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*Criminology and Criminal Justice* 2007; 7; 169

DOI: 10.1177/1748895807075570

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## Beyond apology?

### *Domestic violence and critical questions for restorative justice*

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#### Abstract

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The virtues claimed for restorative justice include its emotional engagement with crime and the opportunities afforded to participants by its discursive character. Yet these issues are rarely explored from a perspective that is attentive to gendered or other asymmetrical forms of social relations. This article explores key issues that remain under-developed in the restorative justice literature from a feminist perspective, taking domestic violence as a focus. Central to this analysis are questions of victims' interests and safety, expectations about the victim's role and the appeal to apology and forgiveness in much of the restorative justice literature. It is argued that the challenge of taking gendered harms seriously may require an approach that differs from common restorative justice practices such as the development of hybrid models that draw from both conventional criminal justice and restorative justice.

#### Key Words

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apology • domestic violence • emotion • feminist analysis • gender relations • restorative justice • victims of crime

The discursive nature of restorative justice (RJ) and the capacity of RJ processes to evoke emotional responses to crime are common features highlighted in the literature as virtues of RJ. Scholars who analyse emotionality within RJ typically seek to manage the discursive character of RJ to elicit emotions in a manner or sequence that facilitates remorse, apology and forgiveness

(Moore, 1993; Retzinger and Scheff, 1996; Presser, 2003). Yet, the capacity for participants to engage in freeform discussion within RJ offers both opportunities and risks for parties in the manner in which the offence in question and its consequences are understood and acted upon (Hudson, 2002; Daly and Stubbs, 2006). Recent RJ scholarship has begun to develop more complex ways of understanding emotions including through engaging with phenomenological approaches (Harris et al., 2004). However, the key literature rarely engages with questions of how gender, or other social relations, might be related to the construction of meaning within, and to the emotional dynamics of, restorative processes (but see Cook, 2006).

This article uses domestic violence as a focus to explore the appeal to remorse, apology and forgiveness in the RJ literature from a perspective that gives emphasis to victims' interests. The centring of victims' interests in this analysis should not be understood as promoting a punitive response nor as endorsing all aspects of victims' rights campaigns. Nor does an expressed commitment to victims' interests preclude a critical approach to criminal justice. However, strong claims continue to be made about the benefits of restorative justice for victims of crime and many of these claims are untested. Moreover, some prominent proponents of restorative justice have begun to raise cautions about the extent to which victims' interests are well understood and safeguarded in some programmes (Archilles and Zehr, 2001). In addition, while some RJ advocates argue that 'there are, potentially, restorative solutions to any harm or crime' (Bazemore and Earle, 2002: 157), the use of RJ for offences like domestic violence and sexual assault remains controversial (Braithwaite and Strang, 2002): questions about the range of offences for which RJ is appropriate and the standards that should apply remain unanswered or under-developed (Hudson, 2002; see also Daly, 2002a).

The term RJ is used imprecisely and I concede that my analysis might apply more readily to some programmes and practices than others. However, the claims I examine in this article are commonly associated with the dominant values espoused by RJ writers. Angela Cameron's (2006) thoughtful analysis cautions against equating western RJ models with Aboriginal justice models; my analysis here is developed with western RJ as the focus although some aspects of the argument may be pertinent in Aboriginal justice models.

### **Restorative justice and victims' interests**

Numerous claims have been made about the potential benefits of RJ for victims of crime including symbolic, material and moral outcomes. Most commonly they include: repairing the harm; the chance to receive an apology, reparation, healing and or empowerment; the opportunity to tell one's story; participation in the process and in decisions about the outcome of the matter; the chance to learn more about the offender and the offence and in doing so to become less angry and or less fearful; and, the chance to transcend resentment and become a more virtuous person. Claims that RJ lessens recidivism also imply enhanced safety for the community and the victim.

