reformed offenders and supporters. With family violence there is a lot of support, drawing on experiences such as *Hollow Water* (Lajeunesse, 1993; Ross, 1996; Bushie, 1999), for victim circles and offender circles to be separate in the first instance, with these circles only being brought together if cycles of denial and intimidation are broken. With sexual offences, Howard Zehr (1990: 206) has counseled against face-to-face meeting unless non-domination can be secured, though he does find virtue in such circumstances in certain restorative programs where offenders meet victims other than their own. In other cases there may be merit in a degree of shuttle diplomacy where a go-between gathers information from both sides instead of from just one side and where certain limited communication is agreed to, such as a letter of apology or a victim impact letter.

The Issues in the Essays

Hope

A particular challenge with restorative justice for family violence is how to make the personal political. Kay Pranis (Chapter 2) advocates 'regular self reflection by the larger community on the issue of family violence included as part of [restorative] process design'. The recent beginnings of restorative justice in Northern Ireland provide some clues as to how this might be transacted. There the ideal being discussed is of local restorative justice initiatives reflecting on the standards and rights in the law and developing their own local principles of restorative justice. Then it is suggested there should follow processes for gathering together the experiences of groups of people who have experimented with restorative justice for healing their conflicts to revise the principles and standards with which they regulate their practice. Ultimately, one would hope that such institutionalization of making the personal political would bubble up into the law (Braithwaite & Parker, 1999). In this way the challenge can be conceived as one of the prudence of the law and the politics of the people each mutually influencing the other: community problem solving constrained by law and law reconstructed through community deliberation and participatory practice.

The chapter by Kay Pranis is in a different style from the others. Kay wanted to tell her story at the conference and in the book as a woman who is not an academic. We have not compromised that style. Perhaps no person has a stronger claim to represent the heart of the social movement for restorative justice than Kay Pranis, though this does seem an invidious thing to say of a social movement with an ideology that values collective accomplishment. Certainly there are few who enjoy the respect within that movement that she does.

Kay Pranis speaks in the voice of a grass-roots activist who has experienced the power of a passionate vision and whose method is storytelling in a personal voice. For her there is integrity of connection between this method and the restorative justice theory of empowerment. She argues that you can tell how powerful a person is by how many people listen to their stories. It follows that a way to empower disempowered people is to institutionalize active listening to their stories, to create spaces of dialogue where consequences will also flow from the listening. The evidence is that women's voices are as often (sometimes more often) heard in restorative justice conferences as men's voices (Braithwaite, 1999a: 93–94). The fact that this is not true of courtroom justice is part of the feminist analysis which, through the work of Kay Harris, brought Kay Pranis to restorative justice. Yet Kay, like so many of the writers in this collection, does not seek to reject statist justice for women. She wants a new synthesis of state and restorative justice. In particular, with family violence she wants legal system participation in restorative justice 'to ensure that the community is accountable to the values encoded in the laws against family violence'.

A crucial insight in Pranis's paper is that community control of family violence fails because while concerned individuals know what is going on, they are afraid to reach out to help or to confront behaviour 'because they fear they will be overwhelmed by the needs of the family' or that they will be punished in some other way for the intervention. An appeal of restorative justice for Pranis is that it provides social support for the needed community intervention. Crucial in this is the creation of a space where active responsibility can be shared so that no one individual need fear being lumped with the whole burden of solving the problem. Obversely, the critique of courtroom process is that it limits both the kinds of stories that can be told (only to stories that are legally relevant) and the kind of shared support that can be mobilized. While courtroom justice may be information-poor and support-poor compared with the 'potential' of restorative justice, it might be that a creative synergy between formal law and restorative justice may mobilize the most potent combination of information and support.

Pranis captures the hope of those of us who have experienced

restorative justice in positive ways: 'Over and over again in restorative processes, participants report behaving in a way – a good way – which they had not expected to behave'. Through this optimistic lens, people are seen as having multiply selves, dominating and empowering, cruel and kind, retributive and forgiving, stubborn and responsive. Restorative justice can be conceived as a democratic ritual designed to give people the chance to put their best self forward.

Critics of restorative justice with some truth point to the nostalgic attachment of restorative justice advocates to the politics of hope for a communitarian past where it may have made more sense to expect the best. In return, the charge is made against legalists that they are locked into an early modern Hobbesian analysis which has it that institutions should be designed for knaves. The restoratist says that if you design institutions on the assumption that people will be knaves, they are more likely to become knaves. The right balance seems to us to see both hope and prudence as ancient virtues that are relevant to the twenty-first century. Yet both are inadequately enacted into our practice for dealing with domestic violence.

