Restorative Justice:
A Literature Review

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INTRODUCTION

This literature review will examine whether current research shows restorative justice to be a safe, effective criminal justice response to cases of intimate partner violence in Canada.[1]

'Restorative justice' will be defined in the literature review itself, through an examination of relevant literature and practice. 'Intimate partner violence' will be discussed as defined by British Columbia's Violence Against Women in Relationships Policy (*VAWIR*). For the sake of brevity, the term 'intimate violence' will be used. The term "victim' will refer generally to victims of crime, including crimes of intimate violence. The term 'survivor' will refer specifically to victims of crimes of intimate violence.

The primary focus of this research paper will be on adults. Where available materials analyzing intersectionalities such as race, ethnicity, culture, (dis)ability, sexual orientation, age, and poverty will be included. Where there is a significant body of literature (for instance regarding Aboriginal peoples), a separate analysis will be included.

RESTORATIVE JUSTICE

What is Restorative Justice?

Restorative justice practices in Canada have diverse theoretical, political, cultural and historical roots. While the term restorative justice is used to refer to particular models, it is primarily a philosophical or theoretical approach to criminal justice that is applied across a broad range of programs (Goundry, 1998). Programs or models are variable and may emphasize several of the characteristics discussed below.

The term itself was coined by criminologist Albert Eglash in a 1977 journal article discussing restitution (Van Ness and Heetderks Strong, 1997; Eglash, 1977). More recently restorative justice has been defined by the Supreme Court of Canada as an attempt to:

> (r)emedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and the community (*R v. Proulx*, 2000).

The Law Foundation of Canada, in a major report exploring and summarizing the principles of restorative justice in Canada, outlines three fundamental principles: 1) crime is a violation of a relationship among victims, offenders and the community; 2) restoration involves the victim, the offender and community members; 3) restorative justice is defined by a consensus approach to justice (Llewellyn and Howse, 1999).

[1] Reference to other jurisdictions will be made where relevant, however Canadian models and programs will be the primary focus of the paper.

Australian scholar John Braithwaite has formulated perhaps the most famous conceptualizations of restorative justice. His theory of 'reintegrative shaming' describes a socio-psychological process that occurs during a restorative justice intervention. Reintegrative shaming "…(a)ttempts to reintegrate offenders, victims, their families, their supporters, and the community without attempting to stigmatize or isolate offenders" (Roach, 2000; Braithwaite and Pettit, 1990; Braithwaite, 1989).

Transformative Justice

Restorative justice has been characterized as a process which *restores* damaged relationships between victims, offenders and communities, and encourages reconciliation between parties (Strang, 2002). These goals may be problematic in cases of intimate violence. The relationship prior to the intervention may not be one that the survivor wishes to 'restore,' while reconciliation of the parties may be dangerous (Stubbs, 2002). Kent Roach, a Canadian legal scholar, notes that "(w)hat should be restored will depend on the concerns and abilities of those who participate in conferences" (2000 at 258). Transformative justice takes up these concerns, charging that restorative justice "…(s)till accepts the idea that one event now defines all that matters of right and wrong - it leaves out the past, and the social causes of the event" (Morris, 2000 at 4). Rather than simply restoring community, individual or institutional relationships to their pre-crime norm, transformative justice seeks to change or *transform* relationships in ways that support social justice and equality more broadly (Martin, 1999; Cooley, 1999).

Margaret Martin, an American legal scholar, states that transformative justice, not restorative justice, should be used in cases of intimate violence (1999).

Donna Coker, an American legal scholar, also reports that transformative justice provides the best response to cases of intimate violence (2002). Coker critiques the use of restorative justice in cases of intimate violence, pointing out theoretical weaknesses in its application (2002). Coker claims that restorative justice fails to offer any clear principles on how to deal with domestic violence in circumstances where the normative opposition to intimate violence is weak or compromised. Second, "…restorative justice theory under-theorizes criminal offending, generally, providing little foundation for a theory of male violence against women" (2002 at 129). Coker instead turns to the theoretical and practical application of transformative justice as a more thorough response to intimate violence. "A transformative practice challenges not only the state's monopoly on responses to crime, but also challenges racial and gender subordinating institutions, beliefs and practices that support the crime of battering" (2002 at 145).

Aboriginal Justice

Many scholars trace the roots of restorative justice to the justice practices of pre-colonial African, ancient Hebrew, and Aboriginal societies (Strang, 2002; Roach, 2000; Braithwaite, 1997; Van Ness and Heetderks Strong, 1997; Weitekamp, 1993). They assert that contemporary restorative justice is modeled on these cultures which practiced restoration and healing following anti-social behaviour rather than punishment.

Others assert that the contemporary restorative justice movement is not synonymous with Aboriginal justice, despite sharing similar theoretical or historical grounding.[2] Michael Jackson, a Canadian legal scholar, and Patricia Monture-Angus, an Aboriginal rights activist and legal scholar, point out key distinctions between the restorative justice movement, and Aboriginal justice. Both see the need for a separate or distinct Aboriginal justice system as rooted in the colonial legacy of over-representation of Aboriginal people in the prison system (Jackson and Rudin, 1996; Monture-Angus, 1994). Scholars also emphasize the unique role of Aboriginal spirituality and culture in making Aboriginal justice distinct from other forms of restorative justice (Roach, 2000; Monture-Angus, 1995; Austin, 1993; Jackson, 1992). "…(A)boriginal people must be allowed to design and control the criminal justice system inside their communities in accordance with particular aboriginal history, language and social and cultural practices of that community" (Monture-Angus, 1994). Monture-Angus asserts that the conflation of restorative justice and peacemaking is dangerous, as it may mask fundamental cultural and value differences that are essential to understanding the Aboriginal peacemaking process. For instance, according to Kent Roach, a Canadian legal scholar, Aboriginal justice is fundamentally different in that it may focus on renewing collective identity and creating community rather than individual reparation (Roach, 2000).

Other scholars, as well as the Supreme Court of Canada, have noted the striking similarities between Aboriginal justice and other restorative justice practices in Canada (*R v. Gladue*, 1999; Doulis, 1996; LaPrairie, 1992).

Christian Influences

While most restorative justice models claim to draw on Aboriginal spirituality, other traditions have also had influences. Christian values have shaped Canadian restorative justice models and projects. Several programs are run by faith communities. For instance, the Mennonite Central Committee maintains a Victim Offender Ministry in British Columbia whose role is to be "…(a) major bearer and exporter of the vision and practice of restorative justice" (FREDA Centre, 1997).

Both Daniel Van Ness and Howard Zehr, well-known restorative justice advocates and scholars, trace their involvement in the restorative justice movement to their Christian convictions (Van Ness, 1997; Van Ness and Strong, 1997; McHugh, 1978). Van Ness argues that "biblical justice" is focused on the rights of victims, and the inherent human value of offenders as people, and he proposes a series of public policy applications based upon this premise (1989).

Definitions

There are a number of working definitions of restorative justice in use in the literature. Two recent Canadian publications provide the most clear and concise:

> Restorative justice is a response to conflict that brings victims, wrongdoers and the community together to collectively repair harm that has been done in a manner that satisfies their conceptions of justice (Cooley, 1999).

[2] In fact it has been suggested that conventional ADR and justice models could benefit from emulating Aboriginal models. (Austin, 1993; Jackson; 1992)

> Restorative justice is a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it… Central to restorative justice is the recognition of community rather than criminal justice agencies, as the prime site of crime control (Llewellyn and Howse, 1999).

A single definition of restorative justice may seem inadequate, or even counterproductive, given the diversity of ideas and influences in restorative justice theory and practice. The sections below explore recurring themes, foundations and ideas which appear throughout the literature, providing a more nuanced and complex picture of restorative justice.

Characteristics

General

Restorative Justice

- heals/reconciles/reintegrates victim, offender and community.
- balances the needs of these diverse stakeholders (Strang, 2002).
- promotes accountability of offender to victim (Strang 2002; Roach, 2000): Accountability should include an acknowledgement of the harm done by the offence (*R v. Gladue,* 1999).
- rehabilitates offenders (Roach, 2000; Stuart, 1996 a) and b); Braithwaite, 1989).
- heals the victim and the offender (Strang, 2002; Roach, 2000; Braithwaite, 1989).
- contributes to crime prevention (Roach, 2000; Van Ness and Heetderks-Strong, 1997).
- uses shaming to re-integrate offenders into society (Braithwaite and Petit, 1990; Braithwaite, 1989).
- reconciles offenders and victims (Strang, 2002; Braithwaite and Daly, 1994; Immarigion, 1991). Reconciliation in cases of intimate violence is contested as a legitimate goal by other commentators (Stubbs, 2002; LaRoque, 1997)
- provides reparation to the victim in some cases (Braithwaite and Strang, 2002; *R v. Gladue*, 1999; Hudson and Galaway, 1996).
- should address the overuse of incarceration generally (*R v. Proulx*, 2000; Van Ness and Strong, 1997; Morris, 1993; Braithwaite and Petit, 1990).
- provides victims with an opportunity to participate in the process in ways that the conventional criminal justice system does not (Umbreit, 1998; Morris, 1993; Knopp, 1991).

Community Approach

- those who have been affected by crime come together to repair the harm that has been done (Marshall, 1996).
- community driven and controlled (*R v. Gladue*, 1999; Stuart, 1996). Other commentators envision an important role for the state. This would include professional service providers bringing resources to the community, and state agents incarcerating those who do not abide by the limits set by the community (Pennell and Burford, 2002; Coker, 2002).

- pays attention to context (such as culture, rural versus urban settings) (Strong, 2002).
- returns the conflict to the community (Stuart, 1996 a) and b); Christie, 1977).
- victim participation should be voluntary (Strong, 2002; Daly and Braithwaite, 1994).

Aboriginal Justice

- Aboriginal spirituality is an important element (Roach, 2000; Perrault and Proulx, 2000 b); Monture-Angus, 1995; Stuart, 1996 a) and b); Jackson, 1992).
- Aboriginal cultural traditions that are embraced by the community are important to the success of models used in Aboriginal communities (Mallet, Bent and Josephson, 2000; Perrault and Proulx, 2000 b); *R v. Gladue*, 1999; Stuart, 1996 a) and b)).
- Aboriginal models may emphasize renewal of community identity rather than emphasizing individual reparation (Roach, 2000).
- should address overrepresentation of Aboriginal people in Canadian prisons (Rudin and Roach, 2000; Quigley, 1999; *R v. Moses*, 1992; Jackson, 1996, 1992; Stuart, 1996 a) and b)).

RESTORATIVE JUSTICE MODELS

The following section will explain the legal basis for individual models, where they came from, and how they are structured, including relevant case law.[3] The models discussed below include: Alternative Measures, sentencing circles, Aboriginal and faith-based programs initiated under optional protocols, Victim-Offender Mediation (VOMs) and Victim-Offender Reconciliation (VORPs), and Family Group Conferencing (FGCs). Restorative justice models are initiated, structured and legally authorized in a variety of ways. They are extremely diverse in their jurisdiction, authority and access to resources. Restorative justice interventions are used at various stages of an offender's involvement in the criminal justice system including:

1. Police (pre-charge)
2. Crown (post charge)
3. Courts (pre-sentence/during sentence)
4. Corrections (post sentence)
5. Parole (pre-revocation) (Latimer, 2001)

Interventions may include face-to-face meetings with the offender at various stages, or allow a complete absence of personal involvement between the victim and the offender (Daly, 2000). Restorative justice processes can take place prior to (or in lieu of) laying criminal charges, or following the laying of charges but before a court hearing.[4] Models such as VOM may be offered in conjunction with an on-going court process, or at any stage of the offender's involvement in the criminal justice process. Restorative

[3] Many restorative justice models, however, do not generate jurisprudence as they are extra-judicial by nature.

[4] In this case legislation generally provides judicial discretion to drop charges upon the completion of certain conditions.

justice also operates after a guilty plea (or finding of guilt in a trial) to inform the sentencing of an offender. Finally, it may be used in an attempt to rehabilitate offenders in prison, (Jackson, 2002; Proulx and Perrault, 2000; Rafferty, 2001; Rucker, 1991) or in anticipation of and following their release from prison.[5]

Bill C-41: The Legal Foundation

Alternatives to incarceration such as restitution, community service orders, and fine option programs were available to a limited extent in Canada as early as the 1930's and into the 1970s (Theoret, 1995; Galloway and Chesney, 1977; Law Reform Commission, 1977). The first instances of what could be labelled 'restorative justice' occurred in contemporary Canada in the form of sentencing circles in 1978 (Barnett, 1995) and VOMs in the late 1970s (Morris, 2000; Van Ness and Strong, 1997; Quinn, 1996; Hudson and Gallaway, 1996; Peachey, 1989).[6]

In 1996, the Canadian government embraced what have been described above as restorative justice principles, with Bill C-41. With this, restorative justice became an important part of the legal landscape, rather than an alternative in limited use. The sentencing goals of retribution and deterrence, which had dominated sentencing theory and practice to that point, became tempered with healing, restoration and a reduction in the use of incarceration, particularly for Aboriginal offenders. Debate on the Bill in the House of Commons clearly shows the intent of the government of the day:

> A general principle that runs through Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.
> …
> This bill creates an environment which encourages community sanctions and the rehabilitating of offenders together with reparation to the victims and promoting in criminals a sense of accountability for what they have done (Minister of Justice Allan Rock).

Three main provisions make up the Bill C-41 sentencing regime and interact to provide several avenues for the application of restorative justice principles. Two are described in some detail below.[7]

Section 718: The Purposes and Principles of Sentencing

Section 718 outlines the purposes and principles of sentencing that apply to all forms of sentencing, including some restorative justice models. The application of these principles may function to divert an offender into a restorative justice program, or mitigate an incarceral sentence.[8]

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[5] An example of this is community-assisted hearings by the National Parole Board regarding the conditional release of an offender into the community under sections 79 to 84 of the *Correction and Conditional Release Act,* R.S. 1992, c.20.

[6] The first VOM in North America took place in Kitchener-Waterloo in Ontario, and was conceived of and run by the Mennonite Central Committee.

[7] The third, conditional sentencing, is beyond the scope of this literature review.

[8] This may mean that an incarceral sentence is shortened, or a conditional sentence is imposed.

Included in these principles are: denouncing unlawful conduct; rehabilitation of offenders; reparation of harm to the victim or community; promotion of a sense of responsibility in offenders; and acknowledgement of harm done to victims and the community.[9]

Section 718.2 also lays out aggravating or mitigating factors to be taken into account in reducing or increasing a sentence. Aggravating factors include: evidence of spousal or child abuse, and evidence of an abuse of authority or trust. This provision clearly highlights the criminal nature of intimate violence, and is a strong public statement that it is considered morally, socially and legally unacceptable.

Sections 718.2 (c) through (e) seek to provide principles which may, on the other hand, mitigate a sentence. 718.2 (d) specifies that incarceration should be used only if "less restrictive sanctions" are inappropriate. Section 718.2 (e) goes further to state that:

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders* [emphasis added].

Restorative justice principles are intended to aid sentencing judges in the difficult task of denouncing crimes committed under aggravated circumstances, healing and rehabilitating the offender, and avoiding the use of incarceration where possible.

Section 717: Alternative Measures

Section 717 allows for "Alternative Measures" for all offenders who meet the criteria as set out in those provisions. Alternative measures programs are subject to the sentencing purposes and principles set out in section 718. They are defined in section 716 as "…measures other than judicial proceedings under this *Act* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence." Alternative measures are the models used primarily by provincial and territorial governments in administering restorative justice through the conventional criminal justice system.

Some restrictions are placed upon the use of alternative measures, including:

> (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate…
>
> (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim; …
>
> (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;(717 (1), (2) and (3)…

[9] Separately, section 718.1 lists proportionality as the "Fundamental Principle" of sentencing. This principle dictates that " a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718.2 (b) also emphasizes that similar sentences should be imposed upon similar offenders for similar offences, although this is not included as a 'fundamental' principle.

Pursuant to provincial jurisdiction over the administration of justice, each province or territory designs and administers their own alternative measures program. Each maintains its own policies regarding the use of alternative measures in cases of intimate violence, designates funds to support the programs, and chooses the model to be employed.

Provincial Administration of Alternative Measures: British Columbia

In British Columbia, the New Democratic Party's (NDP) government introduced restorative justice initiatives under the auspices of Alternative Measures in early 1998. Reforms began in 1997 with a series of documents released for public perusal and feedback, followed by program start up in 1998 (British Columbia 1997, 1998; Goundry, 1998). Two main streams were introduced: community accountability programs (CAPs) and alternative measures programs. These programs continued with the change of government in 2001.