Many of these claims have yet to be evaluated. Some of the concepts remain vague or ill-defined. Evaluation studies commonly have addressed victims' satisfaction with the process but not other aspects of victims' experiences, although some have measured whether fear or anger has decreased (for instance Wemmers and Cyr, 2005). Satisfaction has been defined and measured inconsistently and it is not always clear what the construct means (van Ness and Schiff, 2001). While Morris and Maxwell (2001: 188) found short-term benefits for victims in juvenile conferencing in New Zealand they note a lack of data on victims' reintegration and on the longer-term effects of RJ despite evidence from crime victim surveys that the effects of crime may be long lasting. Presser and van Voorhis (2002) have argued for evaluations that give more attention to victims' concerns and go beyond satisfaction with the process to include other outcomes commensurate with the stated objectives of RJ. Herman (2003) has emphasized the need for more systematic research on the effects of RJ (and other interventions) on victim well-being to allow us to move beyond the speculation and competing tales of horror or success that currently prevail. Recent research suggests that future evaluations should examine specific aspects of victimization and victim and offender characteristics. Daly (2002b) found that in the restorative conferences for juvenile offenders, victims' experiences of RJ were related to the type of harm experienced and the sex/gender composition of victim/offender pairs.

Some characteristics of RJ that have been cited as virtues for victims of crime may not apply in cases of domestic violence (Stubbs, 1995, 1997, 2002; Braithwaite and Strang, 2002). For instance, it is commonly claimed that victims will benefit from meeting the offender and learning that they were not personally targeted for the offence, that the offence is not likely to recur and that the offender is not someone they need to fear (Hudson and Galaway, 1996; see also Strang, 2002: ch. 3). These claims are not valid in domestic violence cases; they also may reflect an assumption underlying some forms of RJ that an offence can be understood best as a discrete, past event for which reparation can be made readily. As Coker (2002: 129) has noted, much of the RJ literature suffers from an inadequate theorization of crime. For instance, Hudson and Galaway suggest that crime should be understood 'primarily as a conflict between individuals that results in injuries to victims, communities and the offenders' (1996: 2). Theorizing crime primarily as a conflict between individuals fails to engage with questions of structural disadvantage and with raced, classed and gendered patterns of crime. In addition, an adequate theoretical understanding of domestic violence should recognize that domestic violence typically involves the exercise of power and control, is commonly recurrent, may escalate over time, may have an impact on a number of people beyond the primary target, including children, other family members and supporters of the victim and that its impact contributes to the subordination of women (Ptacek, 1999; Coker, 2002; Herman, 2005).

Reparation is said to be a defining characteristic of RJ and a key benefit for victims of crime. However, empirical research suggests that reparation may not be the primary concern of women who seek legal intervention following

abuse. Rather women who have been abused typically seek protection for themselves and their children (Lewis et al., 2000) and exposure of the offender rather than punishment (Herman, 2005). They also commonly seek external validation of their attempts to stop the violence and of their right to live without violence (Davies et al., 1998; Ptacek, 1999; Herman, 2005).

The emerging standards and protocols for practice (McKay, 2000; Umbreit and Greenwood, 2000; Braithwaite, 2002) have begun to emphasize victim safety as a predominant requirement for RJ. However, in the abstract those protocols may be inadequate. Without attention to the features of domestic violence insufficient emphasis may be given to the ongoing safety concerns for women and children and to developing effective outcomes. Restorative justice processes that bring a victim and offender together<sup>1</sup> may offer genuine risks to the welfare of victims that other forms of intervention do not (Presser and Lowenkamp, 1999: 336). Women who are separating, or have separated from their former partner may be at a heightened risk of violence including homicide (Mahoney, 1991). Many women who have contact with former abusive partners in order for child access to occur experience repeated violence (Hester and Radford, 1996; Kaye et al., 2003). Offender screening to exclude those who are dangerous has been suggested as one response to such concerns. However, Presser and Lowenkamp have characterized offender-screening criteria used in RJ encounters as 'neither victim-oriented, research-driven, nor consistently applied' (1999: 335). Moreover, our ability to predict violence is poor. Achilles and Zehr acknowledge that some developments in RJ have failed 'to take seriously the full implications of the philosophy and values they espouse' for instance in 'naively attempting to apply restorative approaches in highly problematic areas (such as domestic violence) without adequate attention to complexities and safeguards' (2001: 93).