Prudence

Julie Stubbs' thoughtful essay (Chapter 3) is more dedicated to the dangers of imprudence, to the risks of restorative justice, a theme rejoined in Ruth Busch's final essay. Stubbs makes some quite original points about commonly touted virtues of restorative justice that cannot conceivably be virtues for the specific problem of domestic violence. For example, with restorative justice for young offenders, one of the benefits frightened victims frequently report is relief that an offender whom they had built up in their mind as a terrifying spectre is in fact a person weak and racked with palpable inadequacies and fears of his or her own. The victims also typically learn that they were not specifically targeted but were chosen more randomly. This is one reason why the evidence is that victims exit from conferences with young offenders much less afraid on average than when they went in (Strang, forthcoming). Julie Stubbs fairly points the finger at writers such as ourselves who have made this victimological claim for restorative justice. We have failed to think about the contextual specificity of domestic violence. Domestic violence victims are not chosen at random, are likely to be re-victimized, in most cases are objectively in fear of someone with the physical and other resources to dominate them. If they learn otherwise from the experience of restorative justice, they learn something false.

Another acute analysis in Stubbs' paper is that restorative justice has

failed to come to terms with what she calls 'the relational agency of women with children'. We cannot empower women to make their own undominated choices through an institution like restorative justice when the contextual fact of the matter is that they will refuse to make choices other than in the interests of their children, children perhaps who love a father who batters their mother. While this critique is right, it throws down a challenge in terms which restorative justice, as a relational theory of justice, must meet. Pennell and Burford's chapter is in part a beginning to rising to this challenge. Harry Blagg makes a different point about choice in Aboriginal communities with similar implications: 'The capacity to exit family relationships (indeed, the very concept of 'choice' in such matters) – to repackage and reconstitute one's identity as an autonomous individual in some new location, is a profoundly eurocentric construction.'

A related challenge is to a restorative justice theorized as a response to a discrete past event, as opposed to an ongoing pathology, a critique with application beyond domestic violence (see also Blagg's chapter). A concomitant defect of restorative justice theory is the inadequate account of the discrete apology in a context characterized by cycles of manipulative contrition and violence. These features of restorative justice manifest its development in the terrain of juvenile justice where the focus on the discrete past incident and it alone was part of a strategy for averting the pathologizing of young people, and averting net-widening. Yet the implication of the Stubbs analysis is that nets of social control need to be widened with domestic violence (see also the Daly and Busch chapters). Indeed, perhaps domestic violence is one of those problems where both nets of formal legal regulation and nets of community control need to be strengthened. Corporate crime is another such arena. In these arenas conflicts have not so much been stolen, to use Nils Christie's (1977) formulation, but suppressed, denied, downgraded as something less than a crime problem. The privatization of such problems as sub-criminal means that they are not shameful for large sections of the population and therefore, according to Braithwaite's (1995) analysis, they become our biggest crime problems.

Where this leads is that domestic violence (like corporate crime) is not just another crime problem with specificities that make a history of overwhelmingly privatized regulation and cover-up at risk of being reinscribed by restorative justice. These are our biggest, most destructive, crime problems; the ones that hurt the largest numbers of people in the biggest ways precisely because of this history of privatization (Braithwaite, 1995). With domestic violence, the women's movement has made some limited but very significant gains in transforming domestic violence from a private trouble to a public concern, from 'just

another domestic' to a crime (see Busch's chapter). Ideologies of victim-offender mediation that are morally neutral about violence, that domesticate it as a dispute rather than an injustice (Cobb, 1997), that 'silence narratives that suggest the directionality of violence' (Presser and Gaarder, 2000: 180), really are a threat to those hard-won gains of the women's movement.

Stubbs is also right that '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'. Behrendt's discussion of the importance of female Elders, Blagg's on crafting a regulatory role for 'women's business' and Stubbs' own discussion of the role of women's advocacy groups open up some of the possibilities for countering this concern. Ultimately, none of these options gives enough assurance and they must be complemented by the further assurance enabled by resort to formal law.