CAPs were introduced as a method of "increasing community involvement" in the justice system. CAPs are run by "citizens groups" who are supplied with start-up funding, a CAP Information Binder and access to a team of community advisors (British Columbia, Press Release, 1998). CAPs provide pre-charge diversion in cases where "…there is enough evidence for a charge, but where circumstances lead police to believe that an alternative, community-based approach will provide the best resolution" (British Columbia, Press Release, 2000). They take four forms: Family Group Conferencing, Neighbourhood Accountability Boards, Circle Remedies, and Victim Offender Reconciliation Programs (British Columbia, Fact Sheet, 1998). They receive initial funding of five thousand dollars from the province and can apply for further funding once they are established. Many well-established CAPs also receive significant funds from the Law Society of British Columbia or charitable organizations.

The second stream is simply called "alternative measures." Alternative measures will divert only "low-risk, less serious" offenders who will be subject to guidelines for admission to the programs available. These guidelines are drafted by the office of the Attorney General, and have been written to comply with British Columbia's *Violence Against Women in Relationships* policy. Alternative measures will be used where "…the charge meets the province's standard for prosecution…" (British Columbia, Fact Sheet, 1998). However, pursuant to section 717 of the *Criminal Code*, charges will not be formally laid except at the discretion of a judge in the case of a breach of conditions.

Under the former NDP government policy on *Alternative Measures and Violence Against Women in Relationships* cases of intimate violence were diverted to CAPs and alternative measures at the discretion of the police and Crown Attorney under 'exceptional circumstances' only (Goundry, 1998). The current Liberal government policy on cases of intimate violence relies on the discretion of the police and Crown to divert when "…the case is not likely to produce a conviction or the victim is unwilling to testify…" The new policy also emphasizes "(r)eferring carefully screened cases of minor spousal assaults to alternative measures…" (Plant, 2003 at 590). CAP programs are prohibited from taking cases of intimate violence, as a condition of their government funding. However, Patricia Kachuk, a British Columbia scholar, has found that CAPs have diverted cases of intimate violence, in part due to unclear guidelines (Kachuk, 1998).

Jurisprudence

While Alternative Measures cases do not for the most part generate jurisprudence (unless the conditions set are breached), the Supreme Court of Canada has ruled more generally on the interpretation of the restorative justice principles of section 718. While technically dealing with conditional sentences, these cases have been cited extensively to support the use of other restorative justice models, including alternative measures and sentencing circles.

In the 1999 decision of *R v. Gladue*, involving an Aboriginal woman who stabbed her male partner to death, the Supreme Court of Canada interpreted section 718.2(e) to be remedial, aimed at healing the harm done to Aboriginal peoples[10] by both colonial policies and the criminal justice system. The Court explicitly acknowledged the legacy of colonial repression and its ugly consequences such as poverty and racism, and ruled that the effects of colonialism on individual offenders will be considered a mitigating factor in sentencing.

The Supreme Court of Canada also took aim at Canada's over-use of incarceration generally, and noted it as a particular problem in the case of Aboriginal offenders. The Court interpreted Section 718 to mean that judges *must* at least consider alternatives to incarceration for all offenders. Overall, the Supreme Court of Canada in *Gladue* clearly embraces restorative justice as an appropriate and valuable sentencing framework.

The 2000 decision of *R v. Wells*, involving an Aboriginal man who committed a major sexual assault, further explains the *Gladue* decision, giving lower court judges a specific methodology for applying the sometimes-contradictory goals of restoration, deterrence and denunciation. It could be said that *Wells* dilutes the Supreme Court of Canada's strong stance on restorative justice, by de-emphasizing section 718.2 (e), and placing it as one of many equal objectives within the *Criminal Code*. However, the Court offsets this by adding that certain circumstances may mitigate in favour of Aboriginal accused, allowing a sentencing judge to weigh restorative justice objectives ahead of all others even in a case involving a serious crime. Specifically, the Court names a community's willingness to address social problems such as sexual assault in their own right (at par. 50-51). In other words, the existence of a restorative justice program within an Aboriginal community is a strong factor in favour of applying restorative justice, even in cases such as sexual assault.

In 2000 the Supreme Court of Canada in *Proulx*, a case dealing with a non-Aboriginal offender convicted of dangerous driving causing death, noted that:

> Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society (at par. 20).

The Court provides a definition of restorative justice that clearly embraces many of the characteristics described above:

[10] Both *Gladue* and *Wells* speak specifically to the effects of section 718 on Aboriginal offenders. However, the Court also makes more general statements regarding curbing the use of incarceration and the application of restorative justice principles to non-Aboriginal offenders, particularly in *Wells*.

> [restorative justice is an attempt to] remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community (at par. 33).

Overall, the Supreme Court of Canada has clearly embraced restorative justice as a legitimate sentencing framework, interpreting section 718 as a clear indication of Parliament's intent to reduce the use of incarceration, and to apply sentencing principles such as healing, reconciliation and restitution.

Amendments to the *Criminal Code* under Bill C-41 have been a major cause for the increase in the use of restorative justice in Canada. The move towards restorative justice, however, is not only a result of this codification and jurisprudence. These principles have also been applied in cases involving common law sentencing powers and negotiated agreements, prior to the passage of Bill C-41. The following section discusses these restorative justice models.

Sentencing Circles

A circle formation is frequently used for discussion, counselling and Aboriginal traditional healing by mediators, substance abuse groups, and Aboriginal community groups. While several circle formats do find their way into restorative justice initiatives, the following discussion will focus on the sentencing circle as it is employed in the criminal justice system.

Sentencing circles began in Canada's North under the common law sentencing powers of provincial and territorial court judges.[11] Frustrated with the over-incarceration of Aboriginal offenders in remote communities, non-Aboriginal, activist judiciary looked to community-based alternatives to avoid sending recidivist offenders to prison in the South (Hamilton, 2001; Eber, 1997; Stuart, 1996 a) and b); Barnett, 1995; Fafard, 1994).

The 1992 case of *R v. Moses*, involving an Aboriginal offender who was convicted of theft, breach of probation and carrying a weapon for the purpose of assaulting a police officer, is widely recognized as the jurisprudential starting point for sentencing circles in Canada. The use of circles has spread from the North across Canada, and to non-Aboriginal offenders since that time (Sokoloff, 2002; Perreaux, 2001; *R v. Munson*, 2001). Sentencing circles have been used to address many serious crimes, including cases of intimate violence.[12]

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[11] The common law sentencing power allows judges to hear a wide variety of evidence in making their sentencing decisions. As with all sentences meted out under the *Criminal Code* it is the presiding judge who has the ultimate sentencing decision, not the community.

[12] For example: *R v. Naappaluk,* [1994] 2 C.N.L.R. 143 (Q.C. (Crim Div.)), *R v. Johnson,* [1994] 91 C.C.C. (3d) 21(Y. Terr. Crt. App.), *R v. Bennett,* [1992] Y.J. No. 192 (Y. Terr. Crt.) online: QL (B.C.J.), *R v. Charleyboy,* [1993] B.C.J. No. 2854 (B.C. Prov. Crt. (Crim Div.)) online: Ql (B.C.J.), *R v. Green,* [1992] Y.J. No. 217 (Y. Terr. Crt.) online: QL (B.C.J.), *R v. D.N.* [1993] Y.J. No. 193 (Y. Terr. Crt.) online: QL (B.C.J.), *R v. S.E.H.,* [1993] B.C.J. No. 2967 (B.C. Prov. Crt. (Crim. Div.)) online: QL (B.C.J.), *R v. Seymour,* [1989] M.J. No. 273 (Man. Prov. Ct. (Crim. Div.) online: QL (M.J.), *R v. Clement,* [1994] B.C.J. No. 1247 (B.C. Prov Crt. (Crim. Div.) online: QL (B.C.J.), *R v. Taylor,* [1995] 104 C.C.C. (3d) 346 (Sask. C.A.).

Currently, sentencing circles occur in a number of ways: as a result of the common law sentencing power of a provincial or territorial court judge; as part of a program authorized by a negotiated protocol with a provincial or territorial government (see below); or as part of an Alternative Measures program mandated under the *Criminal Code* (see above). Each circle will differ in its resources, administration, organization, and supervision of offenders.

As with restorative justice itself, there are many versions of sentencing circles. Almost every definition places them within Aboriginal traditions, rooted in healing and talking circles.[13] Sentencing circles are generally held in a less formal setting than the courtroom (although a courtroom may be rearranged to accommodate a circle), and are held in the offender's home community (Barnett, 1995). Participants are drawn from the community, and include the offender, the victim, their families and other interested parties (Stuart, 1996 a)).

Judge Barry Stuart, the Territorial Court judge who presided over the *Moses* case and numerous other sentencing circles, describes the effect of sentencing circles this way:

> Rearranging the court in a circle without desks or tables, with all participants facing each other with equal access and equal exposure to each other dramatically changes the dynamics of the decision-making process. The result is an informal but intense discussion of what might be best of protect the community and extract the accused from the grip if alcohol and crime. The circle breaks down the dominance that traditional courtrooms accord lawyers and judges. The circle encourages participation by the lay members of the community and also encourages the participation of the accused himself… Community involvement through the circle generates new information about the accused and the community (*R v. Moses*, 1992, at 348).

The role of the judge varies from circle to circle, from being a 'chairperson' or 'mediator' (Green, 1998) to having the presence of community "shift the responsibility from the judge to the community" (*R v. Moses*, 1992, at 348).

There has been substantial judicial debate regarding procedures and guidelines for the use of sentencing circles, which has yet to be resolved by the Supreme Court of Canada (*R v. Nicholas,* 1996; *R v. Taylor*, 1995; *R v. Joseyounen*, 1995; *R v. Morin,* 1993). Commentators have asserted that the lack of clear guidelines has caused confusion and unfairness in some cases (Roberts and LaPrairie, 1996; LaPrairie, 1995; Crnkovich, 1993). Others contend that flexibility makes sentencing circles suited to meeting the individual needs of particular communities or offenders (Jackson and Rudin, 1996).

Family Group Conferences

Unlike sentencing circles which are a Canadian creation, Family Group Conferences (FGC) originated "Down Under." They first emerged in New Zealand as the

[13] For a more critical view of the role of tradition in sentencing circles see: LaRoque, 1997; LaPrairie, 1995; Crnkovich, 1993.

centerpiece of the 1989 *Young Persons and Their Families Act* which uses FGCs extensively to deal with juvenile crime (Strang, 2002; Hamilton, 2001; Burford and Pennell, 1996; LaPrairie, 1995). [14] As with sentencing circles, FGC claims to have its roots in Aboriginal practices, in this case in Maori culture (Hamilton, 2001; Morris and Maxwell, 2000; Love, 2000; LaPrairie, 1995). The New Zealand model was explored and adopted by several Australian states, who have also primarily employed them to deal with juvenile offenders (Strang, 2002; Hamilton, 2001). Unlike New Zealand, Australian police in some states have the discretion to divert adult offenders to these programs (LaPrairie, 1995). Since 1996, the RCMP have employed a form of FGC called a Community Justice Forum (CJF) which accepts both adult and juvenile offenders (Canada, Department of Justice, 2002; Hamilton, 2001).

An FGC generally consists of a meeting of the victim, the offender and their immediate families or guardians and a coordinator or facilitator (Hamilton, 2001; LaPrairie, 1995). Coordinators are umpires, not participants (LaPrairie, 1995) who identify people who will participate, invite them to the conference and prepare them beforehand for their roles (Burford and Hudson, 2000). Unlike sentencing circles, the participants are usually limited to immediate family members, as opposed to the larger 'community.' A set process is followed during the meeting which allows for each participant to speak in turn to the crime, its impacts, and possible restitutions (Hamilton, 2001; LaPrairie, 1995).

The RCMP are not the only Canadian group to use FGCs in dealing with adult offenders. Gale Burford and Joan Pennell were co-directors of an extensive Newfoundland FGC project which was used to deal with several types of violence within families.[15] They describe a typical intervention this way:

> (o)nce the FGC coordinators received a referral, they worked with the family group members to prepare them to take part in a safe and effective manner and consulted with a community advisory panel on these preparations. To emphasize the centrality of the family group and create a de-professionalized atmosphere, the FGC coordinators invited a wide range of family group members, ensured they outnumbered the service providers, and designed the conference in consultation with the family group…the conference was typically held in a community setting with chairs in a circle, familiar food selected, and transportation, childcare and interpretation provided as needed. Close attention was paid to safety concerns (Pennell and Burford, 2002).

VORPs and VOMs

Victim-Offender Reconciliation Programs (VORPs) are widely used in the United States, Germany, Finland, the United Kingdom and, to a lesser extent, Canada (Gustafson, 1997; Mesmer and Otto, 1992). VORPs originated in the Mennonite Church, and continue to be primarily run by Christian faith-based groups. There were more than

[14] According to Morris and Maxwell, there is growing support for the use of FGCs with adult offenders in New Zealand (2000).

[15] See below for further discussion. This program is no longer in existence, having been cancelled due to budget restraints.

300 VORPs in North America in the mid 1990s (Umbreit, 1998 b)). [16] According to the British Columbia alternative measures program they

> …(b)ring the victim and the offender together with a trained mediator in a safe, neutral environment to discuss the offending behaviour. The mediator has no stake in the conflict. The mediator facilitates the meeting, guiding the participants through the process. The mediator does not impose a solution on the participants but helps them reach a satisfactory agreement to make reparation for the offence (CAP Handbook Binder).

According to Dave Gustafson, Co- director of a British Columbia VORP that has been in place since 1982, mediators who work with the BC program are"…(f)acilitators of dialogue whose roles are highly informed by trauma recovery research and practice."[17]

VORPS can be generally distinguished from FGCs by the latter's exclusion of the wider community from the discussion of the offence and its consequences (Strang, 2002). VORPs are generally limited to the victim, the offender and a facilitator. Unlike models which may divert the offender from the criminal justice system (such as alternative measures), VORPs generally take place while the offender is incarcerated (Gustafson, 1997, Umbreit, 1990) or after sentencing (Strang, 2002).

According to Gustafson (1997), VORPs are intended to:

- Hold the offender accountable for the harms the have been done to the victim.
- Gather information about the crime and its context in order to answer questions that the victim may have.
- Attempt to place the offence in context.
- Allow both the victim and the offender to begin to heal from the offence.

Although similar VORPs can also be distinguished from Victim-Offender Mediation (VOMs), Mark Umbreit, a restorative justice theorist and activist, describes them as interventions which:

> hold offenders personally accountable for their behaviour, emphasize the human impact of crime, provide opportunities for offenders to take responsibility for their actions by facing their victim and make amends…(Umbreit, 1998 b) at 5).

VOMs rely on a similar grouping of participants, but place more emphasis on reparation and restitution to the victim than on reconciliation of the parties (Strang, 2002). [18] Further, Tim Roberts, a consultant who evaluated a British Columbia VOM, states that they deal with more serious and violent offences, while VORPs deal mainly with minor offences committed by juveniles. According to Roberts, VOMs are more rare than VORPs; the mediators are trained professionals rather than volunteers; they may not result in a face-to-face meeting; they are likely to require more preparation and counselling work for victims and offenders; and are more focused on healing rather than reconciliation (1995).

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[16] Roberts asserts that there were 25 VORPs in Canada in 1995 (1995).
[17] Personal correspondence with Dave Gustafson, March 11, 2004.
[18] Roberts, however, asserts that the VOM process is not predicated on restitution (1995 at 3).

VORPs have been used consistently in the United States and Canada to deal with very violent crimes including sexual assault and intimate violence (Gustafson, 1997; Umbreit, 1990). While they are used extensively in the United States to deal with intimate violence, there are fewer Canadian programs that take such cases. The Fraser Region Community Justice Initiatives Association, which will be discussed in detail below, does deal with such cases. One program on Prince Edward Island, Justice Options for Women Who are Victims of Violence, has completed preliminary consultations on the possibility of mediating cases of intimate violence (Lund and Dodd, 2002). They are cautiously optimistic, and will proceed with more consultation and dialogue. They have no concrete plans to begin mediation in the near future. The Edmonton Victim Offender Mediation Society has been conducting 'restorative justice' mediation sessions with survivors of intimate violence and abusers since 1998 (Edwards and Haslett, 2003).

Negotiated Protocols

Several restorative justice initiatives have been created pursuant to agreements negotiated between provincial Crown Attorneys offices and community organizations that wish to administer a restorative justice program. These agreements are called negotiated protocols. These programs function according to standards, principles and procedures unique to each protocol.