These concerns raise important practical and ethical questions for restorative justice practitioners. What are their ethical obligations with respect to the victim? What mechanisms can be used to offer safety to victims before, during and after the restorative process? Who is accountable for monitoring the outcomes of restorative justice and ensuring that the victims' continue to be safeguarded?

In the remainder of this article I focus on two areas in order to examine how common understandings and practices within restorative justice may unwittingly undermine the safety, or fail to respond to the needs, of women who have experienced domestic violence, and perhaps other forms of what Daly (2002a) has called gendered harms. The first relates to the discursive character of RJ; how is meaning constituted (and contested) within restorative justice? The second relates to the claim that emotionality is a virtue of restorative justice; I raise concerns about expectations of apology and forgiveness that may be communicated to victims and the dangers of exploiting women's emotions in the pursuit of outcomes valued as hallmarks of RJ. I raise these concerns in the spirit of ongoing dialogue about the future development of RJ and the search for safe, effective and just outcomes for victims and offenders.

## The discursive character of RJ and contested meanings?

Personal narratives are the primary source of information and wisdom [in RJ] ... the critical element is to use [them] to understand the harms, the needs, the pains and the capacities of all participants so that an appropriate new story can be constructed.

(Pranis, 2002: 31)

RJ processes emphasize personal narratives and discussion between participants with the intent to reach a consensual outcome. Thus, the capacity to control the meaning of the events in question is crucial. And yet we know little about how meaning is constructed in RJ processes. Most empirical research on RJ has adopted a realist epistemology rather than more phenomenological or discursive approaches (Daly and Stubbs, 2006). Victims and other participants are encouraged to talk about their reactions to the offence and the effect of the behaviour upon them with the intention of having the offender recognize the impact of his or her behaviour on others and to generate remorse (Moore, 1993; Pranis, 2002; Presser, 2003). However, in cases of domestic violence it is less likely that the offender does not know the consequences of his violence—indeed the violence is likely to have been used instrumentally, to gain power and control over the victim (Herman, 2005). What may be more contested is the meaning of the behaviour, its legitimacy and the harm caused.

Contests around the meaning of an offence may be more likely to arise with respect to domestic violence, sexual assault or other forms of violence against women. Popular discourses continue to trivialize such offences, challenge the credibility of the victim and/or construct women as complicit, for instance, by reference to allegedly provocative behaviour. Since domestic violence is not universally recognized as crime, it may be especially open to contests around meaning and the legitimacy of victims' claims (Coker, 2002): RJ 'offers no clear principles for dealing with crimes, like domestic violence, where majoritarian opposition to the crime is weak or compromised' (Coker, 2002: 129; see also Herman, 2005). Most RJ programmes require that the offender admits their offence as a condition for participation, but that does not adequately meet such concerns for several reasons. The meaning of an offence cannot be readily assumed from a bald statement of the facts that make up the offence: where the parties have shared an intimate relationship, the meaning of a given event is derived from the context and the history of the relationship (Dobash et al., 1998) and, while the offender may admit his conduct, those words or behaviours may be minimized, neutralized or their significance may be opaque to others.

Research indicates that men and women interpret domestic violence differently; men typically trivialize the violence and minimize their own responsibility (Dobash et al., 1998; Hearn, 1998). Psychological and emotional abuse may be devastating for victims but may be dismissed by offenders, and others, as not real harm. Victims may not always be willing or able to speak frankly

of their experiences, especially in the presence of the offender and without time to recover from the violence (Herman, 1992/2001; Lamb, 2002a). They may be ashamed or humiliated by what occurred and they may fear the consequences of full disclosure for themselves, their children or supporters. Moreover, victims of violence often express guilt or take some responsibility for their victimization in order to reassert control over events that challenge their sense of identity and autonomy (Herman, 1992/2001; Achilles and Zehr, 2001; Lamb, 2002a; Petrucci, 2002). As discussed later, gender role expectations on women to maintain relationships, and the complexities of women's feelings towards intimate partners who are also their abusers may render some women susceptible to assuming guilt or responsibility. Thus, victim-offender dialogue may not be in the woman's interests unless carefully managed to ensure the victim's capacity to assert her own perspective and interests. The risks of victim-offender dialogue are likely to be greatest in face-to-face interaction, but also may arise using other techniques such as 'shuttle diplomacy' and separate meetings.

