

## Sexual Assault and Restorative Justice

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by Kathleen Daly

### An Unsolvable Justice Problem

What is the problem we are trying to address when we ask, is restorative justice appropriate in cases of sexualised violence?<sup>1</sup> We are trying to solve a justice problem that cannot ultimately be solved. The problem is encapsulated well by Barbara Hudson and Jean Hampton. Hudson (1998, p. 245) asks:

How does one move away from punitive reactions which -- even when enforced -- further brutalize perpetrators, without, by leniency of reaction, giving the impression that sexualised ... violence is acceptable behaviour?

Hampton (1998, p. 35) asks:

How do you combine the respect for criminals' personal responsibility and agency to which conservatives are committed, with the compassion that leftist analysis would have us show these criminals, especially given the variety of ways that the legacy of various forms of oppression will be implicated in the criminal acts of some of them?

What interests Hudson, Hampton, and me is a problem with two components: (a) How do we treat harms<sup>2</sup> as "serious" without engaging in harsh forms of punishment or hyper-criminalisation? (b) How do we "do justice" in an unequal society?

(a) *Harm vindication and the limits of criminalisation.* The symbolic and instrumental purpose of criminal law is the state's vindication of harms, and ideally, an affirmation of behaviours considered right and wrong in a society. Focusing for the moment on the sexual assault of adults ("rape") rather than minors ("child sexual abuse"), recent feminist scholarship has shown conclusively that the harm of rape is not recognised or understood within the terms of criminal law. Some feminists suggest that because women's experiences of sexual violence are ultimately "disqualified" by criminal law and justice system processes (Smart, 1989), efforts to reform criminal law to recognise the harm of rape will be frustrated. Despite the known limits of the rape law reform (Spohn & Horney, 1992) and the many studies of rape victims' re-victimisation in the criminal process (Bumiller, 1990; New South Wales Department for Women, 1996), from a symbolic point of view alone, feminists cannot cede the ground that has been won in demonstrating that the harm of rape is far wider than

the law's "real rape" scenario. Susan Estrich (1986) coined the term "real rape" to refer to stranger rapes, where a woman appears totally blameless for the act. Embedded in the real rape classification are elements such as clear marks of injury to the body that demonstrate a lack of consent, a victim's reporting the rape right away to the police and not drinking or using drugs at the time of the incident (see also Frohmann, 1991). A woman's biography, along with incident elements must show conclusively that, from a male-centred viewpoint, she could not have "provoked" the attack in any way. Therefore, for feminist and victim advocacy groups, the vindication of the harm of rape is today as much a political as a legal act.

Yet, we know that the law's vindication, especially its more harsh manifestations such as prison, is visited on the more marginal members of society and especially on its male marginal members. A growing number of feminist scholars and activists now recognise that increasing the penalties for crime and jailing more violent men may not create safer societies. Dianne Martin (1998) and Laureen Snider (1998) analyse what goes wrong when feminists attempt to vindicate gendered harms through recourse to criminal law.<sup>3</sup> Dianne Martin suggests we should not view "recent innovations in criminal law [as] a triumph for feminism, despite appearances" (p. 157). There is no victory for feminists, she would say, in "measur[ing] the judicial 'recognition of harm' against the length of the prison sentence imposed" (p. 169). Snider points out, as others have, that the vindication of gendered harms via harsh penal sanctions has the potential to incarcerate more minority group men.<sup>4</sup>

*(b) Doing justice in an unequal society.* The idea of doing justice means different things to people. For some, it means identifying the "right punishment" for a wrong, often calculated based on its seriousness and the offender's blameworthiness in proportion to other harms (von Hirsch, 1985). For others, it means identifying the "right response" to a person and the harm, with attention to the wider problem of social justice (Hudson, 1993). For those in the former position, it is possible to "do justice" in an unequal society, even if only in the restricted sense of having uniform and consistent decisions. For those in the latter position, it is not possible to "do justice" legitimately in an unequal society because social and economic inequalities structure what is considered criminal and non-criminal harms, and these inequalities are reproduced in the justice process. While each position has a different view on the meaning of doing justice, they may work with presumptively similar understandings of the problem of inequality, what I shall call the *familiar analysis of inequality*.

The familiar analysis addresses the impact of class relations, of race-ethnic relations, and of colonialism and cultural differences on crime and justice system responses. It demonstrates that society's more marginal members, that is, those with fewer economic resources and who are marked as racially, ethnically, or culturally "other", are, relative to their numbers in the general population, disproportionately more likely caught up in the justice system and disproportionately present in arrest, court, and prison populations. We know this analysis very well; it structures all sociological theories of crime, and for critical criminologists, in particular, it grounds an analysis of the immorality and injustice of criminal law and its application, past and present.

The familiar analysis is missing a key social relation, however, and that is sex/gender,<sup>5</sup> which challenges it in two ways. First, when sex/gender is brought into view, we notice that the heavily criminalised population is composed of marginalised *men*, not simply marginalised *persons*. Thus, social and economic disadvantage does not have similar "effects" on people; women tend to be more law-abiding and conventional than men.<sup>6</sup> Second, while we might wish to blame the wider society for the inequalities that produce the crime problem (at least in part), that indictment does not go far enough in explaining a universal and ubiquitous phenomenon: men's physical and sexual abuse of women and children they know.<sup>7</sup> There are different logics, competing loyalties, and competing justice claims when we consider the relationship of sex/gender to class, race-ethnicity, culture, and colonialism in responding to gendered harms, including sexual assault. For example, McGillivray and Comaskey's (1999) research on Canadian Indigenous women who had been abused by their partners for many years finds that when the women sought redress in the justice system, they believed their partners had "more rights" than they did (p. 149) and that the system often treated their men too leniently (p. 118). Their experiences and justice claims reveal an apparent no-win situation for Indigenous women (or other racialised women) seeking redress for harms via the traditional (white and western) justice systems. "Invoking either [the traditional criminal or child protection systems] may be seen not only as rejecting one's partner and extended family, but also as denying one's culture and going against the politics of one's people" (McGillivray & Comaskey, 1999, p. 156). Doing justice in an unequal society is thus a more complex exercise than critical criminologists have imagined. Relations of sex/gender and the harms associated with them pose fundamental challenges to how we think about the nature of crime and a just response.

This then is the unsolvable justice problem, and it surfaces in our discussions of the impact of inequalities on traditional and alternative justice system practices. For the traditional system,<sup>8</sup> we focus on how inequalities are reproduced and amplified through the system, observing that the symbolic bark of criminal law has its greatest bite on society's more marginal members, even as these offenders may be "more powerful than their victims in the individual crime relationship" (Hudson, 1998, p. 255; see also Daly, 1989). For alternative practices, we focus on how inequalities are expressed in an informal process. When one attempts to bring into conversation parties who are unequal, it is likely that the more powerful person will have his or her way. For cases of sexualised violence, a male offender will be in a position to deny the offence, and perhaps to intimidate the victim, and a female victim will be less able to tell her story, less able to be heard. Therefore, it may be impossible to achieve just outcomes with gender power imbalances in a room of people discussing gendered harms (in addition to Stubbs, Coker & Busch, this volume, see also Astor, 1991; Hooper & Busch, 1996; Stubbs, 1995).

### **A Way Forward?**

Is there any way around this unsolvable justice problem? My answer is yes; there may be a way forward if we do three things:

1. We must rehabilitate "retribution" and make it part of a restorative justice process. Relatedly, we must cease seeing restorative justice as the opposite of retributive justice. I shall draw on Hampton (1998), Hudson (1998), and my own work (Daly 2000a, 2000b, 2002), which utilises arguments by Duff (1992, 1996).<sup>9</sup>
2. We must redefine the harm of rape, other forms of gendered harms, and perhaps violence more generally. I shall draw on Nicola Lacey's (1998) arguments about how both criminal law and the criminal process need to be reconstructed so that the affective and corporeal dimensions of these harms are discussed in the criminal process.
3. We must be cognisant of the variety of meanings and contexts of sexual violence, domestic violence, and family violence. These terms are associated with particular scenarios in people's heads, of cases they are familiar with, of situations they have experienced.

Because of this variety, we may find ourselves disagreeing with each other because we are imagining different scenes of gendered harms.