Located in central Manitoba, The Hollow Water healing circles exist by virtue of a protocol between the Manitoba Department of Justice and a group of Aboriginal professionals and volunteers formed to address the issues of intergenerational sexual abuse and intimate violence in that community. The protocol allows this Aboriginal community to determine a treatment program for Aboriginal offenders, which involves the conventional criminal justice system only in peripheral ways. The courts are used only to receive a plea of guilty; conduct any trials (which the program has mostly avoided), and in a secondary supervisory role through probation officers after the community-based sentence has been passed. One of the main goals of Hollow Water is to reduce the use of incarceration in their community through this post-charge diversion program.

The Aboriginal Legal Services of Toronto Community Council Program operates under a protocol similar to that used in the Hollow Water project. This is a pre-charge diversion program for Aboriginal offenders.

The Toronto Project consciously decided, after community consultation, not to divert cases of intimate violence.

> The Family Violence Working Group, assembled to look at the conditions under which family violence cases could be diverted to the community council, concluded that the provision of services, particularly to offenders, was a prerequisite for the diversion of such charges. Without these healing resources, the working group concluded, nothing significant could be offered to the offender other than what the current system already provides. No one favoured incarceration, but there was no debate that the spouse or partner would be in danger until options became available to treat offenders and change their behaviour. Under these circumstances,

> the working group believed it would be irresponsible to divert such charges. Once the resources are in place, then diversion can begin (Jackson and Rudin, 1996, at 173-74).

A third Aboriginal justice program operating in Canada under a negotiated protocol is the Aboriginal Ganootamaage Justice services of Winnipeg. This program is modeled on the Toronto initiative, and offers diversion, a Community Council, and community-based treatment to Aboriginal offenders in the Winnipeg area. The Winnipeg program excludes: "…(d)riving offences such as refusing a Breathalyser; criminal negligence and dangerous or impaired driving; sexual offences and domestic abuse (child abuse, spousal and/or partner abuse)" (Mallet, Bent and Josephson, 2000, at 62).

DOES RESTORATIVE JUSTICE WORK?

1) What do Survivors of Intimate Violence Need?

Very little attention has been paid to the experiences of survivors of intimate violence in assessing the success of restorative justice. This literature review will focus primarily on the needs of the survivor, and as they overlap, the needs of the offender and the community.

There is a growing body of research and literature on the needs of survivors of intimate violence as regards criminal justice interventions. These needs will clearly be informed by social locators such as race, ethnicity, culture, (dis)ability, sexual orientation, age, and poverty. We need to know what survivors will measure as a successful intervention in order to gauge the success of individual restorative justice models and programs. The following section will provide a short literature review examining the variable needs of survivors, and establish starting points for success. Some of these indicators of success may contradict one another- some survivors may be very concerned with retribution, while others will be concerned with reconciliation. Other needs, such as physical safety and personal dignity will likely remain constant across survivors. The literature reviewed primarily deals with the needs expressed by survivors themselves, and to a lesser extent those expressed by anti-violence service providers.

The Studies

Both *Black Eyes all of the Time* by Anne McGillivray and Brenda Comasky (1999) and "Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of Women's Needs" by Joanne Minaker (2001) examine the needs of survivors in the context of the criminal justice system through interviews with survivors. McGillivray and Comasky deal exclusively with Aboriginal women, while Minaker's sample includes a statistically significant number of Aboriginal women.[19] Both studies are attentive to the

[19] It is worth noting here that, although both studies represent groundbreaking work, neither study represents a large sample of women, indicating the need for more research in the area. Joanne Minaker's study consisted of fifteen women, six of whom were Aboriginal, while Brenda Comasky and Anne McGillivray's study represented 26 Aboriginal women.

interactions of race and gender in the lives of their Aboriginal participants, and have focused on these issues in their analyses.

When participants were questioned on whether restorative justice should be used in cases of intimate violence, the results were contradictory. In McGillivray and Comasky's study, participants were supportive of punishment (incarceration) and treatment for the offender. The study concludes:

> Alternatives to the criminal justice system will not be acceptable to victims of intimate violence unless diversion can do what jail is now seen as doing, however unsuccessfully- *punish*, visibly, actually and symbolically, and *protect*, at least long enough for victims to get their lives back on track. Alternatives will not be acceptable without reliable indications of successful treatment for abusers in programs that also guarantee victims' safety for the duration of treatment (at 131).

Minaker notes, however, that "(i)n contrast to the findings of Anne McGillivray and Brenda Comasky, the Aboriginal women in this study did not view treatment and jail as most effective" (at 100).

Mary Russell's 2002 study "Measures of Empowerment" was conducted under contract for the Victim Services Division of the BC government. This study was comprised of mail-in surveys, focus groups and individual interviews involving female survivors, criminal justice personnel, and anti-violence workers.[20] The study "…sought to explore the ways in which the British Columbia criminal justice system interventions with women who had been assaulted were, or could be, experienced as empowering" (at 6), but did not specifically address the use of restorative justice. The results organized the needs of survivors into six main categories: coordinated teamwork, respectful response, pro-active intervention, information provision, timeliness and speaking out.

Punishment and Accountability

To greater or lesser extents, survivors view punishing their abusers and having them made accountable as important. McGillivray and Comasky found overwhelmingly that participants in their study prioritized punishment both symbolically and actually through incarceration. Minaker found that a minority of participants in her study had a "(n)eed for accountability…reflected in their concern with the consequences for their partners by way of incarceration or punishment" (at 89).[21] More participants, however, expressed a general need to have their partner to take accountability for their actions, and to send a message that the abusive behaviour is not appropriate. It is worth noting that survivors were dissatisfied with the conventional criminal justice system at many levels (Minaker, 2001; McGillivray and Comasky, 1999).

[20] The study included 103 mail-in responses to a survey questionnaire by service providers, and interviews with 63 survivors and 135 criminal justice personnel.

[21] A British Study by Lewis, Dobash, Dobash and Cavanagh (2000) found that survivors asserted the need for incarceration less due to a desire to punish or be retributive, and more in order to secure short or long term physical safety (at 188, 190).

Many survivors want to ensure offender accountability by being able to speak out against the offender for themselves. Participants also indicated that speaking up for themselves was personally empowering (Russell, 2002).

Physical Protection and Safety

There is a need for survivors of intimate violence to secure short and long term physical protection from their abusers.

McGillivray and Comasky found that this could best be accomplished in the short term by removing the offender to incarceration for a short period of time so that survivors could "...get their lives back on track" (at 131). Participants in the McGillivray and Comasky study overwhelmingly saw restorative justice as too lenient, and instead emphasized incarceration coupled with treatment as the best method to secure their safety.

Minaker's study also prioritizes "(t)he need for protection, safety and an escape from abuse…." In the short term, both Minaker and Russell's study saw this as being facilitated by the intervention of police or other service providers.[22] Some participants saw this short term need being met by having their partners arrested, but the majority saw this as a role for social services and other community supports.

Consistently, the most important aspect of feeling safe in the long term was 'being involved' and 'knowing what was going on.' This included knowing the whereabouts of the offenders, and information on the process itself (Russell, 2002; Strang, 2002; Minaker, 2001;McGillivray and Comasky, 1999). Several studies report that long term safety must include carefully planned and well-executed supervision of offenders (Russell, 2002), and consequences for breaches of protective measures (Russell, 2002; McGillivray and Comasky, 1999).

Advocacy and Support

In both the conventional criminal justice system, and in discussing the potential use of restorative justice, survivors consistently identified the need for individual advocacy and support in facing their abusers.

Survivors said they require advocacy and support that is separate from that provided the offender (McGillivray and Comasky, 1999), particularly individual counselling by qualified personnel who are well versed in the dynamics of intimate abuse (Russell, 2002; Minaker, 1999; McGillivray and Comasky, 1999). The need for support includes a need to be believed, and to have experiences of abuse validated (Russell, 2002; Minaker, 2001). The need for advocacy and support is underscored by a more general need for respectful, empathetic treatment (Russell, 2002; Strang, 2002).

Service providers must understand and act according to survivor diversity (Russell, 2002). According to a study completed by Meidena and Wachholz in New Brunswick involving immigrant women survivors of intimate violence, there is an urgent need for interpreters, culturally appropriate and anti-racist services; and service providers that actively welcome diverse survivors (1998).

[22] This short term need for immediate protection from abuse was echoed by Lewis et al. (2000)

Resources

Survivors require culturally appropriate resources within the community such as supervision for offenders, women's shelters, counsellors, and police (Minaker, 2001). Resources for survivors *and* offenders must include drug, alcohol, and mental health treatment (Russell, 2002); language translation; and legal advice and support to understand options and rights (Miedema and Wachholz, 1998). In cases where the community is involved in making decisions regarding cases of intimate violence (such as sentencing circles), communities must be educated on and understand the dynamics of abuse and control (McGillivray and Comasky, 1999).

Culturally appropriate treatment for the offender is also discussed as a priority. The participants in McGillivray and Comasky's study envisioned the safest treatment options in prison, while other survivors looked more to community-based resources (Minaker, 2001; Lewis et al, 2000).

Survivors require resources to rebuild their lives, whether or not they reconcile with their partners.[23] This includes the financial and social resources to leave abusive relationships (Minaker, 2001) or to rebuild the relationship as they choose (Lewis et al, 2000). Poverty was identified as a special concern in leaving or rebuilding abusive relationships (Stern, 2003), particularly for Aboriginal people and people of colour (Coker, 2000 b); Richie, 1996) and immigrant women (Miedema and Wachholz, 1998).

Children's Needs

Survivors with children identified their own needs as being inextricably linked with those of their children's. Priorities include preventing them from witnessing abuse, or being abused, and helping them to recover from witnessing or being abused (Minaker, 2001; Lewis et al, 2000; McGillivray and Comasky, 1999).

Autonomy and Decision-Making Power

Survivors stated that they require a balance of support and autonomy to allow them to make informed decisions. This includes autonomy and support regarding participation in criminal justice models; the steps which follow such an intervention; what will happen to the abuser; and what services they require (Department of Justice, 2002; Lewis et al, 2000; McGillivray and Comasky, 1999).

2) Does Restorative Justice Deliver?

This section is divided into two parts. First, I will outline the general arguments for and against the use of restorative justice in cases of intimate violence as they appear in the literature. This first section contains literature from several jurisdictions with special emphasis on Canadian scholars and commentators.

The second section contains the primary literature review and analysis of individual restorative justice models. Each model is represented by one program, chosen

[23] Only about half of the survivors who participated in Minaker's study identified 'healing' as their priority; most looked to plans for long-term survival such as moving forward in careers and education.

based on availability and abundance of literature.[24] There will be some overlap between models, as many borrow from each other in practice and form. I will deal with literature, if any, addressing issues of intersectionality within each of these sections.

Generally

There is a spirited debate within the literature regarding the use of restorative justice in cases of intimate violence. However, there has been very little, if any, empirical study of restorative justice and intimate violence in any jurisdiction (Morris, 2002; Hudson, 2002; Morris and Gelsthorpe, 2000; Presser and Gaarder, 2000; Sherman, 2000). Commentators on either side of the debate, therefore, rely on theoretical or practical extrapolation, speculation and limited studies. Supporters rely primarily on successes in the juvenile justice field with serious offences such as sexual assault and family violence. There is also evidence from at least four program evaluations (Burford and Pennell, 2002, 1996; Coker, 2000 a); Lajeunesse, 1993; Roberts, 1995) that some survivors' needs may be met in these models.

Detractors rely on evidence from family mediation to show that power imbalances between intimate partners cannot be effectively addressed in many restorative justice models. There is also evidence from at least two studies (Coker, 2000a) and b); Rubin, 2004), and from individual cases (Ryan and Calliou, 2002; Stewart et al, 2001; Crnkovich, 1993, 1996) that indicates that some models of restorative justice are unsafe, and revictimize survivors.

Promise

Many commentators who support the use of restorative justice in cases of intimate violence recognize that intimate violence is a serious, gendered crime that warrants powerful, appropriate sanction.[25] In the works discussed below, restorative justice is constructed as a serious criminal justice response that deals specifically with the needs of survivors as understood by these writers.[26]

John Braithwaite and Kathleen Daly, Australian criminologists, [27] support the use of restorative justice in cases of intimate violence. Based on criminological and social theory, they support the use of the Family Group Conferencing model due to its potential to be 'victim centred'[28] and to call the offender to account (Braithwaite and Daly, 1994).

> Two features of the conference maximize its potential for reintegrative shaming. Giving voice to victims and victim supporters structures shaming into the process; and the presence of offender supporters structures reintegration into the process (at 193).

[24] There are over 400 restorative justice initiatives in Canada, making it impossible to individually examine every program. (Correctional Services of Canada, 1998)
[25] This assertion is made in response to criticisms that restorative justice decriminalizes and trivializes intimate violence (Morris, 2002).
[26] In response to this critics assert that restorative justice is not a stern or serious enough response to intimate violence (Lewis at al, 2001; Stubbs, 1997).
[27] Many scholars who support the use of restorative justice in cases of intimate violence are from jurisdictions other than Canada, particularly Australia, New Zealand and Britain.
[28] Other writers also share the view that restorative justice is 'victim centred' (Hudson, 2002, Morris and Gelsthorpe, 2000; Sherman, 2000).

Lawrence Sherman, an American criminologist, also relies on a conferencing model, the police-run Reintegrative Shaming Experiments (RISE) program in Australia, to provide theoretical support for using restorative justice in cases of intimate violence. The RISE project deals with juvenile offenders, and includes those who commit serious crimes such as sexual assault, or assaulting a family member. RISE does not deal with intimate violence per se. Sherman extrapolates from the successes of this juvenile justice program in dealing with serious crime, stating that by using theoretical models we can predict that conferences will reduce repeat offending in intimate violence cases involving adults (2000 at 276).

Reasons for supporting restorative justice in cases of intimate violence can generally be discussed in two categories. First, commentators assert that the conventional justice system has failed survivors of intimate violence, and that restorative justice can meet the needs of survivors much better. Second, restorative justice is seen as an option that will empower survivors.

Conventional justice has failed survivors of intimate violence in numerous ways including: forcing prosecutions despite survivors' wishes to drop charges (Hudson, 2002; Presser and Gaarder, 2000; Daly and Braithwaite, 1994); low conviction rates for crimes of intimate violence (Hudson, 2002; Sherman, 2000); failing to reduce intimate violence (Morris and Gelsthorpe, 2000; Sherman, 2000; Martin, 1999); revictimizing survivors in the courtroom through cross examination, and a general lack of information and support (Hudson, 2002; Presser and Gaarder, 2000; Daly and Braithwaite, 1994). The conventional criminal justice system prevents survivor empowerment and participation through mandatory arrest and restrictive rules of evidence (Hudson, 2002; Sherman, 2000).

Supporters claim that, properly executed, restorative justice can meet the needs of survivors by holding offenders to account in meaningful ways. Ideally, offenders would face the censure and supervision of those they care most about, family and community.[29] This would constitute a more difficult and appropriate punishment than the short jail term likely to be applied (Hudson, 2002; Morris and Gelsthorpe, 2000; Presser and Gaarder, 2000; Sherman, 2000; Daly and Braithwaite, 1994). Sherman notes that applying restorative justice in cases of intimate violence has the added advantage of repairing society and restoring the offender, neither of which are accomplished by the conventional justice system (2000 at 268-69). Carbonnatto, a New Zealand restorative justice advocate, asserts that restorative justice creates therapeutic space allowing survivors and abusers to focus on their relationship in ways that are denied in court proceedings (Carbonnatto, 1995).

Advocates assert that restorative justice empowers survivors by creating spaces for them to be heard in ways that they are denied in the conventional justice system (Hudson, 2002; Presser and Gaarder, 2000; Morris and Gelsthorpe, 2000; Sherman, 2000). This includes being able to speak for themselves, in their own words rather than being limited to testimony or victim impact statements. Daly and Braithwaite propose that this empowerment, coupled with the minimal use of incarceration to ensure the safety of survivors, provides a legitimate alternative to mandatory arrest and prosecution policies (1994 at 196).

[29] For critical commentary on the role of apologies in this process, see Acorn, 2004 at 74; Coker, 2002.

The gendered power imbalances that characterise abusive relationships are cited as a major concern in allowing cases of intimate violence to be dealt with by restorative justice (see below). Supporters of restorative justice respond to this in an instrumental fashion, suggesting practice-oriented solutions that may address this problem. Suggested solutions include: implementing basic rules of procedural fairness during interventions (Morris, 2002; Morris and Gelsthorpe, 2000; Sherman, 2000); having family and community members openly challenge abusers (Morris, 2002; Morris and Gelsthorpe, 2000; Daly and Braithwaite, 1994); shuttle mediation (Carbonnatto, 1995); and ensuring that the survivor has access to support from family and friends (Morris and Gelsthorpe, 2000).