Cavanagh et al. (2001) have utilized Erving Goffman's concept of remedial work and Sykes and Matza's techniques of neutralization to theorize men's responses to their own violent behaviour against a partner. They argue that men go beyond mere techniques of neutralization to engage in 'the interactive process of apologising and requesting' (2001: 700) as a means to 'manage the meanings they attach to violence' and in seeking to 'impose these [self serving] meanings upon the women they abuse' (2001: 700). 'Requesting' here refers to men making demands of their partners, for instance to be silent, stop nagging or to give him money: if those demands are not met the offender may respond with violence, and attribute responsibility for the violence to his partner who failed to meet the request (2001: 709-10).

The capacity for facilitators and participants in RJ to challenge the offender's control over meaning is likely to depend on their underlying assumptions about domestic violence and their recognition of the strategies used by offenders to deflect or neutralize responsibility. Restorative justice principles would suggest that: 'the offender's family and friends are by far the more potent agents to achieve this objective of denunciation' and to challenge victim blaming and techniques of neutralization (Morris, 2002: 603). However, research suggests that the friends and family of offenders should not be relied on to offer such challenges but instead 'are unlikely to actively oppose the batterer's violence' and may even endorse the violence (Coker, 2002: 139-40; see also Herman, 2005: 584). Moreover, the significance accorded apology in restorative justice also may serve to authorize the offender's management of meaning (see further later).

Hudson (2006) has identified discursiveness as a requirement for justice, and sees this as a potential strength of RJ, however, she recognizes that RJ practices may not meet the ideal. As Daly (2002a: 85) has pointed out, the more freeform discussion possible in RJ as compared with courtroom practices offers both opportunities and risks in responding to gendered harms. Carefully planned and managed restorative justice practices may result in progressive understandings of gendered harms emerging. However, absent

such care and planning there is a risk that older, limited understandings of those harms may prevail (Busch, 2002).

## Emotionality as a virtue

Emotionality is often invoked as a virtue of RJ (Harris et al., 2004). Early work on emotions in RJ suggested that most RJ conferences follow the same sequence of emotions: initial indignation dissipates as the offender apologizes and displays remorse. This constitutes a key turning point at which the victim is moved to forgive (Moore, 1993; see also van Stokkom, 2002). Several writers argue that the symbolic reparation achieved through this display of emotions is more significant than any material reparations (Marshall and Merry, 1990 as cited by Strang, 2002; Moore, 1993; van Stokkom, 2002). However, observations of RJ conferences by Retzinger and Scheff (1996; van Stokkom, 2002) demonstrated that what they call the core sequence of emotions—regret, remorse and forgiveness—is an ideal outcome frequently not achieved in practice. None the less some proponents of RJ continue to emphasize the desirability of this emotional sequence.

In the section that follows I focus on two related issues of emotionality in RJ: first, the appeal of apology and forgiveness; and second, love, empathy and trust as preconditions for RJ. What are the expectations placed on victims? To what extent does RJ exert subtle or other pressures on victims? What, if any, outcomes are privileged? Research by Pavlich (1996; see also Pavlich, 2005) and others on the disciplinary techniques of mediation should alert us to the salience of these questions.

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

A common construction of apology is that of ‘a ceremonial exchange of respect’ (Abel, 1998: 265) by which an offender acknowledges their moral inferiority, the norm they have breached and their responsibility for that breach, and restores respect for the victim (see also Tavuchis, 1991). Some scholars see the giving and accepting of an apology as the hallmarks of RJ (Moore, 1995; see also Braithwaite and Daly, 1994: 205).<sup>2</sup> It is often assumed that the sequence of remorse, apology and forgiveness is empowering for victims ‘through their ability to withhold or render forgiveness’ (Petrucci, 2002: 352; see also Abel, 1998: 265; Harris et al., 2004: 203). Hudson and Galaway argue that victims have a *responsibility* ‘to accept the expressions of remorse made by the offender and to express a willingness to forgive’ (1996: 2), and Clear claims that it is in victims’ self-interest to forgive, that is, to forgo resentment<sup>3</sup> since resentment ‘fosters internal tension, anger, and diversion from positive and uplifting thoughts and feelings’ (1998: 7; in a broader context see Rosenblum, 2002: 99).