Consider, for example, what we learn from Australia in the *Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Robertson, 2000) and from Canada in McGillivray and Comaskey (1999). Women who live in more remote areas and who are beaten or raped, have no place to run to, no refuge, perhaps no place of real safety. Compare that to women living in urban areas, where there may be programs, refuges, and the like, and where there is some place of separation and sanctuary. Consider also the term "sexual assault". So much has been written about rape and sexualised violence, but the variety of offence scenarios people have in mind centre on *adults* as victims and offenders *or* children abused by adults. Throughout this paper, I move between feminist analyses of the sexual assault of adult women ("rape") and actual cases of sexual assault of *child victims* ("child sexual abuse") by *juvenile offenders*. While this movement can be justified by analysing sexual violence as a continuum (Kelly, 1988), it is not a graceful movement. We attach different meanings to the seriousness of violence, depending on the character of victim-offender relations and an offender's maturity.<sup>10</sup>

In South Australia, young people charged with sexual assault (and related) offences, who have admitted to what they've done, may be diverted from court prosecution by the police, and instead participate in a restorative justice process called conferencing. Throughout eight states and territories in Australia and the country of New Zealand, there exists extraordinary variation in the form, purpose, and organisational location of conferencing (for overviews see Barga 1996, 1998; Hudson, Morris, Maxwell, & Galaway 1996; Daly and Hayes 2001, 2002). However, the general idea is that an admitted offender and their supporters, a victim and their supporters, and other relevant parties meet to discuss the offence and its impact. Conference participants discuss the sanction, with at least one legal actor (a police officer) present. In Australia and New Zealand, there are typically two professionals present: a coordinator or facilitator who runs the conference, along with a police officer. New Zealand police data for 1991-93 show that 17 to 20 percent of youth cases were dealt with by conference alone or by referral to conference by the court for pre-sentencing advice; the rest were handled by the police (Maxwell & Morris, 1996, pp. 91-92; since that publication and a review of New Zealand's statistical data, Gabrielle Maxwell says that the percent of cases handled by conference is likely higher, about 20 to 30 percent). In

South Australia, from 1995-1998, of the total referrals of cases to formal caution, conference, and court, 18 percent were referred to conference.

Many people object to using conferences in sexual assault cases; they believe it lets offenders off too easily or puts victims in an untenable position. Plainly this is the dominant world view. As far as I know, conferencing is used routinely in sexual assault cases in only two jurisdictions in the world: New Zealand and the Australian state of South Australia. In this paper, I describe a sample of sexual assault cases that were referred to a conference in South Australia during 1998. My aim is to show the varied harms that fall within the sexual assault offence category and the implications of this variation for imagining what would be just responses.

### **Caveats**

Before launching into the three points, I have several caveats.

1. *Distinctions among gendered harms.* My essay centres on one kind of gendered harm, sexual assault, and whether a restorative justice process would be appropriate for it. Gendered harms take many forms, including domestic violence (which refers to a male abusing a female partner) or family violence (the preferred term for many Indigenous women, which refers to a wider set of violent behaviours in family groups, including sexual abuse of children by family members). An important distinction between gendered harms and other offences is that they are not incident-based, but repeated and on-going, often for many years (see Stubbs, this volume). Sexual assault can be both on-going and incident-based behaviour, the former more likely in the abuse of children and partners, and the latter in the context of acquaintances or those unknown to each other. The distinctions between sexual assault, domestic violence, and family violence can sometimes be important, but depending on the contexts of the abuse, at other times, these distinctions are artificial for those victimised.
2. *Defining gendered harms.* I have been searching for a concept that is inclusive of sexualised violence, domestic violence, family violence, and violence against children, even as I recognise this is a heterogenous category. *Gendered harms* is my umbrella concept. They are gendered in that they are indicative of sex/gender power relations. However, they may not always involve male offenders or female victims; they can include violence in same and heterosexual relationships; and they can include violence of boys and girls against their

parents (typically mothers). I am less certain where to place assaults between boys or men, which may reflect homophobic violence, or where to place assaults between girls and women, which may have been provoked by sexual jealousies over "their" men. There are many causes of gendered harms, that is, they reach into histories of colonial, cultural, race, and class oppression, and consequently, they embed these histories and particularities.

3. *Gendered harms as one site for feminist analysis.* Many assume, wrongly, that sex/gender is mainly or exclusively present in gendered harms but not in other offences. Furthermore, as Lacey (1998, p. 48) suggests, there is a "feminine intellectual ghetto" (albeit also a feminist one) in criminal law, where in an otherwise male-dominated preserve, it is women who analyse and teach on "sexual offences in general, and rape, in particular". Like Lacey, I have refrained for some time to conduct research on rape because like her "I was damned if I was going to occupy the pigeonhole which both feminist and other scholars seemed to have created" (p. 48).

However, gendered harms do offer a litmus test for a feminist evaluation of any new justice practice. As Hudson (1998, p. 245) reminds us, "these crimes have been over-tolerated, whereas burglary, car theft, street robbery, and the like have been over-penalised ... The symbolic force of criminal law has only recently ... been deployed to demonstrate that society ... disapproves of these forms of behaviour". Having said that, I would also say that gendered harms need not be the sole focus of feminist inquiry because sex/gender relations are in *every social encounter*, in *every crime encounter*, and in *every justice encounter*. Studies must consider these other offences. For example, I am finding from my research in South Australia that women may experience some forms of property victimisation as a potential violation of their bodies and spirit, and that the physical and emotional effects of offences may linger longer for some female victims. Thus, while it is crucial that feminist attention be given to the applicability of restorative justice in responding to gendered harms, other harms must be considered as well. We do not want restorative justice to establish a feminist (and Indigenous) ghetto by permitting our voices and intellects to be present solely in discussions of particular offences.



## **Point 1: Rehabilitate Retribution and Cease the Retributive-Restorative Justice**

### **Contrast.**

For several years I have argued against the oppositional contrast of retributive-restorative justice (Daly & Immarigeon; 1998; Daly 2000a, 2000b, 2002). I initially found that the contrast was not accurate in describing the conference process. And in time, I have come to see that the contrast is not desirable in a normative sense. That is to say, not only is retribution part of a restorative justice process, it *should be* part of it.

Part of the difficulty in communicating this position is that people have strong images in their heads about a system of justice they don't like and a new system of justice they find more appealing. They call the system they *don't like* the "retributive" justice system, with all of its problems. And they call the system they *do like* "restorative justice". I can agree that we may wish to refer to an old and new justice system, and I would like to call it just that, the old and the new justice.

In the old justice (or established, traditional courthouse justice), court processes leave little room for communication between the parties in a crime, they stigmatise and demonise offenders, and shut out victims. But it is patently inaccurate to call the old justice "retributive justice" because a variety of theories of punishment have always been present, and over time, we find different ideological emphases in the state's response to crime (that is, treatment and punishment). Retribution means many things to people. Most analysts (with the possible exception of philosophers and some legal analysts) tend to use the term loosely -- far too loosely in my view -- to refer to responses that are harsh, vengeful, punitive, degrading, among others. They tend to assume that a retributive response is one involving incarceration. None of these assumptions or loose definitions needs to be part of retribution, but until we have a frank discussion of the many meanings of retribution, we shall forever be talking past each other. Calling the old justice "retributive" and the new justice "restorative" invites trouble and confusion. We can avoid some of that confusion by referring more simply to "old" and "new" justice practices. My argument is that new justice practices must have elements of retribution in them, but those elements may not have the same meaning or be present in the same way.

What, then, do I have in mind when I say we need to rehabilitate retribution? Empirically, when you observe family conferences, you see that people are moving flexibly across three

major justice domains: first, retribution; then, restoration (or reparation); and finally, to rehabilitation (or reintegration). That is, the group moves from "holding offenders accountable", registering a form of retributive censure that says "what you did was wrong", to ideas of restoration, saying to the offender, "in order for you to make up for what you've done, then you need to do these kinds of things". Or, "show by your amends to the victim that you've done wrong and we want to believe in your capacity to do that, to repair the harm". And third, the group wants to say, "Once you've shown you're sorry and that you'll make amends, we will welcome you back to the society". The group may also identify programs or interventions that may assist the offender in staying out of trouble. Ideally, the conference setting is a dialogic encounter, that is, it is not just a group holding an offender accountable or proposing remedies for reparation; the offender (and supporters) should be actively engaged and participating in the process as well.