One of the Stubbs critiques we are not so sure about is that the reactive nature of restorative justice, reacting to specific injustices, limits its potential as a transformative ideology. This tension is one of the things that motivates Donna Coker in this volume and David Moore and John McDonald (2000), who presented a paper at the conference, to plump for transformative justice in preference to restorative justice. At the same time, these thinkers make the point that reacting to the truth of the concrete story is often necessary for transformation because human beings are storytelling animals. They react to a story more than they do to a political abstraction. The history of social movement politics seems to confirm the transformative power of reactions to the single story. If an environmental group wants to put in place a new regulatory order for oil pollution at sea, it sometimes must wait for the oil tanker that causes the massive spill. The campaigners against mandatory sentencing laws (see Larissa Behrendt's chapter) make little progress with an abstract campaign until an Aboriginal youth sentenced to jail under that law for stealing crayons hangs himself in his cell. The problem, the risk, with restorative justice is that it has not worked through a philosophy and practice of how the injustices it confronts in the private sphere of families and friendship networks get translated into the public sphere. Similarly, as Stubbs points out, it has not worked through the means to give women external validation when they have endured injustice, 'a public record of the abuse'. The corner of the restorative justice debate where some progress has been made on this question is the debate around the appropriateness of the highly public yet largely non-criminal truth-telling of Truth and Reconciliation Commissions. We have not yet come to terms with how to craft a satisfactory truth-telling institutional

response to family violence. However, we believe a number of the essays in this collection take some important preliminary steps down this path.

Vindication

Kathleen Daly (Chapter 4) attempts to tackle what Stubbs conceives as the problem of the public record of the abuse. For Daly the central difficulty is how to (a) show respect to victims by treating harms as serious, without making the mistakes of over-reliance on harsh forms of punishment; and how to (b) “do justice” in an unequal society’. Daly argues that while restorative justice is developing some alternatives to a structurally inequalitarian reliance on prison as a solution, restorative justice must be reconciled with retributivism if harm vindication is to be accomplished. Secondly, substantive criminal law must be reformed along the lines suggested by Nicola Lacey (1998) if it is to adequately enable vindication of the affective and corporeal dimensions of the harms at issue. Thirdly, there is a need to be aware of the different meanings and contexts of sexual violence, domestic violence and family violence. Hence, gendered harms must be considered concretely, not abstractly, in deciding how to take them seriously, to denounce them (rather than excuse them) in a way that vindicates the suffering and dignity of victims and that keeps open the possibility of healing. Daly shows she is serious about revealing the follies of abstraction by confronting us with some troubling concrete cases of gendered harm and restorative justice from South Australia. They are troubling cases in that most of them do not fit neatly into our stereotypes of what family violence or domestic violence is about. More generally, we need to come to terms with the fact that for many of the more mundane forms of gendered violence between brothers and sisters, patriarchy is not the main explanation for what is going on, and when it is violence between sisters, patriarchy may not be an explanation at all.

Power imbalance

Allison Morris (Chapter 5) further enhances the empirical base for making more nuanced policy judgements through a number of New Zealand case studies of family violence that have been dealt with in a restorative way. New Zealand has the longest history of evaluated empirical experience, having had in place a system of restorative justice that

deals with some forms of family violence for more than a decade. We have already mentioned the adult panels evaluated by Maxwell et al (1999). The important contribution Morris makes in her chapter of this book is in analysing the work of care and protection family group conferences in a restorative justice framework. Such conferences would seem to have dealt with thousands of cases of physical and sexual abuse of children over the past decade. Morris concludes that the evaluations of these conferences have been mostly favourable about the safety of children, the holding of abusers accountable and the empowerment of families and whanau (Maori extended families). Indeed, we might add that this literature has been influential in persuading many other nations to follow the New Zealand family group conference approach to care and protection (as opposed to juvenile justice).

Morris uses this empirical experience to test her own feminist concerns about imbalance of power. She concludes that if the huge imbalance of power between an abusing father and an abused little girl can be better managed through care and protection conferences than through court, there is hope that the imbalance of power between a battered adult woman and her abuser can be better bridged through restorative justice. Foreshadowing Pennell and Burford’s findings in the next chapter, she draws from the New Zealand experience the lesson that even seemingly highly dysfunctional families have strengths. An empowerment approach that builds out from those strengths will offer better practical protection than the police, professionals and courts.

Finally, picking up the concern in the chapters by Stubbs, Busch and Daly about impunity and the need to vindicate victims, Morris argues:

The use of restorative processes for men’s violence against their partners would not signify its decriminalization. The criminal law remains a signifier and denouncer, but it is my belief that the abuser’s family and friends are by far the more potent agents to achieve this objective of denunciation.

Nathan Harris’s (2001) analyses of the RISE results for court and conference cases indeed suggest that it is *only* disapproval by family and friends whom one holds in the highest regard that has the capacity to leave offenders feeling ashamed of what they have done. Disapproval by remote agents of the state or even family and friends for whom one has only moderate respect did nothing to induce remorse. It may follow if this is true that victims will gain more meaningful vindication that their suffering is serious from the denunciation of family and friends that hits home with the offender. This will be especially true if these are the family and friends whose regard is also most important to them as victims.