However, there is good reason to scrutinize these claims. There is a substantial literature in disciplines such as psychology, philosophy, jurisprudence, political theory and theology examining the constructs of apology



and forgiveness and their application in RJ and in law.<sup>4</sup> Much of that literature draws upon the work of philosophers Jeffrie Murphy and Jean Hampton and the sociologist Erving Goffman. Debates continue over how to differentiate apologies from accounts, excuses or justifications, the relationship between apology, responsibility and forgiveness, and about the interplay of emotions in RJ. The literature also calls into question some of the claims that have been made about the benefits of apology and or forgiveness for the respective parties. As Petrucci (2002) notes, many of the claims about apology have not been tested empirically.

Murphy argues that we should guard against too hasty and uncritical forgiveness and suggests that 'uncritical boosters for quick forgiveness' often treat resentment as illegitimate and akin to malice: resentment, at least as an initial response to crime, is legitimate in that it 'stands in defense of important values' such as self-respect and respect for the moral order (2000: 1359; see also Murphy, 2002). Genuinely to elevate the victim back to the position from which they were degraded by the crime, their resentment should be respected and not denied. However, he also argues against requiring repentance from the offender, since although repentance opens the possibility for forgiveness, to demand repentance may result in responses that are not genuine. This analysis suggests the need for caution in restorative processes to avoid pressures that might subtly or otherwise require apology and forgiveness and in doing so risk generating false claims that are not in the interests of the offender or victim.

Apology and forgiveness may be used in gendered ways (Murphy and Hampton, 1988; Hampton, 1998; Lamb, 2002b; Petrucci, 2002). Empirical evidence indicates that women are more likely than men to apologize if it restores relationships and to express positive emotions towards others: men may be motivated to apologize 'if apology is viewed as a means of controlling the situation' (Petrucci, 2002: 345). According to Petrucci research indicates that victims rarely reject an apology and is suggestive of 'a strong social norm that encourages victims to accept an apology, even if it is not a convincing apology' (2002: 356). Lamb has warned of the cultural demands placed on women to be forgiving: '[s]ocialization practices teach young girls to place a high priority on the resolution of conflict, healing wounds, and repairing relationships' (2002a: 162) but place women at the risk of valuing these outcomes over their own best interests, inducing gender conformity 'at the cost of self respect'. Moreover, she argues that within some contexts victim status may grant some women the authority to speak, but only within a culturally endorsed narrative consistent with idealized notions of the victim. Non-compliant women, for instance those who are angry, resentful or not ready to forgive, may be judged harshly (2002a: 164; see also Herman, 2005). Lamb stresses the need to re-examine forgiveness with reference to marginality and structural inequality, but says that 'rarely does a theorist consider how a belief in the virtue of forgiveness might affect African Americans in relation to whites; women in relation to men; or abuse victims in relation to perpetrators'

(2002b: 10). While Lamb is speaking of psychotherapy and not RJ, the issues that she raises offer some important challenges to RJ practitioners.<sup>5</sup>

There are also specific reasons for caution about emphasizing apology in the context of domestic violence. Since violence against women is central to women's subordination, expectations of a compassionate response by women towards violent men place a significant burden on women (Hampton, 1998: 31). Lamb notes that women who have been the victims of incest, other forms of sexual abuse or domestic violence and who continue to forgive abusers are often abused again and may be unable to protect their children (2002a: 163). Apology is a common strategy used by abusive men to attempt to buy back the favour of their abused partner. It is a well-recognized tactic described by Walker as a feature the 'cycle of violence' (1989; see also Acorn, 2004). Evidence indicates that abusive men seek to impose their meanings of the violence on their partners using techniques of neutralization and blame and using apology to foreclose ongoing discussion: 'I've said I am sorry, now let's move on' (Cavanagh et al., 2001). Practitioners who fail to recognize apology by violent men as a common strategy for exercising control over their partners risk being complicit in ongoing abuse. Yet practitioners who see apology and forgiveness as the hallmarks of RJ, may themselves exert pressures towards the giving and acceptance of apology (see Pavlich, 1996). This raises ethical issues for practitioners who encourage victims of domestic violence to accept an apology at face value (Stubbs, 2002). This over-emphasis on the value of the offender apology has been labelled 'the cheap justice problem' (Coker, 1999: 15).