Feminist Scholars

While the bulk of feminist scholars view restorative justice as an undesirable response to intimate violence, there are some notable exceptions. Some self-described feminists, particularly those associated with the Mennonite church, view restorative justice as representing a feminist (or feminine) and religious ethical response to social conflict that can address the harms done by intimate violence (Pranis, 2002; Masters and Smith, 1998; Harris, 1991; Knopp, 1991).[30]

Other feminists express cautious optimism regarding the use of restorative justice. These scholars support the use of restorative justice but are also aware of the dynamics of intimate abuse, including power imbalances. They come to the conclusion that the goals of prison abolition and avoiding the overuse of incarceration against marginalized groups outweighs risks posed to survivors (Hudson, 1998, 2002; Knopp, 1991).

Carol LaPrairie, a Canadian legal scholar, expresses skepticism regarding the use of sentencing circles, and other forms of 'community justice,' and includes a focus on the vulnerability of marginalized victims in her analyses (1998; 1995). In the final analysis, however, LaPrairie concludes that "…(t)he benefits of community as a voluntary organization of individuals mobilized in their own interests in a mutually beneficial fashion, where empowered individuals can pursue their interests and practice independence are considerable" (1995). She also, however, provides a full-page list of safeguards and criteria that should be met, with particular focus on supporting and protecting the interests of vulnerable survivors. In the specific context of sentencing circles, she states that a lack of guidelines and protections are a serious detractor, and that these must be in place and functioning to ensure safe and participatory models. Specifically in relation to intimate violence, she states that "(g)iven the majority of victims of domestic violence do not want to go to court, and the primary objective of restorative justice is the restoration of relationships, it would seem eminently sensible to use restorative justice practices in cases of domestic violence" (2001).[31]

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[30] Other feminists view restorative justice as particularly applicable in cases involving women in conflict with the law (Faith, 2000; Pate, 1994).

[31] Australian feminist Kathleen Daly shares this cautious optimism. Daly relies on work in juvenile sexual and family violence offences to support her stance on restorative justice and intimate violence. (2002 b); Braithwaite and Daly, 1994)

Aboriginal Scholars

Aboriginal scholars and activists who support of the use of restorative justice in cases of intimate violence do so both for similar reason to those discussed above; and because they claim restorative justice as a culturally appropriate response to the damage done to Aboriginal people by colonialism.

In particular, those involved with the Hollow Water project (discussed in detail below) have touted restorative justice as an effective response to intimate violence in Aboriginal communities. Supporters assert, for instance, that healing circles as employed in the program provide better deterrence than the conventional justice system; appropriate, holistic treatment for Aboriginal offenders and call the offender to account in ways that both change behaviour and build the community (Couture, 2001; Green, 1998). Burma Bushie, a key player in the Hollow Water initiative, sees the healing process as an arduous one, not as a lenient 'slap on the wrist.' Bushie emphasizes that truly accepting responsibility and facing your community as an abuser may be more difficult than simply 'disappearing' from the community for a period of time in jail (Couture, 2001; Green, 1998; Ross, 1994).

Patricia Monture-Okanee and Mary Ellen Turpel, Aboriginal legal scholars and activists, have written extensively on the role of culture, community and Aboriginal women in criminal justice and self-government models. Both Turpel-Lafond and Monture-Angus reject the conventional justice system, pointing out the ongoing abuses against Aboriginal peoples within it (Turpel, 1994; Monture-Angus, 1994; Monture-Angus and Turpel, 1992). Contextually, they support the adoption of restorative justice models as one small but integral piece of Aboriginal cultural, political and economic self-determination (Monture-Angus and Turpel, 1992).

Turpel and Monture assert that prior to European contact and colonization, there was gender equality within Aboriginal communities, and that there was no intimate violence (Monture-Angus, 1992, 1994).[32] Both state that European laws and abuses forced sexism, in the form of the *Indian Act*, upon Aboriginal communities (Monture-Angus and Turpel, 1992). According to Monture-Angus, Aboriginal women will (re)obtain gender equality following Aboriginal sovereignty based upon pre-contact gender roles and contemporary manifestations of Aboriginal culture, not the Western models of equality sought by some feminists (Monture-Angus, 1995).

In restorative justice, women will fulfill their traditional roles, as teachers and leaders, by including men in this healing process. Monture-Angus and the Royal Commission on Aboriginal Peoples emphasize the importance of women's role in building, administering and running justice initiatives.

> "Women's involvement in justice work is not just a measure or standard of the success of justice initiatives, the Aboriginal women's role is much more central and essential…When talks occur Among political leaders about the administration of justice or constitutional rights for self-government, you are not talking to the right people because you are not talking to the women. It was the women who had a fundamental role in making laws in our communities" (Monture-Angus, 1994; see also Jackson and Rudin, 1996).

[32] LaRoque disagrees with this assertion (1994, at 107).

According to Monture-Angus and Turpel, once traditional honour and respect are accorded Aboriginal women, there will be no need to provide special protection for survivors. "No victim's rights movement is necessary in an aboriginal system of justice because the victim would never be forgotten in the first place if the system was operating according to custom" (Monture-Angus and Turpel, 1992).

In the American context, Navajo Peacemaking has been used extensively to deal with cases of intimate violence.[33] The Honorable Robert Yazzie, Chief Justice of the Navajo Nation, and James Zion, Solicitor of the Court of the Navajo Nation claim that Peacemaking in such cases is superior to the conventional justice system. Furthermore, they claim that in their experience Peacemaking allows parties to deal with underlying problems, such as alcohol abuse; the process reduces offender's ability to deny or minimize their behaviour; it provides support for survivors; and that involving families acts as a safeguard to ensure that survivors will be protected from further violence, and that families will act as advocates for survivors (Yazzie and Zion, 1996).

Problems

Critique of the use of restorative justice in cases of intimate violence comes mainly from the feminist anti-violence movement and scholars associated with this movement. There are a number of feminist anti-violence groups in British Columbia and across Canada who have written scholarly and advocacy materials questioning the use of restorative justice in crimes of intimate violence. These include The BC/ Yukon Society of Transition Houses (Oglov, 1997); The Newfoundland and Labrador Provincial Association Against Family Violence (NLPAAVF, 2000, 1999); and the BC Association of Specialized Victim Assistance and Counselling Programs (Goundry, 1998). Some of these assert that restorative justice should not be used in such cases. "Under no circumstances should restorative justice and alternative measures be applied to offences involving violence against women and children" (Oglov, 1997). Others support restorative justice in very, very rare cases only under the most rigorous scrutiny, and after meeting extensive criteria.

A study conducted by Canadian scholar Stephanie Coward, in which she interviewed practitioners and professionals in the women's movement about restorative justice and intimate violence found "…women are not necessarily opposed to restorative justice *per se*. Rather they are opposed to these initiatives as they are presently developed and applied" (Coward, 2000 at 10, see also PATHs, 2000).[34]

Concerns regarding power imbalances between survivors and abusers, and restorative justice programs' inability to recognize and mitigate them, are a priority. Scholars have concluded that, due to this power imbalance, restorative justice is inappropriate in all or almost all cases of intimate violence (Stubbs, 2002; Busch, 2002, 1995; Coward, 2000; Lakeman, 2000; Busch and Hooper, 1996;Astor, 1994).

Ruth Busch and Stephen Hooper, New Zealand legal scholars, assert that restorative justice is unsuitable for almost all cases of domestic violence because of an

[33] Peacemaking is similar to Family Group Conferencing.

[34] A similar Australian study revealed that "…while victim advocates have concerns and reservations about restorative justice, most saw positive elements" (Daly and Curtis-Fawley, 2003 at 1).

inability to address gendered power imbalances (Busch and Hooper, 1996). They fear that restorative justice

> …carried out against a backdrop of domestic violence …requires the victim to negotiate effectively on her own behalf although her experiences have in all likelihood led her to renounce or adapt her needs in an attempt to avoid repetitions of past violence. There is a strong likelihood, therefore, that a battered woman will negotiate for what she thinks she can get, rather than press for more major changes on the part of the offender (at 225).

Julie Stubbs, an Australian legal scholar, shares many of the concerns expressed by Busch and Hooper.

> A woman who has been living in a violent relationship may well become very practiced at 'not saying too much'…feminist critiques of mediation have drawn attention to the dangers of assuming that a woman who had been the target of violence is able to assert her own needs, and promote her own interests in the presence of the person who has perpetrated that violence (Stubbs, 1995 at 281).

Lee Lakeman, Executive Director of Vancouver Rape Relief Women's Shelter, states that restorative justice, as it is currently manifested, is an insufficient response to intimate violence. According to Lakeman, the idea of restorative justice initially seemed an appealing one that feminists could agree with, but in practice "none of these programs deal positively with the systematic nature or impact of violence… usually one woman or child is left to negotiate what they can from get from each attacking man. The imbalance would be corrupt even if no violence were involved" (Lakeman, 2000).

Associated with the analysis of power imbalances is the assertion that restorative justice practices may revictimize women (Coward, 2000; LaPrairie, 1998; Koshan, 1998; Laroque, 1997; Stallone, 1984). There have been several recorded incidents of survivor revictimization (Ryan and Calliou, 2002; Crnkovich, 1993, 1995, 1996). Many claim that separation violence (Busch, 2002); poorly trained facilitators (Busch, 2002; Cormier, 2002; Coward, 2000; THANS, 2000); and poor community based supervision (Busch, 2002; Stubbs, 2002) create circumstances which may allow survivors to be revictimized.

Feminist anti-violence advocates also assert that the use of restorative justice in cases of intimate violence will decriminalize intimate violence (Busch, 2000; Coward, 2000; Goundry, 1998; Hooper and Bush, 1996; Oglov, 1997; Crnkovich, 1995; Stallone, 1984). After decades of fighting to have intimate violence recognized as criminal, not merely a 'private dispute,' feminists fear that restorative justice will result in moving it out of the public sphere and back into the private sphere, where assistance and resources for women are more limited than those currently available in the conventional justice system.

Other concerns include an overall lack of consultation with women and women's groups in planning and implementing initiatives (Stewart et all, 2001; Coward, 2000; Goundry, 1998; Oglov, 1997); a general lack of gender and diversity analysis in planning and evaluating initiatives (Stubbs, 2002; Wilson et al, 2002; NLPAAVF, 2000, 1999; Goundry, 1998); a perception that in many cases restorative justice is culturally inappropriate (Wilson et al, 2002; LaRoque, 1997; Oglov, 1997); that overall there is a serious lack of transparency and accountability in the planning and execution of

restorative justice programs (Coward, 2000; Goundry, 1998; Oglov, 1997), and that there is a serious lack of research, resources, proper training for facilitators and funding (Stubbs, 2002; Cormier, 2002; Gordon, 2001; NLPAAVF, 2000; Coward, 2000; Goundry,1998; Volpe, 1991; and Cumming, J.A. and McEachern, C.J.Y.T., in the case of *R v. Johnson*, 1994).

Aboriginal Scholars

Aboriginal scholars Emma Laroque, Theresa Nahanee and Fay Blaney have expressed fears that restorative justice practices in cases of intimate violence in their communities will lead to the revictimization of Aboriginal women survivors. Contemporary gendered power imbalances within their communities and individual relationships will make it difficult for survivors to express their needs and interests (LaRoque, 1995; Nahanee, 1994). Some commentators have suggested that models such as sentencing circles do not represent culturally authentic practices (Laroque, 1993, 1997; Nightingale, 1991).

LaRoque suggests that in dealing with the legacy of colonialism, individual offenders must take responsibility for their abusive behaviour and that these problems must not be 'solved' at the expense of survivor's safety (1995). LaRoque particularly disagrees with the use of sentencing circles in such cases (1997). Nahanee wants to see intimate violence treated as a serious crime, and for Aboriginal women to have equal benefit and protection of the law (1994).

The Aboriginal Women's Action Network (AWAN), a feminist Aboriginal women's group based in Vancouver, rejects restorative justice in crimes of intimate violence. AWAN has completed a research project on restorative justice funded by the Law Foundation of British Columbia.[35] They have called for a moratorium on the use of restorative justice in cases of intimate violence, sexual assault and child abuse in British Columbia, and support such a moratorium nation wide (McDonald, 2002; Stewart et al, 2001).

AWAN, like other Aboriginal scholars discussed above, begin their analysis of restorative justice by discussing the impacts of colonialism on Aboriginal communities, with a focus on the specific impacts on Aboriginal women (McDonald, 2002; Stewart et al, 2001) They emphasize the failure of the conventional justice system for all Aboriginal peoples, and particularly for survivors of violence (McDonald, 2002). Like many Aboriginal scholars and activists, they feel that a 'new justice' system of some description is necessary to ensure the survival and healing of Aboriginal communities, however, it must be a model that puts the safety and empowerment of women and children as the first priority (McDonald, 2002; Stewart et al, 2001; Griffiths and Hamilton, 1996).

AWAN's literature review and firsthand research lead them to conclude "…restorative justice should not be used in cases of violence against women and children" (McDonald, 2002 at 23). AWAN's research shows a lack of safeguards for survivors of intimate violence, and insufficient evaluation of current initiatives. They are

[35] AWAN has completed the literature review noted above, and as part of the World March of Women 2000 they rafted the Fraser River from Prince George to Vancouver, BC, passing through nine Aboriginal communities. They held focus groups and rallies on the subject of restorative justice and intimate violence.

also concerned about survivors' fears of retaliation from within their communities, and a lack of accountability and transparency within programs (Stewart et al, 2001). They provide evidence from their research of survivor coercion, and specific instances of failed initiatives that have re-victimized women (McDonald, 2002; Stewart et al, 2001).

Similar to AWAN, Pauktuutit Inuit Women's Association has grave concerns about restorative justice. "Issues related to violence against women and children have repeatedly been identified as among the most serious problems in contemporary Inuit families and communities…" (Dewar, 2000 at 192). They also recognize, however, that "Inuit women have long argued that the (conventional justice system) not only fails them, it causes them harm" (Pauktuutit, 1995). Their major concern is setting standards of safety in the community *before* community justice initiatives are embraced to ensure that all members of the community benefit from them.

Pauktuutit asserts that, amongst the male leadership of their communities, the biggest impact of colonialism has been internalized sexism and corruption (Crnkovich, 1995). They fear that 'community' treatment is dominated by those who have taken an active role in normalizing violence against women within their communities,[36] and that generally there is insufficient understanding of the dynamics of intimate abuse within Inuit communities (Crnkovich, 1993). They provide a lengthy, well-documented example of a restorative justice intervention which failed an Inuit woman survivor of intimate violence (Crnkovich, 1996); and overall indicate that the current manifestations of restorative justice in their communities favour the rehabilitation of the offender over the safety and dignity of the survivor (Dewar, 2000). Much like their Aboriginal counterparts in British Columbia, Pauktuutit wants to see an end to restorative justice in their communities until there is full community participation (including women), full support for survivors, sufficient resources and adequate infrastructure (Crnkovich, 1995; Pauktuutit, 1995). Until then, they feel that their communities are not yet equipped or ready to provide safe restorative justice interventions (Crnkovich, 1993).

Intersectionality

The literature that deals specifically with issues of intersecting oppressions, restorative justice and intimate violence is scarce, except as it pertains to Aboriginal communities. The literature concerning Aboriginal communities particularly is included throughout this literature review. This section summarizes what little work has been done on the topic in relation to other intersecting oppressions.

Several commentators have noted the need for restorative justice practices to pay attention to intersectionality in the lives of offenders and survivors, particularly those who come from marginalized communities (Rubin, 2003; Coker, 2000 a); Goundry 1998). Both the feminist anti-violence movement (Coker, 2000a), and the restorative justice movement (Goundry, 1998) have been accused of failing to provide analysis and action that takes race, poverty, sexual orientation, age etc. into account.

[36] This fear is shared by Julie Stubbs in the non-Aboriginal context. She feels that in the conferencing model participants may assume a consensus of values and level of knowledge between participants, and amongst the larger community (including the police) around intimate violence that does not exist (Stubbs, 1995).

Race and Culture

Commentators Hudson (1998, 2002), Snider (1990), and Coker (2002) view race and culture, and the effects of colonialism and oppression on racialised groups as the primary lens though which to evaluate restorative justice programs in these communities. Although such literature pays attention to gender and gendered violence, race and culture is prioritized, leading these commentators to conclude that restorative justice should be used in cases of intimate violence in racialised communities. In their view, restorative justice not only protects survivors from violence, it plays the very important role of protecting racialised offenders from the state.