Feminist conferencing praxis

Joan Pennell and Gale Burford (Chapter 6) show how in Newfoundland and Labrador (and now in North Carolina) they developed a feminist praxis of family group conferencing to confront family violence and sexual abuse of adults and children. Their approach is one of critically reflective action that *interrupts* assumptions, notably about gender identity, while still fostering the *links* necessary for working together (particularly among women) to oppose injustices. The feminist praxis of 'links, interruptions' fosters a partnership-building strategy for advancing safety and empowerment. It built out from cultural respect and family strengths, particularly the strengths of the women, as opposed to targeting family deficits. An important part of cultural respect was to trust extended families to meet alone without state professionals – private family time. At first the professionals were afraid to risk this lest violence or other dominations might spin out of control. These were families with quite endemic problems of violence that were connected to a multitude of other problems. Feedback from the families was overwhelmingly positive, as were the outcomes for both safety and empowerment.

Through a case study approach, Pennell and Burford show how the conference provided an opportunity for various women to band together across family and professional lines to take leadership in undermining the influence of a dominating male. The data show that these were not encapsulated meetings of nuclear families – rather nuclear families were linked to extended families, community Elders and state professionals. While the model is about empowering families, particularly by giving them private time, there is a crucial role of state authorities, particularly in supporting these links across the women and in supplying legal leverage over perpetrators. The profound meta-lesson seems to be that making the personal political requires both private space for personal troubles to be spoken and public engagement to do the linking that transforms private troubles into public issues. As Presser and Gaarder (2000: 188) put it, through seeing crime as neither 'just personal' nor 'just political', a restorative feminist praxis may 'reconcile the private-public distinction that underpins the battering problem'.

An interesting feature of the interruptions–links approach was problematizing who was victim and who was offender, a concern well articulated in Julie Stubbs' essay. Instead of the normal conferencing practice of organizing supporters around just known offenders and victims, all family members likely to feel at risk during the conference were 'encouraged to choose a support person who would stay by them emotionally and help to prepare in advance a statement of what they wished to say'.

Transformation, anti-subordination

Donna Coker (Chapter 7) makes the case for reframing restorative justice as transformative justice. She identifies a number of theoretical weaknesses of restorative justice. A central concern is that restorative justice seeks to ignore the state or bypass it, when it must engage the state, transform it and engage with political action directed at state inequalities. Some feminist discourse is seen as making the obverse mistake of allowing domestic violence to be positioned as a public issue 'subject to co-optation in ways that increase state control of poor women and women of colour' (see also Daly, this volume). 'The critical dilemma for feminists who seek to empower battered women is to develop strategies for controlling the criminal justice system without increasing state control of *women* [and one might add of children]'. An interesting question is to what extent the Bazemore and Earle model of 'balance' (Chapter 8) can rise to the challenge of averting both errors. But Coker prefers the transformative theoretical move rather than the 'balanced restorative' move.

Coker advocates a struggle for justice via anti-subordination practices that seek to transform both the public and the private. Anti-subordination practices must be crafted to transform multiply oppressive systems. Coker asks us to consider the following weakness of restorative justice theory: 'it offers no clear principles for dealing with crimes, such as domestic violence, where majoritarian opposition to the crime is weak or compromised' (see also the Busch chapter). What is needed is a process that mobilizes families and communities to intervene against domestic violence in a way that 'seeks to transform the norms of family and community members, rather than rely on existing anti-battering norms that may not exist.' On the crucial issue of race and class subordination being used to excuse domestic violence, Coker concludes that discussion of such subordination can be productive so long as 'battering men are encouraged to connect their own experiences of subordination with their subordination of women'.

Coker invokes her study of Navajo peacemaking in which traditional Navajo stories that contain gender egalitarian themes are a resource for women and a resource for men in creating a masculine identity that supports gender egalitarianism. She conceives of such identity transformation not as 'treatment' but as 'justice-making processes'. States, families and communities are thus conceived as projects of political will and imagination, where the guiding normative ideal is to steer them away from subordination. When part of such a transformative project, 'violence is not privatized when a man reads an apology to his wife and daughter in the presence of others, particularly when those others are in

a position to monitor his future behaviour'. At the conference Donna Coker spoke of the need for restorative justice practitioners to borrow from domestic violence activists tools such as assistance for women with safety planning and engaging in lethality assessments of the batterer. Other participants spoke of options that included plans for checking victims at high risk times, personal alarms for women, teaching third parties intervention scripts so that they might move from being bystanders to being change agents, and reparation with resources that increase women's autonomy. Donna Coker complemented these ideas with the perspective that there were limits to a state law that focuses on acts of physical violence; that fails to reach the variegated controlling behaviours of a battering system in a way that community controls might be more able to accomplish.