Some RJ proponents have recognized potential problems of a focus on apology and forgiveness including the possibility of the coercion of victims to forgive. For instance, Bazemore (1998) has expressed a preference for the concept 'earned redemption', which he argues does not imply any obligation on the victim. Umbreit and Greenwood et al. have advised mediators in victim-offender mediation to avoid using the words forgiveness or reconciliation as these may pressure or prescribe behaviours for victims (2000: 14). Braithwaite has argued in his more recent work that neither apology nor forgiveness should be expected:

It is cruel and wrong to expect a victim of crime to forgive. Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person who forgives, apologizes or grants mercy.

(2002: 571)

However, much of the RJ literature continues to stress apology and forgiveness with little or no apparent recognition of the potential for imposing obligations on the parties, for generating inauthentic expressions of emotion or of safety issues for victims.

Daly's (2002c) empirical work on conferences for young offenders found a substantial gap in the understanding of apology between victims and offenders in RJ. While victims judged only 30 per cent of apologies by offenders to

be genuine, 60 per cent of offenders said that apologies were genuine. She found that by comparison with the 'foundation myths' of RJ,

it is relatively more difficult for victims and offenders to find common ground and hear each other's stories, or for offenders to give sincere apologies and victims to understand that apologies are sincere. There appear to be limits on 'repairing the harm' for offenders and victims, in part because the idea is novel and unfamiliar for most ordinary citizens ... For victims the limits reside in the capacity to be generous to lawbreakers and to see lawbreakers as capable of change.

(Daly, 2002c: 72)

Herman's informants, who were victims of or witnesses to sexual abuse and or domestic violence, were divided over the value of receiving an apology; many expressed deep distrust of the motives that might lead an offender to apologize (2005: 587). Most were not interested in forgiveness, and some saw it as 'an additional injustice imposed on victims for the comfort and convenience of others' (2005: 593). However, all informants aspired to 'letting go of resentment and moving on with life' (2005: 593).

None of these arguments are meant to impugn the motives of RJ practitioners, nor to suggest that apology and forgiveness genuinely arrived at and freely given might not be laudable, and perhaps therapeutic.<sup>6</sup> However, RJ practitioners need to think carefully about whether their practices might exploit gendered role expectations that women victims should be forgiving. Also, if we take seriously the evidence that women who have been abused are typically seeking safety rather than reparation, we need to emphasize outcomes that offer more than symbolic reparation.

### **(Whose) love, empathy and trust?**

Scholars working on the emotional dynamics of RJ have begun to analyse the role of love, empathy and to a lesser extent trust in bringing about desired outcomes. For instance, Braithwaite has said that:

my hypothesis is that love is a source of acknowledgment and motivation, as is empathetic engagement with the injustices that other people suffer. The empirical evidence is that the experience of love is a key ingredient in successful restorative justice processes in a way that it is not an important ingredient of successful court cases, that empathy is greater in restorative justice processes than in court cases and that empathy predicts success in restorative justice processes.

(2001: 228, citations omitted)

But if love and empathy are preconditions for restorative outcomes, what are the prospects for domestic violence cases?

Acorn argues that RJ expects too much of victims and she asks 'in the context of restorative justice, what is on offer for the heroically loving victim

who succeeds in caring for the well-being of the offender' (2004: 40). Apologies and proclamations of love are used by abusive men commonly as strategies aimed at placating their partners and buying back favour. For instance, Cavanagh et al. quote one woman they interviewed who said:

He's always sorry, yeah, it's 'I love you, I love you, don't leave me, I can't live without you, please forgive me, I will not do it again, I will change ...' I wish I had a penny for every time I heard that line, I would be loaded.