Empirically, then, I found that what people did in conferences was a flexible blend of retributive and restorative practices, but the next step was to consider, can these practices be defended normatively? In Daly (2000b), I worked through philosophical arguments by Duff (1992, 1996) on retributive censure and punishment and how these related to restorative justice. And in this paper, I utilise Jean Hampton's (1998) arguments on retribution because she addresses directly the unsolvable justice problem in responding to rape.

During 1995, Jean Hampton was asked to testify as an expert witness in a Canadian case concerning the constitutionality of a law prohibiting those prisoners, who had been federally sentenced to serve 2 years or more, from voting.<sup>11</sup> According to Hampton, the plaintiffs, who were arguing that prisoners *did* have the right to vote, believed that the current law effectively disenfranchised the poor and more marginal members of society, and especially minority group members. The government's (that is, the respondent's) case was that Canadian citizens not only had "rights, but also responsibilit[ies], so that people who violated the rights of their fellow citizens should be expected to bear responsibility for doing so" (Hampton, 1998, pp. 26-27), which included a suspension of voting rights while imprisoned.

Hampton (1998) suggests that what was missing in the arguments and in the courtroom were "women" and "minority groups" in a literal and analytical sense.

... Apart from the court reporter, the court clerk and a wife of one of the lawyers, I was the only woman in the courtroom. There were no women lawyers involved in the

case and no other expert witnesses on either side that were women. ... Although none of the prisoners who brought the litigation was a Native [American], there were no members of any minority community in the courtroom and in particular, none involved as lawyers, court personnel or expert witnesses. This was almost entirely a white male trial (p. 29).

What concerned Hampton about this case and what she saw as its feminist aspect was the expressive significance of law. She frames the problem this way: "Does a law depriving prisoners of the right to vote in any way compromise a democracy's commitment to political equality, a principle which universal suffrage realises" (p. 30)? The question raises two concerns: one is systemic discrimination against Native peoples, and the second is what democratic governments must always repudiate: "the idea of 'natural subordination', that is, that people are 'by nature' the superiors of others because of race, class, religion, gender" (p. 29). Hampton assumes that universal suffrage (at least for adults) reflects a government's commitment to "the political equality of all their citizenry" (p. 29).

Although Hampton ended up siding with the government, her reasoning did not fit either the government's or the plaintiff's cases, which she equates, respectively, with traditional "right-wing" and "left-wing" arguments. Although she considered herself a left-wing thinker, she couldn't accept the plaintiff's argument. Her reasoning is that women cannot easily adopt a "sympathetic attitude toward violent men of the sort urged by the plaintiff's left-wing expert witnesses" (p. 31). A sole focus on the injustices arising from an over-criminalisation of the poor is not sufficient because, Hampton argues, that position is "blind to the way these offenders are actually encouraging and helping to enforce a form of oppression in our society" (p. 32).

She argues against two courses of action, finding both unacceptable:

- Disenfranchising prisoners to denounce not only their conduct but also them. This she believes is "abusive, degrading, and unjust" (p. 36).
- Not disenfranchising prisoners as a form of rehabilitation "designed to return the offender to the community as a reformed person" to signal that he/she is one of us. This she sees

as wrong because the victims of the offenders' actions "are given nothing" (p. 36). In her view, permitting prisoners a right to vote fails to express condemnation for their acts.

She imagines how rape victims would feel if prisoners were given the right to vote:

If a policy [of enfranchising prisoners] were enacted, women who were raped and other women whose lives were threatened because of rape, would have to watch while their rapists were systematically embraced by the community and given the political levers of power, without any denunciatory message (p. 37).

In Hampton's view, both disenfranchising prisoners and not disenfranchising them are unjust courses of action because

each ... is too skewed in the direction of one of the parties involved in the dilemma: the denunciatory policy is unacceptably indifferent to the .. offender; the rehabilitative policy is unacceptably indifferent to ... victims. The right policy must involve an acknowledgment of both parties ... [but] this can be only imperfectly done. No matter how hard we try, it is unlikely that we will be able to construct a policy that will give both parties their due (p. 37).

Is there any way around this justice deadlock? Hampton suggests a "more sophisticated way of thinking about the nature and goals of a punitive response -- one that incorporates both compassion and condemnation, both healing and justice" (p. 37). She argues that crime creates or instantiates an inequality: the offender has said "I am up here, and you are down there, so I can use you for my purposes" (pp. 38-39). Punishment should redress that inequality by expressing the "victims' equal value". But this infliction of suffering on the offender "cannot be accomplished in a way aimed at degrading the criminal's value or that has the effect of denying or lowering his (sic) worth".

Hampton is a retributivist, but she wants to distinguish retribution from a revenge response. The avenger "wishes to degrade and destroy the wrongdoer, the retributive punisher wishes to vindicate the value of the victim, not denigrate or destroy the wrongdoer" (p. 39). She argues for a retributive response that includes moral education to the offender and the wider society.

Retribution requires that offenders be treated with dignity insofar as the point of retribution is, among other things, to vindicate the equality of victim and offender.

But you don't secure that vindication by refusing, in the name of being "nice" to him, to take a punitive stand against his offence. (p. 41)

She admits that

To disenfranchise prisoners whose offence is causally connected to ... oppressive forces fails to respond to the injustice of those forces, and ... is a serious cost of the policy I am advocating. ... [but] if, say, poverty and a history of discrimination played a part in a young man turning to violence, our failing to punish him, or our punishing him lightly, ends up further hurting the people who were already hurt by his violence. (p. 42)

In a comment that reinforces what Canadian Indigenous women said to McGillivray and Comaskey's (1999) in explaining why they were against diversion from court for the men who abused them, Hampton says: "It has been insufficiently appreciated that well-meaning compassion toward offenders can, in and of itself, do damage. Kindness toward the criminal can be an act of cruelty toward his victims, and the larger community" (p. 43).

*"Once we acknowledge that we can't have clean hands, we have to choose"* (p. 43, emphasis added). Hampton chooses to vindicate victims: "For the sake of victims and our communities, we can't pull back on or mitigate the appropriate retributive response to criminal conduct; hence, we have to choose a criminal code that is committed to retribution" (p. 43). She is concerned, however, with leaving it there. She asks whether it is possible to "add[] something to this retributive response in order to express a kind of compassion for the criminal himself, in ways that might do him some good and, if he has been the victim of injustice, acknowledge and address that injustice" (p. 43).

She suggests two additions to a retributive response. One lies within the justice system, that of a "reformative aim" that has both rehabilitation and moral education as goals. A second lies outside the justice system, that of retributive responses to those "who are players in systemic forces that encourage impoverishment and discrimination against some [groups] in society" (p. 44). She sees such retributive responses taking place via tort law, legislation, and public opinion. Like retributive responses operating within the criminal justice, she calls for policies "to be fair, yet not hateful, healing yet not complicit in the harm" (p. 44). The

aim of the second addition is to engage wider debates about domination in society and about social justice, although Hampton doesn't use these terms.

Hampton helps to clarify many things for me, but she leaves other things unanswered. She clarifies a meaning for retribution and a retributive response to crime that is morally defensible and sensible. It strikes the right tone in taking gendered harms seriously and in not excusing them. Her analysis reveals the limits of a restorative process that does not directly confront the problem of retribution, or that does not explicitly vindicate victims. It is not a "benefits and burdens" justification for punishment (or for retributivism) but rather one about how criminal acts themselves create inequality which must be redressed in some way, even as we may recognise that those criminal acts may have come about because of, or be linked to, relations of inequality and oppression in the larger society. She suggests, further, that the state has a duty beyond retributivism to assist in the reformation and moral education of wrongdoers. Like other legal philosophers (such as Antony Duff), she anticipates that a "well-crafted" retributive response should be cognitive, to "provok[e] thought" in the mind of the wrongdoer (p. 43). Duff (1992, 1996) conceives of this cognitive dimension being provoked (at least ideally) in the communication between a person (or group) denouncing the offence and the wrongdoer's acceptance of his/her responsibility for it.

Hampton leaves unanswered a key problem: what form and amount of retributive punishment is appropriate or necessary to vindicate harms suffered by victims? Should imprisonment continue to be used as the measure by which certain offences, such as sexual assault, are taken seriously? Barbara Hudson (1998, p. 253) discusses these questions, proposing that "restorative responses" to particular offences or offenders need to be "introduced in a general framework of restorative justice". That is, there should be an overall "penal deflation" (as Braithwaite has consistently argued for), and restorative justice should be used in all offences, not just a small number of less serious ones. Hudson proposes a radical idea for those interested in restorative justice:

to serve the expressive functions of punishment, restorative processes will have to devise ways of *clearly separating condemnation* of the act from the *negotiation of measures* appropriate to the relationships between the particular victim, offender, and community (Hudson, 1998, p. 253).