When we asked Donna Coker at the conference how one should struggle for transformative justice in a more patriarchal culture that lacks the anti-subordination narratives she found in Navajo culture, she said she suspected that in most cultures anti-subordination narratives could be retrieved with greater or lesser difficulty. The crucial point is that restorative/transformative justice must not allow fairness to mean neutrality, must not domesticate violence as conflict (Coker, 1999). It will falter without an ideal of justice as requiring anti-subordination practices.

Balanced restorative justice

Gordon Bazemore and Twila Earle conceive the evidence on family violence as revealing an increasingly complex picture of multidimensional factors contributing to the problem. This implies a need for balanced and nuanced deliberation of cross-cutting concerns in context. It argues against 'cookie cutter' approaches that involve training in standard scripts. It argues in favour of a principle-based approach to restorative justice that is creatively attuned to the complexity of different crimes. Bazemore and Earle structure their argument around a consideration of three kinds of balance: *principle balance*, where the key principles are repairing harm, maximizing stakeholder involvement in decision-making and restructuring/transformation of state and community roles in a way that empowers communities as the primary drivers of justice solutions; *stakeholder balance* between victims, offenders and communities; and *goal balance* between public safety, accountability and reintegration.

Bazemore and Earle show how a principle-driven pursuit of balanced restorative justice can lead, for example, to a contextual judgement that it is necessary to amplify the voice of victim concerns by urging a victim

supporter in a pre-conference meeting 'to express issues of harm and need for reparation when the victim herself seems reluctant to do so'.

In an argument that bears similarities to those of Pennell and Burford and Morris on building from strength, Bazemore and Earle suggest building out from the common ground where stakeholder interests intersect. This, they suggest, is where the 'fertile soil' for repair and prevention will be found. Restorative justice is conceived as institutionally attuned to the pursuit of this common ground, while the current criminal justice process conduces to separating interests. This may be the key to understanding how restorative justice may enable healing to lead to justice (Drummond, 1999), as opposed to the retributive notion of healing only being possible after justice. Strang's (forthcoming) RISE data are consistent with this aspect of the Bazemore and Earle analysis. They show that win-win is much more likely in restorative justice than in courtroom justice. The sample size is insufficient to test this adequately, but across a range of victim and offender needs the pattern of the RISE data also suggests that in conferences a win for victims in meeting their needs, especially their desire for emotional restoration, increases the prospects of offenders meeting theirs, and vice versa. There is no evidence of this dynamic in the cases that go to court.

Indigenous empowerment

Larissa Behrendt (Chapter 9) uses the case of Australian Indigenous peoples to show how both the formal legal system and diversionary alternatives disempower Indigenous people. While one might hope that restorative justice would create a space for the 'speaking from the heart' that is fundamental in Indigenous disputing, in practice professionalized Western mediation has been the norm. Behrendt sees mediation as more an extension of the Western legal system than an alternative to it. There is little improvement over a formal justice system where 'the Indigenous focus on feelings, hurt and perspective when speaking also runs into conflict with the formal rules of evidence ...'.

The efficiency emphasis with case flow management in Western mediation and speedy trial imperatives in criminal law both undermine the imperative of Indigenous justice to allow time for feelings to be resolved (see also Blagg's chapter). Introducing strangers in a privileged role, whether as judges or mediators, counters Indigenous philosophies about who has a right to speak. When mediators or judges are required to have special training this undercuts traditions grounded in experience as training. Behrendt argues for a ground-up approach where instead of adapting a Western mediation model to an Indigenous community, the

starting point is a local community developing the process. When Indigenous communities face continually the challenge of healing the wounds of colonization, restorative justice must not open up another wound by being 'more interested in the method and models' than with results that will heal in a post-colonial context.

Harry Blagg (Chapter 10) echoes the two latter conclusions from Behrendt's work and takes them into the context of regulating family violence. Blagg finds that Aboriginal women seek an holistic process of community healing for dealing with family violence. This violence is largely perpetrated by Aboriginal men destructively searching to reinstate a masculine role stripped of dignity by colonialism. This may be a reason why Aboriginal violence in Australia is much more directed at intimates than white violence. Locking up their men has little appeal to most Aboriginal women as a solution, Blagg finds. Instead they prefer 'forms of intervention that stop abuse, cool out situations, and open pathways to healing, with minimum intervention by the criminal justice system'.