(2001: 708)

Many women have heard these proclamations often, only to be abused repeatedly. Some women who have been abused also express love for their partners and retain a commitment to their partner while seeking to end the violence. Consonant with prevailing discourses of romantic love, some battered women hope to transform a violent partner through their love (Seuffert, 1999; Lamb, 2002a). As Herman has observed, for many women the hope is that:

just one more sacrifice, one more proof of love, will end the violence and save the relationship. Since most women derive pride and self-esteem from their capacity to sustain relationships, the batterer is often able to entrap his victim by appealing to her most cherished values.

(1992/2001: 82–3)

Without great care, RJ processes may be complicit in this entrapment. The overt attempt by some RJ practitioners to mobilize powerful emotions within RJ raises real risks of subtle (or less subtle) coercion or manipulation. The focus on love as a precursor to restorative ends also risks being taken as endorsement of reconciliation as necessarily a desirable outcome (Hooper and Busch, 1996; see Goel, 2005 on the salience of this issue for South Asian women). The love and genuine concern for their (former) partner's well-being that some women express, notwithstanding his violent behaviour, should not be misused or manipulated.

Braithwaite (2001) also places great stock in the capacity of participants to empathize as a precursor for positive RJ outcomes (see also Pranis, 2001; Weijers, 2002). He acknowledges a failed example of RJ for drink driving and attributes the failure in part to the presence of supporters who did not condemn the drink-driving behaviour or helped minimize the offender's responsibility. Research concerning the characteristics of domestic violence offenders questions their capacity for empathy.<sup>7</sup> As noted earlier, we should not assume universal condemnation of domestic violence or that participants will exercise their influence towards outcomes that support and secure the safety of the victim. Daly's empirical work offers some findings that may be salient here. She found that 'effective participation requires a degree of moral maturity and empathetic concern that many people, especially young people, may not possess' (Daly, 2003: 220). The young offenders typically were not oriented towards the victim, and had not thought about what they could offer the victim. They were more focused on the likely penalty. These findings may reflect inadequate preparation of the parties to the conference,

the novelty of a new process and the absence of new cultural understandings of what justice might mean. As Daly identifies, they may suggest also that 'restorativeness' is harder to invoke than might be imagined (2002c: 70).

Despite the focus on empathy and love in RJ, there has been less attention to the concept of trust and this seems worthy of greater consideration (Weijers, 2002). Domestic violence marks a major violation of trust within an intimate relationship, and commonly between the victim and their community. Herman notes that victims often feel harmed by the offender and by a family and community who may have condoned the violence, or whose inaction allowed the violence to recur (2005: 588). In the absence of trust how can a meaningful consensus be reached about an outcome? How can the victim of domestic violence judge the intent of the apology or the expression of other sentiments, or the assurances offered by family and community members? Might not trust be a key precondition for any restorative process to be successful? And should the victim of domestic violence be encouraged to trust the offender? While Braithwaite (1998) sees great virtue in enculturating trust, in institutions, communities and families, more work needs to be done on how this might be achieved.

### **A note on gender essentialism and agency**

My focus on the construction of the contested meanings of domestic violence and on the gendered dynamics of emotionality may be interpreted by some as invoking essentialist readings of women's experience, as being at risk of casting women as inevitable victims and/or as seeing women who have been abused as lacking agency. I disagree. Paying attention to these issues may add to a more complex understanding of agency and of RJ. We need to move beyond polarized debates that characterize women either as free agents empowered through choice or as too victimized to act in their own interests and to recognize agency as constrained by material circumstances and cultural narratives and practices (see Seuffert, 1999 on the construct 'complex personhood').

### **Some implications of this analysis**

The challenge of taking domestic violence seriously may require something that differs from common RJ practices. Domestic violence offences, and perhaps other gendered harms, cannot be subsumed within existing generic restorative practices without significant risks to victims' interests. The broad principles of RJ such as repairing harm, stakeholder participation and community building do not in and of themselves offer sufficient direction or accountability to ensure that practitioners respond to domestic violence adequately and safely. For instance, ensuring that the meanings that emerge in RJ oppose the subordination of women and other groups may imply a

more directive role for convenors or facilitators and a need for greater involvement by victim advocates. This may challenge the claims to neutrality made in some of the literature,<sup>8</sup> and may be seen as undermining the communitarian ideals of RJ by allowing for a new form of expertise to permeate the process (see Schiff and Bazemore, 2001).