Richard Delgado, American critical race scholar, outlines what he calls an 'equity approach' to restorative justice, positing both an internal and an external critique of restorative processes. In relation to race, Delgado points out that the informality of the process may harbour risks for women, Blacks and other 'outgroups.' This may include pressure on survivors to participate, or be labelled 'race traitors,' a concern shared by several commentators (Rubin, 2003; MacDonald, 2001; Coker, 2000 a)). Delgado also interrogates the definition of community in the context of racialised groups (2000).

Gays and Lesbians

I uncovered no significant literature on gays and lesbians, restorative justice and intimate violence. Sandra Goundry (1998) discusses the implications of restorative justice for gay, lesbian, bisexual and transgendered communities generally in her 1998 discussion of Alternative Measures in British Columbia.

Amongst her concerns are: survivors are particularly vulnerable to intimidation and coercion if they live in intolerant communities. Offenders who use physical violence or harassment, as a form of hate crime against queer victims may be diverted to restorative justice programs if administrators are unaware of the dynamics of homophobia. Goundry also points out that some survivors may be 'outed' against their wishes, particularly youth victims, and questions how this may affect outcomes if the family is intolerant or homophobic. Gay or lesbian offenders who commit crimes that have nothing to do with their sexual orientation or victims of non-intimate crimes may be unfairly treated by intolerant or homophobic communities.

Youth

Many commentators who do not support the use of restorative justice in adult cases of intimate violence express some support for diverting youth who commit similar serious crimes. There is a significant body of literature on restorative justice, youth and serious crime (For example: Daly, 2003; Calhoun and Borch, 2002; Calhoun 2001; Faith 2000).

Older Persons

I have uncovered no significant literature on older persons, restorative justice and intimate violence. There is at least one Canadian program, in Kitchener, Ontario, that deals with elder abuse using a restorative justice model. This model encourages the use of Alternative Measures in elder abuse cases, and takes referrals for their own program

which uses a circle dispute resolution model. Initial feedback on the circles is characterized as 'positive' (Groh, 2000). This program claims that restorative justice offers elders and their families and caregivers a less confrontational way of dealing with elder abuse, particularly in light of elders' fears of losing family relationships. Groh notes that elder abuse is underreported, and not being dealt with to any significant extent in the criminal justice system. Groh claims that the program offers older persons a way to change the behaviour of their abusers, while maintaining intact family relationships, and avoiding public discussion or exposure of family matters.

Particular concerns related to older persons and restorative justice include:

- Silencing of survivors. This may be due to: fear of being institutionalized; financial or physical dependence on abusers (who are often family members); wanting to keep loved family members out of 'trouble with the law'; shame and humiliation at being abused by spouses, children or grandchildren; religious or social beliefs regarding the sanctity of marriage or family privacy.
- Older persons are particularly vulnerable to physical violence, especially those with age-related health problems.
- Ageism in service provision, particularly the propensity to treat older persons like children.

Alternative Measures

British Columbia

Promise

When Alternative Measures as the program is currently manifested was introduced in British Columbia, it was characterized by the government of the day as a "…tough, effective justice system that better meets the needs of victims and communities." The program's goals are to reduce recidivism, ensure that there are meaningful and immediate consequences for crime, and to allow victims to be heard and supported (British Columbia, Fact Sheet, 1998).

The program was touted as a cost-effective response to crime (British Columbia, Restorative Justice Framework, 1998; News Release, 1996), that would ensure public safety (News Release, 1996). The NDP government claimed to have been working with partners, including victim's advocates, to develop a vision and direction for the reforms.

The policy regarding the use of Alternative Measures in cases of intimate violence has recently changed. Prior to this policy change, cases of intimate violence were diverted to alternative measures only under 'exceptional circumstances' that required the permission of senior regional Crown, or even the Attorney General, whereas the new policy allows for Crown attorneys to regularly divert such cases. According to Attorney General Geoff Plant, Crown attorneys should divert cases of intimate violence where "…the case is not likely to produce a conviction or the victim is unwilling to testify…" (Plant, 2003 at 590).

Plant claims that pro-arrest and pro-charge policies have not been effective for all survivors, and have in fact created less safety for some. This includes revictimizing

survivors who are reluctant witnesses by cross-examining them as hostile witnesses. Plant also notes that in 2001 –2002 there was a high rate of stays of prosecution in British Columbia, leaving survivors in these cases with no protection. Diverting cases where the survivor is unwilling or reluctant to testify, according to Plant, will better protect survivor's safety. He states that by moving these cases out of the court system and into Alternative Measures, or using a restraining order, survivors will be better protected, and Crown will have more flexibility in dealing with intimate violence cases. He also claims that the government received and took into account feedback from committees of women against violence, transition houses and similar groups (Plant, 2003).

Problems

Generally women's anti-violence groups in this province have reacted negatively to the diversion of intimate violence cases to Alternative Measures. They are concerned that this will decriminalize intimate violence (Turner, 2002; Oglov, 1997); and that notions of 'conflict resolution,' and 'forgiveness' that underlie the use of restorative justice are not appropriate in cases of intimate violence (Goundry, 1998; Oglov 1997).

Women's advocates also assert that serious cases will be diverted despite government intentions to divert only 'minor' cases as survivors often underreport abuse out of fear of losing their children, or a desire to avoid the criminal justice system (Oglov, 1997). Women's advocates also point out that the lack of an appeal process, or publicly accessible record-keeping mechanism ensures that the government cannot be held accountable for violence that results from poorly managed cases (Oglov, 1997). Generally, advocates claim that the policy lacks a sophisticated gender and diversity analysis. This will lead to inappropriate cases being diverted due to a lack of understanding and training regarding power imbalances informed by gender, race, age, sexual orientation, disability, and poverty (Goundry, 1998). Concerns have been raised regarding the ability of police to identify cases that are appropriate and safe for Alternative Measures (Goundry, 1998, Oglov, 1997). Patricia Kachuk notes that police may divert offences such as mischief or trespass at night that are connected to abusive or stalking behaviour (1998).

Women's advocacy groups and survivors claim that they have been left out of the policymaking process, both in the 1997 and the 2001 policy reform process (Turner, 2002; Goundry, 1998; Oglov, 1997). This claim is particularly made by Aboriginal women's groups (Stewart, 2001; Goundry, 1998). Women's anti-violence advocates state that the process of clarifying which cases will be diverted has been unclear and inconsistent, and that there is a need for clear, province-wide standards regarding what cases can and cannot be diverted (Goundry, 1998). Critics claim that the move to diverting cases of intimate violence to Alternative Measures was done without any solid evaluation or research into restorative justice (Stewart, 2001;Goundry, 1998).[37]

Commentators have reacted negatively to the recent policy change which mandates the application of alternative measures for more intimate violence cases.

Tony White of the Nanaimo John Howard Society criticizes the new policy on Alternative Measures and intimate violence. He points out that a lack of resources in the

[37] This point is supported by the lack of research generally available into intimate violence and restorative justice.

system will cause Alternative Measures to become a mere 'slap on the wrist,' as there is no funding for offender counselling or supervision. "There are …no teeth to carry out the idea… and even before this policy reversal more resources were needed to cope with the ongoing problem of domestic abuse." Others fear that the perception that the program is 'soft' will discourage women from reporting the crimes, and police from laying charges (Walton, 2003).

Diane Turner, a Victoria lawyer, notes that the high stay rate discussed by Geoff Plant in intimate violence cases may be due to inadequate support for women in the court process, or delays in prosecution, both of which will discourage a survivor from coming forward to speak up against an abuser. She feels that by diverting cases at the pre-charge level, survivors are denied access to court-based victim services which may furnish the Crown with more evidence on her history of abuse, resulting in a better chance of successful prosecution (Turner, 2002).

Lack of funding and resources has been cited as a consistent problem both before and after the recent policy change (Walton, 2003; Goundry, 1998; Oglov, 1997; Simpson, 1997). The entire program was initially supported on a budget of around one million dollars (Goundry, 1998; Daisley, 1998); while CAPs currently receive five thousand dollars in start-up funding to initiate a restorative justice program.[38]

According to some who administer Alternative Measures programs, they lack human resources, relying on volunteers to provide mediation and other services in order to cut costs. Funding is seen as inadequate, resulting in a "McDonald's-ization of restorative justice…" and downloading criminal justice costs onto poorly funded municipalities (Simpson, 1997). There is also concern that this lack of funding has augmented the workload of volunteer, community-based victim service providers, and resulted in inadequately trained personnel administering programs (Goundry, 1998; Simpson, 1997).

Nova Scotia

Nova Scotia launched its first diversion program for adults in 1995. The program (Alternative Measures) was intended to help address high financial costs, long delays and provide "…an efficient and accountable service that will benefit victims, the community and offenders" (Moulton, 1995). The program emphasizes the accountability of offenders to victims and community, and community participation in and understanding of the justice system. The current Alternative Measures program in Nova Scotia is a pre-charge diversion model that accepts 'minor offences,' including some intimate violence and sexual assault cases (Boomer 2003 b); Avalon, 1999).

In 2000, Nova Scotia launched a more extensive restorative justice program separate from the Alternative Measures program (Restorative Justice). Initially, it included adult and youth offenders diverted at both pre- and post-charge stages. This program was intended to deal with "the total range of offences," including intimate violence cases (Clairmont, 2000). In late 2000, however, the restorative justice program placed a moratorium on sexual assault and intimate violence cases, and restricted participation to those between the ages of 12 and 17 (Boomer, 2003 a)).

[38] As noted above CAPs often receive non-government funding as well.

Promise

Canadian criminologist Don Clairmont notes that the Restorative Justice program was preceded by extensive pre-implementation preparedness including extra funding and volunteer training. The program is described as being administratively structured to allow for feedback, networking, and consensus. Clairmont notes that overall "… the initiative is well-planned, timely and resonant with the revitalized restorative justice movement" (2000). As noted above this program does not currently accept cases of sexual assault or intimate violence.

Problems

Both community and government sources in Nova Scotia have spoken out against the diversion of intimate violence and sexual assaults in the Alternative Measures program. Kevin Deveaux, the NDP justice critic, has spoken out against diverting offenders who have committed sexual assaults to the alternative measures program (Boomer, 2003 a)).

The Avalon sexual assault center in Nova Scotia has cautioned against the use of Alternative Measures in cases of intimate violence, and sexual assault (1999). They state that the emphasis in restorative justice practice on forgiveness is misplaced in such cases; and should instead be on stopping the violence. They refute the claim that restorative justice places victims at the center of the process; they state that survivors were not consulted in developing the policy, and that survivors have no choice as to whether the case goes to Alternative Measures or not. Avalon notes that, in their experience, survivors will need confidential, individual counselling to heal, not a semi-public discussion with her abuser. They cite limited resources as another stumbling block, given the need for intensive therapy, follow up and supervision of offenders. Avalon also notes that volunteer and community participation will require extensive education and training (1999).

Evaluations

A 2003 report by researcher Pamela Rubin, in association with the Management Committee of Restorative Justice In Nova Scotia, examines survivor's responses to the prospect of participating in the Nova Scotia Restorative Justice and Alternative Measures programs.[39] All participants were women, some survivors of intimate violence and some in conflict with the law. This literature review focused on the responses from survivors. The study was conducted using individual interviews and focus groups. A feminist, participatory, narrative approach was used.[40]

Overall, the response from survivor participants regarding the use of restorative justice was negative. Pam Rubin, the report's author, summarizes the findings this way: "…(w)as this something that was going to serve the victims of these crimes? The answer was a resounding no" (Boomer, 2003 b)). The report recommends continuing the

[39] At this point such cases are not diverted.

[40] 23 individual interviews were held with criminalised women who had experienced adult diversion. Two interviews were conducted with survivors of intimate violence. 125 women participated in focus groups, including 80 women who were survivors of intimate violence. Three groups were held exclusively for immigrant women, one for Aboriginal women, one for Black women.

existing moratorium on intimate violence and sexual assault cases. The report notes that it does not 'reject restorative justice principles,' rather the program as it is currently configured in Nova Scotia is unacceptable" (Rubin, 2003 at 9).

Many women identified problems with the existing criminal justice system including trivialization of violence, victim blaming, and problems with referrals and eligibility criteria. The report notes that "there is nothing in place to prevent the carry-over of these problems into restorative justice" (at 3). Others noted positive aspects of the conventional justice system, including the authority that the judge and other justice personnel exercised over abusers. Several noted that if the existing system were functioning the way it was intended risky, untested alternatives would not be necessary (at 4).

Other concerns, specific to Alternative Measures and Restorative Justice, were also raised. The report notes that women were concerned that these programs would be seen as minimizing intimate violence, particularly for offenders who are "…already skilled in avoiding and manipulating legal consequences of abuse" (at 3). Underlining this sense of decriminalization was the private, volunteer-based nature of the system.

The overarching theme of most discussions was ensuring women's physical and psychological safety before, during and after the intervention, and in some cases over the long term. "Women expressed very explicitly how community forum participation with an abuser would be psychologically negative for them, endangering hard-won recovery from abuse" (at 5). Many women said that fear of physical and psychological abuse would prevent them from asking for a period of incarceration for their abuser, even if that is what they thought was warranted (at 5).

Women from small communities feared that their participation in a community forum would violate their confidentiality, which was linked to healing needs (at 5). They also feared that disclosing information about the types and duration of abuse would result in having their children removed by the state. Aboriginal and Black women expressed fear that they would be pressured to participate in options that were less likely to result in incarceration, based on their experiences to date with their communities, police and the Crown in the conventional justice system.

Many participants were concerned about the definition, scope and makeup of 'community' in these programs. They stated that they were isolated from their community as survivors, and that in their own experience their communities had normalized and condoned intimate violence (at 6). They worried that gender, sexual orientation, race and other characteristics would influence how the 'community' treated them and their children (at 6), and that powerful or influential abusers would be favoured.

Women reported a lack of resources within the community to deal with intimate violence, and feared that this would be exacerbated if the process became informal and volunteer based (at 7). Service provider participants expressed fear that these services would be downloaded onto their existing volunteer organization without accompanying funding (at 7). The ability of volunteer coordinators to identify and handle power imbalances in abusive relationships was also questioned (at 7).

Sentencing Circles

Promise [41]

According to some commentators, primarily thorough firsthand, anecdotal experience, sentencing circles are appropriate in dealing with serious crimes such as sexual assault and intimate violence. Proponents generally state that circles offer both victims and offenders positive characteristics that are lacking in the conventional justice system (Stuart, 1996 a); Avison, 1993). Specifically, the process "…afford(s) greater concern for victims…" (*R v. Moses*, 1992; Stuart, 1996 a)). Unlike a courtroom setting, circles offer an informality and equality between employees of the justice system and other participants (Green, 1998) This "...breaks down the dominance that traditional courtrooms accords lawyers and judges" (*R v. Moses*, 1992). Proponents report that circles provide opportunities for victims, offenders and the community to speak at length outside of the usual strictures imposed by evidentiary rules and victim impact statements (Green, 1998; Stuart, 1996 a); Janvier, 1993). Offenders are given an opportunity to explain their behaviour, and apologise for their actions out of a sense of responsibility rather than the threat of prison (Green, 1998; Janvier, 1993). Opening the channels of communication allows for the best and most honest information possible to inform a sentence (Linker, 1999; Janvier, 1993); and rebuilds broken relationships within the community (Stuart, 1996 a)).

Offender accountability is enhanced due to the community's participation in ensuring the selection of an appropriate sentence, and in ensuring that the sentence is successfully carried out (Linker, 1999; *R v. Moses*, 1992; Janvier, 1993). Reintegrative shaming, an important aspect of offender accountability and rehabilitation, is facilitated by sentencing circles (Stuart, 1996 a)) Sentencing circles are seen as a more difficult option than incarceration, as offenders must face a community which does not condone their behaviour (Green, 1998). Judge Barry Stuart claims that the use of circles reduces recidivism rates (Stuart, 1996 a)). [42] He asserts also that when evaluating circles you cannot measure only recidivism, but must take into account less measurable, positive factors such as 'community building' and 'empowering community members' (1997).