Hudson proposes that we separate the quantum of punishment (or perhaps the quantum of reparation) from the condemnation of the act. It means that censure should be decoupled from a sanction, but censure must occur nonetheless. The challenge for restorative justice is to consider how censure and retribution can explicitly feature in the process.

Hampton makes a compelling case for how victims are harmed when it appears that offenders are treated too leniently or their acts are not condemned in an appropriate manner. She also acknowledges the difficulties of doing justice in an unjust society, that is, whether we choose to be compassionate to offenders (many of whom are socially marginalised) or to vindicate victims' suffering. Hampton's and Hudson's analyses reveal the limits of restorative justice when applied to serious harms. Concretely, for sexualised violence, doing justice in an unjust society translates to whether one should be compassionate to marginalised men who harm women and children they know *or* whether one should vindicate the women's and children's suffering. When stated this way, perhaps the choice is not that difficult.

**Point 2: Reconstruct criminal law and criminal process to include emotions and bodies.**

Lacey (1998) argues that criminal law has not satisfactorily addressed the actual harm of rape. The idea of harm communicated by the legal definition of rape is "a peculiarly mentalist, incorporeal one. Its essence lies in the violation of sexual autonomy understood as the right to determine sexual access to one's body ... Rape thus amounts to something between expropriation of a commodity and a violation of will" (p. 59). What is missing, she suggests, is what is valuable about sexuality itself -- self-expression, connection, intimacy, relationship -- and what risks are associated with it: "violation of trust, infliction of shame and humiliation, objectification and exploitation" (p. 54).

Why, Lacey asks, does criminal law have such an "oblique relationship" to these values and risks? Her answer (briefly) is that criminal law generally views legal subjects as "rational and disembodied individuals" and the law of rape conceptualises the harm of rape in terms of the "taking" of sexual autonomy. Both are related to the mind over body dualism at the heart of western liberal law.

Lacey wants to bring "the sexed body" to law and legal argument, but not in a way that ends up "reaffirming an untenable mind-body dualism, as well as [a form] of essentialism" (p. 57).

She wants to make it possible for rape victims to describe the harm of rape with reference to "affective experience" and "embodied existence" (p. 62). At present, however, rape victims giving evidence in court are "effectively silenced, caught between ... the discourses of the body as property ... and the feminine identity as body, which pre-judges ... experience by equating it with stereotyped and denigrating views of female sexuality ..." (p. 62). Such silencing "denies rape victims both the status of personhood and the chance to approach the court as an audience capable of acknowledging their trauma". She suggests that the acknowledging of the trauma is "among the most important things which a public rape trial should achieve" (p. 62), and while she does not propose that victims' accounts "have the unassailable status of truth" (drawing from Wendy Brown's, 1991, arguments), she wishes to "reconstruct the trial process as a political space in which precisely the contestation of meanings ... might take place" (p. 62, note 48).

Lacey argues for two major reconstructions to criminal law and process:

(1) The inclusion of the affective and corporeal aspects of wrongs and victimisation.<sup>12</sup> Such a reconstructed rape law would "specify[] [the] conditions under which coercive, violent or degrading sexual encounters should be prohibited". This would lead to a broader understanding of consent and one "which assumes a mutuality of relationship and responsibility between victim and offender" (p. 65).

(2) A process open to a discussion of the different meanings of the wrong and of sexual victimisation. This would mean that changes would have to be made to the rules of evidence "so as to allow victims more fully to express their own narrative in the court room setting ... [without being subject to] an examination of their sexual history" (p. 66).

In a claim which at first surprises the reader, but which is consistent with the idea of "sexual integrity" as a "project" not an "end state" (p. 67), Lacey argues that "the criminal law of rape should express an unambiguous commitment to the positive integrity as well as the full humanity of both rape victims and men accused of rape" (p. 66). She assumes that defending "a value of sexual integrity" via criminal law is largely a symbolic, not instrumental exercise. She acknowledges the limits of criminalisation in securing "relational autonomy" and "bodily and sexual integrity". By viewing "integrity as a project" (p. 67), Lacey wishes to avoid the problem of defining "personhood" too restrictively. Ultimately, she imagines that the rape



trial might "become an -- always risky -- space for recovery rather than for continued victimisation", where women can "tell their stories" and "be heard" (p. 67).

Lacey alerts us to the ways in which the harm of rape is contained in criminal law, that the harm is effectively silenced because law abstracts and disembodies it. Unless this containment is addressed, any justice process will be inappropriate, and indeed, it may create more injury. While Lacey concurs with Smart (1989) that women's experiences of rape are disqualified in the criminal process, she believes it may be possible to reform criminal law and procedure. She imagines that in a reformed legal process, the harm of rape can be revealed through narratives by the victim and the offender during the trial. Precisely how the trial process as a "political space [for the] contestation of meanings" (p. 62, note 48) would unfold in a traditional courtroom is uncertain. Moreover, in Lacey's formulation, there appears to be no way that women can tell their stories of victimisation when offenders plead guilty and their case does not go to trial. Perhaps an informal process, of the sort used in conferences, may offer a more effective political space than the process in a traditional courtroom. In an earlier paper, John Braithwaite and I gave examples of how this could occur (Braithwaite & Daly, 1994). We said that feminists needed to be involved in the conferences themselves and in the training of coordinators to ensure that conference scenarios were subject to feminist interpretation. The place of "caring men" in conferences may also be important in containing misogynist voices and in reducing men's re-victimisation of women. Thus, restorative processes (like conferences) may have some relevance in responding to gendered harms, and sexual assault, in particular.

Lacey expressly limits her discussion, saying that it centres on rape law in England and Wales, and it concerns adult men and women (p. 53, note 19). She does not address the "special cases such as offences relating to children, where the normative framework of autonomy remains to some extent intact" (p. 52). The next section considers such cases, asking whether we perceive the harm of rape differently when the offence involves an adult male offender and adult female victim, as compared to an adolescent male offender and a younger female victim.

**Point 3: Consider harms concretely, not abstractly, when considering just responses. Be aware of the different meanings and contexts of gendered harms.**

At the Canberra conference in July 2000, a recurring gap emerged in what victim advocates were referring to when speaking of domestic or family violence and what restorative justice advocates imagined was the content of these harms. To Ruth Busch and other victim advocates, the accounts of violence they had in mind were of men's abusing women in the most profound ways and of women's enduring violence for many years, and thus, they had in mind the most serious forms of gendered harms. Victim advocates have rightly critiqued the assumptions of restorative justice advocates of an incident-based way of imagining domestic or family violence (among other critiques, see articles by Stubbs, Coker, and Busch in this volume). However, neither group has discussed the varied contexts, degrees of seriousness, and varied potential for restorative processes in these offences. *It is crucial that both groups come to terms with the fact that gendered harms range from less to more serious, and that some harms will be less and more amenable to restorative processes.* To clarify, I assume that *any* crime may be amenable to a restorative process (whether as diversion from court, pre-court sentencing advice, or post-probation or post-prison meeting), but in many cases, victims may not want to participate in a face-to-face meeting with an offender. It is useful to keep in mind that restorative processes need not involve face-to-face meetings of victims and offenders, and victims need not be present, but can be represented by others. Restorative processes can also be used for victims only, when for example, an offender has not been identified. All of these contexts and possibilities need to be considered when contemplating the uses of restorative justice in responding to gendered harms. Victim advocates often assume that only a face-to-face meeting between victim and offender constitutes a restorative process.