One interesting aspect of Blagg's paper is the examples he gives of culturally specific preventive ideas:

Women on small isolated communities find it difficult to escape violent men. One answer has been to construct shelters on women's 'law grounds' (barred to men) and placing sacred objects in shelters as a deterrent to violent men. These solutions directly empower Indigenous women both at the point of crisis and within their communities by reinstating the power of traditional 'women's business'...

Loretta Kelly's analysis (Chapter 11) gives a more specific focus to the fears Aboriginal women have about sending their men to prison for family violence, the fear of death or injury in custody. Kelly finds the unwillingness in Aboriginal women to grant legitimacy to the colonizing criminal justice system as limiting its effectiveness in providing safety. Where legitimacy is granted to Aboriginal Elders, their regulation for safety can be more effective. Kelly makes a special plea with family violence for empowering women Aboriginal Elders. What they can make a special contribution toward, on Kelly's analysis, is an holistic approach to safety and restorative justice. One of the things she finds it best to empower Elders to decide is how to integrate Western state justice into Aboriginal justice, if at all: 'in some communities, Elders may wish the magistrate to sit with them and convey their decision to the offender. The purpose of this may be to prevent the offender taking revenge on any individual Elder'. Kelly finds much in common between restorative justice values and traditional Aboriginal customary values. However, poor practice in the experience of Aboriginal people makes restorative

justice schemes culturally inappropriate in practice. She points out that while shame might be an important concept in helping the scholar understand what is happening in criminal justice processes in the Aboriginal community, contemporary distinctively Aboriginal ways of using the concept make shame an unhelpful usage for discussing restorative justice within Aboriginal communities.

Kelly, Coker, Behrendt, Busch and Blagg are all concerned about what Blagg describes as forms of 'consultation' that 'aim simply to appropriate aspects of Indigenous governance when it suits the agendas of non-Indigenous agencies'. Coker's anti-subordination principle appealed to us at the conference as a way of thinking clearly about the cultural appropriation problem which has been so central to Blagg's scholarly contribution. The normative theory would be that it is acceptable to appropriate aspects of Indigenous governance when doing so would reduce subordination. Obversely, it would be acceptable to import certain Western notions of, say, human rights into Indigenous governance when that would reduce subordination. Otherwise, these cultural imports and exports would be questionable and subject to Blagg's (1997) Orientalism critique.

Integrated strategies for safety and autonomy

In the final essay (Chapter 12) Ruth Busch argues against the use of restorative justice in the vast majority of domestic violence cases, even though she concludes that 'mandatory arrest policies and no-drop prosecutions result in outcomes which can be destructive to victims' autonomy'. Busch argues persuasively that better choices can be made on how to make state intervention against domestic violence work and that progressively better choices have been made in New Zealand over the past 15 years. Among these are police policies that make for prosecutions that stick without relying upon victims as witnesses at trial. This can protect victims afraid of retribution and grant offenders less control; their intimidatory tactics then do not work as well in deterring arrest/prosecution. Effective enforcement against breaches of protection orders has been another step forward. Most tellingly Busch argues that restorative justice advocates caricature state law enforcement as punitive and stigmatizing of offenders when the New Zealand reality is that rehabilitation of domestic violence offenders is a much more predominant response than punishment. Finally, contemporary responses of the New Zealand state include assistance with 'developing culturally appropriate coordinated community interventions to challenge the power disparities within which domestic violence occurs. Busch rightly suggests that it

would be a terrible mistake to throw all of this away in favour of just restorative justice conferences.

Like Stubbs, Busch reveals a number of assumptions about the supposed superiority of restorative justice that do not apply with domestic violence. The theory of restorative justice assumes that prior relationships assist healing. Yet we know that spousal relationships that disintegrate often leave relational residues that are more of a hindrance than a help to healing. While the empirical experience of restorative justice with juveniles is that the voices of women, especially mothers, are extremely influential, we are also cautioned that with domestic violence there is evidence that abused women report greater fear of being 'out-talked' by their partners and a greater fear of retaliation from them. Ruth Busch also challenges an assumption which we think is generally right – that there are many lay people with the interpersonal skills to be good restorative justice facilitators after a few days training (even if the majority of lay people do not have these skills). She makes the point that with domestic violence highly developed skills in a number of areas are imperative – understanding of the power control dynamics of domestic violence, knowledge of risk-assessment issues, among others.