Sentencing circles are primarily held in Aboriginal communities,[43] and are seen generally as a more culturally appropriate response to crime than the conventional justice system (Linker, 1999; Warry, 1998; Stuart, 1997, 1996 a) and b); Jackson and Rudin, 1996; *R v. Moses,* 1992). In the case of intimate violence, however, several commentators have asserted that the contemporary realities of intimate abuse in Aboriginal communities may make sentencing circles culturally inappropriate (Ryan and Calliou, 2002; Goel, 2000; Green, 1998; LaRoque, 1997; Crnkovich, 1995).[44]

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[41] While most of the commentary discussed in this section does not address cases of intimate violence particularly, the claims made on behalf of sentencing circles have the potential to meet some of the needs of survivors as articulated above.

[42] Roberts and LaPrairie conversely question whether sentencing circles will reduce recidivism (1996).

[43] For commentary on sentencing circles held for African-Canadian offenders in non-intimate violence cases see Llewellyn, 2002. Sentencing circles have also been used to sentence offenders from non-marginalized groups, such as Caucasian police officers (*R v. Munson*, 2001).

[44] Others suggest that by having the sentencing judge retain control of the ultimate sentencing decision, circles may be culturally inappropriate, as they are being used by the conventional justice system to improve mainstream programs rather than as an authentic aspect of self-determination for Aboriginal

In most cases, support for the use of sentencing circles in cases of intimate violence is conditional upon the imposition of certain criteria. Many of these conditions mirror the needs of survivors of intimate violence as discussed above. Separate preparation[45] for survivors and offenders before and after a circle is necessary to attempt to offset longstanding power imbalances (Green, 1998; Tesher, 1996).

Ross Gordon Green, a legal scholar who supports sentencing circles generally, notes that circles should not take place in circumstances of serious power imbalance (Green, 1998). Green asserts that circles must have resources for survivors such as counselling and physical protection, and close supervision of offenders is a priority (1998). The community itself must show clear censure of intimate violence in order to create a deterrent effect, and to protect survivors from further abuse (Green, 1998). Offender accountability and responsibility should be demonstrated by a guilty plea[46] in the first instance, rather than a full trial followed by a sentencing circle (Couture, 2001; Green, 1998; Jackson and Rudin, 1996).

Problems

Longstanding power imbalances between survivors and abusers are raised as a major concern in using sentencing circles in cases of intimate violence (Goel, 2000; McGillivray and Comasky, 1999; Green, 1998; Tesher, 1996; Depew, 1996).

In the context of community-based sanctions such as circles, the values of the 'community' itself are at issue. In such consensus-based models, commentators query whose values represent 'the community' (LaPrairie, 1998; Roberts and LaPrairie, 1996; Depew, 1996; Crnkovich, 1995). 'Community' values may include blaming survivors of intimate violence, minimizing its seriousness, or normalizing violence as acceptable (Ryan and Calliou, 2002; Goel, 2000; Jackson and Rudin, 1996; Pauktuutit, 1995; Crnkovich, 1995). A survivor risks being ostracized and punished for reporting abuse in a community where intimate violence is normalized (MacDonald, 2001; Goel, 2000; Zellerer, 1999).[47]

Sentencing circles are politically connected to the success of Aboriginal self-government. Aboriginal survivors may feel pressure to demonstrate forgiveness and reconciliation in order to ensure the success of this larger project, and the long term gains sought by Aboriginal leadership (LaPrairie, 1998; Goel, 2000).

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peoples (Ryan and Calliou, 2002; Linden and Clairmont, 1998; in the Australian context see: Behrendt, 2002).

[45] This is difficult to implement in circles that are not convened under an optional protocol, where the community has control over the timing of the sentencing. Both the Alberta Court of Appeal in *R v A.B.C,* 1992 and The Saskatchewan Court of Appeal in *R v. Taylor*, 1995 ruled that delays in sentencing for preparation and counselling of offenders were not permissible.

[46] Although several commentators have suggested that a guilty plea be a prerequisite to a sentencing circle, this is not supported by case law. In *R v. Taylor*, 1995 a sexual assault case that went to trial on the issue of consent, and then a sentencing circle the Saskatchewan Court of Appeal held that although it was necessary for "the offender to demonstrate his remorse, sincerity and acceptance of responsibility…" a guilty plea was not necessary (at 401).

[47] The Royal Commission on Aboriginal Peoples notes that this may be a particular concern where there are intergeneration differences in values, such as between Elders and younger generations of Aboriginal people (Jackson and Rudin, 1996).

In emphasizing traditional responses to crime, sentencing circles may fail to give sufficient weight to contemporary manifestations of sexism and colonialism within Aboriginal communities (Goel, 2000; LaRoque, 1997; Razack, 1999; Depew, 1996). Restorative justice advocates may rely on idealized notions of community which ignore or reinforce embedded gender, race, or age power imbalances (Depew, 1996; LaPrairie, 1993).

Survivor intimidation is also a major concern, particularly in small communities. They may be susceptible to intimidation and silencing before, during or after the circle once the court leaves that community (Green, 1998; Crnkovich, 1995). Mary Crnkovich, a feminist lawyer who has worked with Pauktuutit Inuit women's organization, provides a first person account of a sentencing circle. She reports that this circle revictimized and silenced a survivor of intimate violence (1995, 1996). Crnkovich asserts that the physical presence and threatening behaviour of the offender before and during the circle kept the survivor from expressing her concerns or speaking to her own interests (at 17). The focus of the circle was on the needs of the offender (at 166. See also LaPrairie; 1995; Jackson and Rudin, 1996). Her needs were presumed by the community to be identical to those of the offender, and they were ordered to attend reconciliation counselling together, run by untrained laypeople, to deal with 'their' problem (at 167-168). The Royal Commission on Aboriginal People has noted that it is "…a mistake to equate healing with the re-establishment of the family unit (as)…in some cases this will not be possible and should not be sought" (Jackson and Rudin, 1996 at 272).

Another concern in small, isolated communities is that offenders may exert political or familial pressures, allowing them to manipulate the process (McGillivray and Comasky, 1999).[48] This concern seems to have been borne out in one South Vancouver Island diversion and sentencing circle project which ended due to protests by the women of the community that the project was "…dominated by a few men from the Native communities …(who) used it to allow their relatives to escape punishment for sexual offences" (Barnett, 1995 at 4; Nathan, 1993; Jackson and Rudin, 1995).

Scholars point to a lack of resources to deal with intimate abuse, particularly in communities that are poor, isolated, or marked by drug or alcohol abuse or residential school syndrome (Ryan and Calliou, 2002; McGillivray and Comasky, 1999; LaPrairie, 1995). Limited or overtaxed resources in some communities may render participants unable to support complex, difficult cases in restorative justice settings (Depew, 1996; Barnett, 1995).

Finally, the lack of guidelines both for cases that are selected for use in circles, and in conducting circles themselves has been seen as a problem (*R v. Joseyounen*, 1995; *R v. Johnson*, 1994). This may lead to participant confusion (Crnkovich, 1995, 1996), or disparate, unfair results between similar offences (Roberts and LaPrairie, 1996; LaPrairie, 1995). This same lack of guidelines, however, has been seen by some commentators as necessary to ensure individually appropriate sentences (Linker, 1999; Jackson and Rudin, 1996).

[48] Kinship and community relationships in small, close knit communities has also been seen as a strength, allowing participants to be supported and encouraged by those they know and love (Ryan and Calliou, 2002).

Evaluations

There have been no systematic evaluations of sentencing circles (Coates, Umbreit and Vos, 2003; Department of Justice Canada, 2002; Ryan and Calliou, 2002; Latimer et al, 2001; Immarigeon, 1999; Grifiths, 1999). Most of the evidence for or against the use of sentencing circles is first hand, but anecdotal, and is discussed above. The evaluation of Hollow Water that is discussed in detail below deals with healing circles and intimate violence employed under an optional protocol rather than under a conventional sentencing regime. The program is fundamentally different from the circles discussed above and will be discussed separately.

Family Group Conferences (FGCs)

Commentators have suggested that FGC models are particularly well suited to intimate violence cases, based on theoretical models, or extrapolations from juvenile research (Daly and Braithwaite, 1995; Sherman, 2000; Morris, 2002 b)).

FGCs are primarily used to address juvenile offences, both minor and serious. There has been at least one Canadian FGC project, however, that has dealt with adult intimate violence cases. This program and its results have been well documented in the literature. This model, the Pennell and Burford project based in Newfoundland and Labrador, will be discussed in some detail.

Pennell and Burford

The Pennell and Burford project operated in three separate locations: one in a rural Aboriginal community; one in a rural area comprised almost exclusively of persons of Western European descent, and one in an urban area similarly constituted. The project was run by the Department of Social Services, administered by a provincial committee that included representatives from government and non-government bodies (including anti-violence groups), and coordinated by an academic specialist (Stubbs, 1995). Clients were families that had been involved with Child and Family Services, therefore the primary focus was on child welfare proceedings not criminal proceedings for crimes of intimate violence. Adult crimes of intimate violence were dealt with in the program as part of a larger picture of family counselling and healing.[49] The FGC did not stay those charges where there were charges laid against abusers (Stubbs, 1995). These practices are different from FGCs held in New Zealand and Australia.[50]

Other Literature

Braithwaite and Daly strongly advocate the use of this model for cases of intimate violence, and provide a detailed description of how a model program would be administered (1996). Daly has also completed a study of the impact of FGCs on juvenile sexual assault offences, concluding that they provide a just outcome for survivors (2003).

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[49] In the course of conference preparation it was discovered that there was adult intimate abuse in 21 of the 32 families participating.

[50] Pennell and Burford note, however, that their model is "influenced' by New Zealand FGC models (2002).

Donna Coker's work focuses on the impact of restorative justice in 'subordinated communities,' particularly communities marginalized by race or ethnicity. Coker has written primarily about Navajo Peacemaking, a process that she describes as "similar to conferencing."[51] "Peacemakers use …stories to instruct parties regarding their gendered responsibilities to each other, including a husband's responsibility to treat his wife with respect" (Coker, 2002 at 146). Coker's work draws on original empirical research.

Promise

Pennell and Burford

According to Pennell and Burford, "(f)amily group conferencing can stop family violence" (2002 at 108). They primarily attribute the success of their program to a feminist praxis of empowering women as agents of change within families. The praxis is based in the idea of 'link, interruptions,' borrowed from Ristock and Pennell (1996).

> Feminist praxis is particularly concerned with the politics of gender identity. This mode of critically reflective action *interrupts* assumptions, including about gender identity, while still fostering the *links* necessary for working together to end injustice based in gender and other oppressive categorizations (2002 at 111)

Pennell and Burford also cite participatory co-leadership; project planners from diverse community and government groups; substantial funding (from at least 6 sources); firm principles; local ownership; family privacy; and women's leadership as keys to their success. They report that state involvement is crucial to the safety and success of the program. Child welfare, parole and police services were immediately available and ready to take action against those who reoffended against family members (2002 at 125).

Julie Stubbs, a long time critic of the use of restorative justice in cases of intimate violence, praises the Pennell and Burford model and its methods of operation (1995, see also Busch, 2002).

Other Literature

Compared to sentencing circles, LaPrairie (1995) states that there is preliminary evidence that police-run FGCs in New Zealand and Australia meet the needs of victims better.

Donna Coker's work in The United States with Navajo Peacemaking, a model similar to FGC, shows some promise in ending intimate violence for some of the survivors in the study (see below).

[51] Coker also notes, however, that Peacemaking may differ from FGC in that its normative community is more clear; being firmly rooted in Navajo traditions and community (2000 a) at 98).

Problems

Pennell and Burford

Unlike many models the Pennell and Burford project had substantial economic and human resources at its disposal.[52] Preparation for conferences took up to four weeks, and included testing and counselling for all family members. Conferences lasted from four hours to three days, and several families had more than one. The families were provided with access to social, health and educational services to complete the 'plan' drawn up during the conference (Stubbs, 1995). Stubbs cautions that this type of program is not comparable to most other FGCs, where preparation and meeting time are scarce, and resources for follow up virtually non-existent. Stubbs also states that the FGC model itself is not a panacea (Stubbs, 1995).

Pennell and Burford also note limitations of the project. For instance, they would exclude "…families of estranged partners who have no wish to reconcile and no children in common…" from participating in any similar program (Burford and Pennell, 1996 at 13, and 20). They also dealt with "extreme" cases by excluding the abuser. In these cases he was not contacted, and did not participate in the conference (1996, at 14).

Other Literature

Based on evaluations by Morris and Maxwell (1993, 1994; Maxwell, 1993) of juvenile conferencing models in New Zealand and Australia, Julie Stubbs, an Australian legal scholar, notes a number of problems with applying conferencing to adult intimate violence cases (Stubbs, 1995). These problems may be more likely to effect survivors, given power imbalances in their relationships with abusers. These evaluations revealed the absence of due process; a lack of services and resources; culturally unresponsiveness; a higher than expected rate of dissatisfaction by victims; and concerns about reconciling the needs of victims and offenders (Stubbs, 1995).

Stubbs also responds specifically to the model proposed by Daly and Braithwaite (1994) charging that while it is "…genuinely motivated by concerns for the victims of …violence" it "…fails to pay sufficient attention to other literatures which challenge the appropriateness of the model of intervention proposed for domestic violence" (Stubbs 1995 at 276). Stubbs notes that the model has several problems. These include the uncritical way in which Braithwaite and Daly assume the positive, consensus-based participation of community, given social norms about intimate violence. Stubbs criticizes the role of the central police, given some survivors' aversion to contact with the police; and Daly and Braithwaite's assumption that survivors will be able to openly express themselves in a conference with their abuser (Stubbs, 1995).

[52] The program was cancelled due to its high financial cost.

Evaluations

Pennell and Burford

Pennell and Burford have written both systematic evaluations of the project (Pennell and Burford, 2002, 2000 b), 1996) and a work based on the success stories of individual cases of intimate violence (Pennell and Burford, 2000).

Pennell and Burford claim that "(t)he outcomes from the Family Group Decision Making Project establish that FGC can be an effective strategy for stopping child maltreatment and domestic violence" (2002 at 109). Because of the success rates in all three sites, they also claim that it can end intimate violence in a number of cultural and geographical settings. The project took place over one year, and involved 32 families, which accounted for 472 participants, only 88 of whom were service providers. Families were followed for a one- to two-year period after the conference and compared to independently selected comparator families.

Pennell and Burford document their successes this way:

> Notably all of the data sources agreed that in general FGC benefited the families. The major findings for the Project families were:
>
> - A reduction in indicators of child maltreatment and domestic violence;
> - An advancement in children's development; and
> - An extension of social supports (2002 at 110).

Overall, there were no violent outbursts during the conferences despite the fact that the families were left alone for most of the conference. Pennell and Burford also report that they knew of no cases of abuse that followed the conference "…because of the conference." The abuse that already existed did not stop after the conference in some cases (1996, at 14). Some participants noted that abusers were not challenged enough, out of fear of how they might react (1996 at 14).

Other Literature

Donna Coker's work on intimate violence and Navajo Peacemaking draws on original empirical research. Her work compares Peacemaking to the conventional justice system. Coker reports that her work "…is the first attempt to gather empirical data regarding the use of Peacemaking in domestic violence cases" (Coker, 2000 a) at 4).[53] She drew information from Peacemaking files in Arizona, and New Mexico, USA; observations of one Peacemaking session; and interviews with Peacemakers, Peacemaking staff, court and justice system staff, and anti-violence workers in the Navajo Nation. She chose not to interview participants directly as she feared it would be dangerous for survivors (2000 a) at 110). The study captured 31 cases in Arizona and 70 cases in New Mexico.

[53] Others have written on this topic, but without empirical research (Austin, Yazzie, 1997; Yazzie and Zion; Zion and Zion, 1993).

Coker examines what she thinks are the typical problems associated with most restorative justice models in dealing with intimate violence,[54] and concludes that Peacemaking provides *partial* answers to each of these problems (2000 a) at 15).

Her conclusions are much more cautious than those offered by Pennell and Burford. She concludes that "…Peacemaking's process may provide benefits for some battered women that are largely unavailable in formal dispute resolutions" (2000 a) at 13). She is also careful to note that "…(I)t is dangerous to assume that a practice so dependant on a Navajo worldview can be transplanted elsewhere… I do not argue that Navajo Peacemaking as practices can simply be lifted and used in a different locale…" (2000 a) at 13).

Coker reports that Peacemaking "…has the potential to disrupt social and familial supports for battering by addressing both systemic and personal-responsibility aspects of battering." Secondly, "Peacemaking may benefit some battered women through the use of traditional Navajo Stories…stories with gender anti-subordination themes may change the way in which the batterer and his family understand battering, and thus have the potential to restructure familial relations that support battering." Finally, "Peacemaking may avoid the cultural and legal focus on the necessity of a woman's commitment to separate from her abuser…" (2000 a) at 13-14). She explains this further as fostering 'safe connections,' or an understanding that survivors have multiple loyalties, including loyalties to the men who abuse them.[55] Coker claims that additionally Peacemaking gives those who have been affected by the violence, such as family and children, an opportunity to voice their opinions and concerns (2000 a) at 38). She also reports that Peacemaking can benefit some survivors through the practice of *nalyeeh*, or financial compensation for wrongdoing (2000 a) at 102).