**Sexual Assault and Conferencing in South Australia**

I shall present 18 cases of sexual assault that were disposed of by a conference in South Australia during 1998. My aim is to show what kinds of cases are subject to conferencing, and in particular, to give more concreteness to the sexual assault category. All 18 cases had juvenile offenders (males under 18) because conferencing is a court diversion option only for juveniles, not adult offenders in South Australia.<sup>13</sup> For background and context, I draw from a paper by two South Australian Youth Justice Coordinators, Ben Wallace and Marnie Doig (1999) and from data published by the South Australian Attorney-General's Department, Office of Crime Statistics (1999, 2000) on the disposition of sexual assault cases in 1998 and

1999.<sup>14</sup> Such cases are rare in the juvenile system in that they feature in about 1 percent each of conference and court cases (South Australian Attorney-General's Department, 1999, pp. 111, 136). A striking feature from the 1998 and 1999 data is that more sexual assault cases were disposed of in conference (N=38) than were "proved" in court (N=19) (South Australian Attorney-General's Department, 1999, pp. 109, 136; and 2000, pp. 118, 140). An analysis of the "proved" rates in the Youth Court clarifies matters. For all offences disposed of in the Court during 1998, 72 percent were proved; the rest were dismissed or withdrawn (South Australian Attorney-General's Department, 1999, p. 136). For sexual offences, the proved rate is substantially less than the average, at 33 percent (p. 136). For comparison, the proved rate for robbery is 46 percent; for assault, 62 percent; for burglary, 65 percent (p. 136).<sup>15</sup> Driving offences, by contrast, have a much higher proved rate at 89 percent.

My statistical exercise should give victim advocates some pause. For those who believe that a traditional court process may be better for victims, if only that the harm is vindicated and treated seriously in court, these statistics suggest otherwise. For victims whose cases went to court, these South Australian data suggest that *just one-third* will have the satisfaction of finding that the offence was proved. In light of how the conference process is triggered in these youth justice cases, that is, it cannot go forward unless the young person admits to the offence, victims who participate in the conference process have the satisfaction of knowing that an offender has made such admissions.<sup>16</sup>

At present, it is unclear why the police refer some cases to conference and others to court. In addition to evidentiary matters, the referral decision may vary by victim-offender relationship and an offender's official offence history. Of course, an offender's admission is one crucial element. Wallace and Doig (1999, p. 6) find that offenders going to court are older than those in conference, but other than this, they find no other major differences.

In reflecting on conferencing in sexual assault cases, Wallace and Doig (1999, p. 8) say that [These conferences] tend to be more intense for participants [than those for other offences] because the effects of the offence have usually been severe for the victim and his/her family; and the disclosure of the offence has usually had consequences for the offending youth and his family prior to the conference. ... The indications for us are that family conferences are useful in dealing with sexual offences where there is a past, and potentially a future relationship between the young offender and the victim

and that the process does achieve resolution for the victim and appropriate outcomes for the offender.

These Youth Justice Coordinators therefore see a value to restorative processes in cases involving victims and offenders who know each other. The coordinators also say that compared to other offences, they spend more time preparing these cases, and they share their "experiences of these cases with each other frequently" (p. 8).

The Family Conference Team provided me summaries of 18 sexual offence cases that were referred to conference by the police or the court during 1998.<sup>17</sup> Here is an overview of the kinds of cases handled.

- Of the 18 cases, 14 involved indecent assault, and 4 involved sexual intercourse or rape. One case had 6 offenders, but the rest had one each.
- All the offenders were non-Indigenous males.<sup>18</sup> Their ages ranged from 11 to just under 18 years, and the median age was 14.
- There were a total of 26 victims of these offences; all but 3 were female. The victims' ages ranged from 3 to 50. One offence was by a young man who exposed his penis to both older and younger women. Excluding that case (and the 4 victims over 18), the median age of the victims was 6 years.<sup>19</sup>
- Thus, the average offence involved a 14 year old male against a female who was 6.
- Of the 18 cases, 8 involved brothers and sisters (or step relations), and a further 6 involved cousins, family friends, and other friends they played with. Three involved offenders whom the victims knew from school. Just one case involved a "stranger"; however, as the local town flasher, he was "known" to people in the town.
- In 5 of 18 conferences, the victim attended; in those conferences where victims were not present, their views and experiences were represented by other people such as the mother of the victim.

- Several victims were concerned that brothers would be sent away, or they felt responsible for reporting what happened.
- Except for some offenders in the country areas, all the offenders participated in the Mary Street Program, an Adolescent Sexual Abuse Prevention Program (described below), as part of their undertaking, normally for 12 months. Six had to do community service, and the number of hours was substantial, much higher than other offences, ranging from 50 hours to 240 hours.<sup>20</sup> In South Australia, the maximum length of an undertaking is 12 months.
- Twenty of the 23 offenders carried out their undertaking.

The Youth Justice Coordinators say that without the Mary Street Program, they would be more hesitant to use conferencing in sexual assault cases. Mary Street is headed by Alan Jenkins and is based on his "invitations to responsibility" theory (Jenkins, 1990). The program is highly regarded not only by the coordinators, but also by Youth Court judges and magistrates, who rely on it when sentencing youthful offenders. Mary Street workers prefer to have several sessions with an offender prior to his attending a family conference, and some youth may be in the program for some time before attending a conference. Because Mary Street workers are familiar with the conference process, they can prepare an offender (and his family supporter[s]) for it. Among other things, they are concerned that apologies to victims are thought through with a great deal of care and not made prematurely. Thus, in some cases, Mary Street workers may advise against a verbal apology at the conference. The timing of a conference may be determined, in part, by how far along the offender is in the therapeutic process. Unlike conferences for other offences, those for sexual assault have a heightened degree of symbolism in that they mark a stage in an on-going therapeutic process.

Conference outcomes in sexual assault cases may not always involve the Mary Street Program mainly because it serves the Adelaide metropolitan area, not the entire state. However, coordinators may consult with program workers to determine what the most appropriate regional service is, or program workers will liaise with other regional services.

From the case information provided me by the Family Conference Team, I am able to summarise each offence, although I admit to discomfort in presenting the offence "facts" for several reasons. First, the summaries provided me are sketches of the offences, containing little on the individuals' biographies and familial contexts. Second, as noted by Bumiller (1990) and Smart (1989) in analysing rape trials, the recapitulation of offence details can be read as a form of pornography.<sup>21</sup> To appreciate the variety of harms, I grouped the cases into those I perceived as being "more" and "less" serious. I am aware of the problems in any effort to classify seriousness. I do not know how the offence was discussed at the conference, and I do not know how individual victims experienced the assaults, except when this is revealed in some case summaries. While it was difficult to categorise the offences, I classified six as "less serious", five as "more serious", and seven as "most serious". I used these criteria in classifying the offences: whether it was one incident or a pattern of incidents, whether it was rubbing genitals or genital penetration, whether or not the offender used devious methods to manipulate victims, whether or not the offender threatened the victim if she disclosed to others what he did, and the degree of emotional impact the offence had on the victim, as this was described in the offence summary.<sup>22</sup>

Cases 7 and 13 are indicative of "less serious" cases, which appear to be "one-off" events, with the offenders touching victims and rubbing themselves against the victims, but not penetrating them:<sup>23</sup>

*Case 7 (one count of indecent assault)*

The young person, who is 12 years old, admitted to having "played games" in bed one morning with his half-sister, age 3. He touched her and rubbed her "private parts" while they were in bed, and he said he did this only one time. The boy lives with his father, but visits his mother and sister on weekends. The mother thinks that the boy is being abused and this might explain his behaviour.

*Case 13 (one count of indecent assault)*

The young person, who is 16 years old, placed his hand down the victim's underpants and touched her vagina. The victim is his sister, age 4. The incident occurred while the mother was out shopping, leaving her son, daughter, and other children at home. The boy was honest in admitting the offence to his mother after his sister told her what had happened. This appears to have been the only time he did it.

Cases 8 and 12 are examples of the "more serious" cases, where offenders lure victims to secluded places, threaten them or use force in some way, and where there appears to be a pattern of sexual abuse, although not involving penetration.

*Case 8 (one count of indecent assault)*

The young person, aged 15, bribed his 4-year old cousin with an ice cream to come into the garden shed, where he asked her if she'd let him touch her vagina. She said no, but he did it anyway. He touched her for some time until their uncle saw them and reported the incident. When the boy was interviewed by a social worker, he admitted that he had done things like this before. He is described as "intellectually backward" for his age. When the victim was interviewed by the police, she disclosed that another cousin was sexually abusing her [a conference was also held for this boy]. The offender is part of a large family with many uncles, aunts, and cousins. Police suspect that there is an incest pattern in the family.