On the positive side, Busch does see Pennell and Burford's approach (Chapter 6) as having promise because it involves a thoughtful hybrid of formal legal enforcement options and restorative justice. The facilitators were highly trained on domestic violence power dynamics and risk assessment in the terms suggested in the last paragraph. Safety mechanisms that could be enforced by court sanctions were put in place first. The preparation for these conferences was considerable and extended to concern for the safety and emotional well-being of all conference participants, not just a victim and an offender. The follow-up was also more rigorous than with standard restorative justice conferences. For Busch, the crucial feature in the apparent success of the Pennell and Burford program is that it was strategically integrated with the formal system of state enforcement rather than an alternative to it. As we will see below, in important ways this is also true of the other influential Canadian program at Hollow Water.

We actually think this integration has been a failure of restorative justice on a much wider front beyond domestic violence. Restorative justice should be a superior vehicle for getting extended families or networks of friends to commit to provide social support for offenders in rehabilitation. Its empowerment philosophy of deliberative democracy should deliver more richly considered (and therefore more apposite) and more volunteered choices for rehabilitative options. In practice, this does not happen – partly because restorative justice has been sold as an

alternative to the therapeutic state rather than as a vehicle for making rehabilitation more decent and effective. Equally, it has been often oversold as an alternative to the punitive state when in reality, especially with intransigent problems like the worst domestic violence, it can only be effective in the shadow of the punitive state.

On this integration theme, there is much to be learned from the Busch critique by those of us who think there is wider potential for restorative justice to deal with family violence. Beyond family violence, there are some rather constructive suggestions in Ruth Busch's paper about how restorative justice preparation might increase prospects of success – for example, encouraging offenders before the meeting to accept responsibility without blaming someone or something else can 'elicit a more empathetic response from victims who tend then to talk about times that they themselves have made mistakes'.

Above all, we must take in Ruth Busch's admonition that 'safety and autonomy' must be prioritized over other outcomes, including reconciliation. Reconciliation might be the highest priority with a child who is being stigmatized by his family for a minor act of shoplifting. It even might be the highest priority in the aftermath of Apartheid or a civil war that has ended. But in the context of domestic violence that is ongoing, safety should absolutely be a priority that trumps reconciliation. A commitment to universal values to guide criminal justice, like Braithwaite and Pettit's (1990) republican value of freedom as non-domination (dominion), is still bound to require contextual judgements on how the empirical complexities of domination differ for different kinds of crime. Even if it is empirically true that in a wide range of contexts, from shoplifting to war crimes, apology–forgiveness–reconciliation can increase safety and autonomy, Busch shows us that in many domestic violence situations it can have the opposite effect. On the other hand, as Loretta Kelly's chapter suggests, there may be contexts where Indigenous families have been so disrupted by colonialism, where fears of harm in custody are sufficiently real, as to justify a prioritizing of family reconciliation and reconciliation with Elders over threats to victim safety that are not extreme. The path to wisdom and prudence may lie in the capacity to look at a problem like domestic violence through the lens of the kind of feminist analysis advanced by Ruth Busch at the same time as we look at it through the lens of restorative justice theories, theories of Indigenous justice and other theoretical frameworks as well. Indeed perhaps this is the wisdom Joan Pennell and Gale Burford have shown in crafting with their local stakeholders a program that seems to have worked.

Restorative justice and responsive state regulation

A common feature of all the essays in this collection is that they see both the state and civil society as having important roles in the regulation of family violence. While Julie Stubbs has a measured pessimism about the capacity of resource-poor advocacy groups to monitor the abuses of restorative justice, all authors agree that women's groups and Indigenous groups have important roles both in regulating violence and in regulating flawed official efforts at regulating violence. This is more than agreement that we need to strengthen the regulatory capabilities of families, communities, non-government organizations and the state with respect to family violence. All the authors in this collection also see critical synergies between public and private regulation. It is common in restorative justice collections for it to be argued that backing restorative justice with coercive threats by the state irreparably corrupts the ideals of restorative justice. In wider arenas this seems as naïve as it does here. Do we seriously believe youth offenders would regularly turn up to restorative justice conferences were the coercion of the state not lurking in the background?

In our romantic moments, those of us attracted to restorative justice like to laud the accomplishments of the Hollow Water healing circles:

When and where has the traditional criminal process succeeded in uncovering anything approaching 48 admissions of criminal responsibility for sexual abuse of children in a community of just six hundred? (Braithwaite, 1999a: 16)

However, Berma Bushie (1999: 59) from the Anishnaabe clan at Hollow Water is clear that 'When abusers agree to take the healing option, they usually do so out of fear of going to jail.' Two abusers who opted out of the healing circles did go to jail. It seems to us that there is a startling reality of the accomplishment of Hollow Water. It is not an accomplishment of restorative justice; it is not an accomplishment of state enforcement. It is an accomplishment of a new kind of creative synergy between state power and the power of restorative justice. We hope the contest of perspectives in this book casts some new light on how to understand the transformative possibilities of such synergy.

