



Restorative Justice and Family Violence

Edited by Heather Strang and John Braithwaite

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Australian National University



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Restorative Justice and Family Violence

Restorative Justice and Family Violence addresses one of the most controversial topics in restorative justice: its potential for dealing with conflicts within families. Most restorative justice programs specifically exclude family violence as an appropriate offence to be dealt with this way. This book focuses on the issues in family violence that may warrant special caution about restorative justice, in particular, feminist and Indigenous concerns. At the same time it looks for ways of designing a place for restorative interventions that respond to these concerns. Further, *Restorative Justice and Family Violence* asks whether there are ways that restorative processes can contribute to reducing and preventing family violence, to healing its survivors and to confronting the wellsprings of this violence.

Heather Strang is Director, and **John Braithwaite** a Professor, in the Centre for Restorative Justice, Research School of Social Sciences, Australian National University. They are the co-editors of *Restorative Justice and Civil Society* (Cambridge University Press, 2001).

Acknowledgements

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Another special element of the success of the conference was the work of Loretta Kelly in organizing a roundtable discussion of Aboriginal restorative justice facilitators to canvass their experience of restorative justice and family violence before the conference proper began. These Aboriginal leaders took part in an informal session of the conference where they acted as a panel and talked about their experiences. Participants saw this as a positive feature of the constructive engagement at the conference. Donna Coker suggested at the end of the conference that this lesson in conference design for bringing communities of thought together with different perspectives on an intransigent problem might have been taken further. Battered women's movement participants, restorative justice advocates and Aboriginal peoples might each have met and planned ways of communicating their experience for the other participants to absorb before the conference proper, and of course before the publication emanating from those exchanges. While our effort to encapsulate all that was learned from the conference in this volume is a flawed one, it is a better book for the exchanges that occurred. On behalf of all the authors, we thank all the other participants for the many ways they enriched our attempts to grapple with the issues, including some moving and powerful personal testimonies.

Heather Strang and John Braithwaite

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1 Restorative Justice and Family Violence

John Braithwaite and Heather Strang

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