*Case 12 (3 counts of indecent assault)*

The young person, 14 years old, pulled down shorts and underpants pants of his foster sister, age 9, while they were in the computer room. He touched her vagina with his fingers. He did it twice again on the same day, putting his hand down her pants and pulling her toward him. The girl reported the incidents to her mother several weeks later, but she was worried that her disclosure would result in her foster brother being removed from the home, and she didn't want that to happen. The boy, described as having a "slight intellectual disability", made "full and frank" admissions to the police. The mother was concerned that he did not see his behaviour as serious. The children live with their foster parents, having been removed from their biological families some time ago because of neglect or abuse.

Cases 3, 4, and 6 are examples of the "most serious" offences, where offenders penetrate victims, have been abusing victims for some time, and have threatened victims not to disclose the offence, and where victims show many indications of emotional harm caused by the offence.

*Case 3 (3 counts of unlawful sexual intercourse and 2 counts of incest)*

The young person said that he put his "willy" into the victim's (his sister) vagina. He was 12 1/2 years old, and she was 7. He did this in the bedroom and in the bathroom. The victim said she felt sore as a result of what her brother did. When their mother learned what happened, she said she wanted to kill her son. Initially, she thought that both her sons were involved. During his interview with the police, the offender also disclosed forcing oral sex on his sister. He said he wanted to experience sex, and he threatened his sister with "trouble" if she told anyone. The file suggests that the offender appears not to be concerned with the impact of the harm on his sister.

*Case 4 (3 counts of rape)*

The young person admitted "doing sex" with the victim, his sister, at least three times. He was 14 and she was 3. He said he chose her because he wanted to try sex and thought he could control her. He said he knew what he did was wrong. He told his sister that it was a game, and she mustn't tell anyone. Their mother caught them. The mother, who was a heroin user, said that she began using again soon after the disclosure.

*Case 6 (6 counts of indecent assault)*

A group of six young people (males) followed two victims (females) along the beach, onto the bus, into town, and continued following them through a park until they reached home. The boys harassed the girls verbally, assaulted them in the sea while they were swimming, pinched their breasts and genitals, slid their hands under the girls' blouses and down their pants while on bus. At one point, a young person put his hand over one of the victim's mouths when she tried to scream. This occurred during school holidays; the boys ranged in age from 11 to 15; the girls' ages were estimated on the file as being "14 or 15". The victims said that they felt "very dirty" when they got home. One victim said that the other victim vomited in the park when she was trying to scream. Both girls were taken to the hospital; they had bruises on their legs, breasts, stomachs, and cuts on their feet and legs. They had trouble sleeping and wouldn't go out of house after the incident for a long time, up to when the family conference was held, 6 weeks later.



When one absorbs the character of these offences, and their varied seriousness and meaning in the lives of offenders, victims, and their families, it is not easy to make glib or generic claims about "how sexual assault cases should be handled". One major axis in judging the harm of sexual assault is the age of the offender. With all these offenders under 18, we might say that their behaviour is not as entrenched; it is more exploratory and less serious. However, the victims were quite young, and in the sibling and family cases, the victims were used as sexual practice by their brothers or cousins. One could argue that some of these cases are even more serious than those involving adult offenders and victims because these juvenile offenders acted as if their victims had no bodily or sexual integrity at all.

The information supplied to me does not indicate what happened in the conference itself, for example, the degree to which offenders minimised or denied the harm, or the degree to which offenders began to appreciate better that what they did was wrong. Wallace and Doig (1999, p. 13) do make clear, however, that answers to questions such as "what made you do that?" are typically not forthcoming in conferences. "The question of why the youth has committed the sexual offence is not one that youths at family conferences for sexual offences can ever answer to anyone's satisfaction".

Wallace and Doig (1999) also emphasise that the conference provides an *opportunity* for the stories of victimisation to be heard, and it sets in motion (or consolidates) a long term plan, normally of 6 to 12 months for counselling the offender. However, they do not expect that participants will want to reconcile or that victims can ever forgive the offender or even that offenders will feel remorse for their actions:

In cases where there has been real deception by the offender, and if the abuse has been taking place for a long period of time, and when there are serious questions from the victim's parents that they can trust the youth again ... people are more likely to reject reintegrative notions in favour of totally cutting off the relationship with the youth. In other words, the conference may provide an opportunity for remorse and forgiveness, but it's up to the participants to decide whether to feel remorse or to give forgiveness. ... (Wallace & Doig, 1999, p. 13).

One step in developing a feminist-informed criminal jurisprudence would be to gauge the nature of the harm, not from the law's point of view, but from that of an embodied victim

who has emotions and feelings, as Lacey (1998) has proposed. However, it is uncertain how one moves from a detailed knowledge of these embodied experiences to a consideration of what appropriate sanctions would be, assuming that defendants are found guilty or plead guilty. We would benefit first from a consideration of what are "more" and "less serious" forms of sexual assault, and of gendered harms, more generally. That discussion is a necessary prerequisite for subsequent decisions about appropriate responses (censure and sanctions, safety plans, etc) and sites of response (court or conference). There is, however, a problem with my recommendation. The dynamics of gendered harms provoke us to consider additional questions, which are not as relevant for other offences. These emerge in Lacey's discussion of the harm of rape and in victim advocates' concerns for victim safety. How can justice system responses impugn the normative supports for boys' and men's violence toward girls and women? How can victims be safe from these forms of violence?

### **Conclusion**

When considering the viability of restorative justice in cases of sexualised violence (or other gendered harms), we confront a justice problem that cannot be solved. The challenge for restorative justice is *how to treat serious offences seriously* without engaging in hyper forms of criminalisation. I have argued that if retribution is made part of the restorative process in an explicit way, then the problem of taking offences seriously may be satisfactorily addressed. I am persuaded by Hampton's argument that restorative justice must ultimately be concerned *first* with vindicating the harms suffered by victims (via retribution and reparation) and then, *second*, with rehabilitating offenders. Currently, the use of conferencing as a diversion from court in Australia and New Zealand is skewed more toward diversion as a form of rehabilitation. (Using conferences to advise the sentencing judge in New Zealand youth court cases may be an exception.) Perhaps because the offenders are juveniles in these diversionary conferencing schemes, this skew toward rehabilitation is appropriate; but if restorative justice is to be applied to more serious cases and to adult offenders, then the process, and underlying philosophical premises, may have to change.

A second challenge for restorative justice is whether it can incorporate a new understanding of the nature of gendered harms, which includes the emotions and bodies of victims. Because restorative justice processes are tied to extant criminal codes, practices may suffer from treating gendered harms abstractly. However, a restorative justice process typically involves a more free-ranging discussion of the nature of the harm than is possible in a courtroom, and

thus, it may provide a satisfactory "political space [for the] contestation of meanings" that Lacey (1998, p. 62, note 48) imagines. With a space for contestation comes the danger, however, that old ways of thinking about sexualised violence (and gendered harms) would be reinscribed. This is the major concern for victim advocates who see in informal processes a high probability for the re-victimisation of victims unless the proceeding is prepared and managed well.

One can neither fully endorse nor disparage restorative justice processes in responding to sexualised violence or other gendered harms. A generic position is premature and ill-advised (see also Coker, 1999, on this point). If we consider diversionary conferences as one kind of process, they may be appropriate in the handling of some offences, especially when this entails offenders' admissions of wrongdoing and perhaps when offenders are viewed as "immature". For other cases, however, face-to-face meetings may be totally inappropriate, especially when offenders are not remorseful for what they've done and have a history of violence. Restorative justice advocates need to be mindful of research on violent men: the threat of penal sanctions as a "backup" appears to be especially important in changing patterns of entrenched abuse toward their partners (Dobash, Dobash, Cavanagh & Lewis, 2000). While we might wish it were possible to engage in moral education without relying on the threat of incarceration, that is naive.

In calling for the need to think concretely, not abstractly, about harms, I am not proposing that justice is best served by an entirely individualised response to crime, as some might infer. At the Canberra conference, John Braithwaite said that my first and third points seemed to be contradictory. Specifically, he asked, how could I propose to rehabilitate retribution at the same time that I suggest the need to think concretely about harms? I take his question to mean, how can you be a retributivist who says we need to examine cases individually? My answer is as follows. Retribution is a term that has several meanings: it is a justification for *why* we punish (because it's right to do so, to vindicate victims' suffering or the inequality created by the offender harming the victim) and for *how much* we should punish (that is, in proportion to the harm caused). Hampton addressed the *why*, but not the *how much* of retribution. *What form* retribution should take is yet another matter, and I have proposed that at a minimum, retributive censure be made a much more explicit feature of a restorative justice process; otherwise, it cannot be distinguished from a civil proceeding. Following Hudson, I have suggested that one potential way forward is to separate the

censuring of the act from the sanction. In my first point, then, I lodged a critique of the oppositional contrast of retributive and restorative justice: the contrast fails on empirical grounds, and elements of retribution (that is, at a minimum, *censure*) must be part of a restorative process. I was not discussing retribution *as proportionality* in making my first point.