Transforming contexts of choice

In forthcoming work from the Centre for Restorative Justice at ANU we hope to show that it need not be utopian to struggle for a world where subordinated people have a genuine choice of whether to opt for

restorative justice or court. This means a world where restorative justice is always available as an option in a serious legal dispute and legal aid to go to court is always available to a person of modest means. Whether restorative justice or court is better for a subordinated person is a profoundly contextual and personal judgement. We see little merit in deciding which is better in general or on average. Even the project of attempting to sort out which are the contexts where court is best and where restorative justice is best seems a second-best project. The best project is to conceive how to totally transform the regulatory order so that both options are always available.

So much of the public debate is between those who rightly point to why the haves come out on top in court and those who rightly point out why the haves come out on top in Alternative Dispute Resolution. We need to consider instead how the have nots can be guaranteed both better practical access to court and better access to restorative justice under terms they are empowered to choose. This is most simply illustrated by family law disputes. A wife batterer who controls the family bank account can afford an excellent lawyer should a family law matter go to court. This is another whip he holds during family law mediation beyond the fear of his violence. He can dominate in court because he can pay for the lawyer and he can dominate in mediation partly because he can credibly threaten to exit the mediation in favour of court and she cannot. The most crucial feature of the gendered power imbalance is not about whether the power imbalance is worse in court than in mediation. It is about the fact that he can make a contextual judgement on when court suits him best and when mediation suits him best, whereas she cannot. An anti-subordination alternative integration is needed: one that absolutely guarantees the woman a right to a contest in court with well-funded legal aid and one that guarantees her a restorative justice alternative where she does not confront her partner alone, but with the advocacy of as many lay and professional supporters as she chooses to have present, including publicly funded domestic violence advocates if fear of battering is an issue for her. Violence against women and children will remain endemic until societies get serious about gendered social justice and about meeting the needs of those affected by power-based injustices (Sullivan & Tiff, 2001).

We believe that in a world where women are given that choice they will opt for (balanced) restorative justice in droves. But that is not our parting point. Our point is that the anti-subordination challenge is transforming the legal system so that a genuine non-dominated choice of that sort is available to women. Building on the work of Christine Parker (1999), John Braithwaite (2001) is now seeking to show that such a transformation need not be impossibly expensive. Whether or not

it is utopian to struggle for a world where both restorative justice and litigation are always affordable to the subordinated is the stuff of another book. Where we believe this book has taken us is to is this: that such a world would be a better one than a world where litigation is always available, or restorative justice is always available, or our existing world where neither is effectively available to the poor. The feasibility of radical transformation aside, it might be a better world if we could have enough impact on the conditions of domination to make both the healing of the circle and the justice of the courthouse choices family violence victims are realistically able to make more often than now.

2 Restorative Values and Confronting Family Violence

Kay Pranis

Personal Introduction

I wish to begin by sharing key pieces of my history regarding both family violence and restorative justice so that you may have a sense of my context and my potential biases and limitations. I was involved with domestic violence as a community volunteer before I ever dreamed that I would work in the criminal justice system and before I had ever heard of restorative justice. In the mid-80s, looking for an additional way to serve the community I lived in, I responded to an appeal for volunteers to serve on the Board of Directors of a local battered women's agency. Shortly after joining the Board, the executive director asked me to be chair of the Board. The agency was young and struggling for survival. I served as Chair of the Board for three years – during that time we navigated some very rough waters but came through with a solid, stable agency. I learned a great deal about domestic violence and even more about the power of a passionate vision. The woman who was the executive director when I was on the Board died in the early 90s of cancer. She continues to be an inspiration in my life – a reminder that the impossible can be made possible if you believe in it.

I came to my current work by a very untraditional route. I have no formal training in any related field – not law, not criminology, not social science, not psychology. I have not done direct service as a professional in any related field and I am not an academic scholar. I was a full-time parent and community volunteer for 16 years. I went to work for a criminal justice agency in 1988 because no one else would hire me.

Within the field of criminal justice my first exposure to the core values I see embodied in restorative justice was in an article by Kay Harris (1987), which was not about restorative justice, but about a vision of justice based on feminist principles. Kay identified the following as key tenets of feminism and discussed their importance to issues of justice:

- All human beings have dignity and value.
- Relationships are more important than power.
- The personal is political.