Coker observes that there is a significant problem with survivor coercion in the Peacemaking process.[56] Self-referred cases particularly, which make up 50% of the caseload, are vulnerable to coercion and to safety breaches. In these cases, the batterer can apply to participate in the Peacemaking process, and survivors are regularly ordered or coerced into participating (2000 a) at 80).[57] She is concerned that the program displays a "lack of screening for safety" and that survivors are unable to decline participation, even if they are afraid of their abuser. Coker found that batterers have used the Peacemaking process to "flush a woman out of hiding." Advocates for survivors state that survivors are regularly ordered by the Peacemaking court to attend sessions, despite making it clear that they object to participating (at 81). Coker reports that survivors are not given sufficient information to make informed decisions regarding participation (at 103). Some survivors have been physically attacked following Peacemaking sessions that they did not want to attend (at 82).

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[54] Namely: the coercion problem, or forced participation in restorative justice or coercive practices; the 'cheap justice' problem, or the tendency to overemphasize the value of offender's apologies; and the normative problem, or the normalisation of domestic violence through a combination of valuing neutrality in the process, and the unspoken rules of compromise and problem solving (2000 a) at 38).

[55] It is worth noting here that Coker found that some Peacemakers had an anti-divorce or separation bias (2000 a) at 91 and 103).

[56] She proposes administrative changes that may address this problem (2000 a) at 84).

[57] Coker also reports that because the process is seen as traditional survivors feel subtly coerced into participation out of respect for elders or Navajo tradition.

Coker also notes, however, that at least half of those applying to participate in Peacemaking in intimate violence cases were the survivors themselves. Survivors used the venue to attempt to change the behaviour of their abusive partners, or as an opportunity to address the reasons they were ending the relationship (2000 a) 83).

Coker reports that some Peacemakers framed the violence as mutual, when it was clearly one sided, or described brutal beatings as part of mutual 'conflict' (2000 a) at 94). Others accepted the version of events as posited by the abuser with no independent investigation. None of the anti-violence advocates that were interviewed supported the use of Peacemaking in intimate violence cases. Some reported that they would support it with some significant changes, while others stated that because of changes to Navajo culture, and power balances between offenders and survivors the process could never be used in such cases (2000 a) at 8).

Coker points out two problems with the study; which she characterizes as "imperialism' and "empiricism' (2000 a) at 107). As a non-Navajo woman she fears that she may have ignored important cultural differences or romanticized them. She reiterates that Peacemaking, because of this shortcoming, should not simply be 'lifted' for use in other cultural communities. In regards to empirical aspects of her research, she notes:

> Some of the benefits of Peacemaking that I identify may exist more in theory than in practice at this moment in Peacemaking's history in the Navajo nation. There is a danger that readers will fasten on these potentials and support Peacemaking in domestic violence cases without regard to the cautionary warnings of battered women's advocates or with out regard to whether the practices would further women's autonomy in a particular setting (2000 a) at 111).

Kathleen Daly, an Australian criminologist, has recently completed a study on youth sexual assault offences in Australia that were disposed of by FGC (Daly et al, 2003).[58] The study concludes that due to the large number of court cases where the charges were dropped and 'nothing' happened to the offender, conferencing may be preferable to court-based sanctions from a victim's perspective. Daly et al also conclude "…conferences have the potential to offer victims a greater degree of justice than court." (at 20). When participating in a conference the offender must admit their guilt and offer an apology and reparation; in the police/court context, not admitting to the offence often resulted in the charges being dropped or stayed. "Contrary to feminist concerns, our data suggest that the court, not conferences, is the site of cheap justice" (at 21).

[58] Although sexual assault and intimate violence are very different crimes in some instances sexual assault is used as an abusive tactic in abusive intimate relationships. Sexual assault, like intimate violence, is a 'gendered crime,' women are disproportionately targeted, and suffer the effects of this crime in a gendered context. It is a matter of speculation whether successes in these types of offences in the juvenile field can be extrapolated to adult crimes of a similar nature.

VORPs and VOMs

Fraser Region Community Justice Initiatives Association

In British Columbia the Fraser Region Community Justice Initiatives Association operates both a youth Victim-Offender Reconciliation Program (VORP), [59] and an adult Victim-Offender Mediation Program (VOM) (Annual Report, 20003). It is the latter that will be examined in this literature review. This program, in existence since 1982, accepts cases involving physical assault, sexual assault, murder, intimate violence, sexual abuse, and armed robbery (Gustafson, 1995 and 1997). The program does not focus on Aboriginal offenders, and unlike Hollow Water has Christian (Mennonite) roots. This is a post-charge program that usually takes place during incarceration, months or even years after the offence.[60]

There are a range of communication possibilities between survivors and offenders including support and counselling only; indirect contact such as videotaped statements; or face-to-face meetings (Roberts, 1995) Interventions are initiated both by the victim themselves, and on behalf of offenders by criminal justice staff such as corrections officers or prison chaplains (Gustafson, 1995; Roberts, 1995).

The program deals with serious crimes. During the evaluation discussed below the program dealt with sexual assault, murder, armed robbery and 'other.' 56% of these cases, however, dealt with circumstances where the victim and the offender had a previous relationship, with one another; including two spousal murders, four cases of interfamilial childhood sexual abuse, and several cases of sexual assaults in the context of intimate relationships. These cases are not discussed or analysed separately in the literature as 'intimate violence' cases.

Promise

There are a number of characteristics highlighted in the literature that closely match the needs of survivors. The program has highly qualified, experienced staff, professionally trained to deal with trauma (Roberts, 1995). In all of the literature the safety, interests and experiences of the survivor are characterized as absolutely central. The needs of the victim are considered and dealt with separately from the offender. Active steps are taken before, during and after face-to-face meetings to empower those who require support.[61] In the case of the two spousal murders the entire family was offered support and help from the program (Roberts, 1995).

As a pre-requisite to participating in the program offenders must participate in treatment (generally anti-violence and abuse programs within institutions) and take personal responsibility for their crimes. Offenders are frequently screened out of the program if they fail to pass the program's screening test for readiness, ability, stability and willingness to accept responsibility for their actions (Roberts, 1995).

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[59] Until 2002, the program also offered an adult VORP (Annual Report, 2003).

[60] This means that, unlike Hollow Water for instance, the program does not function under an optional protocol. Rather, they gain access to corrections institutions and inmates under a written agreement with the Federal government, in place since 1990 (Personal correspondence with Dave Gustafson, March 11, 2004).

[61] This may include either the survivor or the offender or both, as the program functions on the principle of complete, but neutral support for both parties.

Problems

VOMs may not be suitable for all serious offences, particularly those where a gendered power imbalance exists between victim and offender. In screening out cases, the program staff often turned cases away "…(p)articularly in sexual assault cases where there was a prior relationship, was the potential for power imbalances which could harm the victim, and which couldn't be adequately controlled for victim-offender interactions" (Roberts at 39). In fact, it was in cases involving sexual assaults that staff showed the most concerns about offender appropriateness (Roberts, 1995 at 39).

Because of the potentially intimate nature of the interaction between the offender and the survivor, cautions and concerns regarding mediation models generally (as opposed to larger group dynamics as in circles) apply to VOMs. As demonstrated below, however, there were only two responses that indicated that these concerns manifested themselves to any degree in the Langley project during the evaluation period.

Of particular interest is research and scholarship that deals with family mediation where there has been intimate violence within that relationship.[62] Much of the research and writing in this area deals with mediation that takes place upon the break-up of the relationship. There is a significant body of literature that indicates women in these circumstances are likely to be re-victimized, intimidated and abused by the men they are in mediation with (Zutter, 2002; THANS, 2000; Hooper and Busch, 1996; Goundry, 1998; Robertson and Lapsley, 1995; Perry, 1995; Shaffer, 1994; Astor, 1994; Volpe, 1991; Hart, 1990; Lerman, 1984).

A recent Canadian study out of Nova Scotia (THANS, 2000) has summarized some of these problems. A coalition of transition homes for battered women undertook a province-wide consultation and research project. Specifically their goals were to "…gather abused women's experiences with mediation generally…and to collect culture and community-specific input from women." They then made recommendations based on the women's experiences. These are a few of the main concerns they outlined:

Ex-partners regularly verbally abused women during mediation; this affected their ability to argue for custody, access, and support. They were intimidated and scared for their physical safety before, during and after mediation (at 16).

Mediators were untrained in the psychology of abuse, were unable to recognize situations where women were being intimidated by their abusive partners, and did not stop the mediation when abusive language or body language (such as banging on the table) was used (at 7).

Women were coerced into mediation against their wishes.

[62] Despite the fact that mediation in family law matters and VOMs are not identical processes, in cases of intimate violence the dynamics are remarkably similar. In both cases, a survivor is placed in a situation where she must negotiate for her own interests, in a private forum, against a person who has abused or assaulted her.

> Conciliators and mediators may present confusing or incorrect information to parties about the law or their legal rights… Conciliators have given the impression that mediation is a requirement before the court (at 16).

Women found that the power imbalance between them and their abusive ex-spouse resulted in unfair settlements.

> I had a very hard time saying 'no' to him. I agreed to things I regret. I was too scared to stand up for myself (at 7).

The final recommendation of the report is "…an immediate moratorium on conciliators referrals to mediation assessment for abusers and their former partners, pending more permanent resolution of the issue by policy and legislation" (at 9).

The power imbalances that characterize an abusive relationship may prevent the survivor from negotiating fairly with her abuser, even if she is provided with support and counselling during the process (Busch and Hooper, 1996; Astor, 1994). Two New Zealand studies on the effects of mediation techniques in circumstances involving violence showed:[63]

> When compared to their peers who were not abused, battered women felt less able to assert their interests, they felt that it was more likely that their partners would retaliate against them or their children for asserting themselves (Busch and Hooper 1996 at 104).
>
> Compared to non-abused women, battered women felt their ex-partners could 'outtalk' them, and that ex-partners had much more decision-making power in regards to finances, child rearing and sexual relationships.
>
> Newark et al concluded that this diminished sense of decision-making ability coupled with an increased fear of harm diminished the women's ability to participate assertively and effectively in the mediation process (at 105).

Studies also show that mediators were not able to deal with the ongoing trauma and distress caused to the survivor by the mediations sessions (Busch ad Hooper, 1996; Zutter, 2002); that abusers were apt to use the sessions as an opportunity to have contact with the survivor, who they otherwise would not have seen (Busch and Hooper, 1996; Zutter, 2002); and that the programs studied had insufficient resources to guarantee the safety of the survivor before or after the sessions (Hopper and Busch, 1996).

Evaluations

There have been two evaluations of the Langley project, the second being more comprehensive, and building on the first. The second evaluation, which was conducted

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[63] L. Newmark, A.Harrell, and P.Salem, *Domestic Violence and Empowerment in Custody and Visitation Cases: An Empirical Study on the Impact of Domestic Abuse* (Paper published by the Association of Family and Conciliation Courts, 1994), and Ruth Busch, N. Robertson, and H. Laspley, *Protection From Family Violence* (New Zealand: Waikato Mediation, 1992).

by Tim Roberts for the Solicitor General of Canada, will be the focus of this section. The study included telephone interviews with 24 matched victim-offender pairs, constituting 61% of the 39 cases dealt with during the study period; and 23 criminal justice personnel (primarily Corrections) who had contact with the program. The evaluation also examined videos of interviews with victims and offenders and face-to-face meetings. Finally, the evaluation provides quantitative analysis of demographics and referrals, and a literature review (Roberts, 1995).

> The evaluation characterizes support for the project as 'unanimous'[64]
> "…this level of support was remarkable, considering that VOMP involves parties who are initially polarized, and who could be expected to hold divergent views about the value of the program. VOMP Also exists in a polarized context of offender, victim and feminist advocacy, each of which has a legitimacy in itself, and which one might have expected to find voice at least one or two disappointed participants" (at v).

This is tempered by the fact that the screening process eliminated those survivors who had reservations or doubts about participating.[65]

The evaluation found the staff well trained and experienced female staff were available to all participants which was important for several female survivors of sexual assault. The program was characterised by excellent preparation and support for face-to-face meetings, and follow up after the meetings.

Participants said they did not feel pressured to continue or participate at any stage. They felt that they had control over the situation, and that they were listened to. Survivors felt that they received a lot of useful information about the VOM process, the offender and the context of the crime. Participants noted the large amount of time dedicated to both survivors and offenders and that compared to their experiences with the conventional justice system VOM was better.

In the three cases involving family relationships, the meetings were used to explore future relationships and to clarify responsibilities between the separated or estranged spouses. Neither the process, the dynamics nor the outcomes of these intimate violence cases are specifically discussed, making it difficult to answer specific questions about intimate violence and VOM.

Although negative feedback was limited, it is important to note here as well. One survivor felt that a second face-to-face meeting was dominated by the offender, and became an opportunity for him to tell her how 'good' he had become; she terminated the meeting partway through. Another survivor expressed concern that the offender, a former spouse, was not rehabilitated, and had not answered all of her questions satisfactorily. She did note that he had kept his agreement not to contact their children.

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[64] Support was characterized this way: "…the respondents found considerable specific and overall value to the program, felt it ethically and professionally run, and would not hesitate to recommend it to others." Support did not include definable rehabilitative outcomes for offenders or a complete lack of any concerns by participants.

[65] 65% of all cases were screened out, with the primary reasons being that victims could not be located, were unwilling to participate or offenders were deemed not ready by project staff.

Follow-up research was recommended including: long term recidivism of offenders (as most were only part way through their terms of imprisonment); and long term follow up tracking the effect of the process on survivors.

Negotiated Protocols

Hollow Water

The Hollow Water program is distinct from the sentencing circles discussed above in a number of important ways. Several commentators who are sceptical of the use of sentencing circles generally are supportive of the Hollow Water model due to its unique cultural and geographical characteristics, healing protocol, resources and attention to survivors' needs. The initiative was born out of the concerns of an Aboriginal research and resource group formed in 1984 within the Hollow Water community (Jackson and Rudin, 1996). The group concluded that intergenerational sexual abuse and intimate violence was rampant (Lajeunesse, 1993). Over the next several years, they developed a community training and education program, a protocol to deal with offenders and survivors, and created a culturally appropriate abuse assessment and intervention team.

They approached local Crown counsel, judiciary and the Manitoba Department of Justice to negotiate a protocol which would allow them to treat serious cases in the community with minimal intervention from the criminal justice system. Unlike sentencing circles, it is those involved in the program, not the sentencing judge, who decide what action to take (Lajeunesse, 1993).

Promise

Hollow Water has been the focus of significant scholarship. It has been in existence for about 15 years, and is often cited as a successful model program (Braithwaite and Strang, 2002 at 20; Stubbs, 2002; Couture, 2001). Advocates of the program claim that it deters abusers from re-offending better than the conventional justice system (Couture, 2001; Green, 1998) and in fact the program boasts very low recidivism rates (2% over 10 years) (Couture, 2001).

Observers state that offenders are called to account by the community in ways that going to jail only avoids (Couture, 2001; Green, 1998; Ross, 1994). Survivors needs are met by avoiding the trauma of testifying and being cross-examined in court (Jackson and Rudin, 1996) and by having the offender plead guilty in most cases (Lajeunesse, 1993). Given the geographical isolation of the community, an added advantage is that community members are able to stay in their own community, rather than traveling several hours to the nearest court (Green, 1998; Ross, 1994).

The program is seen by some as culturally appropriate (Couture, 2001; Green, 1998; Jackson and Rudin, 1996). This is due in large part to its geographical and cultural isolation (Coates, Umbreit and Voss, 2003; McGillivray and Comasky, 1999). The community's homogeneity and isolation are seen as contributing to community building and supervision. Survivors have reported feeling satisfied with having a stake in the outcomes, being understood, and in fostering community and cultural pride (Lajeunesse,

1993). It also allows for close monitoring of offenders against recidivism (McGillivray and Comasky, 1999).