In calling for the need to think concretely not abstractly about harms, and by sketching the offending in 18 sexual assault cases, my aim is that scholars and activists become more aware of a diversity of harms that fall into the *sexual assault* or *domestic/family violence* categories, and compare these against the scenarios in our minds and experiences. We require a full appreciation of what harms we are talking about, their seriousness, and impact. Subsequent discussions about whether the sanctioning (or reparative) process ought to be radically individualised (with upper limits) or related in some proportional way to the offence harm are further down the road. We have learned our lessons about the failure of "just deserts" to deliver a more superior justice than "individualised" justice, but we must remember why just deserts made good sense in the first place: the failure of individualised justice to appear fair to a broad constituency. Restorative justice (or new justice practices more generally) will not be able to resolve that longstanding justice problem either.

### Notes

- 1 This paper relies on summaries of sexual assault cases, which were disposed of by a family conference in South Australia in 1998. My thanks to Youth Justice Coordinators, Marnie Doig and Grant Thomas, for gathering and assembling the data, and to Carolyn Doherty (Senior Coordinator) for her help in moving the project forward. My appreciation to Brigitte Bouhours for her research assistance.
- 2 I refer to *criminal* harms, which include both a *public wrong* that must be recognised (and censured) and a *harm* that might be compensated. The definition of restorative justice normally includes the idea of "repairing the harm", which may lead one to infer that it is no different from a civil process. Antony Duff has clarified the importance of censuring the wrong in a restorative process; it is central to his position (and mine, see Daly, 2000b) that "Restoration is not only compatible with retribution and punishment: it *requires* retribution ..." (Duff, 2001, p. 2).
- 3 Such arguments were made more than a decade ago by myself and others (Daly, 1989; Daly & Chesney-Lind, 1988, pp. 522-24; Harris, 1987), but only seem now to resonate with a wider feminist audience.
- 4 Yet, as Coker (this volume) correctly points out, it is unclear whether an increasing criminalisation of domestic/family violence has played any significant role in increasing rates of incarceration for minority group men.

- 5 I use sex/gender to signify the importance of each term, sex and gender, and their interrelationship. Recent feminist work on the "sexed body" suggests that the distinction between sex and gender, which had been made formerly, can no longer be sustained (Gatens, 1983, reprinted as chapter 1 in Gatens, 1996; see review in Daly, 1997, and readings in Naffine & Owens, 1997, especially by Davies, 1997).
- 6 My claim is, of course contextual (i.e., within a neighbourhood or city) and historically and culturally specific. It would be wrong to assume that women as a group are (or will be) more law-abiding than men as a group or that women are less likely to be criminalised across time, place, nation, and culture. One needs only to examine rates of arrest for US black women and white men in certain crime categories (see Chilton & Datesman, 1987).
- 7 While some women also physically and sexually abuse women, men, and children they know, I shall use the masculine and feminine pronouns throughout this article to denote, respectively, the typical relationship of a male abuser and female (or child) victim.
- 8 By traditional, established, or "old justice" practices, I refer to contemporary forms of courthouse justice, not to pre-modern forms.
- 9 My focus is on the response to sexual assault at the point of its detection or reporting to legal authorities. There are other contexts in which restorative processes may be used, for example, when adult women confront men who abused them when they were children or when community members wish to meet a man convicted of sexual offences upon release from prison (see Yantzi, 1998).
- 10 Harry Blagg raised this point during question time at the Canberra conference. It raises difficult questions for how to analyse gendered harms committed by males under 18 years of age. Should they be viewed as "less mature" and hence less blameworthy for their acts? Andrew von Hirsch (2001, pp. 232-33) argues that compared to adults, penalties for young offenders should be "substantially scaled down" on normative grounds: young people should be seen as less culpable, the "punitive bite" should be less, and society should have a "special tolerance" for young people who offend.
- 11 I work through Hampton's arguments in some detail, often choosing to use her words rather than my summary of the argument, because her words are so strong and well chosen.
- 12 She prefers to use the value of bodily-affective "integrity", drawing from Drucilla Cornell (1996), rather than the value of "autonomy", which is at the heart of consent. She also draws on Jennifer Nedelsky's (1989, 1995) development of the concept of "relational autonomy".
- 13 South Australia was the first Australian jurisdiction to legislate conferencing as a diversion from court; the *Young Offenders Act* was passed in 1993, and conferencing began in February 1994. See Wundersitz and Hetzel (1996) and Wundersitz (1996) for a review of the history and first several years of conferencing in South Australia.
- 14 The sexual assault category includes rape (and attempts), indecent assault, unlawful sexual intercourse (and attempts), incest, and indecent behaviour or indecent exposure.
- 15 I have calculated these rates from the data given in the South Australian Attorney-General's Department statistical report (1999, p. 136). My calculations do not include those cases where the major charge was not proved, but there was a finding of guilt to a lesser-included offence. About 6 percent of all cases fell into this category (p. 45).

- 16 It would be important to compare the offence facts in the court and conference cases, including how strong the state's case was.
- 17 The sample includes those cases referred to the Family Conference Team in 1998 (and established in their registry as a 1998 case) for the offences listed in footnote 14. Missing from the analysis is a small number of cases, which the Youth Justice Coordinators could not easily access from the archives.
- 18 Data on sexual assault offences disposed in court and conference (including cases withdrawn and dismissed) from 1995 to 2000 show this racial/ethnic breakdown: for court cases, 13 percent Aboriginal, 77 percent non-Aboriginal, and 10 percent unknown; and for conference cases, 6 percent Aboriginal, 84 percent non-Aboriginal, and 10 percent unknown (data provided to me by the Data Technology Unit, Adelaide, South Australia).
- 19 The Youth Justice Coordinators report that counselling for victims is often addressed prior to a family conference by the family itself. In Adelaide, referral for counselling and support can be made to several providers such as Child Protection Services at the Women and Children's Hospital, and the Yarrow Place program. The Coordinators say that families of very young victims may elect not to seek intensive counselling assistance. If a case is referred to conference, but it appears that counselling or support services have not been utilised, the Youth Justice Coordinators will suggest appropriate referrals, depending on the victim and family's wishes.
- 20 A family conference in South Australia can impose a maximum of 300 hours community service, but this rarely if ever occurs.
- 21 Youth Justice Coordinators say that this can also be a problem in recapitulating the offence in a conference, where the offender may take some pleasure in hearing or discussing the offence details again.
- 22 Of the six cases I judged to be less serious, in three cases, offenders received community service; and of the seven cases I judged to be most serious, in just one case did the offender receive community service. Thus, there seems to be little connection between my seriousness judgments and whether offenders receive community service.
- 23 I am aware that offenders may trivialise or deny their assaults by saying it was "just touching" (see Yanzi, 1998).

## References

- Astor, H. (1991). Mediation and violence against women. Paper prepared for the *National Committee on Violence Against Women*. Report available from Violence against Women and Legal Matters Section of the Office of the Status of Women, Department of the Prime Minister and Cabinet, 3-5 National Circuit, Barton ACT.
- Bargen, J. (1996). Kids, cops, courts, conferencing and children's rights: A note on perspectives. *Australian Journal of Human Rights*, 2(2), 209-28.
- Bargen, J. (1998). Update for 1996-98. Unpublished, on file with the author.