Restorative justice emphasizes the process of reaching an agreement for the repair of harm, and as such the literature pays little attention to outcomes other than reparation. However, as argued earlier, reparation is typically not the primary concern of victims of domestic violence who emphasize safety, denunciation and validation. Daly (2000, 2002a) has contributed important work analysing the role of retribution in restorative justice processes; whether retribution encapsulates women's desires for validation requires further work. There also are strong reasons why an adequate response to domestic violence cannot be diversionary<sup>9</sup> (Lewis et al., 2000; Coker, 2002; Hudson, 2002) since this may risk victim safety and may undermine the important gains of the feminist movement in placing violence against women on the public agenda. But if, as Hudson suggests, restorative justice can deliver the 'traditional functions of criminal justice—retribution, rehabilitation/reintegration, individual and public protection—better than formal justice does' (2002: 626), it is all the more pressing that restorative justice scholars develop a wider vision of what restorative outcomes might look like. For domestic violence, and other gendered harms, symbolic reparation such as apology and forgiveness should not be privileged above seeking effective, safe and just outcomes. There need to be clear lines of responsibility and accountability and sufficient resources to ensure adequate safety planning, follow-up and commitment to the longer-term well-being of the victim and children. This does not dictate punitive responses but it may require recognition of the need for coercive back-up (Braithwaite and Strang, 2002; Coker, 2002; Daly, 2002a; Hudson, 2002). This suggests that the preference of some restorative justice writers to posit restorative justice as a complete alternative to criminal justice is ill-advised. As Hudson (2002) has argued, widening the range of offences to which RJ might apply may see a hybridization of RJ with formal criminal justice.

Whether safe restorative practices can be devised to respond to domestic violence and other forms of gendered harms remains an open question. Joan Pennell and Gale Burford (2002) have developed a model they describe as a family–community–government partnership based in feminist praxis that seems to offer strong prospects and reportedly has produced some positive results. Mary Koss in conjunction with feminist activists has developed RESTORE, a new model for use with date-rape offenders, which combines RJ with therapeutic intervention (Koss et al., 2003). Both models are distinctive in: their feminist approach; careful planning and design specific to the offences and communities they serve; their ongoing engagement with activists, community representatives and service providers; and, the accountabilities they have incorporated. They are time and resource intensive, but in the absence of such resources, RJ may fall short of meeting its ideals. It is

crucial that any model developed challenges subordination, is feasible, appropriately resourced and sustainable over time. Safe and effective outcomes not only should be *possible* but *probable*.

## Notes

- 1 Not all RJ models require the victim and offender to meet (Pranis, 2002), but much of the discussion of apology and forgiveness in the RJ literature seems to assume that they do.
- 2 Duff (2002) provides a normative account of the necessity of apology that does not rely on RJ.
- 3 As Lamb (2002a), Murphy (2002) and Petrucci (2002) acknowledge, there is no settled definition of what forgiveness means. However, there is some agreement that forgiveness involves the forgoing of resentment.
- 4 See, for instance, the special issue of the *Fordham Urban Law Journal*, 2000, 27(5) and especially Murphy (2000); see also Murphy (1988), Murphy and Hampton (1988), Hampton (1998), Latif (2001), Dzur and Wertheimer (2002), Lamb and Murphy (2002) and Petrucci (2002).
- 5 Later she raises the possibility that restorative justice may offer positive outcomes for victims where the offender makes sincere efforts towards reparations: Lamb (2002a: 167–8).
- 6 Maxwell and Morris's (1999) finding that young offenders who apologized were less likely to re-offend than those who did not apologize is worthy of greater attention and further examination.
- 7 Busch says that in programmes for men who have been abusive it can take six to eight weeks before a man begins to shift 'from feeling that they are the victims of their partner's "nagging" or "disobedience" or "uncooperativeness" to accepting even partial blame or responsibility for their actions' (2002: 244).
- 8 Research indicates that some victim–offender mediation practitioners are confused about how to balance their stated commitment to neutrality with the competing needs of the parties (Umbreit and Greenwood et al., 2000).
- 9 At least not simply in the form of diversion *from* court. Diversion *to* appropriate and established programmes, where they exist, may be less problematic.

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