The availability of resources has been cited as a major advantage over most other restorative justice models, particularly sentencing circles conducted by the judiciary. Survivors and offenders receive separate, long-term support before, during and after the circles, even if they choose not to participate (Braithwaite and Strang, 2002; McGillivray and Comasky, 1999; Jackson and Rudin, 1996). McGillivray and Comasky state this will help to protect against manipulation of the process by offenders with political connections in the community, a fear that many survivors in their study expressed (at 166). Support for survivors and offenders is provided by experienced, well-trained staff who specialize in sexual and intimate abuse and violence (Couture, 2001; McGillivray and Comasky, 1999; Jackson and Rudin, 1996). The safety of survivors is prioritized, and includes the deployment of a team of staff around the time of disclosure and any confrontations with the offender (Couture, 2001). Additionally, specialised group learning and therapy sessions in schools and the community center for men, women and children help to denormalize violence in the community (Couture, 2001).

Problems

Couture's assertions of low recidivism rates are complicated by problems and confusion with supervision of offenders and sanctions for breach of conditions. Under the Hollow Water protocol the abuser receives a three year suspended sentence, which places him on probation, a condition of which is to follow the directives of the program (Green, 1998). The treatment program takes five years, however it is only possible to place abusers on three years probation, the maximum allowed by law. This means that for the final two years of the program, there is no legal sanction flowing from the initial intervention for those who breach their probation conditions (Lajeunesse, 1993). [66] A lack of court-backed sanctions for breaches of community-based programs is seen as a problem; particularly in cases of intimate violence (Busch, 2002; Burford and Pennell, 2002).

Under the law, a probation officer must supervise conditions set by the project; however, in practice the Hollow Water team provides supervision, raising possible questions of political influence or favouring family members. Technically, as long as the sentence is still running, the abuser can be charged with breach of probation or conditions, however this must involve the probation officer. Green notes that there is some 'confusion' within the program regarding their ability to charge non-compliant offenders with breach of probation (Green, 1998). There is some evidence that charges were not laid in breaches that have occurred (Jackson and Rudin, 1996).

While some survivors who participated in the project took comfort and support from the close-knit community, others found that the nature of the community contributed to a lack of privacy (intrusion by family and close friends), unprofessionalism, and religious conflicts (Lajeunesse, 1993). LaPrairie found, in reviewing data from an evaluation of the program, that only 28% of victims (versus 72% of offenders) found the circles to be a positive experience (Moyer, 2000).

[66] Research data shows that up to 1999, there were two reported breaches (Couture, 2001).

Aboriginal scholar and activist Emma Laroque has strong criticism for the Hollow Water project and indicates that her reservations are shared by a large number of other Aboriginal women in Canada (1997). She questions the cultural authenticity of many Aboriginal restorative justice projects that rely on tradition. She claims that they are historically inaccurate,[67] and have been recalled in the extremely politicized context of colonization. Because of this, they ignore women's experiences, and are based more on Christian and New Age notions of forgiveness than true Aboriginal traditions.

With specific reference to Hollow Water, Laroque raises questions about the authenticity of the program, claiming that it relies on selectively recalled traditions which ignore the fact that Aboriginal cultures also had punishment and retribution for serious crimes.

> The Hollow Water sentencing must be re-evaluated in light of real traditional justice. The decision to merely 'supervise' two adults who had committed horrific crimes poses, or at least should pose, many disturbing questions with respect to certain uses of 'traditions' such as 'healing circles' within Aboriginal controlled justice systems. Frankly it is difficult to comprehend given the mind-boggling nature of the crime…An obvious questions should occur here: Upon whose tradition" is the Hollow Water decision based? Clearly no one considered those Aboriginal traditions that punished sexual offenders with severity. If programs are claiming to apply traditional measures, then they should (at 84).

Laroque also questions the effects of the program on survivors' ability to express their true concerns given the geographically isolation and small size of the community.

> In the Hollow Water decision, for example,[68] it is difficult to believe that the victims were in any condition to be a part of decisions in the 'healing circle.' What could they do or say in such a small community? (at 81)

Evaluations

The Hollow Water project has been evaluated on two occasions, although neither report substantially evaluates the project in terms of its effectiveness in dealing with intimate violence. The first evaluation by Lajeunesse is based on self-reported information, case studies, pre-sentence reports, and statistical information provided to the report writer by the project itself (Lajeunesse, 1993). The report is highly descriptive, and does not provide substantial critique or evaluation of the project.

The report describes serious considerations of survivors' safety and support, including support before, during and after any circles (see for instance at p. 11). The report does not offer an opinion on the effectiveness of these measures.

Jennifer Koshan, a legal scholar, and Emma LaRoque both question whether this evaluation gives us a full picture of survivor's freedom to participate. Koshan and

[67] For example, she states that the crime of rape was punished not by healing circle, but by death in many Aboriginal societies.

[68] LaRoque refers here to a community-based sentence of three years probation handed down to a couple for sexually assaulting their daughters twice.

Laroque fear that survivors must bow to community pressure and a lack of meaningful alternatives (Koshan, 1998; LaRoque, 1997).

The second report is a cost-benefit analysis, primarily designed to gauge the monetary efficiency of the Hollow Water project (Couture, 2000). In doing so, Couture, also discusses what he calls 'value-added' benefits for the community. These non-monetary gains include community cohesiveness, and healing intergenerational pain caused by colonialism. The report claims that the project has saved the federal government money, in comparison to sending the offender to jail.

This report is also highly descriptive. Ryan and Calliou in their 2002 case study of two Canadian restorative justice initiative note that "(e)valuation of current restorative justice initiatives is clearly needed. Hollow Water cost-benefit analysis indicates their program has saved the correctional system millions of dollars over ten years but that analysis does not tell us what human costs have been."

It is significant to note that there is very little data produced, making a secondary evaluation of the material virtually impossible, and a methodological critique difficult. There is little gender analysis, despite the fact that the overwhelming majority of survivors were women or girls, and the overwhelming majority of offenders were men (at 70, Table B). Despite the purported focus on survivors, project staff estimate that they spend 60% of their time on offenders, 30% on victims, and 10% on community (at 17). Project staff point out the need to be better resourced in order to really fill their mandate in relation to the victim and the community.

ANALYSIS

Despite its inconclusive and contradictory nature, the literature on restorative justice and intimate violence reveals one sure thing; that more empirically-based research is necessary to ascertain whether restorative justice meets the needs of survivors in cases of intimate violence. Until then, we must rely on the theorizing and speculation of detractors and proponents of restorative justice, and the small amount of empirical research that has been completed. Without further empirical research, we are left with what Analise Acorn calls "…sentimental story telling as an (unscrupulous) means of boosting the so-called magic of restorative justice" (Acorn, 2004).

Although the research that does exist is less than conclusive, it allows us to formulate a number of preliminary insights, and particularly aids in drafting questions for further investigation and research.

The literature and empirical research shows a schism amongst those who protest the use of restorative justice in cases of intimate violence. Some detractors report that they would support restorative justice if the processes were better, and the practices were different.[69] From these critiques we can glean characteristics of a restorative justice program that might be widely supported; an ideal model. Other critics state that in some cases, if not all, restorative justice cannot effectively deal with the power imbalances between survivors and abusers. These critics would ban the use of restorative justice in

[69] Some supporters of restorative justice also share this opinion.

cases of intimate violence. It is unclear from the research whether documented cases of revictimization of survivors are due to poor process or to the innate inability of restorative justice to address some power imbalances, regardless of procedural and practical safeguards.

The available research does little to settle the debate. Each of the empirical studies of restorative justice models revealed both successes and failures. There are well-documented cases of survivors being revictimized by offenders, the community and their families in restorative justice models. There are also well-documented cases of survivors being satisfied and feeling safe and supported in restorative justice settings. None of the samples in these studies are large enough to make a statistically significant statement regarding the ability of restorative justice to address power imbalances in intimate relationships, and many fail to measure important indicators of success or failure. The research does, however, reveal some of the reasons behind survivors' diverse experiences.

The literature outlines specific restorative justice models that seem to 'work' better than others, and why they seem to be at least partially successful. Poor practices may be more important in determining success or failure than the employment of restorative justice precepts.[70] In other words, it is the specific characteristics of the model, not necessarily the label 'restorative justice' that may determine success or failure.

The presence of significant financial and human resources seems to be an indicator of success.[71] The programs discussed here may not have huge budgets, but have well-trained and dedicated paid staff that provide specialized services. For example, when comparing the Hollow Water program to judicial sentencing circles, several commentators found Hollow Water to be more successful. This was due in part to the resources available in the community to support healing and supervision, while judicial sentencing circles were criticized for lacking resources, and leaving survivors unsupported, and offenders unsupervised. Resources were also key to the success of the Burford and Pennell FGC model. Again this well-funded and resourced model was compared favourably to other FGC models due to the support and services it was able to provide survivors and offenders. Finally, the Victim-Offender Mediation program in Langley, BC showed success in part because of the presence of significant human, and adequate financial resources. To do restorative justice 'right' may be expensive, as evidenced by the cancellation of the Pennell and Burford project in Newfoundland. To do it 'wrong' may expose survivors and their children to huge risks, as evidenced by reports of revictimization of survivors.

Other program characteristics also emerge as indicators of success. The Langley VOM program provides what might be described as a very risky service: face-to-face meetings between survivors and offenders (with no community involvement) following the most serious crimes in the *Criminal Code*. The success of this program is due in part

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[70] Maxwell and Morris (2000 b), 2002) have found that poorly administered restorative justice programs may actually exacerbate recidivism, both in frequency and in types of offences.

[71] Under resources, I include the dedication of significant time preparing for and debriefing after meetings between survivors and offenders, separate counselling for survivors, access to social services for survivors and offenders, and support staff trained in and dedicated to aiding and protecting survivors of intimate violence.

to the level of control that is maintained by the survivor, and the fact that the safety of the survivor is guaranteed due to the incarceration of the offender. By comparison, the Alternative Measures program offers survivors no choice in whether the case is diverted or not, and the offender is at large in the community before and after any contact.

There also appear to be limitations on the circumstances under which even successful models can be applied. Coker reports that, despite some successes for some survivors, it is dangerous to assume that the Navajo Peacemaking model can be transplanted into systems that do not abide by Navajo worldviews (2000 a) at 13). Pennell and Burford state that their FGC model should not apply to families without children who do not want to reconcile. In the highly successful Langley VOM, many offenders[72] were weeded out prior to participation because they failed to pass the programs' stringent screening tests requiring them to take responsibility for their crimes, and display an awareness of their impact on survivors.

The following section distils from the literature a further list of characteristics of a successful restorative justice model that might be used in cases of intimate violence. This list does not indicate, however, a clear conclusion that restorative justice is suitable in cases of intimate violence. Critics continue to assert that in some, if not most, cases of intimate violence even these procedural and practical safeguards will be insufficient to address power imbalances between survivors and abusers.

CHARACTERISTICS OF AN EFFECTIVE RESTORATIVE JUSTICE MODEL

General

Programming will be culturally appropriate. (Acknowledging that this is highly contested territory.)

Effective programming will ensure consultation with the whole community in developing new programs for intimate violence, or in making existing programs better. There is a consistent theme of exclusion from these processes in the literature, particularly expressed by Aboriginal women's organizations. When programs are being developed to target particular groups or communities (immigrants and refugees, elderly people, particular ethnic groups) representatives from the full spectrum of these communities will be included, particularly groups and individuals that work with survivors.

Programs that do accept cases of intimate violence will begin a systemic, transparent, accountable, ongoing and publicly accessible evaluation process. Data collection from existing projects will be invaluable in future research and will contribute to accountability and transparency generally.

Service providers will be trained to identify and deal with intimate abuse, including survivor support, signs of abuse and how to handle instances of intimidation or abuse during any restorative justice processes.

[72] In cases of intimate violence, the exclusion rate was even higher than the average.

The program will have a clear protocol on selection and determination of intimate violence cases, recognizing that the inherent risks to the physical safety of survivors that require specialized resources and training to address.

Punishment and Accountability

Programs will take into account survivor's voices in each case when deciding to divert cases of intimate violence. Survivors' need to remain safe, and to punish offenders for their crimes will be legitimate factors in this decision.

Physical Protection and Safety

An effective program will ensure close supervision of offenders before, during and after restorative justice interventions. This need is particularly acute in circumstances where abuse is chronic, where survivors choose to leave relationships, or in cases where an incarceral sentence would usually be imposed.

Programs will impose serious repercussions for offenders who fail to comply with conditions or sentencing terms imposed by a restorative justice program, or who engage in abuse or threatening behaviour before, during or after a restorative justice intervention. In most cases, commentators recommended that violators be incarcerated immediately.

Programs will provide emergency assistance for survivors who experience violence while participating in restorative justice programs. Assistance should be made available particularly before, during and after any face-to-face meetings.

Resources

Programs will ensure the existence of sufficient financial and human resources to adequately meet the needs of all participants.

The treatment and healing needs of one set of participants (i.e. offenders) will not receive more resources than another (i.e. survivors).

Mandatory treatment for offenders will be provided including alcohol and substance addiction treatment, anti-battering programs, parenting skills classes, etc.

Programs will be made available for survivors including alcohol and substance addiction treatment, parenting skills classes, anti-subordination workshops, etc. Participation will be voluntary.

Advocacy and Support

Individual counselling for survivors and offenders will be made available, regardless of whether the survivor chooses to participate in a face-to-face meeting.

Individual counselling for survivor and offender will be made available before and after any face-to-face meetings. The need for counselling following any meeting may be long-term.

Autonomy and Decision Making Power

Survivor participation will be determined through informed consent and will be free of any type of coercion. Independent legal advice will be available to survivors.

The program will function on the basis of supported autonomy and control for survivors, including the prerogative to reconcile or leave the relationship before during or after the restorative process. Programs should be entirely free of anti-divorce/separation bias.

The program will involve assistance for splitting assets or obtaining spousal and/or child support should the survivor decide not to reconcile with her partner.

Community

Programs will provide community education to fight against the normalization of intimate violence, particularly in communities where consensus-driven, community-based models are employed.

Steps will be taken to ensure that individuals who are participating in consensus-driven, community-based models are well educated on the dynamics of intimate abuse before participating in any process.

The process will guard against breaches of confidentiality that threaten the safety or dignity of participants, particularly in small, close-knit communities.

Gender

Programming will pay attention to and attempts to address gendered power imbalances inherent in intimate violence, even in the context of particular cultural communities (such as Aboriginal communities).

The program will be aware of the gendered nature of intimate violence, and will likely take a feminist, anti-subordination, or woman-centred approach (as per Pennell and Burford, and Coker).

RESEARCH QUESTIONS

1) Develop a research methodology that can better measure 'success' in cases of intimate violence. This protocol should be developed in consultation with offenders, survivors, and service providers in the community where it will be employed. From the literature, this protocol should include measuring long-term recidivism and the needs of survivors at a minimum, not just the less tangible 'restorative' outcomes that characterize the few evaluations that do exist in this area.

The research methodology must take into account safety, coercion and other concerns that may silence survivors.

2) Clearly more empirical research is required into all models of restorative justice, with particular attention to the needs of survivors. The following outlines some possible directions, based on the literature and available research.

The Pennell and Burford project, Hollow Water, and the Langley VOM are the only three Canadian restorative justice projects that deal with cases of intimate violence which have been subject to first-hand empirical research including survivors.

- Independently and critically examine the data collected in the Pennell and Burford project to verify the extremely good results this program has produced.

- Independently and critically examine the data collected from the Hollow Water project to verify the good results this program has produced. Refer specifically to critiques by Carol LaPrairie, Emma LaRoque and Jennifer Koshan.

- Conduct follow up research on the Langley VOM evaluation, including measuring recidivism rates amongst offenders, and long term effects on survivors. Disaggregate data on intimate violence cases and examine them specifically against the needs of survivors of intimate violence.

3) Research should be conducted on discrete models, not 'restorative justice' generally. The literature reveals that processes, funding and administration make the most significant differences to success; not simply the employment of 'restorative' rhetoric or principles. These practical aspects of each model should be clearly outlined and explored.

4) Alternative Measures should be a research priority. The government infrastructure for this model is well-established in every province, making it quite likely to be employed systematically or regularly in cases of intimate violence. Research should initially explore such basic questions as how many cases of intimate violence are being diverted and how the decision to divert is being made; neither of which are clear at this time. Further research would include an empirical study on the success of each provincial/territorial model.

5) Sentencing circles should also be a research priority. As with Alternative Measures there is no easily accessible research indicating the frequency of use in intimate violence cases. Preliminary research would include a search for reported and unreported case law, and an analysis of the case files, reported cases and transcripts where available. Further research might include contacting and interviewing survivors from these cases.

6) Examine evidence from the United States regarding the use of VORPs and VOMs, as they are used extensively in cases of intimate violence in that jurisdiction.

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