- Braithwaite, J., & Daly, K. (1994). Masculinities, violence, and communitarian control. In T. Newburn & E. Stanko (Eds.), *Just boys doing business?* (pp. 189-213). London: Routledge.
- Brown, W. (1991). Feminist hesitations, postmodern exposures. *Differences: A Journal of Feminist Cultural Studies*, 3(1), 63-84.
- Bumiller, K. (1990). Fallen angels: The representation of violence against women in legal culture. *International Journal of the Sociology of Law*, 18, 125-42.
- Chilton, R., & Datesman, S.K. (1987). Gender, race, and crime: An analysis of urban trends, 1960-1980. *Gender & Society*, 1, 152-171.
- Coker, D. (1999). Enhancing autonomy for battered women: Lessons from Navajo peacemaking. *UCLA Law Review*, 47(1), 1-111.
- Cornell, D. (1996). *The imaginary domain*. New York: Routledge.
- Daly, K. (1989). Criminal justice ideologies and practices in different voices: Some feminist questions about justice. *International Journal of the Sociology of Law*, 17(1), 1-18.
- Daly, K. (1997). Different ways of conceptualising sex/gender in feminist theory and their implications for criminology. *Theoretical Criminology*, 1(1), 25-51.
- Daly, K. (2000a). Restorative justice in diverse and unequal societies. *Law in Context*, 17(1), 167-90. Available at <http://www.gu.edu.au/school/ccj/kdaly.html>
- Daly, K. (2000b). Revisiting the relationship between retributive and restorative justice. In H. Strang & J. Braithwaite (Eds.), *Restorative justice: From philosophy to practice* (pp. 33-54). Aldershot: Dartmouth. Available at <http://www.gu.edu.au/school/ccj/kdaly.html>
- Daly, K. (2002). Restorative justice: The real story. *Punishment & Society*, 4(1) (in press). Available at <http://www.gu.edu.au/school/ccj/kdaly.html>
- Daly, K., & Chesney-Lind, M. (1988). Feminism and criminology. *Justice Quarterly*, 5(4), 497-538.
- Daly, K., & Hayes, H. (2001). Restorative justice and conferencing in Australia. *Trends & Issues in Crime and Criminal Justice No. 186*. Canberra: Australian Institute of Criminology. Available at <http://www.aic.gov.au/publications/tandi/tandi186.html>
- Daly, K., & Hayes, H. (2002). Restorative justice and conferencing. Forthcoming in A. Graycar and P. Grabosky (Eds.), *The Cambridge handbook of Australian criminology*. Cambridge: Cambridge University Press. Available at <http://www.gu.edu.au/school/ccj/kdaly.html>

- Daly, K., & Immarigeon, R. (1998). The past, present, and future of restorative justice: Some critical reflections. *Contemporary Justice Review*, 1(1), 21-45.
- Davies, M. (1997). Taking the inside out: Sex and gender in the legal subject. In N. Naffine & R.J. Owens (Eds.), *Sexing the subject of law* (pp. 25-46). Sydney: LBC Information Services, Sweet & Maxwell.
- Dobash, R.E., Dobash, R.P., Cavanagh, K., & Lewis, R. (2000). *Changing violent men*. Thousand Oaks, CA: Sage.
- Duff, R.A. (1992). Alternatives to punishment -- or alternative punishments? In W. Cragg (Ed.), *Retributivism and its critics* (pp. 44-68). Stuttgart: Franz Steiner.
- Duff, R.A. (1996). Penal communications: Recent work in the philosophy of punishment. In M. Tonry (Ed.), *Crime and justice: A review of research, Vol. 20*, 1-97. Chicago: University of Chicago Press.
- Duff, R.A. (2001). Restoration and retribution. Paper presented to Cambridge Seminar on Restorative Justice, 12-13 May, Toronto.
- Estrich, S. (1986). Rape. *Yale Law Journal*, 95(6), 1087-184.
- Frohmann, L. (1991). Discrediting victims' allegations of sexual assault: Prosecutorial accounts of case rejections. *Social Problems*, 38(2), 213-26.
- Gatens, M. (1996). *Imaginary bodies: Ethics, power, and corporeality*. New York: Routledge.
- Hampton, J. (1998). Punishment, feminism, and political identity: A case study in the expressive meaning of the law. *Canadian Journal of Law and Jurisprudence*, 11(1), 23-45.
- Harris, M.K. (1987). Moving into the new millennium: Toward a feminist vision of justice. *The Prison Journal*, 67(2), 160-76.
- Hooper, S., & Busch, R. (1996). Domestic violence and the restorative justice initiatives: The risks of a new panacea. *Waikato Law Review*, 4, 101-30.
- Hudson, B. (1993). *Penal policy and social justice*. London: Macmillan Press.
- Hudson, B. (1998). Restorative justice: The challenge of sexual and racial violence. *Journal of Law and Society*, 25(2), 237-56.
- Hudson, J., Morris, A., Maxwell, G., & Galaway, B. (Eds.) (1996). *Family group conferences: Perspectives on policy and practice*. Monsey, NY: Criminal Justice Press.
- Jenkins, Alan (1990). *Invitations to responsibility: the therapeutic engagement of men who are violent and abusive*. Adelaide: Dulwich Centre Publications.



- Kelly, L. (1988). *Surviving sexual violence*. Minneapolis: University of Minnesota Press.
- Lacey, N. (1998). Unspeakable subjects, impossible rights: Sexuality, integrity and criminal law. *Canadian Journal of Law and Jurisprudence*, 11(1), 47-68.
- Martin, D.L. (1998). Retribution revisited: A reconsideration of feminist criminal law reform strategies. *Osgood Hall Law Journal*, 36(1), 151-88.
- Maxwell, G., & Morris, A. (1996). Research on family group conferences with young offenders in New Zealand. In J. Hudson, A. Morris, G. Maxwell, & B. Galaway (Eds.), *Family group conferences: Perspectives on policy and practice* (pp. 88-110). Monsey, NY: Criminal Justice Press.
- McGillivray, A., & Comaskey, B. (1999). *Black eyes all of the time*. Toronto: University of Toronto Press.
- Naffine, N., & Owens, R.J. (Eds.) (1997). *Sexing the subject of law*. Sydney: LBC Information Services, Sweet & Maxwell.
- Nedelsky, J. (1989). Reconceiving autonomy. *Yale Journal of Law and Feminism*, 1, 7-36.
- Nedelsky, J. (1995). Meditations on embodied autonomy. *Graven Images*, 2, 159-70.
- New South Wales Department for Women (1996). *Heroines of fortitude: The experiences of women in court as victims of sexual assault*. Report available from Department for Women, Level 11, 100 William Street, Woolloomooloo, New South Wales.
- Robertson, B. (chairperson) (2000). *Aboriginal and Torres Strait Islander Women's Task Force on Violence report*, 2nd printing. Brisbane, Qld: Department of Aboriginal and Torres Strait Islander Policy and Development.
- Smart, C. (1989). *Feminism and the power of law*. New York: Routledge.
- Snider, L. (1998). Towards safer societies: Punishment, masculinities and violence against women. *British Journal of Criminology*, 38(1), 1-39.
- South Australian Attorney-General's Department (1999). *Crime and justice in South Australia*, 1998, Juvenile Justice. Adelaide: Office of Crime Statistics, GPO Box 464, Adelaide, South Australia 5001.
- South Australian Attorney-General's Department (2000). *Crime and justice in South Australia*, 1999, Juvenile Justice. Adelaide: Office of Crime Statistics, GPO Box 464, Adelaide, South Australia 5001.
- Spohn, C., & Horney, J. (1992). *Rape law reform*. New York: Plenum

- Stubbs, J. (1995). Communitarian conferencing and violence against women: A cautionary note. In M. Valverde, L. MacLeod, & K. Johnson (Eds.), *Wife assault and the Canadian Criminal justice system* (pp. 260-89). Toronto: Centre of Criminology.
- von Hirsch, A. (1985). *Past or future crimes: Deservedness and dangerousness in the sentencing of criminals*. New Brunswick, NJ: Rutgers University Press.
- von Hirsch, A. (2001). Proportionate sentences for juveniles: How different than for adults. *Punishment & Society*, 3(2), 221-36.
- Wallace, B., & Doig, M. (1999). Sexual offending and restorative justice: The challenge for family conferencing practice in South Australia. Paper presented at *Victimology Conference*, Melbourne. Adelaide, South Australia: Family Conference Team, Courts Administration Authority.
- Wundersitz, J. (1996). *The South Australian Juvenile Justice System: A review of its operation*. Adelaide: Office of Crime Statistics, South Australian Attorney-General's Department, GPO Box 464, Adelaide, South Australia 5001.
- Wundersitz, J., & Hetzel, S. (1996). Family conferencing for young offenders: The South Australian experience. In J. Hudson, A. Morris, G. Maxwell, & B. Galaway (Eds.), *Family group conferences: Perspectives on policy and practice* (pp. 111-39). Monsey, NY: Criminal Justice Press.
- Yantzi, M. (1998). *Sexual offending and restoration*. Waterloo, Ont: Herald Press.